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**AN EXAMINATION OF THE IMPACTS OF RAPE MYTHS AND GENDER
BIAS ON THE LEGAL PROCESS FOR RAPE IN RWANDA**

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**A thesis submitted to the University of Sussex in accordance with the requirements for
award of the degree of PhD in Law**

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Author's declaration

I hereby declare that this thesis has not been and will not be submitted in whole or in part to another University for the award of any other degree.

Signature:

Abstract

This thesis is an exploration of the legal process for rape in Rwanda, aimed at examining whether this process is influenced by rape myths, as revealed in many Western jurisdictions. To achieve this, the study adopted a socio-legal approach to empirical research, triangulating three methods: interviews, observations and document analysis. Fifty interviews were carried out with forty participants including judges, prosecutors, defence lawyers and rape victim-survivors. Ten court observations were conducted across the country and 276 prosecution and court files were analysed in this research. The results revealed that the legal process for rape in Rwanda is profoundly influenced by rape myths. This finding is evidence that similar rape myths may exist in very different socio-cultural contexts and legal systems. Some of the myths revealed are the belief that a “genuine” rape victim is someone who is chaste, who physically resists the assault and promptly reports the incident to the authorities; as well as the conviction that women tend to make false allegations of rape.

These misconceptions extensively influence prosecutors’ and judges’ decision-making in rape cases. Their conclusions are typically characterised by misapprehensions about rape and rape victims, which results in many defendants being discharged on erroneous grounds. The cases that go through the legal process and which secure conviction are overwhelmingly those that conform to the “real rape” myth. Other complaints of rape are systematically dismissed regardless of their contents. These effects of rape myths on the legal process are undermining in an invisible way the campaign against sexual violence in Rwanda. The thesis exposes this hidden problem in order to contribute to improving the Rwandan criminal justice system’s response to sexual violence.

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Table of abbreviations

Frw: Rwandan francs

GBV: Gender-based violence

ICTR: International Criminal Tribunal for Rwanda

ICTY: International Criminal Tribunal for ex-Yugoslavia

MP: Member of Parliament

RTS: Rape trauma syndrome

UK: United Kingdom

US: United States

TABLE OF CONTENTS

Chapter 1. INTRODUCTION AND METHODOLOGY	9
1.1. INTRODUCTION	9
1. An overview of rape myths	13
2. Thesis objectives and research questions.....	16
3. Theoretical framework.....	18
1.2. RESEARCH METHODOLOGY	19
1. Methods used in data collection.....	20
a. Interviews.....	20
b. Court observations.....	28
c. Collection of prosecution and court documents.....	30
2. Data analysis	32
3. Other research aspects: generalisability and research limitations.....	34
4. Thesis structure.....	36
Chapter 2 DEVELOPMENT OF RWANDAN RAPE LAWS.....	38
2.1. RWANDAN RAPE LAWS IN THE AFTERMATH OF THE GENOCIDE	38
1. The justice process for rape in the <i>gacaca</i>	39
2. Inclusion of genocide rape in the first category and implications for the procedure of confessions and guilty pleas	48
2.2. THE RAPE LAW REFORM IN RWANDA.....	51
1. Criminalisation of marital rape	52
2. The definition of rape	55
CONCLUSION.....	57
Chapter 3 ANALYSING THE ROLE OF RAPE VICTIMS IN THE CRIMINAL JUSTICE PROCESS	59
3.1. DISBELIEF OF RAPE VICTIMS IN THE LEGAL PROCESS	59
1. Review of literature on false rape accusations.....	60
2. Perceptions of false rape accusations in the Rwandan context	69
3.2. VICTIMS' LACK OF PARTICIPATION IN THE LEGAL PROCESS	77
1. The causes of victims' absence in the legal process	79
2. Implications of victims' lack of participation in the legal process	81
3. Victims' perception about their lack of participation in the legal process	88
CONCLUSION.....	93
Chapter 4 EXPLORING THE PROVISION OF EVIDENCE IN RAPE CASES	94
4.1. CORROBORATING VICTIM TESTIMONY IN RAPE CASES	94
1. The corroboration requirement in the legal process for rape in Rwanda.....	95

2. The case for the abolition of the <i>de facto</i> corroboration requirement.....	99
4.2. THE ROLE AND IMPACT OF MEDICAL EVIDENCE IN RAPE CASES.....	103
1. The limitations of medical evidence in proving rape.....	104
2. Application of medical evidence by prosecutors and judges in Rwandan cases.....	106
3. Framing of medical evidence by doctors in Rwandan cases.....	112
4. 3. THE ROLE OF CIRCUMSTANTIAL EVIDENCE IN RAPE CASES.....	118
1. The meaning and importance of circumstantial evidence.....	118
2. Recognition of circumstantial evidence in Rwandan law	124
3. The disregard for circumstantial evidence and the requirement of direct evidence in prosecutors' and judges' practice.....	126
CONCLUSION.....	129
Chapter 5. EXAMINING THE EFFECTS OF VICTIM CHARACTERISTICS AND BEHAVIOUR ON THE OUTCOME OF RAPE CASES.....	130
5.1. VICTIM BEHAVIOUR BEFORE RAPE AND ITS IMPACT ON THE LEGAL PROCESS.....	130
1. The chastity requirement in other jurisdictions	131
2. Impact of victim behaviour before rape in Rwandan cases.....	136
5.2. VICTIM BEHAVIOUR DURING THE ASSAULT.....	151
1. The resistance requirement in the broader literature.....	152
2. The resistance requirement in the prosecution of rape in Rwanda	157
5.3. VICTIM BEHAVIOUR AFTER RAPE.....	162
1. The requirement of prompt complaint in other jurisdictions.....	162
2. The requirement of prompt reporting in the prosecution of rape in Rwanda	166
CONCLUSION.....	175
Chapter 6. EXPLORING THE OUT OF COURT SETTLEMENTS OF RAPE CASES AND THEIR IMPACT ON THE LEGAL PROCESS	177
6.1. THE NATURE OF THE "OUT OF COURT SETTLEMENTS" OF RAPE CASES	177
1. The passive role played by victims in the processes: pressures on victims.....	178
2. The outcome of "out of court settlements" of rape cases	182
6.2. RWANDAN CRIMINAL JUSTICE SYSTEM'S RESPONSE TO "OUT OF COURT SETTLEMENTS" OF RAPE CASES.....	189
1. The majority tendency: Automatic discharge of the accused	190
2. The minority tendency: Proceed despite victims' withdrawal	194
3. The fate of rape complainants who "confessed" to have lied.....	195
CONCLUSION.....	196
Chapter 7. CONCLUSION.....	198
7.1. THE MAIN RESEARCH FINDINGS	198
7.2. IMPLICATIONS OF THE RESEARCH FINDINGS AND RECOMMENDATIONS.....	205

Challenging social attitudes	207
The need for legal reform	207
Changes to strategy and public policy	208
Remaining gaps in knowledge	208
BIBLIOGRAPHY.....	210
APPENDICES.....	228
Appendix 1: PARTICIPANT INFORMATION SHEET.....	228
Appendix 2: CONSENT FORM FOR PROJECT PARTICIPANTS.....	232
Appendix 3: INTERVIEW GUIDES.....	234

Chapter 1

INTRODUCTION AND METHODOLOGY

1.1. INTRODUCTION

This thesis is intended to contribute to academic knowledge on the gendered nature of rape trials in Rwanda, and aims to provide empirical evidence that can be used to help eradicate sexual violence and empower women. In the early 2000s, Rwanda embarked on a journey towards gender equality in order to ensure that women and men enjoy the same rights.¹ This has been a major social shift as it involves correcting traditional gender imbalances that have characterised Rwandan society for centuries.² To date considerable efforts, mainly driven by political leadership, have been made and remarkable achievements have been reached.³ For example, Rwanda has dramatically improved women's involvement in politics and public administration.⁴ It now ranks third globally in female political empowerment.⁵ It also ranks first in the world in terms of women's participation in parliament.⁶

These attainments are significant, but much more effort by both the government and citizens is needed to achieve gender equality. The government has acknowledged that the political will to empower women needs to be translated into more effective actions, policies and strategies.⁷ There are still fundamental issues of gender inequality that need to be addressed in different areas of society.⁸ Some of the most acute problems

¹ Ministry of Gender and Family Promotion (2017), *From Victims to Leading Actors. Rwanda's Gender Dividend*, available from <http://www.migeprof.gov.rw>, [accessed 2 August 2018]; Ministry of Gender and Family Promotion (2011), *National Policy Against Gender-based Violence*, Available from <http://www.migeprof.gov.rw>, [accessed 2 August 2018].

² HAGURUKA (2001), *La Femme Rwandaise et l'Accès à la Justice*, available from <https://repositories.lib.utexas.edu>, [accessed 2 August 2018].

³ Hunt, S. (2017), *Rwandan Women Rising*, Durham, Duke University Press; Ministry of Gender and Family Promotion (2017).

⁴ Historically, women were marginalised from politics and public administration. Presently, they are sixty-four per cent in Parliament, forty per cent in cabinet, fifty per cent in the judiciary, fifty per cent among provincial governors. They are also significantly represented in local administration; HAGURUKA (2001); Ministry of Gender and Family Promotion (2017).

⁵ World Economic Forum (2017), *The Global Gender Gap Report*, available from <http://www3.weforum.org>, [accessed 2 August 2018].

⁶ Ministry of Gender and Family Promotion (2017); World Economic Forum, *ibid*.

⁷ Ministry of Gender and Family Promotion (2010), *Strategic Plan for the Implementation of the National Gender Policy*, available from <https://www.ilo.org>, [accessed 2 August 2018]

⁸ RWAMREC (2010), *Masculinity and Gender-based Violence: Experiences and Perceptions of Men and Women*, available at <https://promundoglobal.org>, [accessed 16 July 2018]; Ministry of Gender and Family Promotion (2010).

highlighted are the burden of poverty on women and the problem of gender-based violence.⁹

Gender, and sexual violence in particular, is a major obstacle to gender equality in Rwanda.¹⁰ Gender-based violence is defined in Rwanda as “any act that results in a bodily, psychological, sexual and economic harm to somebody because they are female or male.”¹¹ The World Health Organisation defines sexual violence as “any sexual act or attempt to obtain a sexual act using coercion”.¹² It is a broad concept that includes many sexual offences such as sexual harassment, sexual abuse of children and rape.¹³ Rape is defined in Rwandan law as non-consensual sexual intercourse by use of force, threat or fraud.¹⁴

Many public and private institutions, for example parliament, the prosecution service and NGOs have denounced the widespread character of gender and sexual violence in Rwanda.¹⁵ The pervasiveness of sexual violence has been confirmed by a major survey conducted in 2010, which revealed that 22.3 per cent of women between the age of fifteen and forty-nine have experienced sexual violence in their lifetime.¹⁶ This prevalence has been attributed, at least partly, to a “culture of violence against women” promulgated by patriarchy.¹⁷

Patriarchal norms are also blamed for contributing to a “culture of silence” surrounding gender and sexual violence, which contributes to impunity for sexual violence in Rwanda.¹⁸ Indeed, these offences are severely under-reported and unpunished. National statistics reveal that only 7.7 per cent of women who experience sexual violence choose to

⁹ Ministry of Gender and Family Promotion, *ibid*.

¹⁰ *Ibid*.

¹¹ Article 1, 1° of the GBV Law.

¹² World Health Organisation (2002), *World Report on Violence and Health*, Chapter 6, p.149.

¹³ *Ibid*.

¹⁴ Article 196 of the Penal Code (2012).

¹⁵ Forum of Rwandan Women Members of Parliament (2005), *Recommendations and Summary of the National Conference on the Bill of the Law on Prevention and Eradication of all Forms of Gender-based Violence in Particular Violence against Women and Children*, 3-4 October 2005. (Unpublished).

¹⁶ National Institute of Statistics of Rwanda (2012), *Rwanda Demographic and Health Survey 2010. Final Report*, available from: <https://dhsprogram.com>, [accessed 2 August 2018].

¹⁷ Ministry of Gender and Family Promotion (2011); RWAMREC (2013), *Sexual and Gender-based Violence. Base-line Study in 13 Districts*. Final report, available at <http://www.rwamrec>, [accessed 2 August 2018].

¹⁸ Forum of Rwandan Women Members of Parliament (2005); Umubyeyi et al. (2016), “Gender inequality prevents abused women from seeking care despite protection given in gender-based violence legislation: A qualitative study from Rwanda”, *Plos ONE*, 11(5).

report to the police.¹⁹ Further, an average of only ninety-one convictions for adult rape per year was secured between 2012 and 2016²⁰ in a country of 12 million, where acts of sexual violence are recognised to be widespread. Only ten cases of marital rape have been prosecuted in ten years, from 2008 to 2018, of which six convictions were secured.²¹ This situation supports the Ministry of Gender's concern that sexual violence is "a very critical issue of justice" in the country.²²

The need to address gender and sexual violence has prompted the country to undertake strategies to prevent it since the last decade. These measures include: adoption of new legislation on prevention of gender-based violence;²³ systematic sensitisation campaigns against gender-based and sexual violence across the country;²⁴ establishment of *ISANGE* centres equipped to provide immediate support to victims of sexual violence;²⁵ and creation of gender desks within police stations to facilitate victims' access to police.²⁶ Yet despite these new measures, there is no indication that the problem of sexual violence is reducing in the country.

It is important to note that the issue of gender and sexual violence is critical not only in Rwanda but continues to disproportionately affect women globally. As such, this thesis will draw comparatively on other countries' approaches to tackling the problem. The World Health Organisation has revealed that sexual violence is a worldwide threat affecting millions of people every year.²⁷ Statistics on sexual violence in many countries illustrate this issue. For example, in England and Wales, twenty per cent of women aged sixteen to fifty nine have experienced sexual violence.²⁸ In the US, 17.6 per cent of women aged 17 and above have experienced rape or attempted rape.²⁹ Further, 20.4 per cent of

¹⁹ National Institute of Statistics of Rwanda (2012), p.252.

²⁰ Statistics on cases of rape especially provided by prosecution authorities for the study, May 2016.

²¹ Statistics on cases of marital rape especially provided by prosecution authorities for the study, August 2018.

²² Ministry of Gender and Family Promotion (2010).

²³ Law No 59/2008 of 10/09/2008 on Prevention and Punishment of Gender-based Violence.

²⁴ Ministry of Gender and Family Promotion (2010).

²⁵ Ministry of Gender and Family Promotion (2011).

²⁶ *Ibid.*

²⁷ World Health Organisation (2002).

²⁸ Ministry of Justice (2013), *An Overview of Sexual Offending in England and Wales*, available at www.justice.gov.uk [accessed 26 November 2018].

²⁹ World Health Organisation (2002).

men in Cambodia acknowledged having committed rape in their lives.³⁰ These figures show that the scale of sexual violence is considerable in many countries across the world.

In addition to the magnitude of sexual violence, reduction of this crime has been reported to be lamentably inadequate in many jurisdictions. Research conducted by feminist scholars since the 1970s in a number of Western countries has revealed fundamental issues in preventing rape. First, unreported rapes remain common, resulting in many rapists not being brought to justice. For example, in England and Wales it has been estimated that only fifteen per cent of victims of sexual violence report their victimisation to the police.³¹ Second, attrition rates for rape cases are high in many jurisdictions. Complaints of rape are systematically dropped at all the stages of the criminal justice process, from police, to prosecution to courts; resulting in low conviction rates. For example, recent statistics show that only 5.7 per cent of reported rapes lead to a conviction in England and Wales.³² Third, rape complainants have been subjected to humiliation by the criminal justice system during the legal process in many countries.³³ The negative experiences of many complainants during both investigation and trial processes has been described by some feminists as a “judicial rape”, due particularly to mistreatment of victim-witnesses during cross-examination.³⁴ These issues demonstrate a “justice gap” with respect to the successful prosecution of sexual violence though it should be noted that improvements have been made in some jurisdictions.³⁵

Feminist research has revealed that the “justice gap” for rape cases is at least partly due to the influence of rape myths.³⁶ These pervasive myths (detailed below), it is argued, have created an unconscious bias against rape complainants among many criminal justice

³⁰ Fulu et al. (2013), *Why Some Men Use Violence Against Women and How Can We Prevent It? Quantitative Findings from the United Nations Multi-Country Study on Men and Violence in Asia and the Pacific*, available at <http://www.undp.org>, [accessed 16 July 2018].

³¹ Ministry of Justice (2013), *An Overview of Sexual Offending in England and Wales*.

³² *Ibid.*

³³ Temkin, J. (2010), “And always keep a-hold of nurse, for fear of finding something worse: Challenging rape myths in the courtroom”, *New Criminal Law Review*, 13(4), pp. 710-734; Lees, S. (1996). *Carnal Knowledge: Rape on Trial*. London, Hamish Hamilton. p31; Gregory, J. and Lees, S. (1994). “In Search of Gender Justice. Sexual Assault and the Criminal Justice System”. *Feminist Review*. Vol 48(1);

³⁴ Lees, S. (1993), “Judicial rape”, *Women’s Studies International Forum*, 16(1): 11-36.

³⁵ Smith, O. and Skinner, T. (2017), “How rape myths are used and challenged in rape and sexual assault trials”, *Social and Legal Studies*, 26(4); Temkin, J. (2002), *Rape and the Legal Process*, 2nd ed., Oxford, Oxford University Press.

³⁶ See for example Temkin, J. et al. (2018), “Different functions of rape myths use in court: Findings from a trial observation study”, *Feminist Criminology*, 13(2):205-226; Eyssel, F. and Böhner, G. (2011), “Schema effects of rape myth acceptance on judgments of guilt and blame in rape cases: The role of perceived entitlement to judge”, *Journal of Interpersonal Violence*, 26(8); Temkin (2002); Estrich, S. (1987), *Real Rape*, Harvard University Press; Lees (1996).

professionals, which has been evidenced to influence their decision-making in cases of rape.³⁷ Due to these prejudices, many legal professionals have tended to unfairly favour the defendants of rape within justice processes to the detriment of the complainants, resulting in high levels of unwarranted discharge of defendants.³⁸ Many studies have therefore suggested that legal reform is necessary to challenge rape myths that affect both the public and the justice system. Such a strategy must also inform Rwanda's campaign against gender inequality and sexual violence.

The following section provides a brief overview of rape myths as informing the basis for the thesis' objectives and the research questions as presented below. The theoretical framework guiding the thesis' empirical research is then outlined.

1. An overview of rape myths

A myth is "a commonly believed but false idea."³⁹ Rape myths are defined as "prejudicial, stereotyped and false beliefs about rape, rape victims and rapists."⁴⁰ They are "attitudes and beliefs that are generally false but are widely and persistently held, and that serve to deny and justify male sexual aggression against women."⁴¹ They tend to place blame on the victim and excuse the perpetrator.⁴² At the core of rape myths is the denial of rape among the public and criminal justice practitioners.⁴³ Lonsway and Fitzgerald have argued that rape myths fulfil a specific function in society designed to justify sexual violence against women and sustain social norms based on gender inequality.⁴⁴

An example of a rape myth is the "real rape" myth. This refers to a narrow understanding of rape, which conceptualises a *real* rape victim as a respectable woman who is attacked by a stranger in an isolated location, who resists the assault, and who presents significant injuries after the abuse and promptly reports the incident to the police, expressing distress.⁴⁵ Due to this belief, other forms of rapes not conforming to this stereotype may

³⁷ *Idem*.

³⁸ Temkin (2010).

³⁹ Cambridge Dictionary available at <https://dictionary.cambridge.org>, [accessed 25 January 2018].

⁴⁰ Temkin (2010), p.714.

⁴¹ Lonsway, K.A. and Fitzgerald, L.F. (1994), "Rape myths", *Psychology of Women Quarterly*, 18, p.134.

⁴² Eyssel, F. and Bohner, G. (2011), "Schema effects of rape myth acceptance on judgments of guilt and blame in rape cases: The role of perceived entitlement to judge", *Journal of Interpersonal Violence*, 26(8), p.1580.

⁴³ *Ibid*.

⁴⁴ Lonsway and Fitzgerald (1994).

⁴⁵ Maier (2008); Williams (1984) cited in Hockett, J.M. et al. (2016), "Rape myth consistency and gender differences in perceiving rape victims: A meta-analysis" *Violence Against Women*, 22(2), p.140; Estrich (1987).

not be considered “real” and can be viewed as being caused by victim characteristics or behaviours, such as dress, speech or other situational conduct.⁴⁶ As a result, such beliefs can result in the victim being (partly) blamed for their own victimisation instead of the offender.⁴⁷ Examples of rapes often discarded for not being “real” are rapes not resulting in remarkable physical injuries and rapes committed by a person known to the victim.⁴⁸

Apart from the “real rape” myth, the literature reveals many other types of rape myths which are sometimes inter-connected. They include the following:

- (1) Rape does not exist except in very exceptional circumstances, because a woman is capable of preventing rape by fighting off her attacker if she really does not want sexual intercourse;⁴⁹
- (2) Women enjoy rape;⁵⁰
- (3) Only some types of women are raped;⁵¹
- (4) Women who invite men for a drink are signalling their desire to have sex, so any ensuing sexual intercourse must have been consensual;⁵²
- (5) Husbands cannot rape their wives;⁵³
- (6) False allegations of rape are very common;⁵⁴
- (7) Prostitutes cannot be raped;⁵⁵
- (8) Rape results from a man’s uncontrollable sex drive;⁵⁶
- (9) Women provoke rape by the way they behave and dress;⁵⁷
- (10) A woman who accepts gifts from a man is expected to consent to sex with him;⁵⁸

⁴⁶ Hockett et al. (2016), p.140.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ Temkin (2010), p.715.

⁵⁰ Smart, C. (1977).

⁵¹ Eyssel and Bohner (2011) give the example of women who hang out in pubs and sleep around (p.1580).

⁵² Smith and Skinner (2017).

⁵³ Edwards, K.M. et al. (2011), “Rape myths: History, individual and institutional-level presence, and implications for change”, *Sex Roles*, p.765.

⁵⁴ Eyssel and Bohner (2011), p.1580.

⁵⁵ Smith and Skinner (2017), p.443.

⁵⁶ *Ibid.*

⁵⁷ Temkin (2010), p.715.

⁵⁸ This is a rape myth that Tavrow et al. named “she owed him.” Tavrow et al. (2013), “Rape Myth Attitudes in Rural Kenya: Toward the development of a culturally relevant attitude scale and “blame index””, *Journal of Interpersonal Violence*, 28(10):2156–2178.

(11) Women who have previous sexual experience with a defendant (or with multiple partners) are not credible witnesses;⁵⁹

(12) A lack of prompt reporting to the police is an indication that rape did not happen;⁶⁰

(13) A withdrawal of a rape complaint suggests that the accusation was false.⁶¹

Research conducted over the last four decades in the fields of medicine, criminology, psychology, history and other social sciences has revealed that these beliefs are not supported by evidence and that they are mostly false. Many of these study findings will be discussed extensively throughout this thesis, but it is helpful at this stage to provide some brief examples as to the research that has underpinned the aims of this thesis. First, medical science has revealed that the majority of rapes do not result in genital or other bodily injury, contradicting the idea that a rape victim must present with significant injury.⁶² Second, psychologists have shown that the emotional effects of rape may affect the victim's behaviour in the aftermath of the assault and cause delay in reporting the incident.⁶³ Third, research has revealed that rape is a "pseudo-sexual" act frequently motivated by anger, punishment, control and domination.⁶⁴ It has also demonstrated that rape has historically been used as a weapon of war and genocide.⁶⁵ Fourth, many rape victims suffer long lasting emotional trauma, which in some cases prompts suicide or attempted suicide.⁶⁶ Fifth, men are generally physically stronger than women: this contradicts the idea that if a woman does not really want sex she can simply prevent it by physical resistance.⁶⁷

⁵⁹ Temkin (2002), p.197.

⁶⁰ Orenstein, A. (1997), "'My God!' A feminist critique of the excited utterance exception to the hearsay rule", *California Law Review*, 85.

⁶¹ Saunders, C.L. (2012), "The truth, the half-truth, and nothing like the truth. Reconceptualizing false allegations of rape", *British Journal of Criminology*, p.1166.

⁶² Sugar, N.F. et al. (2004), "Physical injury after sexual assault: Findings of a large case series", *American Journal of Obstetrics and Gynecology*, 190:71-6.

⁶³ Block, A.P. (1990), "Rape trauma syndrome as scientific expert testimony", *Archives of Sexual Behavior*, 19(4), p.318.

⁶⁴ Groth, A.N. (1979), *Men who Rape. The Psychology of the Offender*, Perseus, New York ; Le Goaziou, V. (2011), *Le viol, Aspects Sociologiques d'un Crime*, La documentation Française, Paris.

⁶⁵ Brownmiller (1976); See also the jurisprudence of the ICTY and ICTR, for example: *The Prosecutor v. Jean-Paul Akayezu* (1998).

⁶⁶ Stephens, S.G. (2016), *Relationship of Sexual Violence and High-Risk Behaviours among Male and Female U.S. College students*, ProQuest Dissertations and Theses.

⁶⁷ Temkin (2010), p.716.

Despite the lack of supporting evidence, rape myths have historically had a powerful influence on the public and the criminal justice systems across the world.⁶⁸ Research conducted in many countries since the 1970s has shown that the police, prosecutors, judges and jurors have tended to adjust their decisions to these pre-conceived stereotypes of rape.⁶⁹ Rape complainants have been humiliated in courts and seem to be on trial rather than the defendants, due at least partly to the pervasive acceptance of rape myths that has historically shaped the legal profession's response to rape.⁷⁰ And though legal reform and changes in social attitudes have begun to shift the negative effects of some rape myths on criminal justice systems, recent works, including Temkin et al. (2018) and Hohl and Stanko (2015), have indicated that many of these invidious myths persist.⁷¹

All of this suggests that the harmful effects of rape myths on the criminal justice system must be considered seriously in any effort to fight sexual violence. However, the extent to which such myths are present within the criminal justice system in Rwanda remains unclear. This thesis seeks to address this lacuna based on the following research objectives and research questions.

2. Thesis objectives and research questions

Similar rape myths identified in Western jurisdictions are likely to be present in the criminal justice system in Rwanda, despite cultural differences, based on the premise that societies in both jurisdictions are characterised by long histories of patriarchy. This premise is reinforced by the following considerations: First, there are indications of similar rape myths in many other non-Western patriarchal societies in spite of cultural differences. For instance, previous studies have revealed the presence of some rape myths in India, Japan, Brasil, China, Turkey, Lebanon, Egypt, Jamaica and in sub-Sahara African countries including Kenya and South Africa.⁷² Second, in Rwanda herself, there is non-scientific evidence of rape myths in the legal system prior to this study.

⁶⁸ Temkin (2010), p.714.

⁶⁹ Estrich (1987).

⁷⁰ Lees (1996).

⁷¹ Temkin et al. (2018); Hohl, K. and Stanko, E.A. (2015), "Complaints of rape and the criminal justice system: Fresh evidence on the attrition problem in England and Wales", *European Journal of Criminology*, 12(3) 324–341.

⁷² Deniece, S. (2015), *Rape Myth Acceptance: A Non-western Perspective*, ProQuest Dissertations; Scarpati, A.S. and Pina, A. (2017), "On national and cultural boundaries: A cross-cultural approach to sexual violence perpetration in Brazil and the United Kingdom", *Journal of Sexual Aggression*, 23(3):312-327; Tavrow et al. (2013); Sadler, N. (2018), "Myths, masterplots and sexual harassment in Egypt", *The Journal of North African Studies*; Stephens, T. et al. (2016) "Rape Myth

Such evidence is found in parliament during debates on the bill of law preventing gender violence in 2007.⁷³ Despite the Rwandan parliament's efforts to introduce legislation ensuring gender equality since the beginning of the last decade, many members of parliament (MPs) betrayed ideas supporting the "culture of violence against women" denounced above. During the debates, many MPs opposed criminalisation of marital rape, making declarations openly showing acceptance of rape myths. For instance, MPs Nkusi Juvenal and Mukama Abbas argued that "no negotiations" for sexual relations between spouses should be required because permanent consent is given at marriage.⁷⁴ MP Mugabowindekwe Emmanuel went as far as to state that some women have sexual perversions and like to be beaten and violated by their husbands.⁷⁵ MP Makuba additionally stated that men have "permanent" sexual needs, which it was asserted is not the case for women; and therefore, they should not have the same sexual rights.⁷⁶ MP Nyandwi Joseph Désiré simply believed that gender equality is "unimaginable" and that criminalisation of marital rape was not appropriate.⁷⁷ Nevertheless, the majority of the MPs repudiated these ideas and managed to pass the bill.

The high probability of the presence of rape myths in the criminal justice system suggests a necessity to explore a new strategy for fighting sexual violence in Rwanda. As noted earlier, rape myths have considerable potential for undermining justice in rape cases. If such myths are present in the criminal justice system in Rwanda, they are likely to be a major obstacle to the campaign against sexual violence the country has embarked on. Therefore, countering rape myths should be a priority.

The objective of this study is consequently to investigate, identify and reveal the influence of rape myths on the legal process for rape in Rwanda, with a view to providing knowledge that can serve to improve the system's response to rape.

Acceptance Among College Students in the United States, Japan, and India", *SAGE Open*, 1-8; Evcili, F. and Golbasi, Z. (2017), "Sexual myths and sexual health knowledge levels of Turkish university students", *Sexuality and Culture*, 21:976-990; Rebeiz, M.J. and Harb, C. (2010), "Perceptions of rape and attitudes toward women in a sample of Lebanese students", *Journal of Interpersonal Violence*, 25(4): 735-752; Finchilescu, G. and Dugard, J. (2018), "Experiences of gender-based violence at a south African university: Prevalence and effect on rape myth acceptance", *Journal of Interpersonal Violence*, 1-24.

⁷³ *Inteko Ishinga Amategeko, Inyandiko Mvugo* No 91/PV/CD/UJ/2007, *Inteko Rusange yo kuwa* 11/10/2007; No 95/PV/CD/UJ/2007, *Inteko Rusange yo kuwa* 18/10/2007 (Rwandan Parliament, Minutes No 91/PV/CD/UJ/2007, Plenary session of 11/10/2007; No. 95/PV/CD/UJ/2007, Plenary session of 18 October 2007). (Unpublished).

⁷⁴ Minutes No 91/PV/CD/UJ/2007.

⁷⁵ Minutes No. 95/PV/CD/UJ/2007, p.21.

⁷⁶ *Ibid.* p.40.

⁷⁷ *Ibid.* p.42.

The research main question arising from the above considerations is the following: “Is the legal process for rape in Rwanda influenced by rape myths?”

This question can be broken down into the following sub-questions:

- a. Are rape myths, as identified in other jurisdictions, present in the legal process for rape in Rwanda?
- b. Are prosecutors and judges influenced by myths about rape when handling rape cases? If so, in which ways?
- c. Are there special procedures that may limit the effects of rape myths in the prosecution of rape in Rwanda?

In this thesis, the concept of the “legal process” will refer to the proceedings in the prosecution and trial of rape defendants.

3. Theoretical framework

This thesis is a socio-legal study which drew on work that had been informed by feminist theory. Feminist theory seeks to address imbalances between men and women resulting from patriarchy.⁷⁸ Feminist approaches to sexual violence research have substantially contributed to revealing gender inequalities surrounding rape myths, which have gone on to influence legal reforms and changes to policies in many countries across the world since the 1970s.⁷⁹

The literature used is predominantly Western because most research on feminism and on rape myths has been conducted in the Western world. This literature is specifically from traditional common law countries, especially England and the United States. These jurisdictions are adversarial while Rwanda’s legal system is traditionally inquisitorial.⁸⁰ This difference presents implications that will be examined later in the thesis.

⁷⁸ Barnett et al. (2018), “Religious affiliation, religiosity, gender, and rape myth acceptance: Feminist theory and rape culture”, *Journal of Interpersonal Violence*, 33(8), p.1221.

⁷⁹ Klein, R. (2008), “An analysis of thirty-five years of rape reform: A frustrating search for fundamental fairness”, *Akron Law review*.

⁸⁰ Rwanda’s system is historically inquisitorial but it is currently embracing adversarial system. For example, it has adopted direct cross-examination of witnesses by defendants or prosecutors. (Articles 150 and 153 of the Code of Criminal Procedure 2013).

There remains scant Rwandan literature relevant to this topic, though some of the research on the Rwandan genocide has informed this study.⁸¹ As such, Western literature has been useful to the background analyses conducted for this study, while the author has been conscious of cultural differences between the two contexts. The broader literature on rape myths is therefore used to *inform* the research study in identifying common issues and understanding of rape myth phenomena as it *might* apply in the context of Rwanda. However, the study avoids generalisations of foreign realities or transplanting of solutions to Rwanda.

Given that the focus of this research is on rape myths, the centre of attention in this study has been the victims of rape. This is not to disregard defendants' rights. These are equally important and they are also examined where appropriate. Within the study rape victims are generally referred to as women and the perpetrators as men. The intention is not to reinforce the gender roles of male violence and female victimisation. It is rather to reflect the reality of sexual violence based on the data where the most common victims of rape were women and where men were overwhelmingly rape perpetrators. The term "victim" is generally used throughout this thesis simply to mean a person who has made a complaint of being raped. No other connotation or assumption was attached to this concept in the study.⁸² Sometimes the word is interchanged with the terms complainant, survivor or victim-witness, according to the position of the victim in the specific context.

1.2. RESEARCH METHODOLOGY

Answering the question whether the criminal justice system is influenced by rape myths in Rwanda requires an approach that transcends doctrinal legal research because the issue is beyond simple analysis of the relevant laws. It entails exploration of the beliefs, practices and decisions of the key players of the criminal justice process. This requires a socio-legal qualitative methodology, which enables the researcher to reach the persons concerned in the field and explore their attitudes and actions.⁸³

⁸¹ Some writings on sexual violence in Rwanda have started to emerge online around 2015 (see for example footnotes 1,2,7,8,16 and 17 above). However, they are still very limited and they rarely refer to the issue of rape myths. The term "rape myth" seems absent in the sources available so far, although many are written in English.

⁸² Some perceive the term "survivor" as more empowering and having a more positive connotation than "victim." Hockett, J.M. and Saucier, D.A. (2015), "A systematic literature review of 'rape victims' versus 'rape survivors': Implications for theory, research, and practice", *Aggression and Violent Behaviour*, 25:1-14.

⁸³ Cownie, F. and Bradney, A. (2011), "Socio-legal studies: A Challenge to the doctrinal approach", in Watkins, D. and Burton, M. (eds), *Researching Methods in Law*, Routledge, Abingdon.

This section provides a transparent and detailed account of the methods used in data gathering and the method employed in data analysis. It also discusses other research aspects relating to result generalisation and research limitations and presents the structure of the thesis.

1. Methods used in data collection

Socio-legal qualitative approaches may use different methods such as focus group discussions, interviews and observations.⁸⁴ Instead of choosing one of them, I used multiple methods in order to maximise validity of the research findings. This approach is termed “methods triangulation.”⁸⁵ It is a combination of different methods in exploring the same subject with the view to enhancing credibility.⁸⁶ It is “simple but powerful”⁸⁷ and has the advantage of producing the best of each method while limiting specific insufficiencies, as the weaknesses of one method are often the strengths of another.⁸⁸ Three methods were triangulated in this research. These are: interviews, observations and document analysis.

a. Interviews

In order to answer the thesis’ main research question it was necessary to explore the experiences, attitudes and motives of the legal professionals as well as the victims’ experiences and emotions. The most effective way to reveal these experiences and emotions is to provide opportunities for individuals to discuss them, as Allport poignantly notes:

If we want to know how people feel, what they experience and what they remember, what their emotions and motives are like, and the reasons for acting as they do - why not ask them?⁸⁹

Two further reasons explain the pertinence of interviewing for this thesis. The first is that emotions, experiences and feelings need to be explored in depth, in order to understand

⁸⁴ *Ibid.*

⁸⁵ Denzin, N. (1989), *The Research Act*, 3rd ed., Englewood Cliffs, NJ: Prentice Hall.

⁸⁶ *Ibid.*, p. 297.

⁸⁷ Mitchell, E. S. (1986), “Multiple triangulation: A methodology for nursing science”, *Advances in Nursing Science*, 8(3), p.17.

⁸⁸ Denzin (1989), p. 308; Webb et al. (2000), *Unobtrusive Measures*, Revised Edition, Sage Publications; Mitchell (1986), p.14.

⁸⁹ Allport, G.W. cited in Heidgerken, L.E. (1953), Researcher’s bookshelf, *Nursing Research*, 2(2), p.95.

their depth and impact on the legal process.⁹⁰ This requires sufficient room for participants to express their opinions via two-way dialogue.⁹¹ Second, interviewing is particularly suitable to research issues that are sensitive, personal and complex as these require cautious treatment of the subject topics and carefully crafted questions.⁹² The topic of sexual violence explored in this research is indeed highly sensitive and personal, particularly when discussed with the victims, and it was therefore important that safe and secure environments were fostered to enable participants to speak openly.⁹³

The following is a description of the interviews subsequently conducted during an intensive fieldwork personally carried out from 5 May to 17 July 2016 in Rwanda.

(1) Participant sampling and recruitment

Having chosen interviewing as one of the data collection methods, it was crucial to select the right people able to provide data needed to answer the research questions.⁹⁴ The most relevant persons were among the key players of the criminal justice system, as it is they who have direct experience of the legal process: judges, prosecutors, defence lawyers, as well as the defendants and the victims of crime. However, these categories have different roles in the process and some of them have conflicting interests. They are consequently likely to have different perspectives. Therefore, the best sampling strategy to obtain most reliable data from the interviews was to triangulate these divergent groups.⁹⁵ The groups selected to be triangulated were judges, prosecutors, defence lawyers and victims. Defendants were not included in the study because their role is largely assumed by their lawyers within the legal process.

Each of the selected categories had a specific ability to provide data relevant to the research questions. Judges have final decision-making powers in the criminal justice process in Rwanda. If there is any influence of rape myths on the legal process, they will

⁹⁰ Denscombe, M. (2003), *The Good Research Guide for Small-scale Social Research Projects*, 2nd ed., Open University Press, Philadelphia, p.165.

⁹¹ *Ibid.*

⁹² *Ibid.*

⁹³ Ellsberg, M. and Heise, L. (2005), *Researching Violence against Women. A Practical Guide for Researchers and Activists*. Washington DC.

⁹⁴ Bryman, A. (2016), *Social Research Methods*, 5th ed. Oxford, OUP, p.407.

⁹⁵ Denzin notes the importance of what he called data source triangulation, a type of triangulation within one method that consists in exploring divergent groups to increase credibility by comparison of data emerging from the different sources. Denzin (1989), p.301.

have direct or indirect responsibility for these because it is they who direct the trials and decide about the outcome. Prosecutors are key professionals in the criminal justice process as they decide the cases to prosecute and those to drop. In other jurisdictions they have been criticised for the high levels of attrition for rape, due at least partly to the influence of rape myths as outlined above.⁹⁶ Defence lawyers have been blamed for cultivating rape myths in court proceedings in other jurisdictions based on their treatment of victims and other witnesses.⁹⁷ Victims are the very persons whom have been reported to be subjected to the prejudicial effects of rape myths during the legal process in other countries.⁹⁸

From the four categories above, forty people were interviewed in total, including eleven judges, ten prosecutors, eight defence lawyers and eleven rape victim-survivors. In this thesis, they will be referred to as follows, in order to preserve their anonymity: JUDGE[number] for the eleven judges, PROSEC[number] for the ten prosecutors, LAWYER[number] for the eight defence lawyers and SURVIVOR[number] for the eleven survivors. Fifty interviews were conducted in total as some of the participants were interviewed twice.

Sampling of prosecutors and judges needed to take into account representation of the different structures and departments that compose the prosecution service and the judiciary. In fact, jurisdiction over criminal offences is shared between ordinary (civilian) courts and (specialised) military courts.⁹⁹ Within ordinary courts, there are two levels of courts that handle rape cases: First instance courts and the High Court. There are also two levels of prosecution: First instance and national prosecution. In the military, there is one prosecution department, one military tribunal and one Military High court. Participants were selected from these departments as shown in the table below. This representation was essential in case of diverse practices in the different departments.

Gender representation was also achieved. This was not a primary target of the sampling plan, as the main aim was to interview a spread of respondents across the different categories, even if some of those categories skewed male or female. Women were

⁹⁶ See introduction section above.

⁹⁷ Lees (1996).

⁹⁸ *Ibid.*

⁹⁹ Articles 143 and 154 of the Constitution (2003).

therefore selected only where possible. Nevertheless, a fairly even gender balance was achieved across the interviewees as a whole. The ratio of female participants interviewed is as shown in the table below. In sum, eleven out of twenty-nine elite interviewees were women and in total the majority of the participants were women: twenty-two out of forty.

CATEGORY	SUBCATEGORY	WOMEN	MEN	TOTAL
Defence lawyers	Defence Lawyers	04	04	08
Prosecutors	First instance prosecutors	03	01	04
	National Prosecutors	01	03	04
	Military prosecutors	00	02	02
Judges	First instance judges	00	05	05
	High Court judges	03	01	04
	Military judges	00	02	02
Rape survivors	Rape survivors	11	00	11
	TOTAL	22	18	40

The mode of participant recruitment varied according to categories. Prosecutors and judges were accessed through their respective authorities because they work in organised government and judicial bodies.¹⁰⁰ Having worked in the justice system for a relatively long time, I had pre-existing connections among prosecutors and judges, which I used in this research. I had contacted the relevant authorities ahead of the fieldwork, and they had agreed to select a number of legal professionals who had experience of rape cases, including women, where possible. They provided me with potential participant contact lists and allowed me to negotiate with them individually. This negotiation was conducted by phone at the beginning of the fieldwork. Each potential interviewee was sent a copy of the information sheet by email (see appendix 1). All those contacted agreed to participate in the study. They signed the consent form on the day of the interviews.

Defence lawyers were recruited directly as they are independent professionals. Two lawyers had been contacted before the fieldwork and had agreed to participate in the

¹⁰⁰ It is diligent to access potential participants belonging to such organizations through gatekeepers rather than contacting them directly. Singh, S. and Wassenaar, D. (2016), "Contextualising the role of the gatekeeper in social science research", *South African Journal of Bioethics and Law*, 9(1):42-42.

research. They helped to identify three of their colleagues who had experience of rape trials whom I also contacted directly. These in turn directed me to three other lawyers. I provided all of them with the information sheet and obtained their consent as with the prosecutors and judges.

Rape survivors were recruited via the prosecution office and two organisations supporting vulnerable victims.¹⁰¹ I ensured that all rape survivors participated voluntarily in the study. Each of them was provided with the information sheet before they agreed to be interviewed. In addition to this, they were given further verbal explanation about the research. Some were given details during meetings facilitated by the intermediaries and others over the phone. However, a number of survivors showed scepticism at first about the intended interviews. For example, two conducted their own investigation on my personal background before they agreed to be interviewed. One of these agreed only after my period of work in the field ended and the interview did not take place. Nevertheless, despite some scepticism, the vast majority of survivors contacted agreed to be interviewed, with only one individual refusing outright.

(2) Interview conduct

The interviews guides were semi-structured. The questions prepared were open-ended (see appendix 3), which allowed the interviewees to make detailed comments and to express their views in a free way.¹⁰² To facilitate this further, the interviews were conducted in a language chosen by the interviewees. Most preferred to speak in *Ikinyarwanda* (the national language of the country) though some mixed with French or English. A few interviewees used some *Swahili* words sporadically (*Swahili* is a regional language spoken especially in East Africa). One interviewee spoke exclusively in English. Despite this mixture of languages, the communication was good as I am fluent in each of these languages. Most interviewees preferred not to be audio taped so I took hand written notes during the conversations.

Preparations and conduct of the interviews differed according to the categories of participants. The interviews with the legal professionals were mostly conducted in their

¹⁰¹ These two organizations are the witness protection unit of the Rwanda Public Prosecution Authority and an association called *HAGURUKA*. *HAGURUKA* literally means "stand up." It is a non-governmental organisation aimed at defending the rights of women and children in Rwanda.

¹⁰² Denscombe (2003), p.167.

offices as per their preferences. They generally lasted about an hour and took place in a cordial atmosphere. The interviews with the rape victim-survivors required special attention due to specific ethical considerations involved.

All necessary preparations were made to address ethical issues that can arise during interviews with rape survivors.¹⁰³ Three possible problems had been identified in this regard. The first was the risk of safety for the survivors.¹⁰⁴ This risk was minimised by selecting a safe place for the meetings. The participants were asked to choose a convenient venue but most of them left me the freedom to find an appropriate place. The best choice was the *Centre Christus*, a convent run by catholic sisters in the city of Kigali. This location had multiple advantages. Firstly, it was likely to give the victims confidence because such convents are usually considered safe spaces. Secondly, it was fenced and secured by professional private guards. It was also calm and clean. Thirdly, the compound had a very large garden with a number of bungalows serving as meeting places. The *Centre Christus* proved to be a good choice as the survivors were reassured when they were proposed this venue. Moreover, most showed appreciation and expressed confidence upon arrival. However, some survivors preferred other venues in Kigali city or in the countryside. I accepted to move there but I prepared some contingency planning because of possible (though less likely) risks for myself. As a precautionary measure, I always informed the local police commanders of my whereabouts prior to the meetings. I also ensured that the locations raised no apparent suspicion before accessing them. No safety incident occurred during all these interviews.

The second problem that had to be avoided or addressed during the interviews with rape survivors was possible distress caused by a likely reliving of the traumatic experience.¹⁰⁵ This possibility was lessened by the fact that the focus of the interviews with rape survivors was not the assault itself but their experience of the criminal justice process. However, it was still crucial to be prepared in case any problem arose. Thus, I took precautionary measures prior to the interviews. I was informed that the witness protection unit had an auxiliary service available on call, which intervenes rapidly when trauma occurs during interrogations with vulnerable witnesses. I therefore gave them

¹⁰³ Ellsberg and Heise (2005).

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

advance warning about the likelihood of requesting their support. In addition to this, I prepared some water and tissues in the meeting venues for use in case of need. I also informed the interviewees in advance that they could stop the interview if they wanted to. Fortunately, in the event, none of the interviewees experienced an extreme emotional response or asked to stop the interview.

The third issue was the possibility of unintentionally shocking the interviewees through questioning or inappropriate language.¹⁰⁶ To avoid this, extra-care was taken in preparing the questions and choosing the words used during the interviews. The questions were carefully drafted (see appendix 3) and the words used during the interviews were also cautiously chosen. Given that the medium of the interviews was primarily *Ikinyarwanda*, which is my first language, I could easily find the appropriate words to express my ideas but I still needed to know the right terms to use with rape survivors. To this end, I approached one professional in the victim protection unit who gave some advice. For example, instead of speaking of “rape”, it was advised that the word “*ikibazo*”, meaning “the problem”, was sufficient to refer to rape despite its imprecision, given the context of the conversation. Some survivors used other more precise terms such as “*guhohoterwa*” (victimisation), so I borrowed them to facilitate communication. As noted above, it was not my plan to speak about the assault, but this happened as the interviewees themselves introduced the subject.

Many survivors surprisingly wanted to talk about the rape itself and its effects on their lives. I carefully avoided initiating this subject for the reasons given above but it was noticeable that many were eager to tell their stories fully. Considering their urge to speak, it was important to give them room to talk. I listened to them very carefully and never stopped them. I also intervened sometimes to keep up the conversations.

It is worth noting that although these conversations were not planned, they were useful to the research. Initial findings made at that stage had revealed that these comments could also be of use in the study. This was an additional reason for listening to the survivors’ stories. I therefore asked them if I could add these comments on their formal data and they agreed. These stories proved valuable as they helped to elucidate important issues

¹⁰⁶ *Ibid.*

related to victims' vulnerabilities in the aftermath of rape. Although recruitment of rape survivors was challenging, their participation was particularly rewarding due to their enthusiasm during the interviews.

This enthusiasm is evidence that the scepticism expressed at recruitment dissipated during the interviews, as claimed above. Several survivors openly stated that they were reassured. I also perceived through the body language of many of them that they were relieved. One of the survivors had been escorted by her relatives to the first interview, but she came alone at a second meeting; which is an indication that her doubts had dissipated at the first encounter. With regards to my gender, there was no detection of any negative influence of my gender on the interviews, contrary to some concerns expressed in the literature.¹⁰⁷ However, this does of course, remain a possibility.

All the interviews with the eleven rape survivors and the twenty-nine legal professionals were fruitful and ended without any apparent incident.

(3) Post interviews

After the interviews, many interviewees expressed interest in the study. Most of the elite interviewees wished to be informed about the research findings. I promised to share with them the results. This will be a good opportunity to sensitise them about the issues revealed by the study. A few rape survivors made a similar request and were given the same promise. Most survivors expressed the hope that the study will contribute to some improvement in the processing of rape cases. Generally, the interviewees were satisfied with their participation.

However, there were some expectations that were raised by the survivors. Regrettably, some of them could not be addressed. For example, one survivor wished to appeal against the judgment in her case. I could not do much about it as the period of appeal had expired, and this would have also fallen outside of my role as a researcher. A number of other survivors expressed continued fear of their rapists. As I had previously been guaranteed support by the police and the witness protection unit in case of need during the fieldwork, I wanted to introduce the survivors to these services for reassurance and protection.

¹⁰⁷ It has been argued that researching sexual violence requires that "women should interview women and men should interview men." Ellsberg and Heise (2005), p.157.

However, they declined this offer, as well as the idea of seeking support from *HAGURUKA*. Sadly, I had no other option to help them.

There are nevertheless concerns that I was able to address. I provided information to some survivors and directed them for further follow up relating to legal assistance.¹⁰⁸ In one case the interviewee expressed concern that she could still be in immediate danger. In this case, the accused had been convicted in absence, but was not yet arrested and was hiding in the countryside. The interviewee was very afraid that he would re-victimise her. In this unique situation, I determined that I had to speak to the authorities of the Criminal Investigation Department at national level who immediately organised an intensive operation to find him. He was arrested about one week later. The victim-survivor informed me that she was relieved.

Before moving on to the next method used in data collection, it may be noted that the interviews were generally satisfactory. Despite the challenges faced in recruiting rape survivors, and the failure to address some of their issues, the process of recruitment and the conduct of the interviews were smooth. Moreover, extensive data was gathered from these interviews.

b. Court observations

Court observations were conducted in addition to interviewing in order to increase credibility of the research findings. Observation as a method of data collection has the advantage that:

[i]t does not rely on what people *say* they do, or what they *say* they think.

It is more than that. Instead, it draws on the direct evidence of the eye to witness events first hand.¹⁰⁹

Some scholars have emphasised that “[n]o other method can provide the depth of understanding that comes from directly observing people and listening to what they have to say at the scene.”¹¹⁰ In this study, it was important to include court observation

¹⁰⁸ Some survivors did not know how to claim compensation. As I had been informed by the association *HAGURUKA* that they help victims who have such concerns, I directed the survivors to *HAGURUKA*.

¹⁰⁹ Denscombe (2003), p.193.

¹¹⁰ Taylor, S.J. and Bodgan, R. (1998), *Introduction to Qualitative Research Methods*, 3rd ed., New York, John Wiley and Sons, p.90.

because this was the only approach that could allow me to see first-hand the attitudes of the criminal justice players and to directly scrutinise court practices. It was specifically the best approach to verify the presence or absence of what has been termed “judicial rape” by some feminists.¹¹¹

Prior to the observations, it was important to plan sampling of cases to observe and to consider any ethical issues involved. Sampling of the courts to be observed was based on the levels of the courts that have jurisdiction over rape as explained above, as well as their geographic distribution. Taking advantage of the small size of the country,¹¹² ten trial hearings were attended in four of the five provinces of the country and at the two levels of courts: first instance courts and the High Court. However, it was not possible to attend military trials because during the period of the fieldwork none were scheduled in these courts. Despite the limited number of the trial sessions attended, the ten court observations were particularly productive because they covered nine full rape trials. This was facilitated by the unexpected short time the trials lasted.

Regarding ethical considerations, observation normally implies obligations such as obtaining participants’ consent, avoiding risks to participants’ safety and protecting their confidentiality.¹¹³ However, participants’ consent and permission to observe the trials were not sought for the following reasons. First, it was not feasible to contact the participants as most of these details were not available until the day of the trial, except for the defendants. Second, the public are free to observe court proceedings, therefore I was entitled as any other member of the public to enter the courtrooms and watch the trials. Third, it was important for the research not to alert the participants. If they knew they were observed they could possibly become self-conscious, thereby potentially skewing the data. However, in two instances the judges were aware of the observations. In one case, the officials who provided the trial schedules contacted the court to confirm the timetable and informed them of my intentions. The presiding judge was aware of the observation during this hearing. In another trial the judge was coincidentally one of the participants earlier interviewed and could therefore guess the aim of my presence in the courtroom.

¹¹¹ See introduction section above.

¹¹² Rwanda is less large than Belgium. It has 26,338 square kilometers. *Atlas Monde* at <http://www.atlas-monde.net/afrique/rwanda/>

¹¹³ Baker, L.B. (2006), “Observation: A Complex Research Method”, *Library Trends*, 55(1), p.184.

However, there is no indication that this awareness influenced the judges' behaviour in these two cases.

The next obligation to avoid safety implications for the participants was not a big concern during the observations because of the nature of criminal trials and the place where they are conducted. Trials are normally very organised and courtrooms are usually very safe places; so no particular issue regarding safety was expected. Moreover, the observations were not intrusive and could not pose any risk to the participants. I simply sat in the courtrooms as any other member of the public, took notes discretely and did not do anything unusual or likely to draw attention.

Finally, the obligation to preserve participants' confidentiality was fulfilled. No names stated during the trials were noted, especially as they were irrelevant to the study, except for the defendants' names. These were noted and disclosed only for the purpose of referencing. Their disclosure was considered unproblematic because they were already published in the halls of the courts. Moreover, it is generally acceptable to reveal defendants' names in public hearings.

c. Collection of prosecution and court documents

The previous two methods provided extensive data to assess the legal process for rape, but one important aspect would have remained missing in the research without studying court documents. Having heard what was said by the legal professionals and seen how they did it, this could not provide all necessary data about the decisions they take in practice and the outcome of the processes. This aspect was crucial for the study because it was essential to scrutinise prosecutors' and judges' decisions in order to discern whether they are influenced by rape myths. These decisions are most fully articulated in the case files. Therefore, I collected a total of 276 files, including 101 cases dropped by prosecutors and 175 that went through the legal process to judgment.

Collecting the files with all their contents rather than the final decisions alone was deliberate. This allowed for these decisions to be critically evaluated in terms of whether they reflected the evidence that had been available to the decision-maker. The files were

consequently copied page by page although the task was laborious.¹¹⁴ However, due to this difficulty, not every file was copied in totality because some were very large. Throughout the data analysis, a list of needed but missing documents in specific files was progressively made. They were later found during informal trips to Rwanda made after the main fieldwork period.

Collection of prosecution and court documents involved sampling and observation of relevant ethical obligations, as for the previous approaches. Proper sampling of these files needed to take into account the different structures of the institutions concerned and their geographic distribution.¹¹⁵ The files were therefore gathered from the five different provinces of the country and from the two levels of civilian courts (First instance courts and the High Court) as well as the military prosecution and courts. Within these departments, the files were collected randomly as their contents were not verified. However, only cases handled between 2012 and 2016 were gathered. This was aimed to facilitate uniformity in their interpretation, given that a new Penal Code had been adopted in 2012.

The nature of the files and the way they were obtained raised certain ethical obligations. The files were on restricted access but my prior relationship with prosecution and court authorities meant that my request to read the documents was obtained relatively easy, providing me access to them and allowing me to make copies. The authorities trusted that the documents would be used responsibly for research purposes. This trust created moral obligations on my part. The resulting ethical duty was at least to ensure confidentiality of a multitude of people mentioned in the files.¹¹⁶ This was observed as the persons mentioned in the files were systematically anonymised throughout the study. They were referred to by their initials, except for the defendants, for the reasons explained above (see observation). Unlike the defendants, the accused whose criminal cases were dropped were also kept anonymous in the same way. Moreover, no information that could reasonably facilitate identification of the persons anonymised was mentioned in the thesis.

¹¹⁴ The copies were made by taking pictures using my personal Ipad. This way of copying was very practical in the field and produced high quality images. It also facilitated access to the data during analysis (see data analysis below).

¹¹⁵ See the section on interviews above.

¹¹⁶ Denscombe (2003), p.219.

Apart from the criminal case files, some subsidiary documentary sources relevant to the research were also searched and collected. These are files provided by *HAGURUKA*, the non-governmental organisation aimed at defending women's and children's rights mentioned above. Aware that there were women who sought support from this NGO, it was useful to explore the reasons that prompted them to seek assistance from this private organisation instead of the criminal justice system. *HAGURUKA* made available for the research eight (smaller) files that were copied the same way as noted above. Ethical obligations arising from these documents are similar to those mentioned about the criminal case files and were similarly assumed.

To summarise, the fieldwork permitted for the collection of a very large amount of data derived from four different sources: fifty interviews, ten court observations, 276 criminal case files and eight *HAGURUKA* files.

2. Data analysis

The considerable quantity of data was an advantage but also a challenge for analysis because of the risk of being overwhelmed by the mass of data for one researcher, including spending too much time in analysis for a three year PhD programme. An efficient exploration of the data required a systematic approach and an effective method of analysis.

There were slightly different approaches to analysing the three data sources. The documents were accessed in three phases. The first was familiarisation with the unknown data to gain an overview of the contents of the files and how to approach them. This involved a reading of about ten out of the 276 case files. The second phase consisted of methodically reading all the case files. It comprised careful and critical reading of the main documents of the files (police and prosecution reports, indictments, judgments) and a number of other most relevant documents such as complainant statements, some witness statements, medical reports or other manifestly essential material. During this phase, the issues relevant to the research questions were identified and recorded (discussed further below). The third phase involved deep and extensive exploration of specific files selected for use in the thesis.

The interviews and observations notes were approached as follows. A first reading was made for more familiarisation with the data already known. During this phase, possible coding of the data became clearer. On the second read through the data was coded (discussed further below).

At the beginning of data analysis, it was essential to organise the data in a way that would permanently ensure efficient and fast access to them during the whole process of analysis and writing up. To allow easy access throughout the process, two electronic folders capable of being instantly linked were created. The first comprised the data bank, which contained the raw data gathered from fieldwork including the interview notes, observation notes and judicial files.¹¹⁷ The second contained word documents with tables in which the information and excerpts extracted from the raw data were recorded.¹¹⁸ Each table contained all the information needed for analysis, including bibliographical or source references, excerpts, remarks, the codes, and crucially, a *link* to the data bank. This link was a reference number which identified each individual document or file consulted in the data bank. It was noted in the table next to the relevant information. The link facilitated the instant retrieval of the source of the information in the data bank. The codes recorded in the tables were also instantly accessible within different tables using the “find” tool in the word processor. Other essential information contained in the tables was also accessed in the same way. Further, it was easy to cross-check information from different sets in the tables. The two folders mentioned above were the main source of data for analysis. As the analysis progressed, other folders were created in order to record processed data in an orderly manner. This organisation considerably facilitated analysis.

The method used to analyse data from the different sets is qualitative. Specifically, I used thematic analysis to interpret the interview data. Thematic analysis is “a method for identifying, analysing and reporting patterns (themes) within data.”¹¹⁹ This method involves coding the data to reduce them into analytic categories.¹²⁰ Using this approach, I identified within the data recurrent concepts, ideas and issues relevant to the research

¹¹⁷ I already had the court documents copied using an Ipad during the fieldwork. To facilitate quick access to all the data during analysis, I also copied the interview notes and observation notes and put them in the same electronic form of Ipad pictures.

¹¹⁸ I made individual tables for each data set: prosecution case files, court files, observations and interviews notes. The interview notes from each category of interviewees were recorded in distinctive tables.

¹¹⁹ Braun, V. and Clarke, V. (2006), “Using Thematic Analysis in Psychology”, *Qualitative Research in Psychology*, 3, p.79.

¹²⁰ Nigel, G. (2001), *Researching Social Life*, 2nd ed., London, Sage Publications, p.228.

questions and coded them.¹²¹ The codes represented specific issues identified in the data, based on the theoretical framework. They were in the form of single words or a group of words and were noted in the tables previously mentioned. These codes were combined based on logical connection between them to make broader themes. With respect to the documents and observation notes, their content analysis was made in a similar way, by identifying basic themes in the materials.¹²² These themes were generally similar to the codes used regarding the interviews.¹²³

Data analysis was guided by the theoretical framework chosen for the research and inspired by the broader literature, as noted in the introduction. The permanent concern during analysis was identification and understanding of issues relating to gender inequality and prejudices against rape victims. Informed by the broader literature on rape myths, I drew on this knowledge to identify in my data similar issues revealed in the literature. Based on the theoretical framework adopted, I went beyond the problems revealed in the literature and raised other concerns specific to the local context, which did not necessarily exist in other jurisdictions. This allowed me to reveal original findings that will contribute to the understanding of rape myths and legal processes beyond Western jurisdictions.

3. Other research aspects: generalisability and research limitations

Despite the difficulty of generalising qualitative research findings, “rough generalisation” is possible in this type of study.¹²⁴ This research has the potential for generalisation deriving from the fact that the proportions of the data studied are substantial compared to the total size of the population studied. This was facilitated by the relatively small size of the Rwandan criminal justice system and the small number of the cases of rape normally handled in the country. Concretely, the study analysed 30.3 per cent of all the cases tried and 15.3 per cent of the cases dropped by prosecution from 2012 to 2016.¹²⁵ The observations were conducted in 6.6 per cent of the trials that took place in the year of

¹²¹ *Ibid.*

¹²² Bryman (2016), p.563.

¹²³ For example, the code “late report” was used in coding the opinions of the elite interviewees about delayed reports of rape. The same was used when recording prosecutors’ and judges’ written decisions in cases where the victim did not promptly report the incident. If in the court observation notes there were instances where the participants reacted to delayed report, this reaction was also mentioned in the table with the code “late report” in a next column.

¹²⁴ Baker (2006), p.187, citing Johnson.

¹²⁵ The number of cases judged between 2012 and 2016 collected for this study is 175 while the total cases of rape judged in the country during this period is 576, according to statistics provided by prosecution authorities specially for this study. The cases dropped that were studied are 101 out of a total of 658.

the fieldwork.¹²⁶ The fraction of the legal professionals interviewed is also significant: 9.6 per cent of the judges and 9.5 per cent of the prosecutors in civilian courts were interviewed.¹²⁷ Two out of seven Military High Court judges and two out of sixteen military prosecutors participated in the study. The smallest ratio of participants compared to the rest of the population is that of the rape survivors interviewed who had been through the legal process, which is estimated at 1.9 per cent.¹²⁸ Overall, these proportions are relatively significant for a qualitative research of this type.¹²⁹

The literature on social research methodology indicates that generalisation of qualitative findings requires a sampling process ensuring representation of diverse sources of data.¹³⁰ This was done as explained above. Generalisation also entails similarity between the group studied and the population to whom the result is intended to be generalised.¹³¹ In this study, there is no indication of any difference between, on one hand, the persons interviewed, the court hearings monitored and the case files studied, and on the other hand, the remainder not studied. Dissimilarity between both is highly unlikely. For all these reasons, some degree of generalisation can be allowed in this research.

This study was subjected to two major limitations. The first is the scarcity of literature on rape myths in Rwanda. This resulted in the study relying on Western literature. Rwandan literature would have enhanced the analysis by providing domestic perspectives. These are missing in the study. On a positive note, it can be said that this paucity gives the present research the potential for being a key reference point for future studies in the country. The second limitation was related to the issue of language. Almost all the data were gathered in *Ikinyarwanda*, the Rwandan national language, which is my first language. This was a great advantage during fieldwork and data analysis. However, it

¹²⁶ According to statistics provided by prosecution for this study in July 2018, the number of cases of rape tried in 2016 is 135, of which I monitored nine fully and one partially.

¹²⁷ According to figures provided by prosecution and courts officials, during the period of the fieldwork there was a total of eighty prosecutors at intermediate level, twenty-five at national level, sixteen in the military, ninety-nine judges at first instance and sixteen in the High court.

¹²⁸ Eleven survivors who had been through the legal process between 2012 and 2016 were interviewed. During this period, 563 cases were tried.

¹²⁹ Most literature on qualitative research note that what is essential in this type of investigation is not the big number of participants taking part in the research or the number of documents analysed but the quality of the data and its ability to provide information that can help answering the research questions.

¹³⁰ Mitchell (1986), p.117; Bryman (2016), p.408; Hultsch, D.F. et al. (2002), "Sampling and generalisability in developmental research: Comparison of random and convenience samples of older adults", *International Journal of Behavioral Development*, 26 (4), p.345.

¹³¹ Baker (2006), p.187.

presented a challenge for translation. Translating passages from my first language to English, my fourth language, was not always clear-cut. This was aggravated by the inexistence of a proper *Ikinyarwanda*-English dictionary. The issue of language was also a difficulty for the study in general but many efforts were made to overcome it. For example, I attended English language courses during the period of research in order to improve my writing skills.

I had these limitations but I also had a personal advantage during this research. This advantage derived from my professional background as I am a police officer. I have held senior positions in law enforcement for two decades before undertaking this research. This background has had a significant impact on the fieldwork I conducted in Rwanda. The good relationships created during my career and the knowledge of the system enabled me to obtain most of the data collected.¹³² However, I was permanently conscious that my status could also unconsciously affect the research because I am part of the system that I was researching on. Thus, I made every effort to be as objective as I could. This effort was enhanced by an attempt to support my findings with substantial and triangulated evidence.

4. Thesis structure

This thesis is divided into seven chapters. After this introductory chapter, the second chapter is dedicated to analysis of the developments of rape laws in Rwanda. The next four chapters discuss the empirical findings as follows. Chapter 3 explores the role of victims in the legal process, to examine how they are perceived by prosecutors and judges and whether they participate effectively in the process. It focusses on investigating the existence of the myth of false accusations amongst Rwandan legal professionals. Chapter 4 analyses different forms of evidence provided in rape cases, the rules and practices relating to evidence, the value attached to different types of evidence, and how all this affects the outcome of the cases. Specifically, it examines the impact of the myth that a rape victim must sustain genital and/or bodily injury and the myth of false accusations, on the provision of evidence in rape cases. Chapter 5 then explores pre-conceived ideas held by the legal professionals about how a victim of rape is expected to behave before the

¹³² See interviewing and documents collection above.

professionals accept that a rape was committed. It analyses the influence of the myth that a “genuine” rape victim is someone who is chaste, who physically resists the attack and promptly reports the incident to the authorities. Chapter 6 investigates the finding that out of court settlements of rape cases are frequent in Rwanda. It explores their nature and their impacts on the legal process. Finally, Chapter 7 concludes the thesis.

There is no chapter specifically dedicated to a “literature review” as I have opted for a recursive method and adopted a pervasive literature review throughout the thesis.¹³³ This approach is used in the following way: Each empirical chapter develops one main finding, divided into two or three sub-findings. These sub-findings are preceded at each stage by a discussion of the literature on issues revealed in other jurisdictions that has informed identification of similar issues in the context of Rwanda. This method facilitates contextualisation of the findings and clarification of the relation between the results in the present study and the findings of previous research.

¹³³ Ridley, D. (2012), *The Literature Review: A Step-by-Step Guide for Students*, 2nd ed., London, SAGE.

Chapter 2

DEVELOPMENT OF RWANDAN RAPE LAWS

Rwandan society has been experiencing a profound transformation since the genocide of *Tutsi* people in 1994. Since these traumatic events, there has been a period of immense social, economic and legal transition. Of greatest significance to the aims of this thesis is that there have been numerous legislative reforms put in place as the country has endeavoured to put an end to old legal systems that were outdated, ineffective or especially discriminatory against women.¹³⁴ As part of this process of legal reformation, this chapter will examine Rwandan rape laws since 1994. It will start with an analysis of the laws adopted in the aftermath of the genocide to punish persons responsible for this atrocious crime. Following this, I will examine current rape laws that resulted from the gender-based violence law reform introduced in 2008. The chapter aims to scrutinise the changes that have been made to rape laws in order to assess whether these new laws help to enhance access to justice for victims of sexual violence.

2.1. RWANDAN RAPE LAWS IN THE AFTERMATH OF THE GENOCIDE

Between April and July 1994, one of the worst genocides in the history of humanity was committed against *Tutsi* people in Rwanda. The *Tutsi* are one of the three main social groups that compose the Rwandan nation, along with the *Hutu* and *Twa*. The beginning of their mass extermination was triggered by the shooting down of the president's plane on 6 July 1994 and the resulting *Hutu* extremist coup d'état.¹³⁵ The new extremist government continued the propaganda against *Tutsis* as vermin, which had been ongoing for many years before, and executed the planned genocide.¹³⁶ In total it has been estimated that the genocide claimed the lives of 1,074,017 people.¹³⁷ Such a vast extermination of a single group was made possible by the mass participation of members of the *Hutu* population who were encouraged by government leaders to participate in the mass killings.¹³⁸

¹³⁴ Arostegui, J. (2013), "Gender, conflict, and peace-building: How conflict can catalyse positive change for women." *Gender and Development*, 21.

¹³⁵ Dallaire, R. (2008), *Shake Hands with the Devil: The Failure of Humanity in Rwanda*, Random House.

¹³⁶ *Ibid.*

¹³⁷ National University of Rwanda / Center for Conflicts Management (NUR/CMM). (2012), *Evaluation of Gacaca Process: Achieved Results per Objective*, p.32.

¹³⁸ *Ibid.*

Part of the incitement of hatred towards *Tutsi* people was the systematic stigmatisation of *Tutsi* women who were portrayed as sexual tools used by the enemy to conquer the *Hutu*.¹³⁹ Much of genocide was therefore characterised by systematic rapes of *Tutsi* women, on an unprecedented scale both in terms of numbers of victims and the cruelty and barbarity with which the crimes were committed.¹⁴⁰ It is estimated that between 250,000 and 500,000 women were raped during the tragic 100 days of the genocide.¹⁴¹ These rapes were generally accompanied by acts of extreme barbarism such as sexual mutilation, cannibalism, crucifixion of naked bodies of rape victims and other most unspeakable horrors.¹⁴²

The Rwandan Patriotic Front led government put in place after the genocide were given the very complex task of punishing the perpetrators of the genocide. This section provides an overview of how the systems put in place to punish genocide functioned in particular regard to rape. It examines the use of *gacaca* for victims of rape. The section then scrutinises the impact of the inclusion of rape in the first category of genocide offences on the procedure of confession and on guilty pleas.

1. The justice process for rape in the *gacaca*

a. Context and nature of *gacaca*

In the aftermath of the genocide, Rwanda was devastated in all structural respects, including the justice system.¹⁴³ More than 120,000 genocide suspects were arrested and detained awaiting trial in what was already a weak judicial system but which had been further shattered by the conflict.¹⁴⁴ The government quickly started to rebuild the justice

¹³⁹ Kaiteisi, U. (2014), *Genocidal Gender and Sexual Violence. The Legacy of the ICTR, Rwanda's Ordinary Courts and Gacaca Courts*, Cambridge-Antwerp-Portland, Intersentia, p.71; Carpenter, M.M. (2008), "Bare justice: a feminist theory of justice and its potential application to crimes of sexual violence in post-genocide Rwanda." *Creighton Law Review*, 41, p.140. The enemy in question was the Rwandan Patriotic Front (RPF) which had launched a liberation war in October 1990.

¹⁴⁰ National Service of *Gacaca* Jurisdictions (NSGJ) (2012), *Gacaca Courts in Rwanda*. pp. 212-218.

¹⁴¹ National Unity and Reconciliation Commission (NURC) (2005), *The Role of Women in Reconciliation and Peace Building in Rwanda: Ten Years after the Genocide 1994-2004. Contributions, Challenges and Way Forward*. p.33.

¹⁴² NSGJ (2012), pp. 214-218.

¹⁴³ Beside infrastructure degradation, the number of judicial personnel available had reduced after the genocide as follows: 70 to 12 prosecutors, 785 to 244 judges, 910 to 210 judicial officers and court clerks. NUR/CCM (2012), p33. The missing personnel had either been killed or fled out of the country. And yet, some of the available judicial personnel would also face justice themselves for genocide.

¹⁴⁴ NSGJ (2012), pp. 14-15.

system to commence the prosecution of genocide cases.¹⁴⁵ A specific law to enable this prosecution was enacted.¹⁴⁶

In December 1996 genocide trials started in conventional criminal courts. The trials were conducted by specialised chambers established within the Tribunals of First Instance and military courts.¹⁴⁷ But the legal process in these courts was too slow compared with the backlog of cases awaiting trial.¹⁴⁸ It soon became apparent that these courts were unable to handle the too numerous genocide cases.¹⁴⁹ Over a four year period just two per cent of all the pending cases were tried by the courts.¹⁵⁰ At this pace it was estimated that it would take hundreds of years to try only the genocide suspects that had been detained.¹⁵¹ It was soon realised that the conventional justice system, with just 12 specialised chambers, was simply incapable of handling the massive number of genocide cases. In response to this, recourse was given to an alternative and traditional justice mechanism: the *gacaca*. The *gacaca* courts had the advantage of being very numerous (around 11,000 existed throughout Rwanda) and were run by the members (typically elders) of local communities (there were 138,505 lay members including 47,456 women in 2005).¹⁵²

“*Gacaca*” is traditionally a population-based Rwandan customary judicial system that began in the 16th century whereby members of the community in a village (excluding women) sit together and resolve disputes through negotiation. The types of conflicts *gacaca* handled were generally disputes over land, domestic animals, and damage to property.¹⁵³ The main purpose of *gacaca* was restoration of social cohesion rather than punishment.¹⁵⁴ *Gacaca* sanctions included symbolic sharing of beer or food between the

¹⁴⁵ Recruitment and intensive training of prosecutors and judges was carried out expeditiously so that within two years the court processes started. NSGJ, p.24.

¹⁴⁶ Organic Law No. 08/96 of August 30, 1996 on the Organization of Prosecutions for Offences Constituting the Crime of Genocide and Crimes against Humanity Committed since October 1, 1990.

¹⁴⁷ Article 19 of the 1996 Genocide Law. Civilian genocide suspects were under the jurisdiction of Tribunals of First Instance while military and *Gendarmerie* personnel were judged by military courts.

¹⁴⁸ NUR/CCM (2012).

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid.*, p.30.

¹⁵¹ *Ibid.*, p.34.

¹⁵² NSGJ (2012), p.50.

¹⁵³ Clark, P. (2008), “The Rules (and Politics) of Engagement: The *gacaca* courts and Post-Genocide Justice, Healing and Reconciliation in Rwanda” in Clark, P. and Kaufman, Z. (eds), *After Genocide: Transitional Justice, Post-Conflict Reconstruction and Reconciliation in Rwanda and Beyond*, London: Hurst and Co Publishers Ltd, p. 302.

¹⁵⁴ Karekezi, A. cited in *Ibid.*

parties of the dispute to encourage restoration of relationships but imprisonment was never inflicted.¹⁵⁵

Recourse to the *gacaca* to help resolve the many thousands of genocide cases throughout Rwanda was prompted by the need to expedite genocide cases, while many also felt that a constructive resolution to the genocide should be based on local populations, thereby allowing for the reconstruction of the social fabric of Rwandan society.¹⁵⁶ Another reason for utilising *gacaca* was that the genocide against the *Tutsi* had been committed publicly and as such it was felt that the participation of the public in resolving genocide was considered necessary.¹⁵⁷ Moreover, many thousands of survivors had no knowledge of what had happened to their loved ones. *Gacaca* was therefore considered a space where communities could seek out the truth allowing them to come to terms with what had happened.¹⁵⁸

However, *gacaca* was not unanimously endorsed as a system capable of solving the issue of genocide justice. During preparatory meetings many participants, especially lawyers and human rights organizations, opposed the idea of *gacaca*.¹⁵⁹ Critics feared the courts would risk trivializing the genocide while the lay aspect of *gacaca* threatened to undermine the due process rights of suspects.¹⁶⁰ They also expressed doubt about the ability of the population to handle genocide crimes.¹⁶¹ Further critiques raised the issue of compensation for victims and the challenges for gathering evidence to prove genocide cases such as the lack of witnesses because most witnesses had been killed. It has also been observed that forensic evidence was lacking in genocide prosecutions.¹⁶² Yet despite these significant concerns there appeared to be few other alternatives. The *gacaca* was consequently adopted as the best option that was available and that was capable of addressing the genocide of a mass scale.¹⁶³

¹⁵⁵ Vandeginste, S. cited in *Ibid*.

¹⁵⁶ NSGJ (2012), p.30.

¹⁵⁷ Preamble, Organic Law NO 40/2000 of 26/01/2001 Setting up *Gacaca* Jurisdictions and Organizing Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed between October 1, 1990 and December 31, 1994; NUR/CCM, p.30.

¹⁵⁸ NSGJ (2012).

¹⁵⁹ *Ibid*, p.30.

¹⁶⁰ See for example Human Rights Watch (2004), *Rwanda: Struggling to Survive. Barriers to Justice for Rape Victims in Rwanda*, Available at <https://books.google.co.uk/books> [accessed 8 February 2016].

¹⁶¹ NSGJ (2012), p.30.

¹⁶² Human Rights Watch (2004).

¹⁶³ NSGJ (2012).

Gacaca Courts were established in 2001 with the following objectives: (1) revealing the truth about the genocide; (2) speeding up genocide trials and (3) contributing to national reconciliation.¹⁶⁴ As time passed the *gacaca* were tested and it became necessary to make changes to respond to various challenges faced. In this regard, a number of new laws were consecutively adopted in 2004, 2007 and 2008.¹⁶⁵ With more than 120,000 suspects to handle at the beginning, *gacaca* subsequently went on to facilitate public hearings bringing nearly two million suspects face-to-face with communities.¹⁶⁶ Note that *gacaca* was primarily used not for planners but for those who murdered, raped and committed property offences directly.

Gacaca trials took place in school classrooms, conference rooms or outdoors.¹⁶⁷ The accused or complainant stood and testified before the local community, in front of a bench of lay judges, the *inyangamugayo* or “honest persons” elected by the local community.¹⁶⁸ The number of the *inyangamugayo* forming the *gacaca* bench was usually nineteen but it could vary. Members of the community were allowed to intervene and give testimony about facts they witnessed during the genocide.¹⁶⁹

It is important to note that categorisation of genocide suspects has been a salient characteristic of the *gacaca* trials and genocide justice. In the face of the massive participation of the population in the genocide, it was clear that the punishments provided by the (ordinary) Penal Code were impracticable. For example, based on the this Code, almost two million people could face the death penalty in a country that counted around seven million.¹⁷⁰ It was therefore imperative to find punishments that should take into

¹⁶⁴ *Ibid*, p.23.

¹⁶⁵ Organic Law N016/2004 of 19/16/2004 Establishing the Organisation, Competence and Functioning of *Gacaca* Courts Charged with Prosecuting and Trying the Perpetrators of the Crime of Genocide and other Crimes Against Humanity, Committed between October 1st, 1990 and December 31, 1994; Organic Law N° 10/2007 of 01/03/2007 Modifying and Complementing Organic Law N°16/2004 Of 19/6/2004 Establishing the Organisation, Competence and Functioning of *Gacaca* Courts Charged with Prosecuting and Trying the Perpetrators of the Crime of Genocide and other Crimes Against Humanity, Committed Between October 1, 1990 and December 31, 1994; and Organic Law No 13/2008 Modifying and Complementing Organic Law No 16/2004 of 19/06/2004 Establishing the Organisation, Competence and Functioning of *Gacaca* Courts Charged with Prosecuting and Trying the Perpetrators of the Crime of Genocide and other Crimes Against Humanity, Committed Between October 1, 1990 and December 31, 1994. Other amendments were made in 2006 and 2007. These three laws are herein referred to as the 2004, 2007 and 2008 *Gacaca* Law respectively.

¹⁶⁶ The total number of cases tried by the *gacaca* courts is 1,958,634. NSGJ (2012), p.261.

¹⁶⁷ Brehm, H. et al. (2014), “Genocide, justice, and Rwanda’s *Gacaca* Courts”, *Journal of Contemporary Criminal Justice*, 30(3), p.337.

¹⁶⁸ Article 10 of the 2001 *Gacaca* Law.

¹⁶⁹ See *Gacaca* procedure in the different Genocide Laws.

¹⁷⁰ The 1977 Penal Code then applicable stipulated a punishment of death penalty for aggravated murder (Articles 312 and 316).

account the need for justice but also the need to reconcile and rebuild the country.¹⁷¹ One way to achieve this was to categorise genocide perpetrators.

Genocide crimes fell into different categories depending on the gravity of the crime committed, with the effect that the penalties were also graded accordingly. Categorisation of genocide offenders also enabled genocide planners, leaders and other notorious criminals who committed the crimes with zeal to be differentiated from the mass of criminals who participated in the killings under the influence of their leaders.¹⁷² These classifications were subject to minor changes through the consecutive texts but remained broadly the same. The first category generally included genocide planners, leaders, the notorious murderers and sexual offenders. The second basically comprised other murderers. Serious assaults against persons usually came into the third category while the last commonly included those who committed crimes against property.¹⁷³

It should be noted that the consecutive genocide laws consistently placed rape and sexual torture in the first category with the most severe punishment regardless of whether the perpetrator was among leaders or notorious criminals. This was the result of lobbying efforts by national and international women's rights organisations.¹⁷⁴

b. Implications of the popular and public nature of *gacaca* on the legal process for rape

(1) Outcome for victim-survivors

Despite some of the positive outcomes of the *gacaca* proceedings, as noted above, the public nature of the hearings may have had a number of negative implications for rape victim-survivors. In *gacaca*, suspects and witnesses, including rape survivors, were asked to give their testimonies before the local community, meaning that details of their experiences were to be stated in front of their neighbours, friends, relatives and the many *inyangamugayo*. Usta Kaitesi notes that the public involvement in such cases was both

¹⁷¹ See the Preambles of the Genocide Laws. They clearly mention that their aim is not only justice but also national reconciliation.

¹⁷² *Ibid.*

¹⁷³ Article 2 of the 1996 Genocide Law, Article 51 of the 2001 *Gacaca* Law, Article 51 of the 2004 *Gacaca* Law and Article 9 of the 2008 *Gacaca* Law.

¹⁷⁴ AVEGA Interviews, by Wells, S. (2005), "Gender, sexual violence and prospects for justice at the *Gacaca* Courts in Rwanda", *Review of Law and Women's Studies* 14(2).

“too large [and] too close to the victims.”¹⁷⁵ Even though genocide rape victim-survivors very much wanted some form of justice, in order to begin to heal from their experience, the *gacaca* may have actually meant that for some victim-survivors “the burden and impact of reporting their experiences was even greater.”¹⁷⁶

Such a situation is likely to have led to restraint amongst many rape victim-survivors to speak out about their experiences of rape in public. This restraint was caused by two main factors. First, rape victim-survivors feared community rejection because of the shame, dishonour and stigma associated with rape.¹⁷⁷ From her interviews with members of the *Association des Veuves du Génocide Agahozo*, (AVEGA)¹⁷⁸, Sarah Wells revealed that rape victim-survivors expressed their reluctance to testify about their experience of sexual violence because they feared being rejected by their communities and, for those who wished to be married, losing their chance of marriage because community members would consider them as dishonoured and degraded.¹⁷⁹ Second, rape victim-survivors also feared for their security.¹⁸⁰ Given that rapists could face the death penalty, accusations of rape attracted reprisals from perpetrators and their relatives.¹⁸¹ Despite the fact that the government had taken measures to protect genocide survivors, many were killed.¹⁸² The killings were facilitated by the fact that the suspects and the victim-survivors lived generally in the same neighbourhood.¹⁸³

The burden of testifying was even heavier because rape victim-survivors were obliged to testify in two phases: before the *gacaca* and before ordinary courts. This is because *gacaca* initially conducted only pre-trial sessions for rape as their jurisdiction over the first category of offenders was limited to receive complaints or confessions and decide upon categorisation of the offence, then transmit the case to conventional courts for trial.¹⁸⁴

¹⁷⁵ Kaitei (2014), p. 211.

¹⁷⁶ *Ibid*, p. 212.

¹⁷⁷ Wells, S. (2005); Waldorf, L. (2006). “Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice.” *Temple Law Review*, 79(1); Carpenter *op. cit.* p.647.

¹⁷⁸ Association of the Widows of Genocide.

¹⁷⁹ Wells (2005), p.187.

¹⁸⁰ See AVEGA interviews. Wells, p.188; King, R.U. (2001), “Healing psychological trauma in the midst of truth commissions. The case of *Gacaca* in post-genocide Rwanda”, *Genocide Studies and Prevention*, 6(2), p.137.

¹⁸¹ AVEGA interviews. Wells (2005), p.188.

¹⁸² FPR Inkotanyi. *Gacaca Courts Genesis, Implementation and Achievements*. Available at <http://rpfinkotanyi.org/en/?gacaca-courts-genesis> [accessed 3 February 2016].

¹⁸³ *Ibid*.

¹⁸⁴ It was then considered that *Gacaca* judges should not be relied upon to impose death penalty, which was the punishment provided for the convicted of first category including rapists.

The National Service of *Gacaca* Jurisdictions¹⁸⁵ acknowledged that not all the victims of sexual violence reported these crimes to *gacaca* because it required considerable psychological efforts and potential secondary traumas on the part of victim-survivors.¹⁸⁶

However, it is worth noting that there were many instances of rape victim-survivors testifying before *gacaca*.¹⁸⁷ These individuals were encouraged by *gacaca* to overcome their fear and many testified about the crimes committed against them despite the trauma and shame caused by the dehumanizing acts they had been subjected to.¹⁸⁸ Rape survivors have been counselled to understand that it was not them, the victims, who should be ashamed but that shame should instead be upon the perpetrators of these horrific crimes.¹⁸⁹ Whether such counselling extended beyond the immediate victim-survivors is unclear. The processes of attitudinal change and stigma relating to sexual violence can be a very slow process, meaning that for many victim-survivors of genocide rape, their ordeals will have continued long after the *gacaca* trials were concluded.

That said, some rape survivors found that *gacaca* gave them an opportunity to heal from their experiences.¹⁹⁰ Research conducted by De Brouwer and Ruvebana found that despite the difficulties of testifying before *gacaca*, many survivors including rape victim-survivors, noted that it had “unburdened their hearts” and paved the way for their personal and social healing.¹⁹¹ One rape victim-survivor interviewed in that study declared: “Testifying in *gacaca* was empowering my heart. I was able to tell people what I went through. It made me feel pleased and stronger.”¹⁹²

Nonetheless, public testimony has not been experienced by all survivors as a healing process. In fact, public testimony does not always restore the dignity of the person or enhance their healing, especially where their experiences of victimisation are linked to shame and stigmatisation.¹⁹³ The *Association Rwandaise des Conseillers en Traumatisme*

¹⁸⁵ This was an autonomous government organisation that was charged with following up and supporting *gacaca* courts.

¹⁸⁶ NSGJ (2012), p.200.

¹⁸⁷ Kaitezi (2014), p. 208.

¹⁸⁸ NSGJ, p. 271.

¹⁸⁹ *Ibid.*

¹⁹⁰ *Ibid.*

¹⁹¹ De Brouwer, A. L. M., and Ruvebana, E. (2015). “The legacy of the *Gacaca* Courts in Rwanda. Survivors' views”, *International Criminal Law Review*, 13(5), p.959.

¹⁹² *Ibid.* p.960.

¹⁹³ Wells (2005), p.192.

(ARCT)¹⁹⁴ revealed that many survivors experienced increased emotional and psychological distress after testifying.¹⁹⁵ Many who testified about their rape experience in *gacaca* reported that they endured this experience as if it was like re-living the genocide.¹⁹⁶ Some collapsed before the court, although they recovered and later reappeared in court to testify again.¹⁹⁷ In brief, the outcome of rape victims' participation in *gacaca* was mixed.

(2) The role of offenders in victim-survivor recovery

For the many genocide rape perpetrators who came forward and confessed their crimes before the community in *gacaca* the outcomes of such confessions have also been mixed. Confessions and expression of remorse and apologies have helped to ease the tension within communities.¹⁹⁸ There have been instances where rape victim-survivors forgave their offenders who apologised sincerely.¹⁹⁹ One rape survivor interviewed in De Brouwer and Ruwebana's study testified that if genocide offenders confessed sincerely, "it would make the survivors heart set free. Sometimes a *genocidaire* would confess and apologise with sincere heart. Some of them kneeled down and you felt you can again be free in your heart."²⁰⁰

However, these confessions were not welcomed by all rape victim-survivors. Rape confessions have also negatively affected survivors, depending on the situation of particular individuals and the way in which the confessions were made. Some survivors reported having been further victimised by such confessions. They complained that they had concealed their rape experience to avoid family and community rejection but it was revealed in public without their prior consent.²⁰¹ Moreover, confessions have been used by many genocide rapists as an opportunity to further hurt the victims by exposing and

¹⁹⁴ Rwandan Association of Counsellors in Trauma.

¹⁹⁵ ARCT interviews, cited by Wells, p.172.

¹⁹⁶ De Brouwer and Ruwebana, p.559.

¹⁹⁷ *Ibid.*

¹⁹⁸ NSGJ (2012).

¹⁹⁹ De Brouwer and Ruwebana (2015), p.954.

²⁰⁰ Rape survivor testimony. *Ibid.*

²⁰¹ ARCT interviews. Wells (2005), p. 191

humiliating them.²⁰² The procedure of confession offered them an opportunity “to strike one last blow against the surviving victims.”²⁰³

It should also be noted that there have been many cases of half confessions and most of the time the parts of the crime concealed concerned sexual violence because of the fear amongst defendants of being labelled a rapist.²⁰⁴ Many rape survivors expressed their grief and the difficulty to forgive those who made only partial confessions.²⁰⁵ These issues prompted new measures adopted by the legislature to stop the damaging effects explained above.

c. Limiting the damaging effects of *gacaca* publicity on rape victim-survivors

In response to the negative experiences outlined above, the legislature amended the law. The new 2004 *Gacaca* Law prohibited public testimonies about rape and sexual torture and provided a procedure to introduce rape complaints confidentially.²⁰⁶ According to this provision, rape victims had the liberty to choose one or more *inyangamugayo* among members of Seat of the competent *gacaca* court to whom they could submit their complaint. Alternatively, the complaint could be filed in writing. Victims were also given the right to go directly to the agencies in charge of criminal investigations or the public prosecution when they did not trust the *inyangamugayo*. The obligation to keep rape complaints confidential remained applicable even in case of the death of the victim. In summary, this proscription applied to all proceedings related to rape and sexual torture, including confessions.

In 2008 a new law gave *gacaca* full jurisdiction over first category offences, including rape and sexual torture.²⁰⁷ This law also took into account the necessity for “conducting rape and sexual abuse cases in *gacaca* courts in a way that avoids traumatising the victims and promotes confidentiality.”²⁰⁸ It provided specific measures to protect rape victims in

²⁰² Kaitesi (2014), p.204.

²⁰³ *Ibid.* p.214.

²⁰⁴ De Brouwer and Ruwebana, p.947.

²⁰⁵ *Ibid.*

²⁰⁶ Article 38 of the 2004 *Gacaca* Law.

²⁰⁷ As noted above, *gacaca*'s jurisdiction over first category was initially limited to receive complaints or confessions and decide upon categorisation of the offence, then transmit the case to conventional courts for trial. The shift was the result of what was seen as a complete failure by the conventional criminal courts to expedite first category cases. It was further facilitated by the abolition of the death penalty in 2007 as well as the fact that *gacaca* judges were by this point in time considered to have gained sufficient experience to deal with such cases. NSJG (2012), p.207; Kaitesi (2014), p.223.

²⁰⁸ NSJG (2012), p. 209.

courts. Firstly, the law reaffirmed the principle of closed sessions initiated by the 2004 *Gacaca* Law.²⁰⁹ Second, it provided for the possibility of trauma counsellors being present in *gacaca* to support rape victim-survivors. The counsellors could be present despite the process taking place *in camera*. Third, it stipulated harsh punishments for any *inyangamugayo* who would violate the confidentiality of rape proceedings. These sanctions ranged from dismissal to criminal prosecution.²¹⁰ Beyond the above legal measures, a special training programme for the *inyangamugayo* who are expected to try rape cases was implemented.²¹¹ All these measures were aimed at ensuring a “discreet and humane way of handling these cases.”²¹²

Since the new measures implemented in 2004 and 2008 the risks of exposing rape victim-survivors to additional trauma has been considerably reduced. Nonetheless, rape victim-survivors have not been totally guaranteed confidentiality. Even the fact of requesting testimony *in camera* itself suggests that the complainant has been victim of sexual violence.²¹³ In addition, the number of *inyangamugayo* composing the bench, mostly survivors’ neighbours, was also relatively large and the risk that the *inyangamugayo* could reveal the content of the testimonies remains real. Furthermore, it was sometimes possible for the members of the community to hear what happened during closed sessions. One rape victim-survivor reported that despite closed sessions, community members listened to her testimony through courtroom windows and even blamed her without the panel of judges reacting to the unwanted intrusion.²¹⁴ These persisting procedural problems mean that many rape victim-survivors remained reluctant to come forward.²¹⁵

2. Inclusion of genocide rape in the first category and implications for the procedure of confessions and guilty pleas

The Genocide Laws recognised the extreme gravity of the crime of genocide rape and sexual torture,²¹⁶ placing them in the first category and providing the most severe

²⁰⁹ Article 8 of the 2008 *Gacaca* Law.

²¹⁰ Article 5 provided a punishment of imprisonment from one to three years.

²¹¹ NSGJ, p. 157.

²¹² *Ibid.* p.200.

²¹³ Kaitesi (2014).

²¹⁴ De Brouwer and Ruvebana (2015), p.949.

²¹⁵ *Ibid.*; NSGJ (2012).

²¹⁶ The law did not circumscribe the meaning of or give the distinction between the terms “rape” and “sexual torture.” As a result, some prosecutors and judges confused the two and used them indistinctively while others adopted the term sexual torture in cases of gang rape or sexual mutilation. See Human Rights Watch (2004).

punishments for offenders. This tough stance against genocide sexual violence is understandable given the extreme nature of these offences. However, it may have impacted on confessions and guilty pleas which were essential to facilitate *gacaca*.

The process of confession and guilty plea has been a cornerstone of the mass prosecution of genocide crimes in *gacaca*. It has been called the “procedure of confession, guilty plea, repentance and apologies.”²¹⁷ This was not a simple guilty plea but a relatively complex process whereby offenders were required to make public apologies to Rwandan society and to the surviving victims, to give a full account of the offences committed, show where the dead bodies were thrown, and disclose their accomplices.²¹⁸ This procedure had three main objectives: to reveal the truth about the genocide, speed up genocide trials, and to contribute to national reconciliation.²¹⁹ To make this possible, it has been necessary to encourage confessions by reducing punishments. This reduction has been significant through the consecutive genocide laws since 1996 until the closure of *gacaca* in 2012.

However, it may be argued that genocide rape suspects have not been encouraged to participate in the process of guilty plea as opposed to other genocide perpetrators. This is because the incentives for guilty plea in terms of penalty reduction were largely inapplicable to rape suspects. As an illustration, a comparative example is given below. The example distinguishes the legal situation of a rapist from that of a murderer. This is not to forget that rapists generally killed their victims during the genocide and thus a distinction between them may be only theoretical. Nonetheless, this differentiation is necessary if we are to study how rape, as a crime of genocide, has been punished.

In the illustration, let us consider the situation of a rapist and a murderer who both were not among genocide planners, leaders or the notorious criminals. The table below shows the penalty faced by each and the reductions of penalty they could secure in case they confessed, under the consecutive Genocide Laws since 1996.²²⁰

²¹⁷ See for example Articles 34, 35, 54 of the 2004 *Gacaca* Law; Articles 12 and 13 of the 2008 Genocide Law.

²¹⁸ Article 34 of the 2004 Genocide Law.

²¹⁹ NSGJ (2012), p.23.

²²⁰ This table is based on the maximum punishment faced by offenders. The term of imprisonment for murderers pleading guilty from 2001 mentioned in the table is the effective imprisonment as part of their punishment was commuted into community service. The legal provisions based upon to draft the table are the following: Articles 1 (4), 14 (a) (b), 15 and 16(a) of the 1996 Genocide Law; Articles 56, 68, 69 (a) and 69(b) of the 2001 Genocide Law; Articles 54, 55 and 72 para 2, and 73, 1° and 2° of the 2004 Genocide Law; Articles 11, 4°, 13, and 14 para.3, 2° (a) of the 2007 Genocide Law; and Article 17 of the 2008 Genocide Law.

OFFENCE	PLEA	1996	2001	2004	2007	2008
RAPE	Not guilty	Death penalty	Death penalty	Death penalty	Death penalty	Life imprisonment
	Guilty	Death Penalty	Death penalty	Death penalty	30 years imprisonment	30 years imprisonment
MURDER	Not guilty	Life imprisonment	Life imprisonment	30 years imprisonment	19 years imprisonment	19 years imprisonment
	Guilty	15 years imprisonment	7 ½ years imprisonment	7 ½ years imprisonment	4 years and 8 months	4 years and 8 months

This table shows clearly how advantageous it was for a murderer to confess and how the scheme was not encouraging for rapists.

It is also important to put the reductions of penalty in context because they have had decisive effects during these time periods. In 2001 when the new law offered a reduction from a maximum of life imprisonment to an effective imprisonment of 7 ½ years for murderers who entered a guilty plea, there were many murder suspects who until then had refused to plead guilty, most of them having spent nearly 7 years in prison awaiting trial. This meant that a guilty plea was almost synonymous with release from prison. It is in this context that 20,000 people were released in the first wave of mass provisional release of genocide suspects in 2003. They did *not* include persons accused of rape as these were not eligible. Rape suspects arrested in 1994 had no incentive to plead guilty in 2003 as they would face the death penalty rather than release from prison.

The advent of *gacaca* in 2001 resulted in another wave of arrests of genocide suspects. So, in 2007 when the law further reduced the maximum term of effective imprisonment to 4 years and 8 months for murderers who confessed, many suspects arrested since 2001 could be released if they confessed. However, rapists arrested during the same period and even before could not qualify for release as their punishment was much higher.

Until the end of *gacaca* in 2012, genocide rape suspects had no immediate advantage in confessing their crime. Thus, the genocide laws were not susceptible to encourage rape suspects to come forward and plead guilty as opposed to murder suspects. This may be

the main reason why murderers pleaded guilty in large numbers (around 120,000) while genocide rapists pleading guilty remained relatively few in numbers.²²¹

Generally, sexual violence played a smaller role in genocide trials. According to De Brouwer and Ruwebana's study published in 2015, the number of rape cases tried by *gacaca* is 8,000.²²² There are also other rape cases tried by ordinary tribunals between 1998 and 2008 which are likely to be in the hundreds.²²³ These numbers are very small compared to the vast numbers of rapes committed during the genocide, estimated between 250,000 and 500,000 as noted above.

The fact that so few perpetrators of rape during the genocide have been punished suggests that the imposition of the heaviest penalties for rape without any chance of reduction in sentence has been counter-productive; at least in terms of achieving larger scale justice for rape victim-survivors. This is not to suggest that genocide rape did not deserve the most severe of punishments. However, the reductions in sentence provided on the basis of confession and plea bargaining meant that these practices became the cornerstone of the genocide justice. This was, however, missing for rape offences, meaning that the framework of justice used for the genocide did not apply to this type of crime.

The problems discussed above should not completely eclipse the positive side of the justice process as it has still brought thousands of genocide rapists to justice. Such a feat should not be understated. In fact, it is the first time in history that wartime and genocide rapists have been held responsible for their crimes in such large numbers. Even the International Criminal Tribunal for Rwanda, largely credited with being the first to punish genocide rape, has only held perpetrators accountable for rape in very small numbers. So, *gacaca's* achievements in regards to genocide rape while clearly limited are still significant.

2.2. THE RAPE LAW REFORM IN RWANDA

In the aftermath of the 1994 genocide, women's rights organisations in Rwanda expressed very strong condemnation of the barbaric and widespread rapes perpetrated against

²²¹ The approximate numbers of murder guilty pleas may be inferred from the figures for categories one and two guilty pleas (130,958 in total) as they were mostly made of murderers. RPF *Inkotanyi* (2016). Unfortunately, these figures were not disaggregated to show statistics for rape.

²²² De Brouwer and Ruwebana (2015), p.940.

²²³ No available publication indicating the exact number of rape cases tried by ordinary courts was found. This number is inferred from some non-exhaustive research such as Human Rights Watch (2004).

women during the genocide.²²⁴ These organisations continued to denounce the problem of sexual violence that remained widespread in post-genocide Rwanda.²²⁵ The gravity of the problem prompted the Forum of Rwandan Women Members of Parliament to initiate a legal reform in 2007. As a result, parliament enacted the Law on Prevention and Punishment of Gender-based Violence in 2008 (referred to below as the “GBV Law”).

The GBV Law introduced a number of significant changes, such as the suppression of unequal punishments for adultery between men and women,²²⁶ criminalisation of sexual harassment, and criminalisation of the act of harassing one’s spouse.²²⁷ The law also criminalised abduction for the purpose of marriage.²²⁸ With respect to the offence of rape, the main modifications made were the criminalisation of marital rape and the provision of a definition of rape. The next section analyses these two changes including the current status of rape law as stipulated in the 2012 Penal Code.

1. Criminalisation of Marital Rape

Forced sex within marriage was considered legal in Rwanda until the enactment of the GBV Law.²²⁹ This legality was justified by the assumption that consent to sexual intercourse was given by both spouses when entering into marriage, therefore the use of force once the woman refused sexual intercourse was considered as “*violence légitime*” (literally, legitimate violence).²³⁰ This exemption was supported by other legal provisions in the civil code especially the “*obligation de consommer le mariage*” meaning the duty to have sexual intercourse within marriage.²³¹

Criminalisation of marital rape is an important declaration of criminal law but it is nominal because of the very low punishment provided. The GBV law provided a penalty of six months to two years’ imprisonment, reduced by the 2012 Penal Code to 2 – 6 months’

²²⁴ Wells (2005), p.184.

²²⁵ Cherry, J. and Hategekimana, C. (2013), “Ending gender-based violence through grassroots women's empowerment: Lessons from post-1994 Rwanda, *Agenda*, 27(1),

²²⁶ Men found guilty of adultery were liable to a punishment of imprisonment of one to six months whereas it was one month to one year for women. Article 354 of the Penal Code 1977.

²²⁷ Articles 20, 24 and 26 of the GBV Law.

²²⁸ Article 17.

²²⁹ Article 19.

²³⁰ Nkubito, A.M. (1995). *Droit Pénal Spécial*. Kigali, Minijust.

²³¹ See below discussion on parliamentary debates.

imprisonment *or* a fine.²³² This has automatically placed marital rape in the category of “petty offences.”²³³

Placing marital rape within this category carries a number of negative implications. First, husbands raping their wives may not face preventive detention because it is not permitted for “petty offences.”²³⁴ This means that justice authorities may not be able to isolate the accused and prevent further victimisation during the legal process or prevent him from interfering with investigations. Second, attempted marital rape is not punishable because the law does not sanction attempt of “petty offences.”²³⁵ Third, the deterrent effect of the provision is limited because of the very low punishment. Moreover, recidivism of petty offences has no legal consequences as opposed to misdemeanours and felonies for which maximum punishments may be doubled in case of recidivism.²³⁶

It is clear that the failure to proscribe marital rape as a serious offence creates a hierarchy of victimhood for rape victims in Rwanda. Despite the vociferous arguments put forward in Parliament defending the lower penalties for marital rape (see below), there is no empirical basis for considering such rapes as being less harmful than other forms of rape.²³⁷ On the contrary, research conducted in other countries has revealed that marital rape is potentially more traumatic and in some instances it is life-threatening.²³⁸ Moreover, it is often accompanied by other forms of physical and mental violence, escalating in some cases into murder.²³⁹

This study explored parliamentary debates on the GBV Law to understand its spirit, including why parliament has treated marital rape as a minor wrongdoing. Analysis of the debates revealed that the understanding of heterosexual relationships was dominated by acceptance of male superiority and a tolerance of violence against women that was shared by many members of parliament (MP). This bias was very noticeable in some MPs’

²³² The fine is 100,000 to 300,000 Frw (approximately 115 to 345 USD, as of September 2018). Article 199 Penal Code.

²³³ The law classifies offences into the following categories: felonies, misdemeanours and “petty offences”, according to their gravity. “Petty offences” are those punishable by a main penalty of an imprisonment of less than 6 months or punishable by a fine only (Art 24 Penal code).

²³⁴ Article 76 of the Code of Criminal Procedure.

²³⁵ Article 30, para. 3 of the Penal Code.

²³⁶ Article 79, Penal Code.

²³⁷ Russell, D.E.H. (1982), *Rape in Marriage*, Bloomington, Indiana University Press. p.190.

²³⁸ *Ibid.* p.191 and 198.

²³⁹ Lees (1996).

declarations. As noted in Chapter 1, a number of MPs stated that marital rape did not deserve to be criminalised because permanent sexual consent is given at marriage, and “no negotiations” for sex within marriage should be required. MPs Irabona Liberata and Renzaho Giovanni overtly stated that refusal of sexual intercourse within marriage is itself a violation.²⁴⁰ Further arguments against criminalisation of marital rape have been raised by those who rejected criminalisation on the basis of what they considered as the “necessity of family protection.”²⁴¹ According to MP Nkusi Juvenal, criminalisation of marital rape is an invasion of family privacy because the law was then “entering in the beds of married couples”.²⁴² In addition, it was argued by some MPs that punishing the husband could have negative effects on the wife and children, and that it was also important to consider family life after the husband’s return.²⁴³ A final argument against criminalisation was the difficulty of finding evidence of marital rape.²⁴⁴

The majority of MPs repudiated categorically most of these ideas, explaining that marital rape was one of the vices that was undermining Rwandan society and that it should not be tolerated.²⁴⁵ They agreed that marital rape should be criminalised but some MPs insisted that the punishment should be lenient in order to limit its effects on the convict’s wife and children.²⁴⁶ This resulted in the adoption of the low penalty set out above.

Part of the problem is that the offence of (non-marital) rape is itself not viewed as a very serious offence under Rwandan law. Apart from child defilement (i.e. “rape of a child”), which since the 2001 Law on Protection of Children has always attracted very severe punishments,²⁴⁷ the punishment for rape is set at five to seven years’ imprisonment.²⁴⁸ This was in fact reduced from ten to fifteen years’ imprisonment under the GBV Law. This is not to suggest that all rapes should be given the most severe of punishments, indeed as we have seen in some situations this may actually be counter-productive, as observed above regarding genocide rape. However, punishments must reflect the gravity of offences as compared to other offences proscribed on the statute books. Where an

²⁴⁰ Rwandan Parliament, Minutes No. 95/PV/CD/UJ/2007, p.15.

²⁴¹ *Ibid.*

²⁴² Minutes No. 91/PV/CD/UJ/2007, p.38.

²⁴³ Including, MP Renzaho Giovanni, Minutes No. 95/PV/CD/UJ/2007, p.16.

²⁴⁴ MPs Kamanda Charles and Mukantaganzwa Pélégie. *Ibid.* pp.16-17; Minutes No. 91/PV/CD/UJ/2007, p.38.

²⁴⁵ Including MPs Nibishaka Aimable and Yankurije Goretti, Minutes No. 95/PV/CD/UJ/2007, pp 17-19.

²⁴⁶ Including Nyandwi Joseph Desiré, No. 95/PV/CD/UJ/2007, p.14.

²⁴⁷ The penalty is now life imprisonment with special provision. Article 191 Penal Code 2012.

²⁴⁸ Article 197 of the 2012 Penal Code.

offence such as rape has a significantly lower penalty compared with other offences of physical violence, the message sent by the State is that these types of crime are less serious than other forms of violence and are, therefore, less condemnable as a social wrong.

2. The definition of rape

The first Penal Code introduced in Rwanda in 1940 by the colonial power criminalised rape without defining it.²⁴⁹ In 1977 another Penal Code was adopted, but it also did not define rape.²⁵⁰ Instead, the meaning of rape has developed within criminal jurisprudence and doctrine which came to define rape as an act of sexual intercourse imposed by a man on a woman without her consent, by use of violence, threat or fraud.²⁵¹ During the preparation of the GBV Law, Parliament observed that it was necessary to provide a statutory definition of rape. The GBV Law consequently defined rape as “sexual intercourse without consent, by force, intimidation, trices and others.”²⁵² The 2012 Penal Code changed this definition by replacing the word “trices” with “trickery” and deleting “and others.” It specifies that rape consists of “non-consensual sexual intercourse by using force, threat or trickery.”²⁵³

There is as yet no available literature evaluating how useful or problematic this definition is. However, there are foreseeable problems with this definition given that research in other jurisdictions that have adopted a similar provision has revealed that it may fail to properly protect women’s sexual autonomy. It does not encompass all situations where the lack of consent is present and may therefore leave unpunished some unwanted acts of sexual intercourse. A similar definition in other jurisdictions such as England and Wales has in the past facilitated the requirement of use of force by the offender and physical resistance by the victim for the offence of rape to be established. This has been prejudicial to victims because non-consensual intercourse outside these requirements was not punished. The legal definition of rape in Rwanda may potentially lead to such interpretative issues especially considering the name of the offence in Rwandan language

²⁴⁹ Article 170 of the 1940 Penal Code.

²⁵⁰ Article 360 of the 1977 Penal Code.

²⁵¹ Nkubito (1995), p.50.

²⁵² Article 2, 6° GBV Law.

²⁵³ Article 196 of the 2012 Penal Code.

which is centred on the term “*ingufu*”, meaning “force.”²⁵⁴ Exploration of parliamentary debates on the GBV Law reveals that the only issue discussed regarding the definition of rape concerned the choice of the right word expressing the concept of force in the definition.²⁵⁵ This illustrates the understanding that the crux of the definition of rape is the use of force. However, the legal definition adopted does not require force as the only factor showing the lack of consent in the offence of rape, as it also cites “threat” and “trickery”. The problem, as stated above, is therefore the interpretation of the definition which may tend to require force, and the issue of situations of non-consensual sexual intercourse not included in the definition.

Another foreseeable issue in current Rwandan rape laws is the absence of a specific procedure for rape trials. It was seen above in relation to the prosecution of sexual offences in *gacaca* that victims of rape faced tremendous difficulties with *gacaca* and that the law was amended to protect them. However, there is no provision protecting victims of post-genocide rape in regular courts. In other jurisdictions, due to biased rules of evidence that have prevailed in the legal process for rape and the humiliation often experienced by victims in courts caused partly by the influence of rape myths (see Chapter 1), many countries have adopted “rape-shield” laws meant to protect victims during the justice process. The absence of such laws in Rwanda may potentially facilitate unfair processes and mistreatment of victims in courts. Yet while there are a number of legal and definitional issues arising from the law, one cannot simply assume that they affect the legal process for rape in Rwanda in exactly the same ways as have been identified in other contexts. Although many of the issues, mostly relating to consent, will be similar to those jurisdictions, both the nature of sexual violation and its legal recourse must be understood within the historical and cultural contexts in which they occur. This thesis explores many of these contextual issues throughout the following chapters.

While this thesis was being finalised, a new amendment of rape laws was adopted by Rwandan parliament.²⁵⁶ A quick analysis of the new provisions indicates some positive changes. First, the amendment improves the concept of consent. It specifies that the lack

²⁵⁴ Art 1 of the GBV Law calls rape “*gufata ku ngufu*” which literally means “to take by force” and the 2012 Penal Code names it “*gukoresha imibonano mpuzabitsina ku gahato*” which means “sexual intercourse by force.”

²⁵⁵ PV 91, pp. 16 and 22. The discussions were about the use of one of the following terms: “*ingufu*”, “*kiboko*”, and “*imbaraga*”. All these mean “force.” The final text adopted the word “*imbaraga*” which is more formal (Article 1.6).

²⁵⁶ Law Determining Offences and Penalties in General. *Official Gazette of 27 September 2018*.

of consent will be established by use of force, threats, trickery, abuse of authority and exploitation of victim vulnerability.²⁵⁷ By adding the last two factors, this new definition of rape potentially encompasses situations of non-consensual sexual intercourse that could not be included in the previous. Second, the *actus reus* of rape now includes penetration of a sexual organ into the anus or mouth and insertion of any object into the anus or sexual organ. These acts are comparably harmful and humiliating as unwanted sexual intercourse, so the change is relevant.

However, the new law also contains some questionable modifications and omissions. Marital rape is no longer treated as rape; it is now called “sexual violence against a spouse.”²⁵⁸ It is placed among offences against morality, unlike rape which is in the category of sexual offences. This contradiction shows that the law continues to make a hierarchy of victimhood for rape victims, as noted above. Moreover, the new law does not introduce specific procedures for the prosecution of rape. The absence of “rape-shield” laws protecting victims against possible gender biases during the legal process still persists. In sum, the latest change makes some improvements but it does not address all possible issues pointed out above. This third amendment in ten years indicates that the legislature is continuously looking for appropriate rape laws to tackle sexual violence but there are still lacunas in law. This reinforces the pertinence of the present study.

CONCLUSION

This chapter has analysed the development of rape laws in Rwanda since 1994. It started with the laws adopted in the aftermath of the genocide to punish the perpetrators of genocide. The genocide laws demonstrated a resolve to punish rape in the most severe way. As Rwanda adopted the use of *gacaca* as the best available approach to repress genocide while pursuing national reconciliation, *gacaca* managed to bring communities including victims, face-to-face with nearly two million genocide suspects. Many pleaded guilty, benefiting from significant reductions of penalties aimed at encouraging confession and ultimately speeding up the proceedings and creating the opportunity for reconciliation. Given that *gacaca* were popular courts with active participation of the community, rape victims experienced considerable difficulties in *gacaca* because their

²⁵⁷ Article 134, *Ibid.*

²⁵⁸ Article 137, *Ibid.*

participation was generally accompanied with stigmatisation and sometimes humiliation, so many victims refrained from testifying. On the other hand, most perpetrators also abstained from confessing rape because this did not imply any advantage for them in terms of reduction of penalty, given the uncompromising stance of the law regarding punishments for rape as opposed to other genocide crimes. All this resulted in sexual violence playing a smaller role in genocide trials. However, this should not completely obscure the unprecedented achievements of *gacaca* with regards to repressing wartime and genocide rape. This is the first system that has managed to hold accountable millions of wartime and genocide offenders including thousands of rapists while these have historically remained unpunished across the world.

While dealing with genocide justice, Rwanda has undertaken another campaign against post-genocide gender violence. A legal reform in 2008 was introduced to address gender violence, along with other measures described in Chapter 1. Several positive changes were made by this new legislation including criminalisation of sexual harassment and abolition of some discriminatory provisions. With regard to rape, two major amendments were introduced: criminalisation of marital rape and adoption of a statutory definition of rape. However, analysis of these changes revealed that they are still influenced by bias against women and might not bring about the results intended.

The following chapters of this thesis examine what impacts these new laws are having on rape cases in Rwanda and whether they remain inhibited by the existing legal framework and the cultural contexts that have allowed some degree of tolerance of violence against women in Rwanda. The thesis goes on to explore the extent to which the new provisions are being used by the courts to adequately protect women from sexual violence and punish sexual violence offenders. Specifically, it focusses on the role of rape myths in affecting how effectively the provisions are applied. As part of this endeavour, the thesis examines the foreseeable issues in the law of rape using empirical research.

Chapter 3

ANALYSING THE ROLE OF RAPE VICTIMS IN THE CRIMINAL JUSTICE PROCESS

Rape victims are central to the legal process for rape. Having personally and physically experienced the commission of the crime, they are naturally the principal witnesses of the offence. They have a key role in reporting the offence to the police to start the criminal justice process and providing evidence to the justice system for the prosecution and trial of rape defendants. Moreover, as persons directly affected by the offence, they have a personal interest in the legal process. They need justice to be served, and eventually they may wish to obtain compensation for the crime committed against them. Therefore, victim participation in the legal process is essential for a fair and efficient criminal justice process for rape cases. Nevertheless, the literature reveals that rape victims' contribution to, and enjoyment of justice has been historically hampered by distrust of rape victims in various jurisdictions across the world, due particularly to the influence of rape myths.²⁵⁹ Moreover, victims of crime in general (including rape victims), have been historically marginalised from the criminal justice system, which has resulted in victims' dissatisfaction and distrust of the system.²⁶⁰

The aim of this chapter is to explore the role played by rape victims in the criminal justice process as an essential component in the legal process. The chapter will first examine the issue of scepticism towards victims during the legal process. After this, it will explore the extent to which rape victims participate in the criminal justice process and whether they have a voice in this process.

3.1. DISBELIEF OF RAPE VICTIMS IN THE LEGAL PROCESS

One of the major issues apparent in the literature on rape is the distrust faced by rape victims when they bring complaints to the criminal justice system, as they are commonly suspected of making false accusations. The following sections will review the broader literature on false rape allegations and then explore the distrust of rape victims in the Rwandan context. The existing literature reviewed is drawn primarily from the US, UK and

²⁵⁹ See introduction chapter of the thesis.

²⁶⁰ Englebrecht, C.M. (2011), "The struggle for 'ownership of conflict': an exploration of victim participation and voice in the criminal justice system", *Criminal Justice Review* 36(2).

elsewhere in Europe. This literature is used to inform the analysis of the issue in the Rwandan context.

1. Review of literature on false rape accusations

a. The issue of false rape allegations

Historically, criminal justice practitioners have shown disbelief of women when they filed rape complaints.²⁶¹ The writings of Chief Justice Matthew Hale (a prominent 17th century English jurist) have been particularly influential in this regard. Hale claimed that:

Rape is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent.²⁶²

Other legal authorities later displayed similar understandings. For example, Justice Salmon stated in 1968:

[H]uman experience has shown that . . . girls and women do sometimes tell an entirely false story which is very easy to fabricate, but extremely difficult to refute. Such stories are fabricated for all sorts of reasons, which I need not now enumerate, and sometimes for no reason at all.²⁶³

Some authors suggested that the tendency to make false rape allegations is natural for women, as women are psychologically inclined to lie about sex. Wigmore wrote that:

Modern psychiatrics have amply studied the behaviour of errant young girls and women coming before the courts in all sorts of cases. Their psychic complexes are multifarious, distorted partly by inherent defects, partly by diseased derangements or abnormal instincts, partly by bad social environment, partly by temporary physiological or emotional conditions. One form taken by these complexes is that of contriving false charges of sexual offences by men.²⁶⁴

²⁶¹ Brownmiller (1976).

²⁶² Lord Chief Justice Matthew Hale quoted in Brownmiller, p.369.

²⁶³ Lord Justice Salmon quoted in Mack, K. (1993), "Continuing barriers to women's credibility: A feminist perspective on the proof process", *Criminal Law Forum*, 4(2), p.333.

²⁶⁴ Wigmore, quoted by Brownmiller, p. 370.

The legacy of historical distrust of rape victims has thus been “sedimented” into the beliefs of justice practitioners.²⁶⁵ As a result, this suspicion of false allegations has become a major obstacle to justice for rape victims in many jurisdictions.²⁶⁶ Rape complainants are so disbelieved that when they file their complaint, this has typically started an ordeal of sceptical questioning throughout the legal process, leading often to humiliation of the complainant.²⁶⁷

The distrust that victims face when they report rape has had serious consequences for “justice” in sexual violence cases, as it potentially allows disproportionately high numbers of rapists to escape criminal liability.²⁶⁸ Instead of concentrating on the suspects to investigate whether they are guilty or not, the tendency has been rather to focus on victims’ truthfulness.²⁶⁹ This problem of false accusation perception has been referred to by Lonsway as “the elephant in the middle of the living room” for the field of sexual assault, and it is an obstacle that needs to be removed to allow a fair treatment of rape victims.²⁷⁰

The spectre of false rape accusations, referred to by Brownmiller as “the old syndrome of Potiphar’s wife” has historically not only created a culture of suspicion amongst criminal justice professionals but it has also been translated into special and biased rules of evidence.²⁷¹ For example, the requirement that rape complainants’ testimonies must be corroborated by other evidence derives from the fear of false allegations.²⁷² This fear may originate from the combination of the legacy of misconceptions about women’s natural dishonesty and vindictiveness, with men’s refutation of the blame of rape.²⁷³ In an effort to deny men’s responsibility for rape, it has even been theorised that rape was impossible to commit without stupefying the victim.²⁷⁴

²⁶⁵ Kelly, L. (2010), “The (in)credible words of women: False allegations in European rape research”, *Violence Against Women*, 16(12): 1345–1355, p.1352.

²⁶⁶ Lonsway, K.A. (2010), “Trying to move the elephant in the living room: Responding to the challenge of false rape reports”, *Violence against Women*, 16(12):1356–1371.

²⁶⁷ Lees (1996).

²⁶⁸ Lonsway (2010), p.1367.

²⁶⁹ Lees (1996).

²⁷⁰ Lonsway (2010).

²⁷¹ Brownmiller, p. 370.

²⁷² The corroboration requirement and other rules of evidence influenced by the fear of false rape allegations are discussed in Chapter 4

²⁷³ Jordan, J. (2004). *The word of a woman: Police, rape and belief*. London: Palgrave, p.42.

²⁷⁴ *Ibid.*

Since the 1970s, the idea that false rape accusations are widespread has started to be challenged, especially by feminist researchers.²⁷⁵ The first argument against the belief that false rape allegations are common, is the absence of evidence to support the claim. Many studies have denounced the absence of any evidence of an especially high prevalence of false rape accusations, or at least higher prevalence compared to other offences (see the section on the prevalence of false allegations below).²⁷⁶ Given the lack of evidence supporting the claim, and the widespread character of the belief, the problem of false rape accusations has been denounced as a dangerous rape myth.²⁷⁷

Another argument advanced to counter the myth of false accusations is that, far from being an accusation easy to make, rape has proved to be very difficult to report as the majority of rape victims do not report the incidents to the police.²⁷⁸ Moreover, the minority who do report rape often go through a challenging ordeal in the legal process as they are questioned, and re-questioned about their past relationships, sexual history and general character, making it a very difficult complaint to bring.²⁷⁹ Bringing a false allegation can be perceived as easy if one considers only the act of saying that the person was raped; but the subsequent processes are very difficult and sometimes humiliating for the complainants.²⁸⁰

The myth of false rape allegations has also been challenged based on the perceived vindictive motive of such accusations. Kelly's study on classification criteria of false accusations in some European countries has revealed that most of the allegations categorised as false were vague and did not name suspects.²⁸¹ Also, the majority were identified at the beginning of the process and did not affect men as commonly feared. Kelly concluded that the fear of the dramatic effects of false rape accusations on men is an exaggeration compared to the reality.²⁸²

²⁷⁵ For example Brownmiller, Lees and Temkin.

²⁷⁶ For example, McMillan, L. (2016), "Police officers' perceptions of false allegations of rape", *Journal of Gender Studies*, 1-13; Gibbon, K.L. (1998), "False allegations of rape in adults", *Journal of Clinical Forensic Medicine*, 5:195-198, p.197.

²⁷⁷ Brownmiller (1976); Temkin (2002); Lees (1996).

²⁷⁸ See Chapter 1.

²⁷⁹ Lees, *ibid.*

²⁸⁰ Rumney, P.N.S. and Fenton, R.A. (2013), "Rape, defendant anonymity and evidence-based policy making", *The Modern Law Review*, 76(1)109-133, p.120.

²⁸¹ Kelly, p.1346.

²⁸² *Ibid.*

Some authors have quite understandably resorted to common-sense to counteract the myth of false rape allegations. Lees points out that:

Myths about women making false allegations override common-sense explanations of why they should run naked into the street, cry compulsively, spend the night in police stations for fear of retribution for taking the case to court, change their name, move house or go into hiding...

Commonly it is argued that women make false allegations through fear of their boyfriend or husband. Rarely does the question arise of why they do not just keep quiet about it if this were the case.²⁸³

Lonsway also argued that the myth of false rape accusations is against common-sense in that, if a woman has to deliberately make a false accusation, she should reasonably fabricate a story that can be easily acceptable and which presents some coherence, but the majority of the rape complaints seem just the opposite:

If I were going to file a false report of rape, would it make sense to give the type of account that victims do every day? For example, would I describe my own behavior in such unflattering ways as survivors do, by describing behaviors that are ill-advised, risky, embarrassing, or even humiliating? Probably not. Would I mention behaviors that might even be illegal? Almost certainly not. How about these particularly damning characteristics that Dr. Lisak highlighted: delayed reporting, drug and alcohol use, and inconsistent or even untrue statements. Surely, if I were filing a false report I would describe it as being prompt, and I would not say that I had used drugs or alcohol. Of course, I would also strive to give a statement that was clear, consistent, and chronological. This would be easy because I would be the one "writing the script." In other words, if I were truly filing a false report, it would probably look nothing like the reports of sexual assault that police departments actually receive from victims every day.²⁸⁴

²⁸³ Lees (1996), pp.124 and 127.

²⁸⁴ Lonsway (2010), p.1361.

The move to challenge rape myths has contributed to legal reforms in many jurisdictions across the world since the 1970s, such as the abolition of the corroboration requirement or the rejection of the requirement of prompt complaint (these are discussed in Chapter 4 and 5 respectively.) However, it seems that the problem is yet to be eradicated. Kelly found in 2010 that despite the efforts to improve victim care, the “culture of suspicion” amongst criminal justice practitioners still persisted.²⁸⁵ More recent research presented similar findings, for example McMillan’s interviews with forty officers in a UK police force (2016), revealed that many believed that false rape allegations were common, though not all officers believed this.²⁸⁶ So, the need “to move the elephant from the living room” is contemporary.²⁸⁷ One way of achieving this may be to show the real prevalence of false rape accusations and remove unnecessary suspicions. But is there a scientifically established prevalence rate of false rape allegations?

b. The prevalence of false rape allegations

The literature on the prevalence of false rape allegations does not provide consensus on the exact or even the approximate rate. This is because there is a wide variety of figures provided by different research, with big gaps between them. More than fifty different figures have been cited in various studies, ranging from 0.25 per cent to ninety per cent, with the majority ranging from one to ten per cent.²⁸⁸ For example, Rumney reviewed about thirty different statistics found in the literature, ranging from 1.5 per cent to ninety per cent, from various jurisdictions in the US, the UK, New Zealand and Canada.²⁸⁹ It is important to note that most, if not all, of these statistics cited by different researchers derived from police records rather than academic research findings. This has methodological implications as will be shown below.

One study frequently cited to show the high prevalence of false rape allegations is by Kanin.²⁹⁰ However, Kanin did not classify allegations as false. He only relied on police figures and classification of false reports in his study of the motives of false rape accusations. In fact,

²⁸⁵ Kelly (2010), p.1351.

²⁸⁶ McMillan (2016), p.11; Stanko, E. (2015), "Complaints of rape and the criminal justice system: Fresh evidence on the attrition problem in England and Wales." *European Journal of Criminology*, 12(3): 324-341.

²⁸⁷ Lonsway (2010), p.1368.

²⁸⁸ The figures of 0.25 and ninety per cent derive from O'Reilly and Brown studies respectively (cited in Kanin, p.84)

²⁸⁹ Rumney, P.N.S. (2006), "False allegations of rape", *Cambridge Law Journal*, 65(1):128–158.

²⁹⁰ Kanin, E.J. (1994), "False rape allegations", *Archives of Sexual Behavior*, 23(1): 81-92.

the figure of forty-one per cent cited by Kanin is the number of cases categorised as false allegations by the police, not his own finding. He totally endorsed the police classification despite the flaws in their methodology (see below).

Although some studies have appreciated Kanin's research as the "most balanced empirical research" on the issue of false allegations, because it relied on "complainant's own admission" of false allegations,²⁹¹ this criterion should not be considered as a conclusive indicator of false allegation. The reason is that a rape victim may "confess" that she lied while in reality she did not. The current research reveals many cases where victims "confessed" to having lied while it was not the case (see Chapter 6). Certainly, the socio-economic context of the present research is different from that of Kanin. Nevertheless, studies conducted in a context similar to that of Kanin also warned against the assumption that a recanted complaint is a false complaint.²⁹² Kanin's study has also been criticised for endorsing the technique of polygraph tests used by that police department to identify false allegations despite their potential to intimidate the victims and compromise the integrity of the results.²⁹³ Lisak noted that this practice has been rejected by the US Department of Justice and outlawed in many jurisdictions, but it was the standard procedure in that specific police unit because of their prejudices against rape victims.²⁹⁴ For Lisak, Kanin's work is simply not scientific research and does not deserve to be referenced; especially because it does not have any added value to the work of the police.²⁹⁵

The lowest prevalence rate commonly cited in the literature is the FBI Uniform Crime Reports Statistics of two per cent.²⁹⁶ Rumney has strongly criticised those that have cited this figure since the 1970s without critique of the methodological approach used to reach this statistic.²⁹⁷ Lonsway has also noted that the FBI figure of two per cent should be understood as relating to "unfounded" rapes, which include false accusations and other baseless cases, meaning that it does not reflect correctly the rate of false accusations.²⁹⁸ She

²⁹¹ Kennedy, D.B. and Witkowski, M.J. (2000), "False allegations of rape revisited: A replication of the Kanin study", *Journal of Security Administration*, 23(1), p.41.

²⁹² Taylor J.S. and Johnson, K. C. (2007), "Until proven innocent: Political correctness and the shameful injustices of the Duke Lacrosse rape case", *Violence Against Women*, 14(3):370-375, p.372.

²⁹³ Lisak, D. (2007), "False allegations of rape: A critique of Kanin", *Sexual Assault Report*, 11(1):1-16, p.9.

²⁹⁴ *Ibid.*

²⁹⁵ *Ibid.*

²⁹⁶ Rumney (2006), p.143.

²⁹⁷ *Ibid.* pp. 143-147.

²⁹⁸ Lonsway (2010), p.1357.

noted that later FBI higher rates of unfounded rape accusations were released (such as 5.8 per cent in 2008) but the oldest figure of two per cent continued to be given as reference despite it being outdated.²⁹⁹ Without accepting this higher prevalence rate, both Rumney and Lonsway criticised the recurring claim that the rate of false rape allegations is no higher than other offences, because there are no established findings to support this.³⁰⁰

De Zutter et al.'s more recent study found that the prevalence of *false and baseless* rape accusations in the United States was higher than the average of all offences except robbery (5.55 per cent, one per cent, and 5.78 per cent respectively).³⁰¹ This finding is not conclusive as regards the prevalence of false accusations for two reasons. First, the figure of 5.55 per cent does not separate false from baseless accusations. The authors noted that baseless allegations are not necessarily false as they include cases that do not meet the legal criteria for the offence. Second, all these figures were provided by police, which raises the issue of the criteria used to classify a rape report as false. It was revealed that police tended to conflate false allegations with other allegations that were not necessarily fabricated, for various reasons (see discussion below on the meaning of "false allegations"). Based on these two reasons, it can be said that the real (and unknown) figure of false allegations is less, and perhaps much less, than the 5.55 per cent rate of false and baseless allegations found in De Zutter et al.'s study. Therefore, this figure is limited in comparing the incidence of false allegations of rape with other offences.

In short, the real prevalence of false rape allegations is yet to be established by independent reliable research. Without evidence to the contrary, the rates are likely to be no higher or lower than for other types of crime, and thus there is no credible reason to treat rape as a special category of being more likely to be prone to false allegations. The excessive variety of the figures cited and the big differences between them may be essentially attributed to different methodological approaches, particularly the different perceptions of what

²⁹⁹ *Ibid.*

³⁰⁰ Rumney (2006); Lonsway (2010).

³⁰¹ De Zutter et al. (2017a), "The prevalence of false allegations of rape in the United States from 2006-2010", *Journal of Forensic Psychology*, (2)2.

constitutes a false rape accusation.³⁰² The central issue is, therefore, to understand the basis for the categorisation of an allegation as false and the meaning of a false allegation.³⁰³

c. What is a “false allegation”?

The concept of the “false allegation” is normally simple to understand.³⁰⁴ Its meaning is “self-evident” and “unproblematic.”³⁰⁵ Logic and common sense indicate that a false allegation is simply an accusation of a fact that did not occur.³⁰⁶ Despite this, there seems to be no agreement on what must be named a “false rape allegation.”³⁰⁷ This is due to the variety of reasons that influence criminal justice practitioners and researchers to believe that an allegation is false.³⁰⁸ For example, in the study conducted by McMillan, police officers admitted that inconsistency in the victim’s account is the primary reason for classifying a complaint as false.³⁰⁹ Other factors include lack of details in the victim’s account, a victim’s lack of cooperation, the absence of victim injury, victim withdrawal and amnesia.³¹⁰ Some even confused false rape allegations with “no-crime” or “unfounded” rape cases, whereas these categories also contain cases where there is a lack of evidence for the police to make an official record of an offence having been committed.³¹¹ Given all these different criteria used by different police organisations, it is unclear what in fact constitutes a false rape allegation.³¹²

According to Saunders, the problem is the confusion between “false complaint”, defined as an allegation of a rape that “did not happen”, and “false account”, which is “an allegation of rape containing statements of fact that are inaccurate and, consequently, *not* true.”³¹³ Saunders notes the failure of the police and prosecutors to make efforts in dealing with this complexity so they choose the easy way which is to conflate both concepts. She emphasises that criminal justice practitioners expect victims to always “tell the truth - the *whole* truth

³⁰² Saunders (2012), p.196.

³⁰³ Rumney (2006), p.155.

³⁰⁴ Gibbon (1998); Saunders (2012), p.1155.

³⁰⁵ Saunders, *ibid.*

³⁰⁶ *Ibid.*

³⁰⁷ Parker, A.D. and Brown, J. (2000), “Detection of deception: Statement Validity Analysis as a means of determining truthfulness or falsity of rape allegations.” *Legal and Criminological Psychology*, 5:237–259, p.238; Hunt, L. and Bull, R. (2012), “Differentiating genuine and false rape allegations: A model to aid rape investigations”, *Psychiatry, Psychology and Law*, 19(5):682-691, p.682; Norfolk, G.A. (2011), “Leda and the Swan -And other myths about rape”, *Journal of Forensic and Legal Medicine*, 18:225-232, p.228; Saunders, p.1155.

³⁰⁸ McMillan (2016), p.7.

³⁰⁹ McMillan, p.7; Hohl, K., and Stanko (2015).

³¹⁰ McMillan, p.7.

³¹¹ Kelly (2010), p.1347.

³¹² Norfolk, p.228.

³¹³ Saunders (2012), p.1160.

and *nothing but* the truth.”³¹⁴ Thus, they fail to recognise the possibility of a “false account of genuine rape” and to deal adequately with such cases.³¹⁵ In fact, rape victims may abstain from disclosing some facts for various reasons, such as the worry of being untrusted or blamed.³¹⁶ Saunders’ distinction has been useful in that it revealed that the same respondents who believed false rape allegations were widespread, were “unanimous” that “false complaints” were rare.³¹⁷ However, the criteria these respondents applied to classify an accusation as a “false complaint” or to decide that the alleged rape never happened are unknown. Perhaps, even these “false complaints” are not all really as “false” as they were perceived to be. As has been pointed out above, police officers may believe that the rape did not happen in a specific case for various reasons that are not always plausible.

Some mistakenly believe that victim withdrawal, whether voluntary or induced, is an indicator of a false accusation.³¹⁸ Nevertheless, victims may retract when they face mistrust or blame, or when they fear danger caused by the reporting of the rape.³¹⁹ Research has also revealed that sometimes police officers themselves persuaded victims to withdraw.³²⁰ The police then contribute to the high rates of withdrawal, which ironically reinforces their belief that they were right to doubt the complainants.³²¹ Victims’ withdrawal may also be caused by a loss of confidence in the criminal justice process.³²²

In summary, the literature provides scant reliable evidence of the prevalence of false rape allegations. Nevertheless, it shows that the real prevalence is conflated with other allegations which are not false in reality, because of the criteria wrongly used to classify false allegations. This means that the real prevalence of false allegations, although it is unknown, is lower and possibly much lower than believed by police, the public, and even some researchers.

There is a need for further rigorous research to find out the real prevalence of false rape allegations and also the incidence of false reports for other offences so that an objective

³¹⁴ *Ibid.*

³¹⁵ *Ibid.*, p.1164.

³¹⁶ *Ibid.*; Kelly (2010), p.1348.

³¹⁷ Saunders (2012), p.1166.

³¹⁸ McMillan (2016), p.9.

³¹⁹ Taylor and Johnson, p.372

³²⁰ De Zutter A. et al. (2017b), “Motives for filing a false allegation of rape”, *Archives of Sexual Behaviour*, 1-8, p.4; McMillan, p.6.

³²¹ McMillan, p.6.

³²² Kelly (2010), p.1350.

comparison may be made. Given that many judges and prosecutors in this study believed that victim testimony is unreliable and therefore lacks evidential credibility (see section on victims' evidence in Chapter 4), it is important to explore further whether biased views about female victims of rape amongst legal practitioners in Rwanda also extends to a general perception that women are predisposed to making up allegations of rape.

2. Perceptions of false rape accusations in the Rwandan context

a. The belief of the elite interviewees

This study found that the belief in false rape accusations was deeply entrenched among the legal professionals interviewed. Of the twenty-nine lawyers, prosecutors and judges interviewed, twenty-five openly stated that false rape accusations are widespread. Some went as far as to state that true rape accusations by adult complainants are exceptional. For example, LAWYER2 was categorical that “genuine rape complaints are rare.” Similarly, LAWYER3 stated that: “Rape complaints are rarely true. Generally, there is mutual consent and if any issue arises, she makes the accusation.” LAWYER3 was so concerned with false rape accusations that she expressed her disappointment about the “innocent people” who, she said, are routinely convicted based on false accusations. The interviewee literally conflated rape complaints with false complaints, expressing her concerns in the following terms:

Generally, the *victims of lies* are punished. We need to develop our forensic capacity to tackle false rape accusations. Too many innocent people are convicted unfairly...There are few acquittals in rape cases. When the complainant who came *to lie* is challenged, sometimes it is proved that they even never met and then the defendant can be acquitted.³²³

Such was the widespread belief in false accusations that one judge (JUDGE4) exclaimed that “it is a culture.” Indeed, a number of judges revealed that they constantly keep in mind the risk of false accusations while conducting rape trials. In one court ruling reviewed as part of the case file analysis, the judge stated that one of the main issues to be analysed in the case was “to find out if the defendant is not falsely accused of rape.”³²⁴ In this case, the court

³²³ Emphasis added.

³²⁴ *PP v, Mbarushimana Emmanuel*, RP 0096/16/TGI/MUS, 23 June 2016.

found that the accusation was false but the reasons advanced by the judge appeared to lack any basis in either law or evidence (this case is discussed further in the section on victims' sexual experience in Chapter 5).

Responding to the question about common types of questions asked during victims' cross-examination, JUDGE5 commented on rape complainants' tendency to lie, and added:

Yayayayayaayaya! (loud exclamation) That is why we ask them if they have any issue with the defendant. It is very frequent that they lie. An adult person has the ability to respond to tough questions. The reason why we ask those questions is to be sure that they do not lie.

JUDGE9 also said:

We ask complainants many questions when there is not enough evidence or when we suspect that they are lying. That is why we prefer hearing in camera so that the complainant may feel relaxed.

Such an attitude of deep distrust potentially has a considerable impact on the legal process for rape. As the victims are to give evidence of the crime, it can be feared that their evidence is less likely to be considered true because of this profound mistrust. The effects of the disbelief of rape victims' testimony on the provision of evidence in rape cases are explained in Chapter 4.

Two key reasons emerged during the study that underpinned interviewees' belief that rape complainants frequently lie: the non-payment of sex work and the shame that they had sex with someone and this is being found out by others who will disapprove. Other perceived motives of false rape accusations were occasionally cited, such as the existence of prior conflict between the accused and the complainant or their families. The issue of "non-payment" for sex was the most cited motive. This perceived financial motive for false rape accusations is linked to the critical issue of "the defence of prostitution", discussed in detail in Chapter 5. For the purposes of this chapter, I note simply that the study revealed that it is common for rape defendants and their lawyers to brand the victims as prostitutes without any proof, as a tactic to disprove the victim's case.

Although the distrust of rape complainants was very deeply felt among most interviewees, four of them, including two judges, one prosecutor and one lawyer did not believe that women tend to lie about rape. JUDGE11 stated:

Generally, rape complainants do not lie. There are cases of acquittals but these are normally due to the lack of evidence. When you look closely you realise that the crime was committed; that the complainant did not lie at all, but the evidence is not sufficient to convict the defendant.

PROSEC8 appreciated that it is not easy to bring a rape complaint:

It is frequently said that rape complainants tend to make false accusations. I cannot confirm this idea. I believe that no one would lightly accept the brand of 'rape victim', with all the shame associated with it, unless there is a very serious reason.

For JUDGE10, the frequent allegations made in court that women tend to lie about rape are simply meant to humiliate the complainants:

Defendants and their lawyers generally say that women tend to lie about rape. However, this is not the reality. It is only a way of humiliating the victims. It is unfair to generalise that women lie. What about men? Such an attitude is dangerous. This is only aimed at demeaning women.

Interestingly, one lawyer conceded that he frequently relies on this argument to defend his clients though he does not believe it:

We defence lawyers, tend to say in court that rape complainants frequently lie. We give some reasons like non-payment of the price of sex. We say it routinely. However, to be honest, I cannot confidently affirm that women tend to lie about rape. On the contrary, many women are raped but never reveal it. If all rape victims reported the crime, we would have too many cases.
(LAWYER4)

Asked if he gives evidence in court when he alleges that the victim lied, LAWYER4 replied:

When you want to show that she lied, you make a parallel with other cases, you show that in those cases they lied but you do not give evidence of fabrication because you can't find it. (LAWYER4)

This revelation is very concerning because defence lawyers are auxiliaries of the criminal justice system and are supposed to assist the system in being more effective and fair. This research revealed that many lawyers are deliberately feeding others' false perceptions in order to exonerate rape defendants. This is damaging for the system which relies on professionals who sometimes intentionally mislead judicial authorities. The implications for rape victims are not negligible because such lawyers reinforce the already existing distrust of rape complainants, which only contributes to further relegation of rape victims in the criminal justice process.

In short, the majority of the justice practitioners interviewed deeply believed that false rape accusations were widespread but not all shared the same belief. This conclusion is similar to McMillan's findings cited above. Saunders' study also reached similar conclusions.³²⁵

Having found that the belief in the existence of widespread false rape accusations was so deeply entrenched among many interviewees, it was important to explore whether this belief had any supporting evidence in the Rwandan context.

b. Justice professionals' grounds for believing false allegations are widespread

The elite interviewees were pressed to give concrete examples of false allegations to support their claim about the high prevalence of false accusations. Most could not give any single example. Even JUDGE4 who asserted that false accusations are a culture and LAWYER3 who equated rape complaints with false complaints, failed to give any tangible examples. Most participants simply replied: "I do not remember." Some added comments that revealed the true meaning that they attached to a false accusation. For example, LAWYER5 said:

I do not remember, but there are cases I pleaded where the defendants were acquitted, meaning that the accusation was false.

³²⁵ Saunders (2012), p.1167.

LAWYER5's answer denotes confusion between acquittal and false accusation. This is evidently incorrect because an acquittal may be caused by various reasons. It cannot be assumed that if the defendant is acquitted in a trial, this means that he was falsely accused. It simply means that the court did not find sufficient ground to convict him. This may be due to doubts raised in the mind of the judge, insufficient evidence, procedural obstacles or any other reason that may pre-empt the judge to deliver a guilty verdict. Conflating acquittals with false allegations therefore aggravates misconceptions about the high prevalence of false allegations.

PROSEC10 also said he did not remember, and added the following comments:

There are cases where you find that they agreed to have sex but because of any misunderstanding she says that she was raped. The suspect says that they agreed and when we try to find evidence we do not find any trace of force.

This reply shows that the absence of victim injury led to the conclusion of absence of rape (see section on medical evidence in Chapter 4). This finding concurred with McMillan's research conducted in the UK, which also revealed that a lack of injury was one of the key reasons why police officers believed a rape allegation was false.³²⁶ Such an attitude is linked to another pervasive rape myth discussed earlier in the introduction chapter, which conceives of rape involving a substantial amount of physical violence, and that the victim must consequently present significant injuries. This connected rape myth persists despite research persistently showing that the majority of rapes do *not* cause physical injuries, a theme that will be further explored in Chapter 4.

In response to the same question about concrete cases of false allegations, PROSEC3 commented:

I could find some among the cases dropped, but we do not write that she lied; you only realise that there is no evidence of rape. (PROSEC3)

This answer denotes that the recurrent conclusion of the "lack of evidence" in many rape cases (see Chapter 4 and 5) may conceal other extra-evidential considerations in the mind of the decision maker who may use it as an easy justification; especially that the concepts of

³²⁶ McMillan (2016), p.7.

the “lack of evidence” or “insufficient evidence” may sometimes be more or less subjective and more difficult to challenge.

Another interviewee failed to give a concrete case of a false rape allegation and said:

I cannot remember exactly. I cannot say it is this or that specific case but there have been cases we investigated and found that they [the complainant and the accused] were friends. (PROSEC6)

This response further reveals a connection between rape myths, which seemingly combine to strengthen an individual’s biased belief towards victims of rape. In this case, the prosecutor shows that a prior friendship between the suspect and the victim is to be equated with the belief that the victim must have consented.³²⁷

Some interviewees said that they did not recall the details but they remembered cases where the complainants themselves “confessed” to having lied. This issue of victims’ recantation is discussed in Chapter 6, which will demonstrate that recantations are not sure indicators of false accusations.

Far from providing concrete examples of a false allegation, the interviewees’ responses revealed generalised comments that are based on an interconnected system of beliefs about rape that reinforce negative stereotypes about complainants. Most of the interviewees revealed that their classification of a case as a false allegation was influenced by common rape myths. Indeed, amongst the interviewees, just two could give actual case examples of perceived false allegation but these examples also betray a misconception of what is a “false allegation.” LAWYER6 remembered this case:

There is one case I pleaded. It was a twenty-four-year-old man who shared [an alcoholic] drink with the woman. It was clear that the woman lied because even the prosecutor himself said that he had no evidence of rape. The man was released.

This conclusion of false accusation was influenced by the absence of evidence in the case. Nevertheless, a lack of evidence must not be conflated with a false accusation because there are many reasons that can cause the lack of proof in a rape case, such as the absence of a

³²⁷ This issue is discussed in Chapter 5.

third party witness. This means that a rape may be committed but the investigation may still fail to gather cogent evidence. Therefore, conflating unproven rapes with false allegations is a misconception.

JUDGE9 gave the following example:

I remember the case of a girl who complained of rape in the Northern region. The defendant was her friend. The girl accepted to leave Kigali and visit him in the Northern region. She called him, then they agreed to meet in the evening and they went in a bush and had sex. Later she said it was forced. The boy said: 'Check how many times she called me on phone. We had consensual sexual intercourse. It was in the bush but near a neighbourhood. If it had been forced, she would have screamed, it was near a church, she would have been helped. She travelled many kilometres to see me. Also, she dressed in trousers. How could I remove her trousers, put on a condom and rape her? It was consensual but she accused me because when she went back home they asked her where she came from and she could not explain. Otherwise she would have complained to people around because there were many homes nearby.'

This judge's answer is dominated by the defendant's arguments rather than the finding by the judge about the facts that happened. Although this judge endorsed the defendant's arguments, these do not warrant the conclusion that the rape accusation was false: (a) if the girl travelled long distances to visit the boy, it does not necessarily mean that she went for sex; (b) wearing trousers cannot pre-empt rape. The victim may be threatened and obliged to remove the trousers or the assailant may overpower the victim and forcibly remove them; (c) the victim may not have screamed out of fear or out of hopelessness; or she may have screamed and not be heard, or even be heard and not be rescued; (d) it is unlikely that the victim lied to her parents supposedly because she lacked any explanation for her absence. As she intentionally travelled relatively long distances, it is more likely that she had an explanation for such a deliberate activity.

Collectively, these circumstantial factors do not provide any conclusive evidence of a false allegation. The example also does not reveal any effort was made by the judge to find out whether the allegation was false.

A careful reading of the judgment in this case to check the reason given by the court, did not uncover any mention by the court of a false allegation. Rather, it found that there was “doubt” about the commission of the rape. This reinforces what was mentioned above that prosecutors’ and judges’ decisions are sometimes justified with legal explanations such as “doubt” or “insufficient evidence” while the drive of the decision was a personal and extra-legal belief. Furthermore, this example illustrates the way that a perceived lack of evidence is often conflated with a false allegation.

In short, none of the interviewees’ responses above provided any tangible evidence to show that a victim had made a false accusation. Most participants stated that they did not remember any specific cases, and those who gave some explanation to support their views betrayed the absence of any factual basis to ascertain the falsity of the allegations. They rather relied upon doubtful indicators of false accusations.

It was observed above that in other jurisdictions the concept of the “false accusation”, although it appears to be straightforward, is often interpreted by criminal justice practitioners to include various situations which do not necessarily mean a deliberate fabrication of rape. Factors such as inconsistency in the victim’s account, the lack of evidence and so on, are but two examples that have been shown to influence justice practitioners to classify rape allegations as false. Similar to the findings in other jurisdictions, the following further perceived indicators of false allegations were found in this research: victim-offender acquaintance, absence of victim resistance, delayed reporting, victims’ sexual experience, victim withdrawal, victim recantation and perceived lack of evidence. The vast majority of the legal practitioners interviewed stated unequivocally that these factors are strong indicators of false allegations.

The review of the files revealed that most of the cases where these perceived indicators were present have been systematically dismissed, regardless of the evidence contained in the files, on the ground that the allegations were false. As will be demonstrated in the following chapters, it was revealed that the facts in the cases declared false did not support

the conclusion of a false allegation. More importantly, the study revealed that *not a single case* declared false was investigated to find cogent evidence of fabrication before concluding the accusation is false. The conclusions of false allegation derived *exclusively* from the dubious perceived indicators of a false accusation that have been explained above. If the influence of these perceived indicators was removed, it is unlikely that there would be a significant number of rape reports deemed “false.”

In light of all this, it can be concluded that the (unknown) real prevalence of false rape allegations must be *very much lower* than believed by the criminal justice professionals. This supports previous findings that justice practitioners believe in high prevalence of false rape accusations while the reality is much lower.³²⁸ Chapter 4 will demonstrate how this belief shapes the whole system of evidence in rape cases and how the special evidentiary rules created for that matter have had dramatic consequences for the processing of cases through the legal process.

3.2. VICTIMS’ LACK OF PARTICIPATION IN THE LEGAL PROCESS

Historically, crime victims have been considered as the “forgotten” player in the criminal justice process in various jurisdictions across the world.³²⁹ The main concern of the criminal justice process has been the protection of society through sentencing of offenders, because crime was considered as a violation against the state rather than harm caused to individual victims.³³⁰ Victims were only used as “tools” for the prosecution of defendants, with a limited role as witness to the crime.³³¹

In the 1970s, what has been described as a “victim’s rights movement” emerged, promoting a more significant role for victims during the criminal process.³³² This movement led to the adoption of measures in some jurisdictions in the US and in Europe, allowing victims’ greater participation and a voice in the criminal justice process.³³³ This has led, over time, to victims becoming a more integral part of the criminal process. For example, in the United Kingdom

³²⁸ For example, Kelly et al. (2005), *A Gap or a Chasm? Attrition in Reported Rape Cases*, London, HMSO

³²⁹ Sumner, C.J. (1987), “Victim participation in the criminal justice system”, *Australian and New Zealand Journal of Criminology*, 20:195-217; Riley, M.B., (2007), “Victim participation in the criminal justice system: in re Kenna and victim access to presentence reports”, *Utah L. Rev.* p.236; Haynes, S.H. (2011), “The effects of victim-related contextual factors on the criminal justice system”, *Crime & Delinquency* 57(2), p.299.

³³⁰ Englebrecht (2011), p.129; Haynes (2011), p.299.

³³¹ Riley (2007), p.236.

³³² Tobolowsky, P.M. (1999), “Victim participation in the criminal justice process: fifteen years after the President's Task Force on Victims of Crime”, *New England Journal on Criminal and Civil Confinement* (25), p.21; Riley, p.236.

³³³ Davies, M. et al. (2010), *Criminal Justice*, 4th ed., Harlow, Longman, p.70.

and in the United States, victims of crime are allowed to submit a “victim impact statement” to court. This statement is given before the sentence proceedings and allows the victim to inform the court about the various effects the offence has had.³³⁴ In many jurisdictions (especially in the US), victims are also allowed to give their views prior to various judicial decisions such as pre-trial release, acceptance of plea agreement and the sentence itself.³³⁵ The debate on victim participation in these jurisdictions has moved beyond an understanding of the role of victims as limited to a witness to crime and whether victims should play a greater role in the criminal process. The subject of most debates is now the *extent* to which victims should be involved in the criminal justice process, and how the effectiveness of victim participation can be increased.

In the context of this study, the issue of victims’ participation in the criminal justice process is of a very different nature to many Western jurisdictions. The study revealed that victims are severely marginalised in all parts of the criminal justice process for rape in Rwanda. It was common that after victims made their complaint to the police, they all but disappeared from the criminal process. The research showed that prosecutors almost never call them for questioning and judges mostly conduct trials without hearing victims’ oral testimony, except in very rare cases.³³⁶ Only victims’ written statements initially made before the police are considered throughout the whole process. During the ten sessions of court observations conducted, no victim was invited to testify. In addition, none of the eleven rape survivors interviewed attended court proceedings. Further, the review of the case files reveals that in the overwhelming majority of the cases, the victims never testified.

Only military courts make an exception to this practice.³³⁷ The four military prosecutors and judges interviewed were unanimous in stating that they do not hold rape trials without the victim’s participation, unless she is exceptionally unavailable. The prosecutors stated that they normally arrange transport, accommodation and subsistence for the victims to attend trials. The examination of the thirteen military judgments studied also showed evidence of

³³⁴ *Ibid.*

³³⁵ *Ibid.*

³³⁶ According to many interviewees, the victims are exceptionally invited to court when it is very necessary to clarify the facts of the case. However, it is not clear when this becomes “necessary.” Moreover, there are no specific guidelines in this regard. All depends on the assessment of the judge.

³³⁷ Military personnel fall under the jurisdiction of military courts, whether they commit military or common offences. There are two military courts: one of first instance and one court of appeal. There is also a specific military prosecution office for both military courts.

victims' testimonies in court. In one case, the trial was postponed in order to hear the victim.³³⁸ This disparity in the practice of civilian and military courts was difficult to comprehend, especially as both categories of courts are governed by the same rules of criminal procedure. A plausible explanation will be explored below.

The following sections discuss three main issues that arose during the empirical analysis in relation to victim participation: (1) the causes of victims' lack of involvement; (2) the implications for justice and victims' rights; and (3) the perceptions of victims about their marginalisation from the legal process.

1. The causes of victims' absence in the legal process

The elite interviewees were asked why rape victims do not appear in court. Nine out of the twenty-nine elite interviewees believed that the legal system is such that victims are not needed in court because they are already represented by the prosecution. Four stated that the cases contained enough evidence so there was no need to hear further evidence from the victims. Others put the responsibility on prosecutors for not involving victims, while some blamed the victims for a lack of follow-up or a lack of willingness to testify. A few interviewees believed that rape victims needed to be protected against humiliation in court. Finally, one lawyer (LAWYER4) asserted that the lack of oral testimony was a direct result of judges' laziness to thoroughly conduct the trials.

Based on other findings of this research, it is doubtful that any one of these reasons advanced by the legal practitioners are an accurate reflection of victim non-participation. Instead, the study found that victims' lack of participation during the trial was mostly likely due to a combination of two factors. The first factor relates to the value given to victim evidence in prosecutorial and judicial practice. The practice regarding the provision of evidence in rape cases gives almost complete precedence to medical evidence, with victim evidence being relegated to simple "information" that may merely inform the court, or otherwise it is deemed to be unreliable evidence which does not best serve justice.³³⁹ It is likely that, what is sometimes, an almost complete disregard for victim testimony contributes most saliently to the lack of interest in hearing them in court. However, this

³³⁸ *PP v. Pte Nsengiyumva Innocent*, RP 0112/12/TM, 25 June 2012.

³³⁹ See Chapter 4 for a more detailed analysis of the use of medical evidence during rape trials.

factor alone does not fully explain victims' non-participation. Even in foreign jurisdictions where rape victims have historically been disbelieved, they nevertheless appeared in court, though as it has already been highlighted, many have faced humiliation in the process.³⁴⁰ Moreover, the disregard for victims' testimony does not explain why the military courts have a different practice while both types of courts use the same procedural rules.

The second factor explaining the non-participation of victims was revealed during court observations as pertaining to time constraints faced by the prosecutors and judges. Court observations revealed the effort by judges to try as many cases as possible within the shortest time possible. It was noted that, far from being lazy, prosecutors and judges were extremely busy. They invariably entered the courtrooms with about ten case files scheduled to be completely tried the same day. The trials were so expeditious that a full rape trial was often completed in one session. During the ten sessions attended, nine cases were completely tried and only one was adjourned. The rape trials were extremely short to the extent that the longest case observed took one hour and forty-one minutes,³⁴¹ while the shortest lasted just ten minutes.³⁴² Most trials lasted between twenty-five and thirty-five minutes. It was concluded from these observations that the justice system was overloaded, leading to extraordinarily short trials.

During the interviews, one judge explained that each judge is regularly given a large number of cases that he/she *must* judge within the required period. In fact, the issue of case backlog in courts has been a serious concern for the judiciary over the last two decades. The "clearing of case backlog and speeding up proceedings" is one of the main pillars of the successive strategic plans for the judiciary adopted since 2004.³⁴³ The 2009-2013 strategic plan openly required that each judge should aim to complete at least fifteen cases per month.³⁴⁴ As a result, the average number of cases effectively tried by one judge increased from two in 2004 to twenty-seven in 2013.³⁴⁵ The swift administration of justice is likely to have partly influenced the practice of not hearing victims and witnesses in civilian courts.

³⁴⁰ Temkin (2002).

³⁴¹ This is the case of *PP v. Nzaramba Eleothere*, that started at 8:59 am and ended at 10:40 am. (Trial observation conducted in the Court of First Instance of Ngoma, on 21 June 2016.)

³⁴² This is an appeal case of *Ahishakiye Hamisi v. PP*, in the High Court in Kigali city, heard on 13 June 2016. It started at 9:39 am and ended at 9:49 am. In this case the appellant confessed and begged forgiveness.

³⁴³ *Report on the Achievements of the Judiciary of Rwanda for the Past Ten Years (July 2004-June 2014)*. Supreme Court, Rwanda.

³⁴⁴ *Ibid.*

³⁴⁵ *Ibid.*

The situation is different in military courts as was confirmed by the military prosecutors and judges interviewed who stated that they do not have such time constraints. This enables them to hear victims and witnesses during trials. The military interviewees explained that they do this as a matter of principle in all cases, to ensure that the trials are conducted properly. Nevertheless, this does not suggest that they have a different attitude towards rape victims more generally.

This evidence shows that the combination of the above two factors (disregard for victims' testimony and time constraints) are the main causes of the marginalisation of victims in the legal process. However, it is important to note that despite time constraints, judges are still choosing what to prioritise within those constraints and are not prioritising victims. For example, one of the observed rape trials was adjourned only to obtain further medical examination (see section on the value of medical evidence in Chapter 4). Though the judge had many cases left to hear that day, she found time to adjourn the trial. Also, during the court observations, I noted that sometimes the judges could find time to hear witnesses. While waiting for the turn of rape cases to be heard, I attended a number of other criminal trials in which the courts sometimes received testimonies of victims and third party witnesses. This means that although the judges had tight schedules, they still had the discretion and possibility to prioritise the activities regarding the trials.

2. Implications of victims' lack of participation in the legal process

The lack of victims' participation in the legal process has detrimental effects on justice for rape victims. First, prosecutors and judges lose vital information by not hearing victims. Second, the victims are denied a voice.

a. Loss of vital information as victims' written statements and prosecutors' narration cannot entirely replace victims' oral testimony

Paradoxically, the legal professionals who are responsible for the marginalisation of victims, and who mostly believed that victim testimony is unreliable (see Chapter 4), acknowledged the pitfalls of not hearing victims' testimony in rape cases. It is likely that the questions they were posed during the interviews influenced them to take a more flexible position. In fact, some of their comments below were given when asked about the advantages and disadvantages of the lack of participation of victims in the legal process. Also, at the end of

the interviews, the final open question about a general assessment of the law and what needs to be improved (see appendix 3), prompted many legal professionals to return to the issue of the lack of victims' involvement, which was pointed out by most as an area that needs reform.

Whatever the case, many legal practitioners admitted that the presence of victims in court may be useful and that their absence is detrimental to the process. Some added that the presence of the victim is preferable even when she is lying because it can help to ascertain that she made a false accusation. Hence, many justice practitioners acknowledged the disadvantages of holding trials without hearing the victims. For example, LAWYER7, who was critical of the system's response to sexual violence, said that:

There is a big impact on justice. When the person concerned is absent, the court loses the truth. Although prosecutors try to explain what happened, it is like telling stories.

Some justice professionals rightly emphasised that the victim's testimony in a rape case cannot be replaced by her written statements or prosecutors' narrations of the facts, because:

It is the victim who has the original version of the facts... There is a big difference between a written statement and a testimony of a person speaking about what happened to her. (JUDGE4)

When somebody is explaining what happened to her, you feel the difference. You may even realise that it happened, through how she explained the facts. (JUDGE8)

Many interviewees also noted that sometimes prosecutors fail to explain the facts adequately:

The presence of the complainants is essential because prosecutors sometimes fail to explain some issues. (LAWYER3)

PROSEC4 similarly admitted that "sometimes there are questions that are asked by judges that only the complainant can answer." JUDGE11 also confirmed that:

There are things that prosecutors cannot explain and which only the complainant can. Sometimes they fail to explain all the steps of the offence.

PROSEC4 concluded: "This may be one of the reasons of failing some cases." This conclusion was echoed by JUDGE4 who stated that "victims' presence can increase the conviction rate."

Victims' oral testimony can make a substantial difference to how evidence is interpreted during a trial. JUDGE11 explained one case where the testimony of the victim significantly affected the outcome of the case.

One day while I was judging a case, a lady stood up in the court room and asked to intervene. She was the complainant in the case but we had not invited her to testify. I could see from her facial expression that she was very sad, so I found it important to give her the floor. She started explaining how the man (her husband's uncle) raped her. She went on to explain that it was not the first time; that he used to come in her home and rape her when her husband left. She added that the defendant told her that she had become his wife because she would never reveal the rapes for fear of being repudiated by her husband. The complainant added that it was too much and that she was then ready to face all the consequences, that is why she reported the last rape to the police and decided to reveal the previous rapes in court. She said that she was ready to die instead of continuing that life. When the man was asked to react to the testimony, he was confused and he admitted some very critical facts, although he pleaded not guilty. I thanked God that I allowed this lady to speak. I imagine how she would have felt if I had refused to let her speak. Also, I am not sure if the verdict would have been the same if this complainant had not come forward. Her testimony, together with the critical admissions of the defendant prompted by the woman's testimony, and other evidence in the case, resulted in the conviction of the defendant.

This judge's experience reveals the practical importance of hearing rape complainants in the legal process. First, this victim was relieved by the opportunity to tell her experience in court. Second, the judge himself admits that the victim's testimony contributed to the verdict as an important part of evidence that led to the conviction of the defendant.

The study of the case files also revealed many instances where further interrogation of the victim's testimony would have been crucial to examining the veracity of the accusation. For example, in *PP v. Hategekimana Tite* the court doubted whether the defendant was really the author of the rape in question. It found that the complainant's written statement mentioning that she recognised the assailant by his height and voice was not enough to ascertain the identity of the assailant.³⁴⁶ Yet had the victim been given the opportunity to explain further why she asserted that it is the defendant who raped her, it could have become clearer whether she could in fact confirm the identity of the assailant. Another example of the importance of the victim's oral testimony in court is *PP v. Shumbusho*, in which the court relied on a complainant's letter of recantation to dismiss her account.³⁴⁷ The file contains a victim's statement complaining that she had been pressured to recant but the judgment did not mention this statement. Perhaps the judge did not notice it. He could have learned more by hearing from the victim why she has recanted her complaint, including whether her recanting was freely made or not. This would also allow the court to (re)evaluate other evidence in the case. For instance, the case file contained a testimony from a person who directly witnessed the rape. This testimony was overlooked because of the victim's recantation. There are many other cases where the victims wrote letters of withdrawal, that have been dropped without hearing the victims. These cases logically required further interrogation of the victims and inquiry into the reasons for the withdrawals (see Chapter 6).

The failure to hear victims' testimony also results in a loss of opportunity for prosecutors and judges to obtain information that can allow them to identify further evidence. Note that in Rwandan law the duty to gather evidence is not limited to police, as prosecutors and judges also have the responsibility to enquire further when necessary.³⁴⁸ For example, if they come across information about a key witness who was not interviewed by the police, they can automatically summon them.

The failure to involve rape victims during trials is detrimental to the justice process. Both interviews and case file analysis revealed that without oral testimony the chances for defendants to escape criminal liability is increased. In jurisdictions where victims normally

³⁴⁶ *PP v. Hategekimana Tite*, RP 0316/13/TGI/HYE, 26 November 2013, para 7.

³⁴⁷ See details of the case in Chapter 6.

³⁴⁸ Article 44, Code of Criminal Procedure 2013.

give evidence in court, it is believed that the prosecution is very unlikely to succeed in the absence of victim testimony.³⁴⁹ Considering the importance of victim testimony in rape cases and the vulnerability of such witnesses in court, Menaker and Cramer suggest that rape victims should be prepared (not “coached”) to give effective testimony.³⁵⁰ They argue that effective victim testimony may lead to more successful prosecutions of rape cases. Nevertheless, there are no available statistics showing the likelihood of conviction based on the presence or absence of victim testimony. This is an avenue for further research.

b. Victims are denied a voice

As noted above, victims of crime have been traditionally marginalised in the criminal justice process, and simply used as witnesses to facilitate prosecution of defendants. Historically, it is the defendants who have been in the centre of the criminal justice process.³⁵¹ The presumption of innocence and the standard of proof required in the criminal process are put in place to protect defendants from being wrongly convicted.³⁵² Hoffmann and King summarised this perception of criminal justice in these terms: “Justice means, first and foremost, ensuring that defendants are not convicted of crimes they did not commit.”³⁵³

Victims have no formal voice in the legal process; they are theoretically represented by the prosecution, as other members of the general public.³⁵⁴ Nevertheless, the victim is unlike other members of society who are not directly affected by the offence.³⁵⁵ Their experience of victimisation gives them a specific interest in the criminal justice process and it is, therefore, important that they are given a voice in the process.³⁵⁶ Rape victims in particular have specific needs that require special attention.³⁵⁷ Their needs include the desire to relay their account of the incident and participate in the resolution of the violation.³⁵⁸

³⁴⁹ Davies et al. (2010), p.84.

³⁵⁰ Menaker T.A. and Cramer, R.J. (2012), “the victim as witness: strategies for increasing credibility among rape victim-witnesses in court”, *Journal of Forensic Psychology Practice*, 12(5):424-438.

³⁵¹ Davies et al. (2010), p.84.

³⁵² *Ibid.*

³⁵³ Hoffmann, J. and King, N.J. (2011), “Improving criminal justice”, *Judicature* 95, p.59.

³⁵⁴ Erez, E. and Bienkowska, E. (1993), “Victim participation in proceedings and satisfaction with justice in the continental systems. The case of Poland”, *Journal of Criminal Justice* (21), p.48.

³⁵⁵ Lamborn, L. (1987), “Victim participation in the criminal justice process: The proposals for a constitutional amendment”, 34 *Wayne L. Rev.* p.143.

³⁵⁶ *Ibid.*, p.146.

³⁵⁷ Keenan (2017).

³⁵⁸ Herman; Strang, cited in Koss, M, P. (2006), “Restoring rape survivors. Justice, advocacy, and a call to action”, *Ann. N.Y. Acad. Sci.* p.209.

“Participation” and “voice” are among the overriding needs as expressed by sexual violence victims.³⁵⁹

In this study, one of the most disturbing findings is that the victims were systematically denied a voice. They were denied a voice both during the provision of evidence as witnesses of the offence, and during the entire criminal process as victims. With respect to victim testimony, it is usually said that in rape cases, the central issue is the evaluation of the word of the victim against the word of the accused. By not hearing the victim’s oral testimony, the advantage is given to the accused who may more easily convince the prosecutor or the judge although the victim’s account does sometimes prevail. The law compels prosecutors to re-interrogate suspects before taking the decision to confirm detention.³⁶⁰ This is meant to protect the accused; to ensure that there are reasonable grounds to convict the accused. The judges are also legally required to hear the defendants before deciding on their fate. Nevertheless, this can cause an unintended imbalance between the defendant and the complainant, particularly regarding the offence of rape because of its specific nature. As pointed out above, the issue in rape cases is often to evaluate the word of the accused against the word of the victim. Therefore, if only the defendant is heard, the risk of unfairness to the complainant becomes amplified.

The denying of the victim’s voice extends beyond that of the trial process and affects all other proceedings of the legal process. The research study revealed that a vast majority of the decisions made during the whole process were taken without hearing and considering victims’ views. In particular, victims did not have the opportunity to share their experience of the impact of the rape. This may reduce the chances for prosecutors and judges to perceive the weight of the offence and the consequences of the crime. It was observed in many cases that the judges tended to consider that the rapes had no significant effect on the victims, especially when the victims did not sustain considerable physical injuries. For example, in the appeal trial of a gang rape case, the judge decided to reduce the penalty from six to three years although this reduction was not requested by the defendant, and one of the reasons for the reduction was that “the rape had no serious consequences.”³⁶¹ In

³⁵⁹ Daly, K. (2017), “Sexual violence and victims’ justice interests”, in Zinsstag, E. and Keenan, M. (eds), *Restorative Responses to Sexual Violence: Legal, Social and Therapeutic Dimensions*, New York, Routledge, p.115.

³⁶⁰ Article 99, Code of Criminal Procedure 2013.

³⁶¹ *Ntakirutimana Enias v. PP*, RPA 0050/13/HC/KIG, 23 March 2014, para 6.

this case, there was no evidence of the impact of the rape on the victim. Apart from the usual medical examination aimed at providing evidence of physical injury, the victim had not been examined to find out the extent of any psychological effect or any other damage caused by the rape, nor had she provided the court with any information regarding possible emotional, social or financial effects of the rape. Based on the absence of any relevant information in the court transcripts in this case, it can be said that the judge had no valid knowledge of the effects of the rape on this victim. The judge's conclusion about the lack of serious effects is therefore uninformed.

If judges are to make informed decisions on matters concerning victims, it is crucial that they hear them first. The authors of the Task Force Report are right in stating that:

[v]ictims, no less than defendants, are entitled to their day in court. Victims, no less than defendants, are entitled to have their views considered. A judge cannot evaluate the seriousness of a defendant's conduct without knowing how the crime has burdened the victim. A judge cannot reach an informed determination of the danger posed by a defendant without hearing from the person he has victimized.³⁶²

If in the above case (and other similar cases not mentioned) the victim had participated in the process and had had the opportunity to show the damage caused to them by the offence, the judge would have obtained information about the consequences of the rape on the victim. This would have possibly changed his conclusion.

It is not only the trial process that is negatively impacted by the lack of participation by victims. The study also revealed that a failure to engage with victims directly affected the appeal process. For instance, prosecutors sometimes exhibited less motivation in prosecuting rape cases because of victims' lack of participation. Several prosecutors admitted that they were sometimes less encouraged to appeal against acquittals, because the victims were not part of the process to motivate them. Unlike in some jurisdictions where appeal by prosecution is not applicable, in Rwandan law appeal is a fundamental right of the defendants, the victims claiming damages and the prosecution.³⁶³ This study revealed prosecutors' tendency not to appeal against acquittals even when there were tangible

³⁶² Task Force Report, cited in Lamborn (1987), p.127.

³⁶³ Article 175 of the Code of Criminal Procedure 2013.

grounds for appeal, such as an openly biased court's decision. By contrast, military prosecutors confirmed that they always appeal when they are not satisfied with the judgment. They said that the reaction of victims to the verdict plays an important role in the decision to appeal. Analysis of the case files shows that in ordinary courts, thirty-nine out of forty appeals were filed by defendants and only one by the prosecutor. But in four military appeal cases, two were initiated by prosecutors and two by defendants.

The lack of a strong commitment of prosecutors in rape cases was also visible in some cases where they requested acquittals in court. This is not abnormal in the Rwandan legal system because prosecutors have the responsibility to incriminate but also exonerate the defendants depending on the evidence found during the trial process. The problem is that in those cases where acquittal had been sought, the case file analyses found no valid reason why the prosecutors did so. For example, in *PP v. Hakizimana*³⁶⁴ the case contained some evidence that could be examined by the court, such as the complainant's testimony and the defendant's confessions during preliminary investigations. Nevertheless, the prosecutor retracted in court without any apparent reason. He simply stated that there was "no evidence."³⁶⁵ The case had been duly transmitted to court and the trial was taking its normal course when the prosecutor decided to request acquittal of the defendant. This prosecutor did not show any new evidence in favour of the accused or detail why any of the pre-existing evidence needed to be retracted. Such an important decision to request acquittal should normally be grounded on serious facts and be appropriately reasoned.

3. Victims' perception about their lack of participation in the legal process

The eleven rape survivors interviewed in this study were asked what they thought about the trial taking place without their participation (see appendix 3). They were unanimous in expressing their disappointment. For example, SURVIVOR8 and SURVIVOR5 stated:

I really wished to give testimony in court because I am the only person to have tangible information of what happened. I would have explained to them how the offence was committed and they would have understood. If they had

³⁶⁴ *PP v. Hakizimana Jean de Dieu*, RP 0412/12/TGI/NYGE, 30 November 2012.

³⁶⁵ *Ibid.*

any issue I would have facilitated them. It would have been useful, but they never approached me. (SURVIVOR8).

I would solidify the case. They would have understood my version. I feel that if they had understood my side, it could have changed the course. (SURVIVOR5)

Several survivors were particularly upset by the fact that they were not even informed about the outcome of their cases or if the trial took place at all (note that their cases had all been tried at the time of the interviews). SURVIVOR2 complained: "I do not know if he [the accused] was arrested or not, or if he was prosecuted at all."

All the survivors interviewed expressed the feeling that their cases had simply been neglected; regardless of whether the defendants were convicted or not. In the case of SURVIVOR4, the defendant was convicted but still the victim felt that she was uncared for because she was not informed about the process and its outcome. She simply concluded: "I consider that they neglected me." SURVIVOR7 knew that the defendant was convicted but still she was not satisfied because she did not participate in the process:

I am very upset. Perhaps if they had seen me they would not have given him that punishment. They must have thought that it was a simple matter. (SURVIVOR7)

This survivor had multiple scars on her face, visible at the moment of the interview which took place nearly one year after the assault. Her assailant was convicted to a term of seven years' imprisonment - the maximum punishment - but she was still unsatisfied because she did not participate in the trial, and was not duly informed of the outcome of the case.

This shows the importance of procedural justice. Procedural justice is concerned with the sense of fairness and respect in the interactions between individuals and criminal justice authorities.³⁶⁶ Miller and Hefner's study found that victims were more concerned about the fairness of the process than its outcome.³⁶⁷ They argue that when victims are treated with respect and dignity, and are given the opportunity to participate fairly in the legal process,

³⁶⁶ Wood, W.R. (2015), "Why restorative justice will not reduce incarceration", *British Journal of Criminology* (55), p.885.

³⁶⁷ Miller, S.L. and Hefner, M.K. (2015) "Procedural justice for victims and offenders: Exploring restorative justice processes in Australia and the US", *Justice Quarterly*, 32:1, 142-167.

this gives more legitimacy to authorities' decisions and more satisfaction to victims, regardless of the outcome of the process. They believe that a victim may remain unsatisfied despite the offender's conviction if the process was not inclusive or did not fairly take into account the victim's needs. Konradi's study on rape survivors in particular, reveals that participants gave more importance to solving the emotional pain resulting from the rape than obtaining substantive justice and punishment of the offender.³⁶⁸ She advocates for well sustained participation of rape survivors in various proceedings of the criminal justice process to meet the needs of the survivors, which include continued "ownership of the rape" during the whole criminal justice process.

In this study, some survivors managed to go to court without the court's invitation, seeking the opportunity to participate in the process. SURVIVOR6 went there but she was not allowed to testify. This is how she expressed her disappointment:

I wished to give evidence in court but they did not give me the opportunity. It could have been useful. They would not have freed him like that. They would have benefited from my testimony, for example some issues which they did not understand.

Her friends later informed her that the defendant was acquitted. She concluded:

I had realised that they had not given any weight to my case. I did not even appeal. It would have been useless.

SURVIVOR11 also went to court and tried to find a way to testify in court but she returned without giving her testimony:

I rose in the court and asked to speak but they said: 'how come you are here?' and yet I was the victim of the crime being tried!

They told this survivor that she was represented by the prosecutor but she was not satisfied. She was frustrated and deeply disappointed for being disregarded in a case directly affecting

³⁶⁸ Konradi, A. (2007), *Taking the Stand. Rape Survivors and the Prosecution of Rapists*, Greenwood Publishing Group, p.196.

her. During the court observations, a similar scene was witnessed. Below is an extract of the notes taken from one hearing:³⁶⁹

The judge asks the prosecutor to explain the complainant's absence of consent...

One woman holding a baby, seated on the left side of the courtroom stands up and says: 'It is me.'

The judge asks: 'What do you want?'

The woman replies: 'How can you consent to somebody who breaks your door...?'

The judge says: 'Stop! Madam. The prosecution is here and they did not invite you. The court neither found it necessary to invite you. You do not appear anywhere and you did not even seek damages. You will follow the hearing like anyone else here.'

The woman: 'I wanted to participate in the process!'

Judge: 'We do not know that.'

(The baby held by the woman cries.) Then the judge says: 'Please see how you can rock the baby.'

The woman looks extremely frustrated, sits down and tries to take care of her baby.

The defendant raises his hand and says: 'I do not understand why she screamed. It must be because I gave her less money than agreed.'

The defendant was convicted and sentenced to six years' imprisonment. The court based its verdict on the medical evidence which certified injuries and statements of witnesses who intervened to rescue the victim (the value attached to these forms of evidence is explained in Chapter 4). It is unknown whether the victim was informed about the verdict and whether she was able to sue for civil damages.

³⁶⁹ Court observation on 14 July 2016, case *PP v. Nyabyenda*, Tribunal of First Instance of *Karongi*.

This shocking scene witnessed during court observations is an illustration of the frustration that can result from victims' exclusion from the legal process. Victims' marginalisation is negating efforts by the criminal justice system to punish rape offenders. This problem is summarised in the question posed by SURVIVOR5: "For whom did they think they were doing justice while the person concerned was excluded?" This is a powerful statement that shows the need to rethink the judicial practice.

In summary, analysis of the victims' interviews reveals that the victims were disappointed by their lack of participation in the legal process particularly because they believed that their lack of involvement made conviction less likely. Victims were also frustrated because they felt silenced. In many instances they attempted to speak out in court but they were refused any opportunity to speak. As observed above, the silencing of victims is very damaging because they have a personal interest in the trials therefore they should have a voice in the process, and their lack of participation only aggravates their emotional state.

A further potential effect of victims' marginalisation is the lack of opportunity to claim civil damages. The chances for seeking damages are affected by the fact that the victims are not informed and do not take part in the legal process. The law allows the victims to claim damages during the criminal trial without necessarily waiting for the verdict. This procedure is normally cost effective for the judiciary and fast for the victims. Nevertheless, rape victims rarely used this option. The victims sought damages only in nine cases out of the sample of 175 cases reviewed for this thesis (five per cent). This figure almost coincides with a national figure released by the National Commission for Human Rights which reported that rape victims filed for damages in only four per cent of all the cases tried for the period of 2015-2016.³⁷⁰

It is beyond the scope of this study to examine the effects of the quality of rape trials on reporting rates. However, the marginalisation of victims from the legal process is likely to have a significant effect on rape reporting. The failure to allow victims to testify, combined with a lack of information provided to victims throughout the legal process and the resulting

³⁷⁰ The New Times, "Awareness could be the missing link in sexual abuse cases", available at <http://www.newtimes.co.rw/section/read/205037/> (accessed 4 November 2016)

frustration of victims will undoubtedly reduce the trust in the system's response to rape. This may dissuade reports and result in higher levels of impunity for rape offenders.

CONCLUSION

This chapter explored the role of rape victims in the legal process as their involvement is essential for a fair and efficient criminal justice process for rape cases. The chapter has revealed that rape victims play a very marginal role in the justice process. It was found that rape complainants are profoundly distrusted by most legal professionals interviewed, and that this scepticism leads prosecutors and judges to dismiss many rape complaints, regardless of the contents of the criminal files. The main cause of this disbelief is the influence of the myth that women are prone to making false accusations of rape. It was revealed that in most cases this disbelief is not based on any evidence.

The chapter also revealed that rape victims are rarely allowed to participate in criminal trials. Their role is limited to reporting the crime and providing written evidence. Not only are the victims denied a voice in various proceedings of the legal process, they are also denied the opportunity to give testimony in court. The lack of victims' participation deprives prosecutors and judges of substantial input that can improve the evaluation of complaints. It also causes victims much dissatisfaction with the criminal justice system. This results in immense distrust which, when combined with the marginalisation of rape victims, inevitably impacts on the provision of evidence in rape cases. The next chapter explores further the effects of the disbelief and marginalisation of victims on the provision of different types of evidence in rape cases.

Chapter 4

EXPLORING THE PROVISION OF EVIDENCE IN RAPE CASES

This chapter will explore the influence of rape myths on the provision of evidence in rape cases. Provision of evidence is crucial in criminal proceedings as the facts of a case are established based on evidence, and the defendants are convicted or acquitted based essentially on how the evidence has been evaluated in specific cases.³⁷¹ However, feminist scholars have revealed that the application of the rules of evidence in rape cases has been biased and has contributed to a “justice gap” in many jurisdictions due primarily to the influence of rape myths.³⁷²

The chapter will analyse consecutively three main types of evidence applicable in such cases: victim testimony, medical evidence and circumstantial evidence. Analysis of victim testimony is important in this study, given the findings of previous research that this type of evidence has been relegated in many other jurisdictions, often resulting in unfair processes.³⁷³ It is particularly important in the context of Rwanda, based on the findings in Chapter 3, which revealed that rape complainants are deeply disbelieved by the justice professionals and marginalised from the legal process. As for medical evidence, the broader literature reveals that it has frequently been misinterpreted in other jurisdictions, causing many justice errors.³⁷⁴ This was a result of the belief that rape inevitably causes victim injuries.³⁷⁵ Finally, analysis of circumstantial evidence in rape cases is critical because this type of evidence can potentially contribute to solving rape cases, if well considered.³⁷⁶ Given that rape is often committed in private and that direct evidence is usually absent, circumstantial evidence may play a vital role in such cases.³⁷⁷

4.1. CORROBARATING VICTIM TESTIMONY IN RAPE CASES

Chapter 3 illustrated how victim testimony can be central to rape trials. Despite this, rape victims’ testimony has historically been treated as unreliable in many jurisdictions unless it

³⁷¹ Keane, A. and McKeown, P. (2011). *The Modern Law of Evidence*, 9th ed., OUP.

³⁷² Childs, M. and Ellison, L. (2002) (eds). *Feminist Perspectives on Evidence*. London. Cavendish.

³⁷³ *Ibid.*

³⁷⁴ Sugar, N.F. et al. (2004),

³⁷⁵ *Ibid.*

³⁷⁶ Raum, B.A. (1983), “Rape trauma syndrome as circumstantial evidence of rape”, *The Journal of Psychiatry & Law*, p. 206.

³⁷⁷ *Ibid.*

is supported by corroborative evidence. For example, in some countries that observe Sharia law, rape victims' evidence must be corroborated by at least four male Muslim witnesses.³⁷⁸ Clearly, this is very unlikely, and the consequence of the existence of such systems of evidence is that rapists are almost ensured of impunity.

The common obligation to have additional confirmatory evidence implicating the accused is broadly referred to as the "corroboration requirement."³⁷⁹ This rule exists in a number of justice systems, although not as rigorous as in Sharia law jurisdictions.³⁸⁰ In many common law jurisdictions, it was commonly applied until the 1970s.³⁸¹ In some jurisdictions, victim evidence could be sufficient to prove the case against the accused but the judge had the obligation to warn the jury about the danger of convicting the defendant on the complainant's testimony alone.³⁸² The rationale for this warning was based on the belief that women are prone to fabricate rape accusations, resulting in what was viewed as a necessary caution before convicting on the victim's testimony alone.³⁸³

The corroboration rule was to have a profound negative impact on trial outcomes, generating as it did prejudice against rape complainants and causing confusion and doubts in the mind of the jury; prompting many undue acquittals of rape defendants.³⁸⁴ Many scholars argued for the abolition of the rule, emphasising that it directly discriminated against women and is founded on an unjustified and misogynistic belief that women are inclined to lie about rape.³⁸⁵ As a result of these criticisms, many jurisdictions across the world have abolished this rule during the recent wave of rape law reforms.³⁸⁶ This section reveals the existence and the damaging implications of the corroboration requirement in the legal process in Rwanda and advocates for its abolition.

1. The corroboration requirement in the legal process for rape in Rwanda.

³⁷⁸ Saudi Courts-Women's Rights-General Court of Qalif Sentences Gang-rape Victim to Prison and Lashings for Violating 'Illegal Mingling' Law", in *Harvard Law Review*, 121; Farooq, M.O. (2006), *Rape and Hudood Ordinance: Perversions of Justice in the Name of Islam*.

³⁷⁹ Temkin (2002), p.255.

³⁸⁰ *Idem*.

³⁸¹ Nicolson, B. and Bibbings, L.(2000), *Feminist Perspectives on Criminal law*. London, Cavendish. p.6; Temkin (2002), p.256.

³⁸² Adler, S. (1987), *Rape on Trial*, London, Routledge and Kegan Paul, p.23.

³⁸³ Ferguson, I.R. (2000), "Corroboration and sexual Assault in Scots Law", in Childs, M. and Ellison, L. (eds). *Feminist Perspectives on Evidence*. London. Cavendish. p.155; Temkin, p.257; Adler, p.23.

³⁸⁴ Temkin (2002), 260-262.

³⁸⁵ Lees (1996); Temkin (2002), 258.

³⁸⁶ Temkin, p. 264.

Rwandan law does not require corroboration of rape complainants' testimony. However, this study revealed that the legal professionals strongly believed that corroborative evidence is essential in rape cases. This understanding directly results from the deep disbelief of rape victims felt by the legal professionals, as demonstrated in the previous chapter. As seen in Chapter 3, many interviewees openly expressed the belief that women frequently lie about rape. It was for this reason that many participants believed that allegations must always be corroborated with other evidence, so as to avoid the wrongful conviction of innocent defendants. For example, JUDGE7 stated that:

It is frequent that rape complainants lie. So we must be careful because it is about two people, one accusing and the other denying. She can easily accuse him of rape. It is therefore essential that her words be corroborated so that the judge does not take the risk of convicting an innocent.

This view was shared by several of the prosecutors, one of which noted that:

In most rape cases, it is the word of the complainant against the word of the accused. You cannot know who to believe. The complainant can even lie for different reasons. So it is important that her testimony be corroborated.
(PROSEC5)

It was clear from the majority of elite interviews that a pervasive disbelief in the allegations of sexual violence inhibited the successful prosecution of defendants. Such were the negative views held toward victims' evidence that for many interviewees they did not even believe that the complainant's written statement was evidence at all. This was illustrated by PROSEC1 who simply stated: "The statement of the complainant is considered as simple information, not evidence." Such views were not specific to prosecutors, as one judge commented:

Complainants' statements serve as information. They are not evidence. Judges cannot rely on complainants' testimony without other evidence. They must be corroborated. (JUDGE5)

One reason given for this stance was that the victim is a complainant so her statement cannot be considered as evidence because she has a stake in the outcome of the case. This

justification is problematic because the defendant is allowed to testify when he has a stake in the case.

Only a minority of legal practitioners recognised victims' testimony as a legitimate form of evidence for examination in court. These interviewees believed that victim testimony had some value in rape cases. Still, such evidence was viewed as lacking in probative value unless it was supported by corroborating evidence. This suggested that like other interviewees there was still a pervasive belief that victim testimony, by itself, lacked veracity.

The analysis of case decisions revealed a clear pattern of systematic disqualification of perceived uncorroborated rape victims' statements in both prosecutorial and court decisions. The overwhelming majority of the cases dropped by prosecutors examined in this research were closed because of perceived "lack of evidence" despite the presence of victims' statements in all these files. The prosecutors routinely concluded that there was no cogent evidence to base a prosecution on. In some cases, prosecutors simply ignored the relevance of victims' statements altogether. In other cases, prosecutors mentioned that they could not rely on complainants' statements because these were considered to be either untrustworthy, uncorroborated or simply not considered as evidence. For instance, in one of the cases, the prosecutor simply decided: "I cannot rely on the complainant's testimony... to establish that the accused committed the offence. I close the case..."³⁸⁷ In another case, the prosecutor noted: "There is no other evidence except the statement of the woman... This statement alone is not sufficient because there is nothing else that supports it."³⁸⁸

In most cases, the prosecutors did not evaluate complainants' statements and explain whether they were valid or not. They rejected these statements as a matter of principle, without justification, and regardless of their contents. Such attitude clearly denotes a bias against the complainants and a lack of proper consideration of important evidence available in the files.

The study of the courts' rulings revealed a similar trend in the overwhelming majority of the cases examined. For example, in *PP v Hakizimana*, the court decided that:

³⁸⁷ File RONPJ 37008/S1/15/NKF/NC, Report on provisional case file closure, 14 September 2015, p.3.

³⁸⁸ File RONPJ 04487/S3/13/NR/UR. Report on provisional case file closure, 14 September 2015, p.3.

The complainant's testimony alone cannot be evidence inculping the defendant as long as there is no other tangible evidence supporting her testimony.³⁸⁹

In *PP v. Rutiyomba*,³⁹⁰ the court simply dismissed the complainant's testimony because it was believed to be untrustworthy:

The statement of the complainant...is not to be relied upon because it is her own words and there is no other thing that was revealed to confirm its veracity so that it can deserve trust.³⁹¹

In this case, the court did not explain why the complainant was untrustworthy. Yet, the review of the case file did not reveal any aspect suggesting fabrication on the part of the complainant. On the contrary, the case contained other corroborating evidence but this evidence was disregarded. This is another critical issue related to the understanding of what corroborating evidence actually is. This problem will be discussed later in this chapter.

As pointed out above regarding prosecutorial decisions, the vast majority of the courts' decisions that dismissed complainants' statements did not contain any evaluation of this evidence. The statements that were perceived to be uncorroborated were simply dismissed without explication or justification.

A unique case of successful prosecution without corroboration evidence

Among all the 175 court decisions studied, only one case of conviction without corroboration evidence was identified. This is the judgment in *PP v. Karekezi*, in which the court decided as follows:

...The fact that the defendant said that the sexual intercourse was consensual has no basis because he does not give any evidence especially that the very person who had the said sexual relationship with him complained before the judicial police, stating that she was raped...³⁹²

³⁸⁹ *PP v. Hakizimana Vincent*. RP 0044/13/TGI/GSBO, 5 September 2013, para 3.

³⁹⁰ *PP v. Rutiyomba Ismael*. RP 0206/14/TGI/GIC, 15 April 2015, para 7.

³⁹¹ *Ibid.*

³⁹² *PP v. Karekezi Emmanuel*. RP 0162/13/TGI/HYE, 12 November 2013, p.2.

In this case, the defendant was convicted based on the complainant's testimony alone. It is worth noting that this exceptional case has the singularity that the complainant was blind and deaf. The court did not explain why it was so convinced that the complainant was telling the truth. One assumption is that the veracity of the complainant was more believable because she was particularly vulnerable, indeed the court noted that the complainant could not call for help because of her disability. Although it is unclear from the court transcript, the judge may also have assumed that the complainant could not possibly have voluntarily engaged in sex because she was disabled.³⁹³

Though this case raises the question whether a disabled rape complainant is necessarily more trustworthy than an able-bodied complainant, it demonstrates how the courts can, if willing to, rely on the complainant's testimony alone to convict the accused. As is now the case in many other jurisdictions, the absence of corroboration should not be an obstacle to conviction, so long as the court can be satisfied that the complainant's testimony proves that the accused committed the rape. The study has established that despite this, there is a *de facto* corroboration requirement in Rwanda that is applied in all but exceptional cases.

2. The case for the abolition of the *de facto* corroboration requirement

There is a case for legal proscription of the practice of the corroboration requirement for the following four reasons. First, this practice is based on a misconception that women tend to lie about rape. The previous chapter has demonstrated that although the belief in false accusations is deeply entrenched among many legal practitioners, there is no cogent evidence which indicates that women are inclined to fabricate rape allegations. Indeed, when pressed, most interviewees in this study could not give a single example of a tangible case of a false rape accusation in their experience of handling rape cases. For those interviewees who did give some examples, further analysis of these examples revealed that the suspicion of a false accusation was based mostly on stereotypes about women who report rape, such as the late reporting of the incident or the absence of the victim's resistance, as against any conclusive evidence that the victim had actually lied about her victimisation. In fact, the study showed that in the few cases where prosecutors and judges

³⁹³ See Hazel, M. (2004), *Disabled Women and Socio-spatial "Barriers" to Motherhood*, ProQuest Dissertations Publishing.

had concluded there had been a false accusation, these determinations had clearly been influenced by similar stereotypes and did not show any reasonable ground to suspect fabrication.

Second, the requirement is unfair to rape victims and potentially contributes to the high rate of attrition for rape. By dismissing victims' statements altogether, the prosecutors and judges disregard important evidence in the cases and lose the opportunity to build on these reports to find further evidence. Note that prosecutors and judges have the legal responsibility in Rwandan law to conduct additional investigation when necessary.³⁹⁴ The failure to exploit victim evidence appropriately gives the accused an unfair advantage that frequently results in charges being dropped, thereby affecting the rights of many victims to obtain redress for the damage caused by the crime.

Third, the practice has no legal basis. There is no legal justification for denying the evidential value of rape victims' testimony. Rwandan law of evidence does not preclude complainants' evidence; on the contrary, it recognises the value of this type of evidence. Indeed, the Supreme Court has had the opportunity to specify that complainants' statement or testimony is a legitimate form of evidence.

In *PP v. Hakizimana et al*,³⁹⁵ the appellant requested the Supreme Court to quash the High Court decision on the ground that the court had relied on the complainant's testimony, among other evidence, to convict the accused. The Supreme Court rejected the appeal because "there is no legal provision preventing the complainant from giving testimony in court..."³⁹⁶ The court cited Article 63 of the Evidence Law which specifies that "any person can be allowed to testify in court, with the exception of those people who have no capacity to be witness in court," so it concluded that the High Court had the discretionary power to decide on the veracity and admissibility of the complainant's evidence, based on Articles 19 and 44 of the Code of Criminal Procedure 2004. Although this was a case of child rape rather than adult rape, this ruling has broader applicability to sexual offence cases. The decision provides general guidance on the issue of whether a complainant's statement or testimony is a legitimate form of evidence that can be relied upon to convict a defendant.

³⁹⁴ Article 44, Code of Criminal Procedure 2013.

³⁹⁵ *PP v. Hakizimana Servillien et al*. RPAA-12/08/CS, 26 November 2010.

³⁹⁶ *Ibid.* para 13.

In addition, the law does not stipulate any obligation of corroboration of rape victims' testimony. It only provides that the testimonies of children aged 14 and below and adult persons with incapacity must be corroborated by other evidence.³⁹⁷ There is no provision requiring that victims' testimony in general or rape victims' testimony in particular must be corroborated. On the contrary, the law emphasises that the number of witnesses is irrelevant as regards the validity of their testimony.³⁹⁸ This clearly shows that the testimony of the complainant alone *can* be sufficient to prove the accused's guilt. The law provides further guidance in this regard, stating that the court shall consider the "knowledge of facts and the objectivity and sincerity" of the witness, not their number.³⁹⁹

Fourth, the requirement of corroboration of rape victims' testimony is discriminatory. The law has limited the corroboration requirement to two categories of witnesses: children aged 14 and below and people incapable of communicating what they witnessed.⁴⁰⁰ This means that testimony of all other adults and children above 14 does not require any corroboration. Therefore, if among adults, rape complainants are conflated with those who lack capacity, it is discriminatory against this category of complainants. As the overwhelming majority of these victims are women, their assimilation to the incapable is a violation of women's rights.

In other jurisdictions, the corroboration requirement has similarly been criticised for discriminating against women.⁴⁰¹ Ferguson has emphasised that it is unacceptable to impose stricter rules of evidence on one category of witnesses unless it is proved that there is some fundamental difference in that particular category of people, and yet, there is no evidence of such difference in the case of rape victims.⁴⁰² Further, the "presumption of perjury" implied in the requirement of corroboration has also been denounced as pure discrimination against women.⁴⁰³ In this regard, Quansah's statement is particularly apt to the Rwandan context:

³⁹⁷ Article 63, para 3, Law n° 15/2004 of 12/06/2004 Relating to Evidence and its Production, *Official Gazette*. Special n° of 19/07/2004. (Evidence Law)

³⁹⁸ *Ibid.* Art 65.

³⁹⁹ *Ibid.*

⁴⁰⁰ Article 63, para 2. Evidence Law.

⁴⁰¹ Tapper, C. (2010), *Cross and Tapper on Evidence*, 12th ed, Oxford. OUP, p.257; Quansah, E.K. (1996), "Corroborating the Evidence of a Rape Victim in Botswana: Time for a Fresh Look", *Botswana Notes and Records*, 28. p.236; Ferguson, p.155; Adler, p.16.

⁴⁰² Ferguson (2000).

⁴⁰³ Quansah (1996), p.231; Temkin (2002), p.259.

The general constitutional rule that an accused is to be presumed innocent until proven guilty seems to have been translated, as far as the complainant in a sexual case is concerned, into one of being a liar until proven credible.⁴⁰⁴

In light of the negative effects of the requirement of corroboration, as evidenced above, this unlawful and prejudicial practice must be brought to an end. Nevertheless, it can be expected that its prohibition will raise questions about the rights of the defendants and the risks of convicting innocent people.

3. Protection of defendants' rights without the corroboration requirement

Whereas the belief that women tend to fabricate rape accusations is a myth, this does not mean that false accusations never occur in rape cases. False allegations are possible in rape cases as in any other criminal case, regardless of the offence. As such, concerns will inevitably be raised that by not requiring corroboration of the complainant's testimony, the accused will be left unprotected in the eventuality of a false accusation.

A number of points must be highlighted in response to such concern. First of all, it should be noted that the rejection of the corroboration requirement does not mean that victim testimony must be automatically relied upon and that conviction will automatically follow. Nor does the abolition of this rule mean that there is no value in having corroborating evidence in rape cases. The point is that victim testimony must be accepted as a legitimate form of evidence and that it *can* be sufficient to prove the accused's guilt. What is important is that this evidence be evaluated and scrutinised objectively, both by the prosecutors in deciding to proceed with a case, and by the court in determining whether an accused has committed an offence. Both maintain their discretion to evaluate this evidence as any other evidence. In this regard, Quansah has argued that:

If the judiciary's [sic] ability to evaluate evidence and to ascertain the veracity of a witness' testimony in cases other than rape, then, it is submitted that it must also be a sufficient safeguard for an accused charged with rape.⁴⁰⁵

Temkin also points out that the accused in rape cases, as other persons charged with different offences, are protected by the requirement that he cannot be convicted unless his

⁴⁰⁴ Quansah (1996), p.231.

⁴⁰⁵ *Ibid*, p.236.

guilt is established beyond reasonable doubt. The defence lawyer as well as the judge have every opportunity to check any insufficiency in the prosecution case. Therefore, the absence of a corroboration requirement should not be perceived as an unfair disadvantage for rape defendants.⁴⁰⁶

In the case of Rwanda, there are many legal safeguards that protect the accused regardless of the charge.⁴⁰⁷ The whole range of mechanisms that safeguard defendants' rights remain available to the judges in rape cases. Moreover, the court keeps the full discretion to assess the relevance and pertinence of testimonial evidence.⁴⁰⁸ It has the powers to decide at its sole discretion on the veracity and admissibility of the evidence produced.⁴⁰⁹ Beyond all these prerogatives, "the court may itself collect evidence which has not been collected by the Public Prosecution, the plaintiff, the accused or their representatives."⁴¹⁰ With all these prerogatives entrusted in the judges, and knowing that the absence of a corroboration requirement does not impose any obligation on the courts to automatically rely on victims' testimonies without thorough and objective evaluation, there should be no genuine concern that the abolition of the corroboration requirement in rape cases would leave accused persons unprotected against false complaints.

4.2. THE ROLE AND IMPACT OF MEDICAL EVIDENCE IN RAPE CASES

Another critical issue related to the corroboration requirement which adds to the case for its abolition, is the finding from the study that the supporting evidence required to corroborate victims' testimony can itself be very problematic. Specifically, medical evidence and direct witness testimony seem to be the only evidence that is admitted as corroborating evidence in rape cases. This thorny issue is examined in the following sections.

First, the limitations of medical evidence in proving rape will be discussed. After that, the study will explore the application of medical evidence by prosecutors and judges in Rwandan cases. Finally, the framing of medical evidence by doctors in Rwandan cases will be analysed.

⁴⁰⁶ Temkin (2002), p.262

⁴⁰⁷ The constitution as well as the Code of Criminal Procedure guarantee a series of defendants' rights traditionally recognised in various jurisdictions across the world, such as the presumption of innocence, the right to a fair trial, the right to cross-examine witnesses and so on.

⁴⁰⁸ Art 65, Evidence Law.

⁴⁰⁹ Art. 86, Code of Criminal Procedure 2013.

⁴¹⁰ Art. 87, *Ibid.*

1. The limitations of medical evidence in proving rape

Medical evidence has been valued in many justice systems as it is capable of showing traces of violence on the rape victim's body and thus it is believed to be cogent evidence of sexual violence.⁴¹¹ Such traces include signs of injuries such as bruising or internal fissures and more particularly, genital injuries.⁴¹² The evidential value generally attached to genital injuries in rape cases has prompted a number of researchers to investigate to what extent such injuries can help to solve rape cases. The key question has been whether the presence or absence of genital injuries is conclusive evidence of the presence or absence of rape, as many legal practitioners have tended to assume there was a necessary association between rape and genital injuries.

Many studies have revealed that this association between rape and genital injuries is erroneous since not all rape victims present such injuries upon medical examination.⁴¹³ For example, Bowyer and Dalton's research found that twenty-seven per cent of rape complainants sustained genital injuries.⁴¹⁴ McLean et al. found only twenty-three per cent⁴¹⁵ while Maguire et al. and Sugar et al. found an incidence of thirty-nine and twenty per cent respectively.⁴¹⁶ A much more recent study using a sample of 1266 women, found that the incidence of genital injuries among the complainants examined was 24.5 per cent.⁴¹⁷ Collectively, these studies show that only a minority of rape complainants will present evidence of genital injuries upon medical examination. The common perception that rape inevitably causes genital injuries is therefore false.

⁴¹¹ Bowyer, L. and Dalton, M. (1997), "Female victims of rape and their genital injuries", *British Journal of Obstetrics and Gynaecology*, p.617; Kennedy, K.M. (2012), "The relationship of victim injury to the progression of sexual crimes through the criminal justice system", *Journal of Forensic and Legal Medicine*, 19: 309-311.

⁴¹² *Ibid.*

⁴¹³ Walker, G. (2015), "The (in) significance of genital injury in rape and sexual assault", *Journal of Forensic and Legal Medicine*, p.173; Rees, G. (2010), " 'It is not for me to say whether consent was given or not': Forensic medical examiners' construction of 'neutral reports' in rape cases", *Social & Legal Studies*, p.372; Crozier, I. and Rees, G. (2012), "Making a space for medical expertise: Medical knowledge of sexual assault and the construction of boundaries between forensic medicine and the Law in late nineteenth-century England", *Law, Culture and Humanities*, 8(2), p.285.

⁴¹⁴ Bowyer and Dalton, p.619.

⁴¹⁵ McLean I. et al. (2011), "Female genital injuries resulting from consensual and non-consensual vaginal intercourse", *Forensic Science International*, 204(1):27-33.

⁴¹⁶ Maguire, W. et al. (2009), "Injury in adult female sexual assault complainants and related factors", *European Journal of Obstetrics and Gynecology and Reproductive Biology*, 142:149-153; Walker (2015), pp.174-175.

⁴¹⁷ Zilkensa, R. et al. (2017). "Genital and anal injuries: A cross-sectional Australian study of 1266 women alleging recent sexual assault", *Forensic Science International*, 275:195-202.

Rape victims may not sustain genital injuries, or victims' medical examinations may not reveal any genital trauma due to many factors.⁴¹⁸ For example, the state or age of the victim, the sexual position during the assault, the victim's resistance or absence of resistance, the use of a condom or lubricant by the assailant, and the degree of erection, can affect the likelihood of injuries.⁴¹⁹ Also, some genital injuries might not be seen, depending on the examination techniques.⁴²⁰ Furthermore, tiny injuries heal fast and may not be documented if there is a delay between the rape and the examination.⁴²¹ The experience of the examiner may also play a role in the documentation of genital injuries.⁴²² All this shows that genital injuries must not necessarily be expected after rape.

Another research revelation is that hymeneal injury does not always happen at the initial sexual contact, whether consensual or not.⁴²³ White and McLean compared medical records of virgin adolescents alleging rape with data from adolescents who had prior sexual contact before the rape, and found an incidence of genital injury of fifty-three and thirty-two per cent respectively.⁴²⁴ This finding indicates that a victim's claim that she was a virgin before the rape cannot be disproved by the absence of hymeneal injury.

Research has also revealed that the presence of genital injuries does not always indicate presence of rape.⁴²⁵ Both consensual and non-consensual sexual intercourse can cause such injuries.⁴²⁶ However, it is unusual for consensual intercourse to cause trauma on sexual organs.⁴²⁷ McLean et al. found that six per cent of women presented genital injuries following a consensual sexual relationship.⁴²⁸ Besides sexual intercourse, small genital injuries may also be caused by tools used during examination, and be mistaken for having been caused by an assault.⁴²⁹ All this emphasises the need for careful interpretation of evidence of genital injuries in rape cases.

⁴¹⁸ Walker (2015), p.176; Sugar et al. (2004).

⁴¹⁹ *Ibid.*

⁴²⁰ Walker (2015), pp.174-175

⁴²¹ Maguire et al. (2009).

⁴²² Eckert, L.O. et al. (2004), "Factors impacting injury documentation after sexual assault: Role of Examiner Experience and Gender", *American Journal of Obstetrics and Gynecology*, 190:1739-46.

⁴²³ Walker (2015), p.174.

⁴²⁴ White, C. and McLean, I. (2006), "Adolescent complainants of sexual assault; injury patterns in virgin and non-virgin groups", *Journal of Clinical Forensic Medicine*, 13:172-180.

⁴²⁵ Walker (2015), p.173; Rees (2010), p.372, Crozier and Rees (2012), p.285.

⁴²⁶ *Ibid.*

⁴²⁷ McLean et al. (2011), p.28.

⁴²⁸ *Ibid.*

⁴²⁹ Walker (2015), p.175.

Apart from trauma on sexual organs, it is often expected that rape victims will experience other external bruising as they struggle against their assailant.⁴³⁰ However, research has shown that they do not always present bodily injuries and that they frequently have no injury at all. Sugar et al.'s study found that fifty-two per cent of rape victims had bodily injuries and forty-one per cent sustained no injury, whether genital or extra-genital.⁴³¹ Maguire et al. found an incidence of sixty-one per cent of injured victims.⁴³² Bodily injuries are generally correlated with the circumstances of the assault.⁴³³ These findings reinforce the idea that the absence of victim injury does not indicate absence of rape.

In sum, the findings discussed above demonstrate that medical evidence has very limited ability to provide evidence of rape. It is centred on victim injury while research has established that rape may occur without causing injury. The legal professionals in Rwanda and elsewhere must therefore be mindful of this limitation and exercise caution in the evaluation of medical evidence.

2. Application of medical evidence by prosecutors and judges in Rwandan cases

The relegation of victims' testimony explained above resulted in a clear preference for medical evidence, considered by most legal practitioners as much more reliable and objective. Many prosecutors noted that they cannot pursue rape cases without a conclusive medical report. For example, PROSEC8 stated: "Medical evidence is the most important evidence in rape cases. Without it, we do not send the file to court." Similarly, PROSEC1 said: "Sometimes we don't even agree to receive files from the police, which do not contain medical reports." The majority of the judges interviewed took a similar stance. For example, JUDGE8 called medical evidence "the number one proof in rape cases." He added that "in most cases without medical evidence, the defendants are acquitted." It is clear from the above statements that these legal professionals attach superior value to medical evidence.

The impact of such a positioning of evidence is that other types of evidence were overlooked by prosecutors and judges, resulting in high numbers of cases dropped and defendants acquitted. For example, in one case the victim complained of having been raped

⁴³⁰ Sugar et al. (2004).

⁴³¹ *Ibid.*

⁴³² Maguire et al. (2009).

⁴³³ Sugar et al. (2004).

by a person well known in the neighbourhood.⁴³⁴ There were witnesses who heard the victim screaming, went to rescue her and saw the accused running away. As the medical report did not confirm rape as expected by the prosecutor, he dropped this case, giving the following explanation:

Although the witnesses interrogated said that they saw the suspect running, and that the complainant told them that he attacked and raped her ... the medical report does not show that the complainant had sexual intercourse by force. Therefore, the statements of the complainant and witnesses cause confusion as they are contradicted by what was revealed by the doctor. As a result it is difficult to confirm that the complainant was really raped.⁴³⁵

Another example is *PP v. Habimana* in which the court reasoned as follows:

...Among the evidence produced, there is the statement of the complainant... the declarations of the suspects who said that the complainant has no other issue with them ... Nevertheless, the court fails to know if the complainant was really raped, because this should be ascertained by a report by the doctor who examined her but this report is not contained in the file.⁴³⁶

In these cases, as with most others, the absence of a “conclusive” medical report in the case file resulted in the release of the suspects regardless of other evidence in the file that could be exploited.

The unwarranted superior value attached to medical evidence was also evident during trials directly observed in this study. In many hearings attended, medical evidence was the central issue of discussion in the court. An example was a gang rape case hearing that was attended in the High Court on 14 June 2016.⁴³⁷ As the case file did not contain any medical report, the judge asked the prosecutor many questions about this lack of medical evidence and postponed the trial in order to obtain some medical expertise.⁴³⁸ Although the

⁴³⁴ Case file RONPJ 009606/S2/15/NJ/NYJ.

⁴³⁵ Report on provisional case file closure, 8 May 2015, p.2.

⁴³⁶ *PP v Habimana Alexis*, para 11.

⁴³⁷ Trial of Ngiuwonsanga Etienne et al., file RPA 0375/15/HC/RWG.

⁴³⁸ It was mentioned that the complainant was HIV positive, so the judge wanted to know the HIV status of the defendants.

prosecutor had mentioned the existence of witnesses, the judge did not show an interest in these witnesses or in the complainant.

The main reason underlying the pre-eminence given to medical evidence is the association of rape with genital or bodily injury. The study revealed that the vast majority of the legal professionals believed that rape must result in genital and/or bodily injuries and so they tended to conclude that rape was not committed when the medical report did not provide such evidence. Only a few judgments recognised that the absence of injury does not necessarily mean absence of rape.⁴³⁹

This practice of giving pre-eminence to medical evidence and requiring evidence of genital/bodily injury in rape cases needs to be stopped for the following reasons. First, it is based on a false assumption that rape must be accompanied by genital/bodily injuries. It has been demonstrated above that this idea is a misconception. Second, it lacks a legal basis. Rwandan law stipulates the principle of freedom of proof in criminal matters and does not create any hierarchy within the types of evidence admissible.⁴⁴⁰ Medical evidence therefore has no special value in law. In fact, the jurisprudence of the Supreme Court has explicitly denied any superior value to this type of evidence. In *Akimaninzaniye Agnes v. PP*, the appellant challenged his conviction on the ground that it was not based on any medical evidence. The Supreme Court rejected his appeal as follows:

On the question that there is no medical report relied upon to convict the defendant, the court finds that if the medical evidence had been available, it could only have been one of the pieces of evidence the court could rely upon. It would not have been the decisive evidence.⁴⁴¹

This is an important decision as it relates to a child rape case and is therefore directly applicable to cases involving sexual offences. The decision therefore provides guidance that

⁴³⁹ For example, *PP v. Ntakirutinka Moses*, RP 0073/14/TGI/GIC, 11 July 2014, para. 11.

⁴⁴⁰ Article 86 of the Code of Criminal Procedure, Articles 9 and 108 of the Evidence Law. See also the discussion on freedom of proof in the section on circumstantial evidence below.

⁴⁴¹ *Akimaninzaniye Agnes v. PP*, RPAA 0107/07/CS, 11 September 2009, para 28.

is applicable in adult rape and other cases as regards the absence of supremacy of medical evidence.

Similarly, in a case of adult rape,⁴⁴² the High Court also clarified that medical evidence is not superior to other forms of evidence. In this case, the appellant requested that this conviction for rape be quashed on the ground that the judgment ignored the medical report, which concluded that there were no signs of sexual violence. The High Court rejected the appeal as it found that:

The fact that the Intermediate Court did not rely on the medical report is not a valid ground for appeal because medical evidence is evidence like other evidence; it has no special evidential value.⁴⁴³

Despite the clarity of the law and the jurisprudence, the vast majority of the legal practitioners continue to consider medical evidence as the decisive evidence in rape cases. This shows that the beliefs mentioned above underlying this practice are very powerful. The solution to the problem will therefore require not only legal reforms but also education and a change of attitude.

The third reason for abolishing the practice of giving precedence to medical evidence is that this undermines the prosecution of rape defendants. It causes neglect of other forms of legally admissible evidence that can be used against rape defendants, and which are commonly used in other jurisdictions. This reduces the chances of successful prosecution of rape cases in Rwanda, entrenching a “justice gap” that discriminates against the testimony of, mostly female, rape victims. The practice further undermines prosecution by requiring victims’ injury to prove rape. The danger of this requirement is that violence may be used and not necessarily result in documentation of genital or extra-genital injuries upon victims’ examination, as explained above. Moreover, there are situations of rape without use of force, such as the circumstance of submission where the victim surrenders without resistance, or fraud where the victim simply does not realise the nature of the act she is

⁴⁴² *Rwanzegushira Jean Baptiste v. PP*, R.P.A. 62/09/HC/KIG, 8 May 2009.

⁴⁴³ *Rwanzegushira v. PP*.

being involved in, or any other situation of lack of consent. Such rape cases may not be proved if evidence of injury is required because victims' injury is less likely in such situations, given the absence of force.

The study revealed cases of rape without use of physical force where the prosecutors still expected evidence of bodily injury. An example is a case where the victim complained that the accused deceived her and brought her into the bush, threatened to kill her, then raped her. The medical report concluded that there was "no sign of physical trauma."⁴⁴⁴ The prosecutor dropped the case because "the doctor did not show signs of violence to establish that the complainant was raped."⁴⁴⁵ Nevertheless, the file contained clear information that the complainant, overwhelmed by fear, submitted to the assailant.⁴⁴⁶ Despite this, the prosecutor still wanted to have evidence of injury on the complainant's body.

Medical evidence must not be given the special consideration it is given in practice as it is not forensically decisive. As pointed out above, this type of evidence is very limited with regard to its ability to prove rape. It is crucial while interpreting medical evidence, to be always mindful that the absence of genital or bodily injuries is not conclusive evidence of absence of rape, and should not be considered as such by the criminal justice practitioners.⁴⁴⁷ Both prosecutors and judges in Rwanda should understand that "it is normal to be normal," as pointed out by Adams et al., emphasising that it should not be surprising that even child victims of sexual abuse may not present abnormal genital injuries upon forensic medical examination.⁴⁴⁸ Unfortunately, the reality has not always been the case, and the mistaken reliance on medical evidence in various jurisdictions has significantly contributed to the "justice gap" in rape cases.⁴⁴⁹

The misinterpretation of medical reports caused by the belief that injuries are a necessary outcome of rape raises the question whether the authors of these reports should also

⁴⁴⁴ Case file ROPNJ 9390/S2/15/BB/RJO, Medical Report, 19 February 2015, p.2. C31.

⁴⁴⁵ Case file ROPNJ 9390/S2/15/BB/RJO, Report on Provisional Closure of File, p.2.

⁴⁴⁶ Case file ROPNJ 9390/S2/15/BB/RJO, Police report, p.3, C.01.

⁴⁴⁷ Kennedy (2012); Bowyer and Dalton (1997), p.620.

⁴⁴⁸ Adams, J.A. et al. (1994), "Examination findings in legally confirmed child sexual Abuse: it's normal to be normal", *Pediatrics*, 94.

⁴⁴⁹ Roberts, R.E. (1999). "Forensic medical evidence in rape and child sexual abuse: controversies and a possible solution", *Journal of the Royal Society of Medicine*; Crozier and Rees.

provide explanations to guide the criminal justice practitioners and inform them about the limitations of medical evidence. White and McLean have suggested that it is the responsibility of medical doctors to “put any examination findings in context” and explain their results to avoid misinterpretation by the legal professionals.⁴⁵⁰ Rees also showed the concern that forensic medical examiners do not have the opportunity to provide adequate explanation to the legal practitioners to help them properly understand the right meaning of absence of genital or bodily injuries in medical reports.⁴⁵¹

Forensic examiners tend to avoid contentious issues and prefer to make “neutral reports,” defined as “reports that neither confirm nor deny the complainant’s allegation of rape.”⁴⁵² According to Rees, this approach diminishes the evidential value of the report and is useful only when the reports match the “real rape” stereotype prevalent among prosecutors.⁴⁵³ He suggests that forensic medical examiners should take further steps to “educate” prosecutors and help them understand that the association of injuries and rape is a myth.⁴⁵⁴

This idea looks attractive, but it might not always be effective. First, it seems to be founded on an assumption that, on one hand, the doctors are all free from the influence of rape myths in their examination of the victims, and that on the other hand it is only the legal professionals who are influenced by the “real rape” myth and confuse bodily/genital injuries with rape. This may not always be the case, as both categories of professionals live in the same society and are exposed to the same social beliefs, meaning that even doctors can be influenced by these myths.

Research has shown that forensic doctors have themselves historically been influenced by rape myths in their examination of rape victims.⁴⁵⁵ They were generally influenced by the “real rape” myth and their conclusions about rape were characterised by the association of rape with body and genital injuries.⁴⁵⁶ In addition, forensic doctors historically went beyond purely medical physical examinations of the victims to study their character and find out

⁴⁵⁰ White and McLean, p.172.

⁴⁵¹ Rees (2010).

⁴⁵² *Ibid.*, p.372.

⁴⁵³ *Ibid.* p.381.

⁴⁵⁴ *Ibid.*

⁴⁵⁵ Ruberg, W. (2013), “Trauma, body, and mind: Forensic medicine in nineteenth-century Dutch rape cases”, *Journal of the History of Sexuality*, 22, 1: 85-104; Crozier and Rees (2012).

⁴⁵⁶ *Ibid.*

whether the victims were making false allegations.⁴⁵⁷ Some were judgmental about women, and their reports were influenced by their own attitude towards women and towards rape.⁴⁵⁸ Medical evidence that should normally be scientific and therefore objective, became a reflection of social beliefs.⁴⁵⁹ In the jurisdictions where these studies were conducted, there is no evidence that forensic doctors are totally free of rape myth influence, at least until recently.⁴⁶⁰ In the present research, it was found that many doctors and judicial professionals shared the same misconceptions about the association of victim injuries with rape (this finding is discussed in the next section).

Second, even if it were certain that the doctors are not influenced by rape myths in their examination, it would not be sustainable that they take the burden of “educating” prosecutors in every case. This seems not to be their responsibility and, in any event, it is unsure that the prosecutors would act according to their explanations. Indeed, in this research study, it was found that when some doctors took the step to explain that the absence of evidence of injury in their reports did not mean absence of rape, the prosecutors still dropped the cases because of “lack of evidence” (this issue is also debated in the next section).

Doctors’ attitude towards rape is beyond the scope of this study, but a brief exploration of their perceptions about rape is conducted below in order to have a better comprehension of their influence on prosecutors and judges.

3. Framing of medical evidence by doctors in Rwandan cases

The following sections examine two issues: the implications of doctors’ perception of “evidence of rape”, and the problems caused by the disclosure of victims’ sexual history and other personal information in medical reports.

a. Doctors’ perception of “evidence of rape”

An attempt to understand doctors’ perception of the recurrent mention of “evidence of rape” in their reports was made through analysis of medical reports contained in the files examined in this study. The study revealed that similar to the legal professionals, many

⁴⁵⁷ Ruberg, p.94.

⁴⁵⁸ *Ibid.*

⁴⁵⁹ Crozier and Rees (2012), p.304.

⁴⁶⁰ Ruberg (2013); Crozier and Rees, *ibid.*

doctors meant by “evidence of rape” the presence of genital injuries. For example, in one report, the doctor concluded as follows:

Client consulted with complaints of being raped. On examination, there was no sign suggestive of genital injuries.⁴⁶¹

In many other reports, it was apparent that the doctors concluded there was “no evidence of rape” when they did not find injuries, particularly genital injuries. For instance, a doctor mentioned:

...The history is in favour of Gender-based violence (sexual assault) but the physical examination and laboratory findings show no evidence of rape....⁴⁶²

Another report states that: “There is no evident sign that can confirm this rape.”⁴⁶³

It is legitimate for the doctors to search for genital or bodily injuries while examining rape victims. The problem is that many medical practitioners are providing a written conclusion to the absence (or presence) of rape. For example, having found signs of injury on the complainant, one doctor concluded: “She has been raped.”⁴⁶⁴ Another went as far as to give the following details: “...31 year old victim of rape by a business colleague.”⁴⁶⁵ As explained above, it is not the duty of the doctors to make a finding of whether a rape has been committed or not. It is even less their role to identify the offender. This is the very task of prosecutors and judges who must assess the evidence provided by medical practitioners.

The damage caused by medical reports that confirm or deny rape was evident in this study. Such reports negatively influenced the outcome of many cases, as outlined above. It is very concerning that the doctors’ reports which themselves wrongly confuse genital injuries with rape are given considerable weight by the legal professionals. This has dramatic effects on the prosecution of rape cases especially that medical evidence is in practice treated as “the number one evidence” in rape cases. This situation caused prosecutors to unfairly close many cases and the judges to acquit those accused of rape without further examination of the evidence. Conversely, it may also lead to wrongful conviction of innocent defendants.

⁴⁶¹ Case file RONPJ 009014/S2/14/BB/UJ, Medical report, 2 October 2014, p.3, C.20.

⁴⁶² Medical report, 7 July 2015, p.3. C.42.

⁴⁶³ Case file RPGR 34961/S1/12/MR/GA, Medical report, 4 May 2012, p.2, C.17.

⁴⁶⁴ Case file RONPJ 009374/S2/15/BB/MA, Medical report, 2 February 2015, p.2.

⁴⁶⁵ Case file RONPJ 009712/S2/15/MJ, Medical report, 26 May 2015, p.2, C.35.

However, it is worth noting that not all medical reports were misleading. Some reports avoided confusing the absence of genital injuries with the absence of rape. Some doctors even took steps to “put the examination finding into context”, explaining that the absence of genital or bodily injuries should not be interpreted as absence of rape. For example, one doctor concluded that he found no sign of sexual assault, and went on to advise that: “Other investigations are needed to confirm or deny the hypothesis.”⁴⁶⁶ In another case, after finding no trace of lesions on the complainant, the doctor suggested the following: “I cannot conclude that she was not raped. There is a possibility that she has been raped.”⁴⁶⁷ In another similar case, the doctor advised that “[the] physical examination and investigation are normal, but [I] cannot say that the rape is done or not.”⁴⁶⁸

It is important to understand the effects of the doctors’ advice regarding the meaning of absence of injuries; whether the prosecutors judiciously used the doctors’ explanations. Analysis of the files containing these medical reports reveals that, instead of following the doctors’ advice, the prosecutors used these medical reports to conclude that there was no evidence of rape. Returning to White and McLean’s and Rees’ suggestion that forensic doctors should help the prosecutors understand the significance of injuries in rape cases, this seems not workable at least in this study. Finding a solution to this problem will be challenging. At the very least it must involve new guidance on, and education about, the use and validity of medical evidence in rape trials for both categories of professionals to counter the myths that influence many of their respective members.

b. Disclosure of victims’ personal information in medical reports

The study found that many medical reports frequently disclosed victims’ personal data. I will not attempt to define types of information that should or should not be disclosed by forensic doctors as this issue is beyond the scope of the research. However, it is crucial to analyse the effects of disclosure of complainants’ personal data on the outcome of rape cases.

(1) Disclosure of victims’ sexual history

⁴⁶⁶ Case file RONPJ 06360/S3/14/NR/MJ, Medic report, 27/10/2014. C.17

⁴⁶⁷ Case file RONPJ 36240/S1/14/RNG/NC, Medical report, 3 June 2014, p.2. C.27.

⁴⁶⁸ Case file RONPJ 8868/S2/14/BB/UJ, Medical report, 19 September 2013, p.2.

This research found that doctors routinely mentioned victims' past sexual experience in their reports. Below are some examples:

"We cannot tell if she had sexual intercourse as she is sexually active."⁴⁶⁹

"The client is not virgin. She has had sexual relations before the age of 18"⁴⁷⁰

"She is used to having unprotected sex."⁴⁷¹

The relevance of such information is doubtful. For example, it is unclear how the fact that the complainant is "used to having unprotected sex" would have helped to solve the issue whether she was raped or not. Such statements are potentially prejudicial to complainants, as noted by PROSEC8:

When the doctor adds the mention of the victim's sexual habit, it dilutes the case. People ask why she complained while she is used to having sex; and the suspect builds on that to say that the complainant was consenting. It really devalues the case. It is better for the doctors to abstain from adding such mentions especially because we do not ask them to tell us the victim's sexual habits... If it happens that the complainant is not married, automatically the defence claims that she is a prostitute, and that she therefore consented but lied later because of some broken agreement. Depending on the prosecutor's understanding, such case may even be dropped as a result of the mentioning of the complainant's sexual habit in the medical report.

Indeed, the research revealed that the disclosure of sexual history in medical reports was very detrimental to the complainants and negatively affected the outcome of the cases. For example, in one file, the prosecutor concluded that:

There is no evidence because the medical report which is the evidence remaining to be relied upon does not help; it shows that the complainant is used to having sex....⁴⁷²

⁴⁶⁹ Case file RONPJ 000505/S3/16/NJ, Medic report, 22 January 2016, p.2, C.15.

⁴⁷⁰ Case file RONPJ 37750/S1/16/MJ/RE, Medical report, 1 September 2015, p.2, C.33.

⁴⁷¹ Case file RONPJ 46638/S3/16/MO/HB, Medical report, 25 February 2016, p.1, C.29.

⁴⁷² Case file RONPJ 02071/S3/12/NR/UR, Report on case file closure, 15 March 2012, p.2.

This passage shows that the prosecutor, relying too much on medical evidence, was heavily influenced by the doctor's information that the complainant was "used to having sex." This information has contributed to the conclusion that there was "no evidence" whereas it should in fact have no logical connection with the issue of consent. In another case, the prosecutor quotes the complainant's sexual habit disclosed by the doctor as part of the reason why he dropped the case:

The doctor too confirms that the woman is used to having sex, and that she had given birth before. Further, the medical report shows that there is no evidence that the complainant was raped...⁴⁷³

Similar decisions were taken by judges. For example, in *PP v Banyakiri*, the court reasoned as follows:

The defendant shows that he is a friend of the complainant; he accepts that on the same day they went together to watch a football game and that afterwards they had consensual sex... As it is apparent, the woman is aged 22 and the boy 22, therefore it is not clear how they can have sex without planning it and yet she did not call for help, and the medical report shows that *she has no problem, she is used to having sex.*⁴⁷⁴

This quote raises various issues that are discussed elsewhere. For the purposes of this section, it shows that the judge was negatively influenced by the information that the complainant was "used to having sex", which contributed to the judge's conclusion that she consented. Such conclusions are based on an erroneous belief that a woman who is sexually active must mean that she will always consent to sex.⁴⁷⁵

The scrutiny of this judge's paraphrasing reveals that he added his own interpretation to the doctor's information. In fact, the part stating that the complainant "has no problem," is an inference made by the judge alone because the medical report does not contain such a statement. The terms used in the report are the following: "This lady is sexually active."⁴⁷⁶ For the judge, if the complainant is sexually active, then "she has no problem." This shows

⁴⁷³ Case file RONPJ 009526/S2/15/JN, Report on provisional case file closure, p.3.

⁴⁷⁴ Emphasis added. *PP v Banyakiri Eric*. RP 0197/14/TGI/HYE, 30 September 2014, para. 9.

⁴⁷⁵ See Chapter 5 for more details on misinterpretation of victim behaviour.

⁴⁷⁶ Medical report, 16 June 2014. C.23.

the extent to which the disclosure of the complainant's sexual history in medical reports can be prejudicial and yet, there is no evidence that it helps to solve cases.

However, some legal professionals exceptionally refused to be influenced by doctors' irrelevant observations. For instance, one medical report mentioned the following:

Single mother who gave birth 3 years ago but has sexual relationship with multiple partners. ... The clinical examination reveals a woman sexually active who has given birth and is presently pregnant. The second pregnancy is not related to the suspected violence.⁴⁷⁷

In this case, the judge was not impressed by this excessive information and he simply ignored it and never referred to it in any part of his judgment.

(2) Other personal information disclosed in medical reports

The study found that apart from victim sexual history, some medical reports disclosed other types of personal data which also influenced the outcome of the cases. For example, one medical report concluded: "there is an absence of any sign of sexual aggression." It then added: "Note that she [the complainant] has been followed up for a mental health issue for two years."⁴⁷⁸ This information appeared in the prosecutor's justification for dropping the case, as he noted that:

The report of the doctor who examined [the complainant] shows that there is no evidence that she was raped. It also shows that she spent two years being seen among patients who have mental problems.⁴⁷⁹

Here again, there is no clear connection between the fact that the complainant has been seen for a mental health issue and the issue of non-consent. Despite this, the information seems to have influenced the prosecutor. Perhaps he considered that the complainant's account was unreliable because of the doubt about her mental health. This would be unfair because a mental health patient does not necessarily imply that the person is incapable of giving a credible testimony.

⁴⁷⁷ *PP v. Ntakirutimana Enias*, RP 0579/12/TGI/NYGE, Medical report, 23 October 2012, pp.1-2, C.13.

⁴⁷⁸ Case file RNPJ 54590/S1/MD/MO, Medical report, 2 August 2015, p.3, C.45.

⁴⁷⁹ Report on provisional closure of file, 21 September 2015, para 11.

The negative influence of the disclosure of victims' sexual history and other personal information in medical reports demonstrates the need for guidelines on acceptable contents of medical reports. This is a subject of interest for further research.

To conclude the discussion on medical evidence, the research reveals that the use of this type of evidence is very problematic to the extent that it seems to be more an obstacle to justice than a form of corroborating evidence as believed by many legal practitioners. Medical evidence was unfairly given superior evidential value in most rape cases; causing disregard of other types of legally admissible evidence, and resulting in inopportune closure of rape cases and uncertain acquittals of rape defendants. It was also grossly misinterpreted in the majority of cases where the absence of genital/bodily injury was confused with absence of rape, thereby negatively affecting the outcome of the cases.

4. 3. THE ROLE OF CIRCUMSTANTIAL EVIDENCE IN RAPE CASES

It was clear from the study that victim testimony and medical evidence were the two most salient forms of evidence that made or (more frequently) broke a case. However, in some cases there are also other forms of "circumstantial" evidence that can prove pivotal when prosecuting an offence of rape, such as where there is indirect evidence pointing to the commission of the offence. The following sections will discuss the meaning and importance of circumstantial evidence before exploring the role of this type of evidence in Rwandan rape cases.

1. The meaning and importance of circumstantial evidence

Circumstantial evidence has traditionally been opposed to direct evidence.⁴⁸⁰ Direct evidence is defined as:

...testimony given by a witness of the witness's perception by her own senses (sight, hearing etc) of one or more of the facts in issue. It can also include the presentation of documents or things in issue to the tribunal of fact.⁴⁸¹

Circumstantial evidence is, "evidence from which a fact in issue may be inferred."⁴⁸² It is:

⁴⁸⁰ Dennis, I. (2013), *The Law of Evidence*, 5th ed., London, Sweet & Maxwell, p.8.

⁴⁸¹ *Ibid.*

⁴⁸² Choo, A. (1998), *Evidence. Text and materials*, London, Longman, p.12.

...a combination of circumstances, no one of which would raise a reasonable conviction, or more than a mere suspicion; but the whole, taken together, may create a strong conclusion of guilt, that is, with as much certainty as human affairs can require or admit of.⁴⁸³

Illustrating the distinction between both forms of evidence, Allen explains:

Suppose x is a fact that has to be proved. It can be proved in two different ways. You may be able to prove it by producing a witness who, with his own senses, perceived x: such evidence is sometimes called 'direct evidence' of x. If you cannot do this, you may be able to prove x by producing a witness who, though he did not perceive x, did perceive directly facts y and z, from which x can be inferred: such evidence is called 'circumstantial' evidence of x.⁴⁸⁴

There are so many types of circumstantial evidence that it would be very difficult to try to make an exhaustive list.⁴⁸⁵ The following are some examples: (a) Motive: evidence of facts that a person has a particular reason to carry out a specific action, such as hatred towards the victim in a murder case, can be accepted to prove the high probability that the person committed that act;⁴⁸⁶ (b) preparatory acts: evidence that the accused made plans and preparations to commit an offence may be used to show that he committed the offence;⁴⁸⁷ (c) opportunity: proof that the suspect was present at the scene at the time the offence was committed may be used against them especially if the suspect fails to provide a valid alibi;⁴⁸⁸ (d) failure to explain: failure for the suspect to provide swift elucidation of his conduct or insufficient explanation may also serve as circumstantial evidence.⁴⁸⁹

Circumstantial evidence is sometimes perceived as an inferior form of evidence compared to direct evidence, but such a perception is short-sighted.⁴⁹⁰ Both direct and circumstantial

⁴⁸³ Pollock, C.B, *R v Exall* (1966) quoted by Choo, A. p.12.

⁴⁸⁴ Allen, C. (2004), *Practical guide to Evidence*, 3rd ed., London, Cavendish publishing, p.19.

⁴⁸⁵ Dennis, I. (2013), p.9.

⁴⁸⁶ Keane and McKeown (2011), p.13.

⁴⁸⁷ *Ibid.*

⁴⁸⁸ Tapper (2010), p.33.

⁴⁸⁹ *Ibid*, p.38.

⁴⁹⁰ Emson, R., (2008), *Evidence*, 4th ed., Palgrave Macmillan, p.10.

evidence can have the same evidential value.⁴⁹¹ Circumstantial evidence, unlike hearsay, is not “second hand” or secondary evidence, but rather it is original and independent information that can be used as probative evidence in establishing criminal liability.⁴⁹²

Nevertheless, it is admitted that there may be more problems of evaluation with respect to circumstantial evidence, compared to direct evidence.⁴⁹³ There are two risks of error regarding direct evidence, which are mistake and perjury by the witness, whereas circumstantial evidence presents a third risk: the possibility of incorrect inference.⁴⁹⁴ There is always a danger of making hasty conclusions in inference, especially when such conclusions match the witness’s pre-conceived ideas.⁴⁹⁵ To mitigate the risks of error in inference, it is advised that:

...circumstantial evidence must always be narrowly examined... It is also necessary before drawing the inference of the accused’s guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.⁴⁹⁶

Further, Bucknil emphasises that:

The strength of circumstantial facts exists when those facts not only point in the direction of the fact which they are thought to prove, but also are such that the mind cannot reasonably imagine them as pointing in any other direction, cannot reasonably imagine any different fact which would fit in them.⁴⁹⁷

Crucially, circumstantial evidence must not only create a strong inference of guilt, but it must also point to the guilt of the accused as the only reasonable conclusion. Therefore, circumstantial evidence is better defined as follows:

A circumstantial case consists of evidence of a number of different circumstances which, taken in combination, point to the guilt of the accused

⁴⁹¹ Best, W. (1978), *A Treatise on the Principles of Evidence*, New York, Garland, p.315; Emson, p.10, Dennis (2013), p.9; Allen, p.19.

⁴⁹² Best, *ibid.*

⁴⁹³ Dennis (2013), p.9.

⁴⁹⁴ Allen (2004), p.19; Best (1978), p.317.

⁴⁹⁵ Bucknil, A. (1953), p.33.

⁴⁹⁶ Lord Norman: Extract: *Tepper v R* (1952) AC 480,489 (HL) Choo, A. p.13.

⁴⁹⁷ Bucknil, A. (1953), *The Nature of Evidence*, London, Skeffington, p.33.

person because they would usually exist in combination only because the accused did what is alleged against him... Such a conclusion must be established beyond reasonable doubt. It is not sufficient that it is a reasonable conclusion available from that evidence. It must be the only reasonable conclusion available. If there is another conclusion which is also reasonably open from that evidence, and which is consistent with the innocence of the accused, he must be acquitted.⁴⁹⁸

In light of the above discussion, it can be said that circumstantial evidence is typically useful as part of the prosecution's case, but it must be carefully evaluated before reaching any conclusion regarding the guilt of the accused. The key to safe conviction lies therefore in the proper evaluation of the evidence, rather than the *type* of evidence available in the case. Criminal cases including serious crimes such as murder can be proved entirely by circumstantial evidence.⁴⁹⁹ Indeed, if direct evidence were the only evidence to be accepted, many cases would not be proved.⁵⁰⁰

Circumstantial evidence is particularly important in rape cases. As noted above, it may have particular importance in situations where the issue is consent because in such cases both the complainant and the defendant agree that the sexual intercourse took place and there is typically no third person to testify to the lack of consent.⁵⁰¹ An example of circumstantial evidence that can be useful in such cases is distress. In England and Wales and in Scotland, the victim's distress resulting from the rape has been admitted in many cases as corroborative of the victim's account.⁵⁰² However, distress must be spontaneous to qualify as corroborative of the complainant's evidence.⁵⁰³ In the case of *Moore v HM Advocate* the complainant had shown distress neither to her boyfriend nor to other people until twelve hours after the incident. The conviction was quashed for a lack of spontaneity.⁵⁰⁴ However, it was emphasised that the key factor as regards distress is not the time that elapsed

⁴⁹⁸ *Prosecutor v. Zejnil Delalic et al.*, (Appeals Judgement) IT-96-21-A, 20 February 2001, para. 458. Available at www.icty.org. [Accessed 26 July 2017].

⁴⁹⁹ Dennis (2013), p.9.

⁵⁰⁰ Tapper (2010), p.30.

⁵⁰¹ Raum, B.A. (1983), p. 206.

⁵⁰² For example, *R v Redpath*, *R v Chauhan*, cited in Davidson, F.P. (1997), "Corroboration in distress", *Scottish Law & Practice Quarterly*, 1:30-40, p.30; Ferguson (2000), p.158.

⁵⁰³ Davidson (1997).

⁵⁰⁴ *Ibid.* p.32.

between the alleged incident and the expression of distress but the spontaneity of the distress.

What matters is not the time interval as such but whether the shocked condition or the distress of the complainant was caused by the rape. Only then can it be said that it provides separate and independent testimony to corroborate what she herself has said in her evidence. The shorter the interval the more likely it is that the condition was spontaneous and independent, and thus evidence of itself of what occurred. The longer the interval, the more important it becomes to examine what happened during that period.⁵⁰⁵

With respect to distress, some exceptions to the common law rule of hearsay are applicable as circumstantial evidence of rape. The hearsay rule provides that statements made out of court cannot be admissible to prove the fact stated.⁵⁰⁶ One exception to this rule in some common law jurisdictions is "the excited utterance."⁵⁰⁷ This exception means that statements made in the aftermath of a moving incident while the subject is still in a state of shock or emotion, may be admissible as proof of the facts stated.⁵⁰⁸ The rationale of the exception is that the person concerned may not have had the time to think of her declaration; therefore, her statement is likely to be true.⁵⁰⁹ Orenstein emphasises that given the nature of sexual offences, which often cause shame, distress and fear, this exception should not be limited to declarations made by the victim immediately after the rape because women's experience of sexual assault is that many keep silent in the aftermath of the assault.⁵¹⁰ The author makes a parallel between this exception and the biased requirement of prompt complaint,⁵¹¹ and suggests that even declarations made by a rape victim long after the rape should be admissible as an exception to the hearsay rule.⁵¹² Another exception to this rule directly applicable to rape is the statement made by a victim

⁵⁰⁵ Lord Justice-General, quoted by Davidson, *Ibid.*

⁵⁰⁶ Orenstein (1997), p.165.

⁵⁰⁷ *Ibid.*

⁵⁰⁸ *Ibid.*

⁵⁰⁹ *Ibid.* p.168.

⁵¹⁰ *Ibid.*

⁵¹¹ The requirement of prompt complaint will be discussed in further detail in Chapter 5.

⁵¹² Orenstein (1997).

to a forensic nurse for medical diagnosis or treatment.⁵¹³ Barnoon and Sytcheva point out that these exceptions are particularly important in rape cases since such cases often turn on “he said-she said” testimony and the reliability of the victim can shift the balance in favour of one side.⁵¹⁴

A further example of possible circumstantial evidence in rape cases is the wider concept of rape trauma syndrome (RTS). It has been recognised as circumstantial evidence of rape in a number of cases in the United States and in Scotland.⁵¹⁵ RTS is defined as:

An identifiable cluster of emotional and physical symptoms suffered by a woman who has experienced a sexual encounter as rape.⁵¹⁶

It is considered that because a person who has been raped may experience RTS and that another who had consensual sex may not, evidence of RTS is therefore admissible as circumstantial evidence of the absence of consent.⁵¹⁷ Nevertheless, the concept of RTS remains controversial, as discussed in detail in the next chapter.

Distress and RTS are only a few examples of possible circumstantial evidence in rape cases. As pointed out above, it is not possible to give an exhaustive list of the types of circumstantial evidence applicable in rape cases, as they are unlimited.⁵¹⁸ This means that the circumstances of the rape in a specific case may provide a wide range of evidence if the investigation is focused and thorough. Circumstantial evidence may be particularly useful in jurisdictions that recognise the principle of free proof in criminal matters. In civil law, this principle allows prosecutors to prove facts by all means, and gives judges full discretion to assess the evidence produced without being restricted to some types of evidence. This is the case for Rwandan law, which recognises the freedom of proof in Article 86 of the Code

⁵¹³ This exception is stipulated by the Federal Rule of Evidence 803(4). (United States.) Barnoon, Y. and Sytcheva, E. (2012), “Rape, sexual assault and evidentiary matters”, *The Georgetown Journal of Gender and the Law*, XIII, p.478.

⁵¹⁴ *Ibid.*

⁵¹⁵ See *People v. Rance*, *People v. Leporte*, *People v. Wells*, *State v. Staples*, among others, quoted in Raum, B.A. (1983); Clarke, B.A. (1992), “Making the woman's experience relevant to rape: the admissibility of rape trauma syndrome in California”, *UCLA Law Review*, 39:251. These articles reveal that many, but not all courts in different jurisdictions in the United States consider rape trauma syndrome relevant to prove the occurrence of the intercourse and the lack of consent. In Scotland, Ferguson (2000) reviewed numerous cases that have recognised victim distress as circumstantial evidence in Scotland.

⁵¹⁶ Clarke (1992), p.252: The victim may lose emotional feelings towards friends and relatives, she may reject sexual activity, be depressed or express fear, have nightmares, or experience modifications of sleeping habits etc.

⁵¹⁷ *Ibid.*

⁵¹⁸ Dennis (2013).

of Criminal Procedure. Giving the example of the hearsay rule discussed above, Rwandan law does not prohibit hearsay; therefore, it is the responsibility of the courts to judiciously evaluate the declaration made out of court and decide on its admissibility and value. This shows the extent to which circumstantial evidence may be instrumental in prosecuting rape.

The problem may come from the legal practitioners themselves since it has been revealed that they tend to apply the rules of evidence in an unusual and prejudicial way in rape cases.⁵¹⁹ Concern has been raised in some jurisdictions that circumstantial evidence to support rape victims' accounts is often provided in court but it is not considered as corroborative.⁵²⁰

The following sections will explore whether circumstantial evidence is given its real value in cases of rape in Rwanda.

2. Recognition of circumstantial evidence in Rwandan law

As in many other jurisdictions, Rwandan law recognises circumstantial evidence as a legitimate form of evidence.⁵²¹ The Evidence Law 2004 provides that written evidence, testimony, circumstantial evidence, confession or any other material evidence are all acceptable forms of evidence.⁵²² It does not discriminate between these types of evidence or create any hierarchy among them. Neither does it require circumstantial evidence to be complemented by direct evidence. This means that a court can rely entirely on circumstantial evidence in determining the guilt of an accused.

The Supreme Court confirmed the legitimacy of circumstantial evidence in the case of *Karekezi*,⁵²³ where this type of evidence was directly challenged. It was a murder case where the defendant attacked the victim with a grenade. However, no witness saw him throwing the grenade at the victim. The conviction was based on the following circumstantial evidence: One witness saw the defendant at the scene at the time of the attack. Other witnesses testified that the defendant had repeatedly openly stated that he would harm the victim with whom he had an open dispute over property. Witnesses also testified that after the attack, the defendant's house was searched in their presence, as the

⁵¹⁹ See above discussions on victims' evidence.

⁵²⁰ Lees (1996), p.110.

⁵²¹ Article 9 of the Evidence Law 2004.

⁵²² *Ibid.*

⁵²³ *Karekezi Gaspard v. PP*, RPA 89/08/CS, 4 June 2010.

authorities found and seized military equipment and other weapons. The defendant then admitted that he killed the victim.

Although the defendant denied the allegations in court and stated that there was no direct evidence against him, the High Court relied on all these facts and convicted him. The defendant appealed on the ground that the High Court based its decision on “suppositions”. The Supreme Court reviewed all the evidence in the case and found that the evidence presented coherence between the various testimonies and facts. Rejecting the appeal, the Court concluded: “...All these facts taken together, which have been relied upon [by the High Court] are not mere suppositions but evidence.”⁵²⁴

An example of the application of circumstantial evidence in a rape case is *PP v. Nshutiyabagabo*.⁵²⁵ The facts of this case as explained by the prosecutor are as follows. The defendant was in a neighbourhood together with a girl (Witness X). The victim was passing nearby, and then the defendant stopped her and obliged both girls to accompany him around, threatening to break their legs if they ever refused. They submitted and both walked away with him. While walking, the defendant grabbed the victim’s *pagne*⁵²⁶ and wore it on his neck. When they reached an uninhabited place, he told the victim that she was used to rejecting men but that he was then going to check her virginity. He started to strangle her and ordered witness X to go. Witness X ran away. He then raped the victim.

There was no direct witness who saw the defendant committing the rape and he denied the crime. Further, the medical report did not provide any “evidence of rape.”⁵²⁷ The court relied on the following evidence to reach its verdict: (a) the complainant’s detailed account of the rape; (b) the testimony of witness X who confirmed the defendant’s threats and declaration that he was going to check the virginity of the victim; (c) the fact that the suspect took away the victim’s clothes; and (d) the testimony of another witness, Y, who

⁵²⁴ *ibid*, para 18.

⁵²⁵ *PP v. Nshutiyabagabo Fulgence*, RP 226/14/TGI/MUS, 22 January 2015.

⁵²⁶ The word “*pagne*” was translated from the Rwandan word “*Igitenge*.” This means a type of African cloth called in French “*pagne*.” According to the wordreference dictionary, “*pagne*” means in English: “sarong”, “wrap skirt” or “*pagne*.” It is defined by the online Dictionary.com as “a garment worn by some African peoples, consisting of a rectangular strip of cloth fashioned into a loincloth or wrapped on the body so as to form a short skirt.”

⁵²⁷ See the section on medical evidence above.

saw both girls together with the suspect in the neighbourhood before they walked away. The court found that all of these facts combined constituted evidence of rape.⁵²⁸

It is fair to say that the court's judgment in this case is sound. The court made thorough evaluation of the evidence available: the judge properly appreciated that the absence of "medical evidence of rape" did not mean absence of rape; something which many prosecutors and judges fail to do (see section on medical evidence above). It also put evidential value on the victim's evidence, which is not always the case (see section on victims' evidence above). Further, it recognised the importance of circumstantial evidence and its capacity to assist in proving rape. In fact, it has noted that all the facts of this case taken together pointed to the culpability of the defendant and there was no other conclusion that could be reasonably be drawn from the facts of this case.⁵²⁹ This judgment provides a good example of judicious evaluation of evidence in rape cases. However, this study suggests that it is not typical of judicial practice, as will be shown further below.

3. The disregard for circumstantial evidence and the requirement of direct evidence in prosecutors' and judges' practice

Notwithstanding the clarity of the law regarding the legitimacy of circumstantial evidence and its practical importance in proving rape cases, analysis of the elite interviews and the prosecutorial and judicial decisions reveals a tendency to disregard such evidence. Speaking of evidence in rape cases, most of the legal professionals emphasised the unreliability of victim evidence and the importance of medical evidence (see sections above). None mentioned circumstantial evidence, except for one judge. The review of the case files as well as the court observations showed the same trend. The majority of the 101 prosecution cases studied contain circumstantial evidence, yet in each case this evidence was overlooked. With respect to the cases tried, the convictions were essentially based upon medical evidence and direct evidence; very rarely on circumstantial evidence. Out of the 175 judgments studied, just two cases (1.1 per cent) relied on circumstantial evidence. One of these is the example directly given above. The tendency is, rather, to disregard circumstantial evidence and to require direct evidence as proof of rape.

⁵²⁸ *Nshutiyabagabo*, para 8 to 12.

⁵²⁹ Bucknil (1953), p.30.

This study revealed a recurrent rejection of testimonies given by witnesses who “did not see the rape being committed.” Most of the testimonies disregarded provided valuable information that could amount to circumstantial evidence but they were dismissed simply because the witnesses “did not see the rape” itself. For example, in the case of D.J., the file contained the following evidence: (a) a statement of a witness who testified that the accused threatened the complainant before the rape;⁵³⁰ (b) testimonies of witnesses who were called for help and found the complainant immediately after, complaining that the accused just raped her;⁵³¹ and (c) the statement of the complainant that describes the alleged rape and which coincides with all the witnesses’ testimonies. The prosecutor dropped the case for “lack of evidence” because “the medical report did not provide any proof of rape” and “the witnesses *did not see the rape* being committed.”⁵³²

In another case,⁵³³ the following was testified: the complainant, a mentally disabled young girl was alone at home when the suspect, a family acquaintance, forcibly brought her behind the house and raped her. This happened while the complainant’s mother was on her way back home together with another person. They were near home when it happened and when they arrived, they saw the suspect running away. They found the victim crying and trying to wipe dust from her clothes. She immediately told them that the suspect had torn her underwear and raped her. The prosecutor similarly closed the case because of “lack of evidence” on the ground that:

The doctor shows no evidence that the complainant was raped and the witnesses said that they did not see the complainant being raped.⁵³⁴

It is clear in the two examples above that although the witnesses did not “see the rape”, the facts as they were testified were both coherent and cogent. These could reasonably amount to circumstantial evidence. The prosecutors should have exploited them to pursue investigations and/or eventually prosecute the cases in court, but instead, they closed the cases. There are many other similar cases that were identified.

⁵³⁰ Statement of witness X, C.13.

⁵³¹ Statements of witnesses X, C.14; Y, C.17; and witness Z, C.21.

⁵³² (Emphasis added) Report on Provisional Closure of File, 25 August 2015, p.6.

⁵³³ Prosecution Case File RONPJ 29628/S1/15/JM/RJ.

⁵³⁴ Report on Provisional Case File Closure, p.2.

Requiring direct evidence and disregarding circumstantial evidence has serious implications in criminal proceedings. Circumstantial evidence is essential because many cases may be solved based entirely on this form of evidence.⁵³⁵ By dismissing this type of evidence, judicial practitioners are creating extensive scope for perpetrators of rape to escape liability. Many rape cases that might be proved are simply being dropped by prosecutors or acquitted by the judges who require direct evidence.

The insistence to rely on *direct* evidence alone is most likely connected to the pervasive suspicion of false rape accusations observed among many legal professionals interviewed (see Chapter 3). Linked to this perception is the sense amongst practitioners that they must protect against innocent people being falsely convicted. Many stated that they are very careful when they handle rape cases. For example, PROSEC1 and JUDGE5 respectively admitted:

When we receive rape cases, we are always very, very cautious in order to avoid prosecuting innocent people.

As false accusations are frequent in rape cases, these cases require extra-caution because if you are not extra-cautious, you may end up convicting innocent men.

It is certainly legitimate to be cautious when handling any serious case to ensure that the evidence is collated properly and evaluated carefully. However, if this caution is excessive it can undermine the fairness of a trial. By seeking absolute certainty and requiring direct evidence only, the legal professionals' caution is likely to obstruct, rather than safeguard, the criminal process. As has been rightly pointed out by Coleridge,

[t]he law does not demand that you should act upon certainties alone...In our lives, in our acts, in our thoughts we do not deal with certainties; we ought to act upon just and reasonable convictions founded upon just and reasonable grounds.⁵³⁶

This idea is applicable in Rwanda as Rwandan evidence law does not require absolute certainty and allows decisions to be based on reasonable grounds. The study indicated that

⁵³⁵ Dennis (2013), p.9.

⁵³⁶ Justice Coleridge, quoted by Bucknil (1953), p.31.

the problem lies in the legal professionals who have created their own rigid rules of evidence. Paradoxically, many of them believed that the problem with prosecuting rape is that “rape is an offence very difficult to prove”, but with little acknowledgment that the profession has curated this difficulty.⁵³⁷ While it is fair to acknowledge that there are some genuine issues of evidence, especially related to the lack of forensic evidence, the conviction that rape can only rarely be proved should be situated in the context of pervasive and erroneous beliefs about the types of evidence that can be used to evidence rape. Not only do rape myths affect the value of certain types of evidence, but much evidence is frequently overlooked because of a mistaken understanding as to what actually constitutes “evidence.”

CONCLUSION

This chapter discussed three important research findings about the provision and interpretation of evidence in rape cases. First, the chapter showed that most legal professionals treat victims’ evidence as unreliable and therefore they systematically dismiss victims’ statements, often as mere “information”. This perception prompted the judicial practitioners to create a *de facto* requirement of corroboration of victims’ evidence. Second, the study found that medical evidence is the form of evidence privileged by prosecutors and judges as capable of corroborating victims’ statements. However, it was revealed that instead of serving usefully as corroborative evidence as believed by the prosecutors and judges, medical evidence can in fact undermine the processing of rape cases because of two common misconceptions about this evidence: (a) medical evidence is unjustifiably considered as superior evidence, rendering other forms of evidence irrelevant, and (b) medical evidence is expected to provide proof of genital or bodily injuries, despite previous research showing that genital or bodily injuries are not a necessary outcome of rape. This injury expectation is especially erroneous because Rwandan law does not require force as the only cause of the lack of consent in the definition of rape.

Third, the chapter also revealed that although circumstantial evidence can legitimately prove rape cases, judicial professionals almost invariably make it irrelevant in cases where such evidence is available. This resulted in the creation of another unjustified *de facto* requirement of *direct* evidence in rape cases. In most instances, practitioners only give

⁵³⁷ This belief was expressed during the interviews by many participants including prosecutors, judges and lawyers.

value to testimonies of the witnesses who “saw the rape” being committed, and ignore other testimonies despite critical evidence provided in those testimonies.

The misapprehension of all these forms of evidence significantly reduces the ability of the criminal justice system to prosecute rape offenders. Typically, only cases with overwhelming medical and *direct* evidence of violence are likely to pass through the legal process and secure conviction. As a result, many rape cases are unjustly dropped, and defendants undeservedly acquitted. This is extremely detrimental to the rights of women to be protected against sexual violence.

The data presented in this chapter has been directly linked to rape myths, particularly the myth of false allegations and the “real rape” myth discussed previously (see Chapter 3 and Chapter 1 respectively). It is these myths that prompted prosecutors and judges to relegate victims’ testimony, to give undue value and weight to particular types of medical evidence, and to require direct evidence only as evidence of rape. The study found that these myths have negative impacts on the legal process beyond these initial findings. The next chapter explores the influence of other misconceptions about victims’ behaviour.

Chapter 5

EXAMINING THE EFFECTS OF VICTIM CHARACTERISTICS AND BEHAVIOUR ON THE OUTCOME OF RAPE CASES

The literature on sexual offences has revealed many causes of the “justice gap” in the legal process for rape. Linked to the biased rules of evidence examined in the previous chapter, another major factor that produces unfair processes in rape cases is the tendency of judicial authorities to hold false beliefs about characteristics and behaviour of a “genuine” rape victim and to focus on these, instead of the defendants’ actions. This chapter aims to explore the extent to which these beliefs effect rape trials in Rwanda. The chapter will analyse the effects of victim conduct before, during and after rape respectively. At every step, it will draw on the broader literature to inform the analysis of the issue in the context of Rwanda.

5.1. VICTIM BEHAVIOUR BEFORE RAPE AND ITS IMPACT ON THE LEGAL PROCESS

1. The chastity requirement in other jurisdictions

Historically, the victim's sexual history has become the focus of many rape trials across jurisdictions.⁵³⁸ In the nineteenth century, common law courts admitted evidence of victim past sexual conduct as relevant to their credibility as witnesses and to the issue of consent.⁵³⁹ It was widely accepted that unchaste women were untruthful and more likely to have consented to sexual intercourse.⁵⁴⁰ This resulted in a rule of practice that women needed to be chaste in order to secure legal address for rape, which Michelle Anderson has termed the "chastity requirement."⁵⁴¹ In this context, the complainant's prior sexual conduct became the centre of attention in rape trials, rather than the acts of the accused.⁵⁴²

It has been argued that the chastity requirement and the admissibility of sexual history evidence, such as prior sexual relations, have contributed to the low conviction rates for rape in a number of jurisdictions.⁵⁴³ For example, Adler's study revealed that complainants' sexual experience significantly influenced the outcome of rape trials in England. She found that conviction was more likely in cases where the complainant was a virgin (ninety-four per cent) and less likely where it was known that she was sexually experienced (forty-eight per cent).⁵⁴⁴ When the victim admitted previous sexual activity with the defendant, he was almost invariably acquitted.⁵⁴⁵

Since the 1970s, the admissibility of victim sexual history evidence began to be challenged in various jurisdictions such as Canada, Australia, the United States and the United Kingdom.⁵⁴⁶ For example, in England and Wales, its harmful effects have been revealed by the Heilbron report published in 1975.⁵⁴⁷ This document exposed the stigmatisation of rape victim-witnesses in court resulting from the focus on their past sexual conduct, and

⁵³⁸ McGlynn, C. (2017), "Rape trials and sexual history evidence: Reforming the law on third-party evidence", *The Journal of Criminal Law*, 81(5): 367–39.

⁵³⁹ Temkin (2002), p.197.

⁵⁴⁰ Temkin, *Ibid*; Berger, V. (1977), "Man's trial, woman's tribulation: Rape cases in the courtroom", *Columbia Law Review*, p.15; Easton, S. (2000), "The use of sexual history evidence in rape trials", Childs, M. and Elisson, L. (eds), *Feminist Perspectives on Evidence*, London, Cavendish, p.169.

⁵⁴¹ Anderson, M.J. (2002), "From chastity requirement to sexuality license: Sexual consent and a new rape shield law", *The George Washington Law Review*, p.53.

⁵⁴² Easton, S. (2000) in Childs and Elisson (eds), p.173.

⁵⁴³ *Ibid*, p.167; Temkin (2002), p.246.

⁵⁴⁴ Adler (1987), p.101.

⁵⁴⁵ *Ibid*, p.91.

⁵⁴⁶ Temkin, J. (1984), "Regulating sexual history evidence: the limits of discretionary legislation", *The International and Comparative Law Quarterly*, 33(4):942-978.

⁵⁴⁷ The Heilbron Committee, Report of the Advisory Group on the Law of Rape Cmnd. 6352 (1975).

questioned the relevance of the practice. It recommended restrictions on admissibility of such evidence.⁵⁴⁸ The criticism was echoed by many scholars in the 1980s, 1990s and onwards.⁵⁴⁹ Since then, two major arguments against sexual history evidence have been advanced in the literature: its irrelevance to the issue of rape and its distressing and humiliating effects on victims.

The lack of relevance of sexual history evidence results from the “twin myths”⁵⁵⁰ underpinning the practice. These are: the belief that sexually experienced women are more likely to consent to intercourse with the defendant, and the conviction that such women are not credible. It is now widely acknowledged that these ideas are erroneous. First, there is no empirical evidence supporting the claim that women with sexual experience are more likely to have consented to intercourse in any particular case than those without such experience.⁵⁵¹ Although it can be admitted that people tend to behave in a usual manner, there is no evidence to support the presumption that a woman who consented previously to X will necessarily do so with Y.⁵⁵² Indeed sexual consent is not indiscriminate; neither is it transferable to other people.⁵⁵³ The following words by Lady Hale can best express this idea:

It is difficult to think of an activity which is more person and situation specific than sexual relations. One does not consent to sex in general. One consents to this act of sex with this person at this time and in this place.⁵⁵⁴

Further, if a woman grants sexual consent to one person at some point, this does not mean that consent is given to that individual at all times and in any circumstances.⁵⁵⁵ Consent is not unlimited in time or independent of circumstances.⁵⁵⁶ Therefore, victim consent must not be inferred from previous consensual intercourse with the defendant.⁵⁵⁷

The other “twin myth” related to women’s lack of credibility has also been widely refuted, as articulated in the following extract:

⁵⁴⁸ Heilbron report, p.16.

⁵⁴⁹ See for example: Temkin (1984); Easton (2000); Adler (1987); Lees (2002); Temkin (2002) and McGlynn (2017).

⁵⁵⁰ See Justice McLachlin in *R. v. Seaboyer*, 26 March 1991, cited in McGlynn (2017), p.369.

⁵⁵¹ Easton (2000), p.174, Lees (1996), p.152.

⁵⁵² Lees, *ibid.*

⁵⁵³ Anderson (2002), p. 54.

⁵⁵⁴ Lady Hale, cited in McGlynn (2017), p.371.

⁵⁵⁵ Adler (1987), p.78.

⁵⁵⁶ Anderson (2002), p. 54.

⁵⁵⁷ *Ibid.*

The idea that a complainant's credibility might be affected by whether she has had other sexual experience is today universally discredited. There is no logical or practical link between a woman's sexual reputation and whether she is a truthful witness.⁵⁵⁸

This belief is again connected to the myth that women are prone to making false allegations of rape, a theme that runs throughout this thesis (see Chapter 3).

The second main argument commonly put forward against the admissibility of sexual history evidence is its distressing and humiliating effects on victim-witnesses. Numerous studies conducted in different jurisdictions since the 1970s have concluded that complainants' cross-examination on their past sexual behaviour is generally degrading and upsetting.⁵⁵⁹ The studies reveal that the vast majority of rape complainants felt it was they who were on trial rather than the defendants.

The victims were routinely asked irrelevant and upsetting questions.⁵⁶⁰ Some examples are the following questions asked to different witnesses during trials: "do you have any boys in Antonio that you go with to dances?"⁵⁶¹ "Had any other boy or man put their private parts in you before?"⁵⁶² "Isn't it true that you have been known to kiss men at public parties?"⁵⁶³ "Isn't it true that you have had sexual intercourse many times before with a number of different men?"⁵⁶⁴ There have also been instances where the complainants have been questioned about whether they "enjoyed" the intercourse,⁵⁶⁵ or asked about the use of contraceptives and gynaecological experience.⁵⁶⁶ Tapper points out that in this context, a victim-witness could be compelled to "defend her whole life" since sexual activity may be frequent.⁵⁶⁷ Sometimes victims were cross-examined by the defendant, causing re-living of the assault.⁵⁶⁸ Easton cites the example of a complainant

⁵⁵⁸ *R. v. Seaboyer*, p.6.

⁵⁵⁹ For example, the Heilbron report; Adler (1987); Lees (1996); Temkin; McGlynn (2017); and Berger (1977).

⁵⁶⁰ See for example Berger; Anderson, Adler.

⁵⁶¹ Berger, p.14, citing *Struna v. People* (1950).

⁵⁶² *Ibid.*

⁵⁶³ Anderson (2002), p.54. The author cites *Satterwhite v. State*, 23 S.W.2d 356, 361 (Tex. Crim. App. 1929).

⁵⁶⁴ *Ibid.*, citing *People v. Biescar*, 275 P. 851, 854 (Cal. Dist. Ct. App. 1929).

⁵⁶⁵ Berger (1977), p.13.

⁵⁶⁶ Adler (1987), p.78.

⁵⁶⁷ Tapper (2010), p.330.

⁵⁶⁸ Easton (2000), in Childs and Elisson (eds), p.168.

who was questioned by the accused for six days on trial in the case of Ralston Edwards in 1996.⁵⁶⁹ The types of questions mentioned above and the way in which the complainants were frequently cross-examined were often exasperating and distressing for the victims.

The criticism of sexual history evidence prompted the adoption of “rape-shield” laws in many jurisdictions such as Canada, the United States, Australia, New Zealand and England and Wales.⁵⁷⁰ These laws restrict admission of evidence related to the complainant’s prior sexual behaviour in order to protect witnesses against unnecessary distress and embarrassment.⁵⁷¹ For example, in England and Wales, the Sexual Offences (Amendment) Act 1976 limited the admissibility of evidence of victim sexual experience with a third party.⁵⁷² Such evidence could be allowed only upon leave given by the judge on application made to him in the absence of the jury, if he was satisfied that it would be unfair to the defendant to refuse the evidence.⁵⁷³ Two decades later, the Youth Justice and Criminal Evidence Act 1999 extended the restriction to evidence of sexual activity with the defendant, but provided a number of exceptions.⁵⁷⁴ In the United States, many jurisdictions opted for the general exclusion of sexual history evidence, subject to some exceptions.⁵⁷⁵ Similar regimes were adopted in Canada and in Australia.⁵⁷⁶

Since these reforms, there has been considerable debate over the validity and efficiency of the “rape-shield” provisions.⁵⁷⁷ Analysis of the legitimacy and effectiveness of these reforms is beyond the scope of the present thesis. However, it is worth noting that these provisions have been severely criticised in the literature, mainly because of their potential to undermine defendants’ rights.⁵⁷⁸

Nonetheless, supporters of the “rape-shield” laws believe that these should be strengthened instead.⁵⁷⁹ They denounce both the loopholes in the texts, which do not

⁵⁶⁹ *Ibid.*

⁵⁷⁰ Temkin (2002).

⁵⁷¹ *Ibid.*

⁵⁷² Sexual Offences Amendment Act 1976, Section 2 (1) and (2).

⁵⁷³ *Ibid.*

⁵⁷⁴ See the Youth Justice and Criminal Evidence Act 1999, Section 41.

⁵⁷⁵ For example, in Michigan, only two exceptions were provided: (a) Evidence of the victim’s past sexual conduct with the actor, and (b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease. Temkin (2002), p.205.

⁵⁷⁶ *Ibid.*

⁵⁷⁷ See more details in McGlynn (2017).

⁵⁷⁸ This issue is discussed very briefly in the section on abolition of the “defence of prostitution” below.

⁵⁷⁹ For example, Adler, McGlynn, Anderson and Temkin.

allow effective protection of the victims and resistance by the legal professionals who exploit these gaps to undermine the changes.⁵⁸⁰ More recently McGlynn has revealed that admission of victim sexual history evidence continues to be an issue in England despite previous legal amendments.⁵⁸¹ She has emphasised that it is still a source of unwarranted humiliation for victims, distracting the courts from their legitimate purpose and inhibiting them from exploiting useful and relevant evidence. She points out that this has had detrimental effects on the integrity of rape trials and has ultimately contributed to the failure to provide justice to rape survivors. McGlynn consequently recommends further law reform to address the problem in courts, and more importantly, to help change societal attitude towards rape.⁵⁸²

Notwithstanding the continuous criticism of the “rape-shield” laws and the judicial resistance to their implementation, it is fair to note that these laws may have improved to some degree the treatment of rape victims in courts.⁵⁸³ Kebbell et al.’s 2007 study on rape complainants’ experience in English courts has revealed that the participants were generally satisfied with their experience.⁵⁸⁴ Although this study was limited (nineteen victim-survivors participated), and did not focus on sexual history evidence, it nevertheless shows that the situation of rape complainants in court may have been ameliorated to some extent. This is because the respondents did not express considerable dissatisfaction with the process, contrary to the previous accounts of the more extreme contention of “judicial rape.”⁵⁸⁵ By contrast, they generally displayed a sense of satisfaction with the criminal justice system. Further empirical studies are needed to further clarify the benefits and limitations of “rape-shield” laws.

These findings from the broader literature will help in the study of the Rwandan context. Informed by them, the analysis will scrutinise instances where Rwandan legal professionals focused on victim characteristics and prior conduct, and examine whether this resulted in biased outcomes.

⁵⁸⁰ *Ibid.*

⁵⁸¹ McGlynn (2017).

⁵⁸² *Ibid.*

⁵⁸³ Kebbell, M.R. et al. (2007), “Rape victims’ experiences of giving evidence in English courts: A survey”, *Psychiatry, Psychology and Law*, 14(1): 111-119.

⁵⁸⁴ *Ibid.*

⁵⁸⁵ For example, Lees (1993).

2. Impact of victim behaviour before rape in Rwandan cases

Similar problems relating to the use of victim sexual history evidence found in other jurisdictions were revealed in the present study. Analysis of the elite interviews as well as prosecutorial and judicial decisions revealed a tendency to dismiss (1) rape complaints where the victim showed sympathy or familiarity towards the assailant before the rape and (2) cases of complainants who allegedly had previous sexual experience with the assailant or other men. These two factors will be analysed in the following sections respectively. Afterwards the practice of the “defence of prostitution” revealed in this study will be explored.

a. Expression of familiarity with the assailant prior to the attack

In their interviews and written decisions, the legal professionals used one recurrent term regarding victim familiarity with the assailant. It is the verb “*kwijyana*.” *Kwijyana* means “to go alone.”⁵⁸⁶ In the study context, the term was used to state that the complainant went freely and willingly to the defendant’s place. *Kwijyana* was often interpreted as evidence of consent to sexual intercourse, or provocation of rape. For example, JUDGE8 stated:

Sometimes you find that the woman went freely to the man’s home. In this situation, you realise that she contributed to the assault.

PROSEC6 confirmed that:

If the woman was raped at the defendant’s place, judges tend to ask why she went freely to visit him knowing that he is single.

LAWYER6 said that “if a woman is raped in the defendant’s house, generally she has some responsibility in the rape.”

This attitude was also revealed in prosecutorial and judicial decisions. For example, in the case of N.B.⁵⁸⁷ the prosecutor decided:

N.B. [the accused] said that he had consensual sexual intercourse with N.C. [the complainant] and that this is shown by the fact that she left her home

⁵⁸⁶ Glosbe, available at <https://glosbe.com/rw>

⁵⁸⁷ Prosecution case file RONPJ 009230/S2/15/BB/UJP.

and went to visit him. He received her at *Nyabugogo*. This coincides with N.C.'s own admission that N.B. called her and they met at *Nyabugogo* then they went to his home. This shows that she was not raped.⁵⁸⁸

This prosecutor assumed that the complainant consented to sex, based solely on the fact that she went voluntarily to the suspect's home. Such assumptions are problematic and feed directly into erroneous stereotypes about the behaviour of women. Moreover, there were no facts in this case file that could suggest the complainant had consented. On the contrary, the file contained information capable of corroborating the accusation of rape. For instance, upon immediate report of the incident to the police, the assailant immediately went into hiding. Further, the forensic medical report showed evidence of genital trauma. Such a report was considered by most prosecutors as credible evidence of rape,⁵⁸⁹ but it was overlooked in this case. This indicates that, for some prosecutors, victim behaviour can prevail over even direct evidence of rape during their evaluation of cases.

Apart from "*kwijyana*", expressing attention or interest towards the accused prior to the assault or sharing drinks with him, was considered as provocation of rape. The following interview quotes illustrate this attitude:

There are cases where the complainant shows a provocative behaviour. For example, when a woman sits close to a man and gives him attention. (JUDGE3)

Rape may sometimes be caused by the victim. For instance, a woman agrees to share [alcoholic] drinks with a man in a bar and attracts him, and then the man is provoked to have sex with her. (JUDGE2)

Such prolific assumptions about the behaviour of complainants, as evidenced in this study, are reflective of a culture in Rwanda that blames women for their own victimisation. By shifting the blame onto victims, men are able to deny responsibility for what is often viewed as innate or primal instincts to have sex with women; whether they are willing participants or not.⁵⁹⁰ Women are imbued with the responsibility to protect themselves against male sexual advances, and those who fail to, or who are perceived to "provoke"

⁵⁸⁸ Report on provisional closure of case file, p.2.

⁵⁸⁹ See Chapter 4 for further discussion of the value attached to medical evidence.

⁵⁹⁰ Brownmiller, (1976).

men into sexually violating them are deemed to be the main cause of that violation. While this belief was still clearly dominant in the Rwandan legal system, it is by no means isolated to this jurisdiction. Brownmiller writing in the 1970s spoke of these patterns of behaviour and systemic beliefs about women as occurring throughout history. These structural and cultural prejudices deny women the freedom to live a life free from the threat of sexual violence. The sharing of a drink with, or giving other people attention (men or women) is part of basic human interaction. If women are expected to avoid other people and to be insensible, then they cannot freely socialise.

Such attitudes must be challenged by evidence. Previous research has revealed that rape is a “pseudosexual act”⁵⁹¹ motivated essentially by factors such as punishment, revenge, power and domination.⁵⁹² In fact, many of the cases analysed in this study included evidence that the rapist’s motive was something other than sexual desire. For example, in *PP v. Nziringirimana* and *Barayagwiza* the defendants inflicted severe cuts on the complainant’s vagina using a razor blade after the rape.⁵⁹³ Mark Walters and Jessica Tumath cite such a heinous act as an example of evidence of gender hostility which should warrant classification of the act as a hate crime in addition to being a sexual offence.⁵⁹⁴ They emphasise the importance of identifying hate motivations present in some sexual assaults driven by gender hostility and suggest to treat these according to their particular gravity. This would contribute to changing gender-biased attitudes towards rape.⁵⁹⁵ Another example is the case of M.J. and E.S.⁵⁹⁶ where the drive of the accused was to punish the victim (a prostitute) for allegedly having infected him with HIV during a previous consensual sexual relationship. Evidence in the case showed that the accused had sworn to punish the woman, and later he hired two other men to help him beat and gang rape her. These actions are evidence of revenge and punishment, not sexual desire, otherwise the accused would have paid for sex and have sexual intercourse alone with her as he had done before.

⁵⁹¹ Groth (1979).

⁵⁹² Le Goaziou (2011).

⁵⁹³ *PP v. Nziringirimana Jean Claude and Barayagwiza Emmanuel*, RP 0076/16/TGI/NGOMA, 25 May 2016.

⁵⁹⁴ Walters, M.A. and Tumath, J. (2014), “Gender ‘hostility’, rape, and the hate crime paradigm”, *The Modern Law Review*, 77(4), p.589.

⁵⁹⁵ *Ibid*, p.596.

⁵⁹⁶ This case is discussed in more detail in the section on the defence of prostitution below.

Beyond the interviews with the justice professionals, the review of the cases further revealed that victim characteristics or behaviour was at the centre of the evaluation of many cases, rather than the evidence of rape. Sometimes the prosecutors and judges openly based their decisions on moral judgments about the complainant. For example, in the trial of *PP v. Nibishaka*⁵⁹⁷ the judge reasoned as follows:

Based on the fact that M.J. [the complainant] went freely in N.J.P. [the defendant]'s home, while they had stopped the relationship aimed at marriage, and that she went there knowing well that the young man was preparing to marry another girl; the court finds that this is an act of provocation aimed at disrupting N.J.P.'s marriage.⁵⁹⁸

This is clearly a subjective judgment of the complainant's actions. The facts cited in this passage do not disprove the accusation of rape, but they influenced the judge's decision to acquit the defendant. Another example is the case of H.V.⁵⁹⁹ where the prosecutor concluded:

There is no evidence that N.D. [the complainant] was raped, for the following reasons:

N.D. stated that on 6 December 2015 while she was coming from hospital, the night fell then she requested to be accommodated by B.J.P. Here a question arises how a woman can request accommodation from a young man. We find that this is problematic. They then went to a bar and she shared drinks with young men and it is her who paid the bill. It is also very confusing how after this she may have been raped... N.D. herself called H.V. [the accused] to come and share drinks. How can it be that H.V. may have raped N.D while they had shared drinks?⁶⁰⁰

This prosecutor's reasoning is clearly contestable. The passage contains moral judgments about the behaviour of the complainant, and does not show any objective evaluation of facts which led him to conclude there was a lack of proof. The prosecutor relied on a

⁵⁹⁷ *PP v. Nibishaka Jean Pierre*, RP 0102/14/TGI/RSZ, 8 August 2014.

⁵⁹⁸ *Ibid.* para 10.

⁵⁹⁹ Prosecution case file RONPJ 009373/S2/15/BB/MA.

⁶⁰⁰ Report on provisional closure of file, 27 February 2016, p.2.

personal assessment of the circumstances from which he assumed that the alleged rape could not have been committed. Whether the complainant shared drinks with the accused and paid the bill cannot in law be a reasonable indication that she consented to have sex with the defendant, or that rape was not plausible in such circumstances. Consent is not defined in terms of someone's prior actions in relation to drinking or paying the bill. It was therefore erroneous of the prosecutor to question how someone could be raped given these facts.

b. Victim past sexual activity

This study revealed that victim past sexual activity can heavily influence the outcome of rape cases. Analysis of case files revealed that many accused were released due to the complainant's previous sexual conduct which was disclosed in medical reports.⁶⁰¹ In these cases, the prosecutors and judges assumed that a victim who was "used to having sex" must have consented to the sexual intercourse at issue and therefore had fabricated the accusation of rape. In addition to disclosure of victim sexual behaviour by forensic medical examiners, allegations of complainants' past sexual activity made by the defendants or their lawyers produced similar effects. For example, in *PP v. Mbarushimana* the court reasoned as follows:

Based on the fact that *Mbarushimana* [the defendant] accepted that he had sexual intercourse with U. [the complainant] and that it was the fifth time or so, the court finds that the intercourse in question was consensual.⁶⁰²

This judge's reasoning reflects the traditional misconception that sexual consent is "temporally unconstrained."⁶⁰³ Anderson points out that it is a misapprehension to believe that sexual consent given to one person at a certain point is without time limit.⁶⁰⁴ Even within marriage, sexual consent is not unlimited. This is a reason why marital rape has been criminalised in many jurisdictions including Rwanda.⁶⁰⁵

⁶⁰¹ See Chapter 4 for more details about revelation of victim sexual history by forensic doctors.

⁶⁰² *PP v. Mbarushimana Emmanuel*, RP 0096/16/TGI/MUS, 23 June 2016, para. 6.

⁶⁰³ Anderson (2002), p.53.

⁶⁰⁴ *Ibid.*

⁶⁰⁵ See Chapter 2.

Victims' past sexual relationships with other person(s) than the accused have also influenced many prosecutorial and judicial decisions. For example, in the case of N.O.⁶⁰⁶ the complainant was pregnant and had been cohabiting with another man prior to the incident. In the prosecutor's assessment of the case, he noted that the complainant was pregnant before the alleged rape and concluded:

This shows that she went to the accused's home while she had already had a prior sexual relationship. Therefore, there is no evidence that the suspect committed the alleged offence.⁶⁰⁷

As in the other cases above, here the prosecutor focused on the complainant's past behaviour rather than the investigation of the rape itself. He concluded there was "no evidence", based on facts that were unrelated to the issue of consent. Clearly, the complainant's pregnancy before the encounter with the alleged rapist was not relevant to the issue of consent; especially as she never imputed the pregnancy to the accused. Such a situation perfectly exemplifies McGlynn's assertion that, by focussing on the victim's character, legal practitioners are often distracted from the primary purpose of the investigation and fail to properly evaluate other relevant evidence.⁶⁰⁸ It also shows that rape complainants viewed as promiscuous are often considered not deserving protection of the law.⁶⁰⁹ Many complaints were simply dismissed because the complainant had previous sexual experience, as if this category of women did not deserve to be protected by the law. One judge, having found that the complainant was "used to having sex", openly concluded "she ha[d] no problem", and acquitted the defendant, as if there was no issue in raping that woman.⁶¹⁰

Notwithstanding the common practice of dismissing cases where the complainant had prior sexual history, in a minority of cases the defendants were convicted despite victim sexual experience. However, even in these cases, prior sexual history evidence remained a prevalent factor in sentencing. For example, in one trial where the complainant had had consensual sexual intercourse with one of the accused before the rape,⁶¹¹ the judge

⁶⁰⁶ Prosecution case file RONPJ 009458/S2/15/JN/NY.J.

⁶⁰⁷ Report on provisional closure of case file, 30 March 2015, p.2.

⁶⁰⁸ McGlynn (2017), p.371.

⁶⁰⁹ Anderson (2002).

⁶¹⁰ *PP v Banyakiri Eric* earlier discussed in Chapter 4.

⁶¹¹ *PP v. Barirushya innocent and Turatsinze Jean d'Amour*, 18 July 2013.

convicted the defendants but showed them excessive sympathy. The judge openly blamed the complainant and insinuated that she should have accepted the sexual intercourse in question. This is how he expressed his attitude:

Based on the fact that it is their first offence, there is no reason why they should serve their sentence in prison especially given that they have been provoked to commit the crime. She [the complainant] went to visit I.T. and when she did not find him she exposed herself to unknown people who bought her drinks until she agreed to have sex with one of them (B.I.) but when B.I. called his friend so that he can also have sex with her the woman refused.⁶¹²

This passage is alarming. It suggests that complainants who have previously “exposed” themselves and who have agreed to sexual intercourse with someone else must have provoked their own victimisation. Such a conclusion shows a disturbing misconception amongst parts of the judiciary that sexual consent is transferable.⁶¹³ Such judicial conclusions have serious implications, not only for the interpretation of rape law, but for the many victims of rape whose experiences of sexual violence are blamed on them.

In summary, the study revealed that victims’ past sexual conduct significantly influenced prosecutors’ and judges’ decisions. This factor, rather than material facts relating to non-consensual sexual activity, was the focus of the decision-makers in a high proportion of cases. Many accused were released or acquitted based on it, regardless of the evidence available in the case file. This tendency reflects a cultural tendency within the Rwandan criminal justice system to subjugate women and to portray rape complainants as sexual predators who aim to entrap men. It is this pervasive belief that has contributed to what I refer to as the “defence of prostitution”, a specific manifestation of the focus on victim behaviour that is particularly prevalent in the Rwandan context.

c. The “defence of prostitution”

(1) “She is a prostitute, so there is no rape”

⁶¹² *Ibid*, para. 17.

⁶¹³ McGlynn (2017); Anderson (2002).

In many jurisdictions, prostitutes have been historically considered as “unrapeable.”⁶¹⁴ In England, for example, rape of a prostitute was recognised in the 18th century.⁶¹⁵ However, Sullivan’s study revealed that despite this, the judicial practice was that men were not prosecuted or convicted for rape of a sex worker. It is only since the 1980s and 1990s in the UK, Australia, Canada and New Zealand that prosecution practices started to change.⁶¹⁶

In Rwanda the law allows prosecution of rape of a prostitute but similar to the situation before the 1980s in England and other commonwealth countries, the practice remains one of resisting prosecution of defendants accused of raping sex workers. Interview data, as well as case review analysis, revealed a strong tendency towards exonerating rape defendants based on allegations of victim prostitution. Perhaps even more concerning was that the elite interviews also revealed that defendants and their lawyers routinely assert that the victim is “*indaya*” (a prostitute) to show that the alleged rape did not take place, regardless of whether the complainant had any history of sex work. In many cases they abstained from expressly using the term “*indaya*” and simply stated that the accusation was motivated by non-payment of the price of sex.

LAWYER4 admitted:

We frequently advance that the complainant is a prostitute, that she is used to having sex voluntarily and that consequently there was no rape.

Many participants thought that suspicion of victim prostitution sometimes caused silent hostility towards the complainant and influenced the decision to acquit the defendants:

Allegations that the complainant is a prostitute affects judicial decisions in rape cases. Sometimes the judges show antipathy towards the complainant and alleviate the responsibility of the defendants without stating it openly. (PROSEC1)

⁶¹⁴ Sullivan, B. (2007), “Rape, Prostitution and Consent”, *Australian and New Zealand Journal of Criminology*, 40(2):127-142.

⁶¹⁵ *Ibid.*

⁶¹⁶ *Ibid.*

In our society prostitutes are considered as marginal people. If the complainant is a prostitute, the judge says to himself that a prostitute cannot be raped. (LAWYER7)

Some prosecutors thought that the judges do not expressly rely on victim prostitution to acquit the defendant but they often find any loophole in the case to justify their decision.

If the complainant is married, it is difficult to acquit the defendant. If she is unmarried and used to having sex, and the defendant says she is a prostitute: 'I am used to having sex with her but this time I failed to pay', this type of argument influences the judges and if there is any trivial aspect in the file that can potentially cause a slight doubt, the judges use it to acquit the defendant. (PROSEC9)

In most cases, actual evidence of prostitution was not provided to support the defence's allegation, as explained below. The "defence" was used even in situations where it was patently clear that the rape did not take place in the context of sex work. I noted this in a number of trials during court observations. For example, during the hearing of *Nyabyenda*,⁶¹⁷ it was raised in the following circumstances: the prosecution case was that the defendant broke the door of the complainant's house at night while she was sleeping with her children, then he raped her and inflicted serious injuries on the victim. The defendant explained that he failed to pay the totality of the money agreed, and that this was the reason why she accused him. It was clear that this was not a case of disagreement between prostitute and client over the price of sex, based on the description of the circumstances given by the prosecutor and the judge's decision.

The legal professionals were asked whether and how evidence of victim prostitution was provided in court to prove the allegations. Most admitted that these were often unproven assertions made against the complainant. For instance, LAWYER6 recognised that "victim prostitution is frequently invoked without evidence." JUDGE8 also acknowledged that: "They [the defendants and their lawyers] generally show that the complainant lives in a place commonly known to accommodate prostitutes."

⁶¹⁷ Court observation conducted on 14 July 2016, *PP v. Nyabyenda*, Tribunal of First Instance of Karongi.

These comments were in line with the findings in Chapter 3 that revealed how defence lawyers often intentionally feed others' false perceptions in order to exonerate defendants. For example, LAWYER4, who was particularly willing to admit defence malpractices throughout the interview, was asked if he and his colleagues provide evidence of victim prostitution when they make such allegations in court. He replied without hesitation: "Never. We only pick here or there anything to argue that she is a prostitute. Generally, they [the victims] are not prostitutes." Such comments illustrate that there is an issue of professional ethics that must be addressed.

Prosecutors and judges are also responsible for allowing this unfair practice to take place. Asked if they take steps against lawyers who display such behaviour, most judges responded that they never sanction the attorneys who allege victim prostitution because it is their right to defend their clients. For example, JUDGE3 stated:

The accused has the right to defend himself, so we let him or his lawyer make such statements. They frequently allege that the victim is a prostitute but it is generally in the absence of the victim. (JUDGE3)

In spite of this judge's view, the complainant's nonattendance does not justify such conduct. Unsubstantiated allegations of this type have devastating effects on the integrity of rape trials in Rwanda. Whether the victim is present or not, such allegations clearly influence the judge's decision, while additionally re-victimising victims and tarnishing their reputation before the public.

Only a few judges stated that they discourage the practice but they never take serious measures against the defence lawyers concerned.

Most times we only give a warning to the defendant or the defence lawyer who maliciously alleges victim prostitution, or we ask them to withdraw their declaration. (JUDGE9)

This seems insufficient, especially given that withdrawal of a statement may not guarantee the removal of its effects particularly on the victim if she is present, on the public and even on the judges. There is consequently a need for more serious measures to prevent victim defamation and humiliation. These measures should be mandatory for all the participants

of the criminal justice process because in some instances the judges themselves raised issues of victim prostitution (see below).

Although evidence supporting an allegation of victim prostitution was generally not provided, it was in some cases. For example, on rare occasions where the victim appeared to give testimony in court, defence lawyers sometimes used subtle means during cross-examination to show from the witness's answers that she is a prostitute. LAWYER7, who disapproved of this practice, stated:

They [defence lawyers] merely allege that the complainant is a prostitute without any evidence but sometimes they induce her to confess facts which show that she is a sex worker.

Some of the cases studied contained witness statements, victim confessions, and other reports confirming victim prostitution. Such evidence was fatal for the complainant, as revealed in the examples below.

(2) Rape complaints filed by prostitutes

The elite interviewees were unanimous in recognising that non-consensual sexual intercourse with a woman is rape, whether the person abused is a prostitute or not. This appeared to be a simple declaration of legal opinion rather than a statement of facts because the study revealed that the reality was often the opposite. In practice, the cases of victims known to be prostitutes resulted invariably in disqualification of the complaints irrespective of the evidence contained in the case files. This discrepancy reveals the extent to which prosecutors and judges' bias against this category of rape complainants is overriding, as demonstrated in the following cases.

In the case of M.J. and E.S.⁶¹⁸ it was clear from various testimonies, including the complainant's statement, that she was a prostitute. She previously had sexual intercourse with M.J. who later suspected that she infected him with HIV. Witnesses stated that M.J. swore to them he would kill her in retaliation. Days later, she complained that M.J. brought her into a bush where M.J. together with E.S. and another unidentified person tied her up and raped her. Witnesses confirmed that M.J. brought the woman from the

⁶¹⁸ Prosecution case file RONPJ 05185/S3/14/NR/ND.

neighbourhood at the time of the alleged rape. Another witness confirmed that he found the complainant near the crime scene still tied up and he untied her. He added that she had wounds on her mouth. This was confirmed by the medical report. The police also seized the ropes used to truss up the victim.

The prosecutor decided to drop this case, giving the following dubious reasoning:

There is no evidence because M.J. [the accused] and N.D. [the complainant] both stated that they were friends and have had sex before and that N.D. is a prostitute. He cannot conspire against the complainant whereas he used to have consensual sex with her.⁶¹⁹

This prosecutor's written decision does not withstand critical scrutiny. First, the assumption that N.D. could not conspire with other people to abuse N.D. simply because they previously had sexual intercourse is erroneous, since this fact does not reasonably exclude the possibility of conspiracy. Second, the claim that there is "no evidence" flies directly in the face of the material facts as presented in this case. Whether the complainant is a prostitute and had a sexual relationship with the accused before cannot on any factual basis explain a lack of evidence. The real matters of evidence were the complainant's and suspects' testimonies, the ropes seized, the complainant's injury, and the statements of the witnesses who saw the accused moving away with the complainant and those who heard him swearing that he would kill her. This prosecutor seemingly overlooked all these relevant facts and concluded there was "no evidence." Based on all this, it is highly likely that the underlying reason for dropping this case was that the complainant was a prostitute, rather than there being "no evidence."

This case is another illustration that victim character is given more weight in the evaluation of the cases than the evidentiary matters at hand. The evidence shown above could have been exploited by the prosecutor to pursue the case but it was simply disregarded because of the complainant's status.

The prosecutor took another unusual and arbitrary decision in this case. She astonishingly went as far as to destroy some evidence, by burning without justification the ropes made

⁶¹⁹ Report on provisional closure of case file, 25 February 2014, p.2.

from the victim's clothes used to tie her up during the rape.⁶²⁰ This action lacks any legal basis because material evidence are normally destroyed during investigation if they are perishable or dangerous to store,⁶²¹ which was not the case here. Moreover, the ropes could be needed in court although the case was closed because the victim still had the right to initiate private prosecution, in which case the prosecutor would be obliged to participate in the trial and produce the evidence collected during investigation.⁶²² Based on the fact that this prosecutor's action had no legal basis and that she did not give any justification in her official report on destruction of evidence, it can be suspected that she was driven by what some interviewees called "silent hostility" towards rape complainants allegedly prostitutes (see quotes above). The destruction of evidence in this case is a serious professional misconduct, but it is unclear from the file whether the prosecutor was held accountable.

In another case, the court openly cited victim prostitution among the reasons to acquit the defendant:

Based on the fact that U.J. [the complainant] is a prostitute and that she is now in detention for being found having sexual intercourse in the street at night...

The court finds that the evidence produced by the prosecution is insufficient.⁶²³

Here again it is clear that the complainant's status as a prostitute is not relevant to the issue of evidence of non-consent. Nevertheless, the court relied on it to conclude the evidence was "insufficient."

The military prosecutor appealed against this judgment. One of the grounds for appeal was that victim prostitution should not lead to acquittal of the defendant because prostitutes are as capable of being raped as other women. Unlike the first court, the Military High Court avoided referring openly to the profession of the complainant but this played an important role in its decision to confirm the first judgment. This is because one

⁶²⁰ See report on destruction of seized objects, 16 April 2016.

⁶²¹ Article 30, Code of Criminal Procedure 2013.

⁶²² Article 144, *Ibid*.

⁶²³ *PP v. Habarurema Claude*, RP 0270/11/TM, 24 October 2011, para 12-13.

key testimony was dismissed on the ground that the witness (G.E.) might have had a promiscuous relationship with the complainant known to be a prostitute. G.E.'s evidence was that he saw the defendant forcibly pulling the complainant to the direction of the crime scene, and heard her crying.⁶²⁴ The court asked another witness called H.I. what was the *usual behaviour* of the complainant. This question suggests that the court wanted to confirm if she was a prostitute. H.I. replied it is said in the neighbourhood that she is a prostitute and that she is used to sleeping with Ugandans. On this basis, the court concluded that the complainant was a friend to the Ugandans, including the key eyewitness G.E. (G.E. was Ugandan). It consequently dismissed G.E.'s testimony.

This judgment denied any credibility to the key witness simply because he probably had an unconfirmed relationship with the complainant said to be a prostitute. This is not a valid reason to dismiss otherwise important testimony. It exemplifies the assertions of some interviewees cited above, that the judges often look for *any* excuse to justify the decision to acquit the defendant when the complainant is a prostitute.

(3) The case for abolishing the “defence of prostitution”

There are three main arguments for abolition of the *de facto* “defence of prostitution.” First, as has been successfully defended in many other jurisdictions, evidence of victim sexual experience (including prostitution) is irrelevant to the issue of whether the complainant was raped or not. Moreover, the law does not discriminate between women protected against rape as all women, including prostitutes and sexually active women have the same legal protection against sexual violence.

Second, the “defence of prostitution” is a major obstacle to victim participation in the legal process. Chapter 3 of this thesis advocated for greater victim involvement in the criminal justice process, after it was revealed that rape victims very rarely appeared in Rwandan courts to give evidence. Victim participation in the legal process will be counter-productive if there is no conducive environment allowing them to have a voice. Several elite interviewees revealed that on the rare occasions where the complainants testified in court or claimed damages, they were humiliated and distressed to the point that many

⁶²⁴ *PP v. Habarurema Claude*, RPA 0146/011/HCM, 21 February 2012, para 9.

cried and failed to pursue their testimony. The main reason being that they were called prostitutes or said to be “used to having sex.”

This *de facto* “defence” proved to be capable of affecting any woman complaining of rape, including prostitutes and other women with past sexual experience as well as chaste women, since it was revealed that the allegations of prostitution were often made without evidence and with impunity. This “defence” is in fact extremely harmful to complainants. Indeed, PROSEC2 was right to say that it is “a terrible weapon against rape victims.”

Third, the “defence of prostitution” serves no legitimate purpose. According to most of the elite interviewees, the main reason for accepting this practice is the protection of defendants’ right to a fair trial (see above). Nevertheless, although this “defence” led to the release and acquittal of many accused persons, this benefit for defendants is not fair because it derives from the decision-makers bias against female victims. Such an illegitimate advantage cannot be a justification for maintaining the practice. If the defendants lose this unjust opportunity, their defence rights will not be affected because these are meant to ensure a fair, not an unfair trial.

In other jurisdictions, the issue of whether exclusion of sexual history evidence violates defendants’ rights has been raised in courts. A case in point is *Oyston v. United Kingdom*.⁶²⁵ The Court of Appeal in the UK refused to admit evidence of a witness who had had a previous sexual relationship with the complainant. The evidence was meant to prove that she was not as vulnerable as she claimed to be. The defendant brought the case to the European Court of Human Rights arguing that this refusal denied him the right to a fair trial and equality of arms. The European Court found that in this case the Court of Appeal had given every opportunity to the applicant to defend himself and had found the evidence in question irrelevant and unable to render his conviction unsafe. It unanimously rejected the claim and declared the application inadmissible.⁶²⁶

This decision is significant but it is specific to that particular case and does not lay down a general principle. Despite this ruling, there is a need for some caution because there may

⁶²⁵ See *Oyston v. United Kingdom*, European Court of Human Rights, 22 January 2002.

⁶²⁶ *Ibid*, p.11.

be exceptional situations where sexual history evidence can be relevant to a rape trial.⁶²⁷ In such cases, it can be prejudicial for defendants to exclude the evidence.⁶²⁸ For instance, in *Seaboyer*,⁶²⁹ the defendant argued that evidence of the complainant's previous sexual conduct could clarify the cause of her bruises and other condition presented in court as evidence of rape. In this case, the Supreme Court (Canada) found that the provisions excluding sexual history evidence infringed the right to a fair trial principally on the ground that they had the potential to reject evidence which may be relevant to the defence.

In this light, although there is an urgent need for abolition of the *de facto* "defence of prostitution" in Rwanda, this change requires very careful consideration to avoid the risk of unfairness to defendants. Moreover, it is important to note that legal reforms will not be sufficient to resolve the issue. This is because the underlying cause of this problem is the attitude towards rape victims. As revealed above, the legal practitioners were conscious of the law but they failed to implement it in many cases because of their bias against the complainants. Therefore, education, judicial training and a change of attitude are a prerequisite for fairer rape trials.

In summary, this section has demonstrated that victim past sexual behaviour is an important factor in prosecutorial and judicial decision-making in rape cases in Rwanda. Many defendants were discharged based on the victim's past sexual conduct irrespective of the evidence against them and regardless of the irrelevance of the victim's sexual history. This was due to prosecutors' and judges' bias against women who were allegedly sexually active. The practice is extremely problematic, resulting in significant numbers of unfair acquittals. There is clearly an urgent need for both legislative and cultural change to prevent further prejudice to rape victims. Before exploring how these changes might be brought about, the next section will analyse the effects of victim behaviour during rape.

5.2. VICTIM BEHAVIOUR DURING THE ASSAULT

⁶²⁷ Temkin (2002), p.224.

⁶²⁸ *Ibid.*

⁶²⁹ *R. v. Seaboyer*, 26 March 1991.

The literature on rape reveals traditional public and legal expectations in various jurisdictions that a woman victim of rape must physically resist the attack to ensure that she did not consent to the sexual intercourse.⁶³⁰ This section begins with a discussion of this requirement and its implications as revealed in the literature before analysing the issue in the legal process for rape in Rwanda.

1. The resistance requirement in the broader literature

Rape laws in many jurisdictions have traditionally required that a victim of rape must resist physically to prove use of force by the assailant and her non-consent to the intercourse.⁶³¹ At common law, in the US for example, the victim needed to resist to the utmost of her physical ability for the offence of rape to be established.⁶³² The following stance of the Supreme Court of Wisconsin is an illustration of this requirement:

Not only must there be entire absence of mental consent or assent, but there must be the most vehement exercise of every physical means or faculty within the woman's power to resist the penetration of her person, and this must be shown to persist until the offence is consummated.⁶³³

Research has revealed that the requirement of physical resistance disregards various ways in which women express non-consent and resist rape in real-life.⁶³⁴ Resistance may take several other forms than physical struggle but these are not often recognised.⁶³⁵ Randall calls this misunderstanding by the legal professionals a "psychological illiteracy in law."⁶³⁶ She emphasises the need to acknowledge that rape victims' resistance strategies are "complicated, varied, creative, often subtle, and always context-specific."⁶³⁷

Bucher and Manasse's study on acquaintance rape has revealed that only 18.7 per cent of their sample denied consent by physical resistance while forty-nine per cent expressed

⁶³⁰See Anderson, M. (2010), "Diminishing the legal impact of negative social attitudes toward acquaintance rape victims", *New Criminal Law Review: An International and Interdisciplinary Journal*, (13)4, p.653.

⁶³¹Anderson, M. (2010), "Diminishing the legal impact of negative social attitudes toward acquaintance rape victims", *New Criminal Law Review: An International and Interdisciplinary Journal*, (13)4, p.653.

⁶³²*Ibid.*

⁶³³*Brown v. State*, 106 N.W. 536, 538 (Wis. 1906), cited in Estrich, S. (1987), *Real Rape*, Harvard University Press, p.30.

⁶³⁴Bucher, J. and Manasse, M. (2011), "When screams are not released: A study of communication and consent in acquaintance rape situations", *Women and Criminal Justice*, 21(2):123-140.

⁶³⁵Randall, M. (2010), "Sexual assault law, credibility, and 'ideal victims': Consent, resistance, and victim blaming", *Canadian Journal of Women and the Law*, 22(2): p.420.

⁶³⁶*Ibid.*, p.398.

⁶³⁷*Ibid.*, p.422.

non-consent verbally. Among these, only fifteen per cent objected by screaming. Most opposed the act by saying “no” repeatedly and some said it only once.⁶³⁸ Forty-two per cent did not resist verbally or physically in spite of their lack of consent.⁶³⁹

Various other studies have revealed that the absence of any physical or verbal resistance may stem from uncontrolled factors or sometimes be deliberate. A victim may intentionally abstain from resisting despite being unwilling to have sexual intercourse for many reasons such as fear of death or injury.⁶⁴⁰ Such a victim response is often referred to in the legal literature as submission. It has been widely emphasised that submission is not consent despite its appearance. A victim may also “freeze” and be unable to offer any resistance. Bucher and Manasse cite the following examples of “freezing” extracted from various victims’ accounts:

He began kissing my neck and breast and I froze...my body froze...I froze, his height and weight, I just froze...I felt like I could not move and was frozen during it...My heart was racing, and I was screaming so loud in my head...my body was frozen and I couldn’t yell out...He threw me on the couch and I couldn’t move. I just laid there...I wanted to scream but nothing came out.⁶⁴¹

Psychologists have attempted to explain victim “freezing-up” using the concept of “tonic immobility” experienced by some animals under overwhelming attack. Tonic immobility is defined as a state of uncontrolled freezing or deep motor inhibition caused by fear and restraint.⁶⁴² It implies a sense of inescapability and is characterised by a motionless position, insensitivity to pain, loss of vocal ability, unfocussed gaze and shaking.⁶⁴³ This state is normally found in species such as insects, fish, reptiles, mammals and primates.⁶⁴⁴

⁶³⁸ Bucher and Manasse (2011), p.130.

⁶³⁹ *Ibid.*

⁶⁴⁰ Lees (1996).

⁶⁴¹ Bucher and Manasse (2011), p.133.

⁶⁴² Suarez, S.D. and Gallup, G.G. (1979), “Tonic immobility as a response to rape in humans: A theoretical note”, *The Psychological Record*, 29(3), p.315; Fuse’, T. et al. (2007), “Factor structure of the tonic immobility scale in female sexual assault survivors: An exploratory and confirmatory factor analysis”, *Journal of Anxiety Disorder*, 21:265–83.

⁶⁴³ Bovin, M.J. et al. (2008), “Tonic immobility mediates the influence of peritraumatic fear and perceived inescapability on posttraumatic stress symptom severity among sexual assault survivors”, *Journal of Traumatic Stress*, 21(4), p.402; Moller, A. et al. (2017), “Tonic immobility during sexual assault – a common reaction predicting post-traumatic stress disorder and severe depression”, *Acta Obstetrica et Gynecologica Scandinavica* 96, p.392.

⁶⁴⁴ Suarez and Gallup (1979), p.315, citing Ratner, 1967.

It has been argued that human victims of traumatic stress may experience tonic immobility as well.⁶⁴⁵

A number of studies have revealed that tonic immobility can happen to humans during sexual assault. TeBockhorst's research on the behaviour of seven women who experienced immobility due to sexual assault found strong similarities with tonic immobility.⁶⁴⁶ She found the following in the victims' experience: Shock, fear, profound desire to avoid eye contact with the attacker, moments of eye closure, loss of vocal ability, incapacity to command body movements, urge to run away, lack of sensation, confusion in the immediate completion of the attack, slow recovery of body movement control and tremor.⁶⁴⁷ Suarez and Gallup analysed various reports of rape-induced paralysis and found that this is analogous with tonic immobility.⁶⁴⁸ Rape-induced paralysis is the concept commonly used to describe a reaction of motionlessness found in victims of rape.⁶⁴⁹ Marx et al. also studied the literature on rape victims' conduct and reached a similar conclusion.⁶⁵⁰ Interestingly, they further point out that rapists also often respond to victims' behaviour as some animal predators react to their prey.⁶⁵¹

Various research statistics have revealed that tonic immobility is frequent in rape victims. In their empirical study on a sample of 298 women, Moller et al. found that seventy per cent reported significant immobility and forty-eight per cent experienced extreme immobility during the attack.⁶⁵² They reported previous studies that have also revealed that the incidence of tonic immobility in sexual assault victims was relatively high: thirty-

⁶⁴⁵ Volchan, E. et al. (2001), "Is there tonic immobility in humans? Biological evidence from victims of traumatic stress", *Biological Psychology* 88:13-19; Marx, B.P. et al. (2008), "Tonic immobility as an evolved predator defense: Implications for sexual assault survivors", *Clinical Psychology: Science and Practice*, 15 (1); Suarez and Gallup (1979). The latter note reports of humans "frozen with fear" and soldiers inhibited by "shell shock" in fighting. They also cite the account of an explorer who fell into inertia and analgesia upon attack by a lion (p.317). Marx et al. cited the study of Johnson (1984) which found instances of passengers frozen during plane crash (p.81).

⁶⁴⁶ TeBockhorst, S.F. (2012), *I Still Have to Overcome Just Being Captured Inside Myself: The Experience and Meaning of Peritraumatic Tonic Immobility among Survivors of Sexual Violence*, ProQuest Dissertations Publishing.

⁶⁴⁷ *Ibid.*

⁶⁴⁸ Suarez and Gallup.

⁶⁴⁹ Fuse' et al. (2007), "Factor structure of the tonic immobility scale in female sexual assault survivors: An exploratory and confirmatory factor analysis", *Journal of Anxiety Disorders*, 21, p.267.

⁶⁵⁰ Marx et al. (2008).

⁶⁵¹ *Ibid.*, p.79. The authors note that some rapists react with extreme anger to victims' resistance while others need victims to struggle in order to commit the rape. Suarez and Gallup suggest that such behaviour is similar to some animal predators that may be disinterested in unmoving preys. They hypothesise that victim's immobility during sexual assault may be an unconscious defence mechanism that serves to prevent sexual arousal of the rapist and avoid the rape, or reduce the harm that would result from beating, or allow the victim's escape if the rapist is distracted (p.318).

⁶⁵² Moller et al. (2017), p.393.

seven, forty-two and fifty-two per cent.⁶⁵³ However, Fuse' et al have specified that the proportion of the victims who experienced extreme immobility was ten to thirteen per cent.⁶⁵⁴ Although there is no agreement on the prevalence of tonic immobility in victims of sexual assault, these studies show that it is nevertheless likely to be a common reaction. This finding should inform the legal authorities who must appreciate that sometimes the lack of victim resistance may be a natural biological response to the assault rather than an indication of consent.⁶⁵⁵

In summary, contrary to pervasive traditional legal and social expectations, it has been established that women do not always physically express dissent to unwanted sexual intercourse, and many communicate non-consent by various means such as verbal resistance, while others simply fail to resist either verbally or physically as they freeze with fear. This shows the inadequacy of the resistance requirement to establish the lack of consent.

In response to this issue, feminist scholars have developed a number of models of consent over the last four decades with the view to improving concepts that can better protect women's sexual autonomy. An example of these is the "no means no" model. This model aims at rejecting the requirement of victim physical resistance and affirming the value of a woman's verbal response to sexual advances. It maintains that if a woman says "no" to sexual propositions by a man, it must be understood as such; therefore if the defendant disregarded the woman's verbal objection and proceeded with the sexual intercourse, rape must be established despite the absence of physical resistance.⁶⁵⁶ This model has been criticised for not addressing the risk of misinterpretation of the victim's passivity because if the victim fails to object for any reason, this silence can be interpreted as consent while it may be genuinely caused by a number of other factors such as disorientation, confusion or fear.⁶⁵⁷ With respect to tonic immobility explained above, the

⁶⁵³ Moller et al. cited the following respectively: Galliano G. Et al. (1993), "Victim reactions during rape/sexual assault: A preliminary study of the immobility response and its correlates", *Journal of Interpersonal Violence*, 8:109–14; Fuse', T. et al; Heidt, J.M. et al. (2005), "Tonic immobility and childhood sexual abuse: A preliminary report evaluating the sequela of rape-induced paralysis", *Behaviour Research and Therapy*, 43:1157–71.

⁶⁵⁴ Fuse' et al. (2007), p.278.

⁶⁵⁵ Moller et al. (2017).

⁶⁵⁶ Anderson, M. (2005), "Negotiating sex", *Southern California Law Review*, 78.

⁶⁵⁷ Schulhofer, 269.

model cannot protect a woman affected by this condition because she is unable to say “no.”

The “affirmative consent” model⁶⁵⁸ attempts to rectify some weaknesses of the “no means no model.” According to the affirmative consent model, consent will be deemed present if the woman positively stated that she wanted to have sexual intercourse, or showed through “unambiguous body language” that she desired to engage in such activity.⁶⁵⁹ This model can address the issue of a frozen victim. The absence of a positive response from the frozen victim may confirm her lack of consent. However, the model has also been criticised for a number of reasons, including the risk of inferring sexual consent from a woman’s erotic conduct.⁶⁶⁰

In order to address the weaknesses of the previous two models, other models have been developed, such as the “communicative sexuality” model⁶⁶¹ and the “negotiation model.”⁶⁶² These promote communication between the two partners, to ensure that both agree to the sexual intercourse, and the absence of communication should be an indication of a lack of consent. Another related model is the “freedom to negotiate” model.⁶⁶³ It is proposed as an alternative to consent and advocates for recognition of the importance of the surrounding circumstance of sexual negotiation, which must be free in order to ensure the legitimacy of the resulting sexual encounter.⁶⁶⁴ Finally, the “coercive circumstances” model adopted by the International Criminal Tribunal for Rwanda in *Akayezu*, suggests that coercion does not require exercise of physical force and may be inherent in certain circumstances, such as armed conflict or the military presence.⁶⁶⁵

All these models have their strengths and weaknesses but they present progressive ideas about sexual autonomy which may improve the understanding of sexual consent.⁶⁶⁶ Some

⁶⁵⁸ It is also referred to by the motto “only yes means yes” or “no does not mean yes; silence does not mean yes; only yes means yes.” Mclvor, C. (2017), “Exploring and sharing strategies for staging affirmative sexual consent: 100 shades of grey and beyond”, *Theatre topics* 27(2):137-149; Graybill, R. (2017), “Critiquing the discourse of consent”, *Journal of Feminist Studies in Religion*, 33(1): 175–176.

⁶⁵⁹ *Ibid*, p.272.

⁶⁶⁰ Anderson (2005), p.1414.

⁶⁶¹ Lois Pineau (1989), “Date Rape: A Feminist Analysis”, 8(2) *Law and Philosophy*, 217.

⁶⁶² Anderson (2005).

⁶⁶³ Palmer, T.V. (2017), “Distinguishing sex from sexual violation: Consent, negotiation and freedom to negotiate.” In Reed, A. et al. (eds.) *Consent: Domestic and Comparative Perspectives. Substantive Issues in Criminal Law*, Routledge, Oxon, pp. 9-24.

⁶⁶⁴ *Ibid*.

⁶⁶⁵ *The Prosecutor v. Jean-Paul Akayezu*, ICTR-96-4-T, Trial Chamber 1, 2 September 1998. Para 688.

⁶⁶⁶ For more details, see in particular Anderson (2005) and Palmer (2017).

of the above ideas have contributed to (or sometimes been prompted by) changes of legislation in various countries, aimed at protecting women's sexual autonomy in a more meaningful way. All this reinforces the assertion that the resistance requirement is inadequate to establish rape.

2. The resistance requirement in the prosecution of rape in Rwanda

Under Rwandan law consent does not require physical resistance, as explained in Chapter 2. Despite this, the study revealed a persistent application of the resistance requirement in Rwandan judicial practice. This finding is based on the review of case files, as well as analysis of the interviews with the legal practitioners. For instance, the vast majority of the elite participants stated categorically that victim resistance during the assault is essential to establish rape. One interviewee, JUDGE4, simply stated that "without victim resistance, [they] do not consider rape." In dismissing cases where the victim did not resist, some were concerned that evidence of force used by the assailant was difficult to find in such cases. Many others merely claimed that the absence of resistance was indicative of victim consent. For example, PROSEC9 stated that:

When the complainant is adult and she did not resist we immediately consider that she consented and that she made the accusation of rape because of some other misunderstanding. (PROSEC9)

LAWYER5 similarly noted:

In cases where the complainant did not resist it is considered that she has consented especially if the complainant is an adult. (LAWYER5)

Commenting on the issue, one female judge laughed and exclaimed:

"If the woman does not resist, for example she does not scream or attempt to fight, then it means that she consented, especially given that Rwandan women do not say expressly 'yes' to men's sexual advances" (JUDGE7)

Such comments illustrate the common belief that silence means consent. As we have seen above, such beliefs can carry damaging implications for victims of rape.

From the elite interviewees' comments it was clear that they meant by resistance either a physical struggle or at least a loud scream. They conceded that in some exceptional cases it could be understandable that the victim did not resist, such as cases of persons with cognitive impairments or very old and weak women. PROSEC1 gave the following example:

I remember the case of a very old woman severely injured by the defendant. The police asked her why she did not at least bite him. She replied that she had no teeth. The court convicted him.

Analysis of case files also showed that prosecutors' and judges' tendency in cases of absence of victim resistance was to conclude that the rape did not occur. For example, in *PP v. Byararangiye* the complainant did not scream, so the court reasoned as follows: "What happened is a drama because an adult person cannot be raped and fail to scream."⁶⁶⁷

The danger of such an understanding is that when a victim is unable to scream or chooses to submit after realising that it is the best option for her in order to survive or sustain less injury, any reports of rape are likely to be dismissed. Further evidence of this finding was found in multiple case files. For example, in the case of N.J.⁶⁶⁸ the complainant was very sick and was being treated by a doctor who allegedly raped her during the treatment while her mother was waiting outside the treatment room. Asked if she screamed, the woman answered that she attempted to but her voice could not be released because of her condition. In spite of this, the prosecutor concluded: "If she had been raped, she would have screamed and her mother who was nearby would have helped her."⁶⁶⁹ The case was consequently dropped. In another case the complainant stated that she could not scream as she was threatened by the assailant (witnesses confirmed that the suspect was armed with a knife), yet the judge noted that "...it is not understandable that she was raped while she did not call for help."⁶⁷⁰

In many cases prosecutors and judges additionally expected rape victims to fight with their utmost energy to prevent the intercourse before it could be accepted that they did not

⁶⁶⁷ *PP v. Byararangiye Leonard*, 30 October 2014, para. 8.

⁶⁶⁸ Prosecution case file RONPJ 54590/S1/MD/MOB.

⁶⁶⁹ Report on provisional closure of case file, 21 September 2015, para. 7.

⁶⁷⁰ *PP v. Banyakiri Eric*, RP 0197/14/TGI/HYE, 30 September 2014, para. 9.

consent to the sexual conduct. They also expected that the resistance should be sustained throughout the duration of the attack, similar to the decision of the Supreme Court of Wisconsin in 1906 quoted above. A case in point is *PP v. Ntahomvukiye*.⁶⁷¹ In this judgment, the court decided that the sexual intercourse in question “was consensual” for a number of reasons, including that:

Ntahomvukiye had enough time to put on condoms. The first was torn down and he found more time to put on a second one while she was looking on.⁶⁷²

In a similar case, one prosecutor dismissed the complaint because it was “not understandable that he [the accused] could find time to put on a condom.”⁶⁷³ In another case, the prosecutor noted:

She never screamed. In addition, she stated that he raped her two times, which is impossible because after the first rape she would have tried to flee.⁶⁷⁴

According to this understanding, the victims were supposed to permanently resist the assault. This interpretation of non-consent does not conform to the reality of rape, as it has been established that not all rape victims physically resist the attack (see discussion above). Further, there is no evidence that those who do struggle to prevent the rape fight persistently from the beginning to the end of the assault. On the contrary, empirical evidence shows that victims may resist but submit out of exhaustion or discouragement.⁶⁷⁵ These examples also reveal the lack of awareness that a rape victim may be in a state of powerlessness or inhibition, which may prevent her from resisting physically or verbally. Further, they expose the failure to conceive that a woman may express non-consent in other ways than physical resistance or screaming.

The study of the cases further revealed that the screaming expected of rape victims must be loud enough to be heard at a good distance. In many instances, if the incident was alleged to have happened in a neighbourhood or at a time when people were around and

⁶⁷¹ *PP v. Ntahomvukiye Emmanuel*, RP 0029/12/TM.

⁶⁷² *Ibid*, p. 4.

⁶⁷³ Prosecution case file RONPJ 29509/S1/2015/JM/NE.

⁶⁷⁴ Report on provisional closure of case file, 26 February 2015, Prosecution case file RONPJ 009374/S2/15/BB/MA.

⁶⁷⁵ Cahill, A.J. (2009), “In defense of self-defense”, *Philosophical Papers*, 38(3).

that the complainant was not rescued, it was assumed that she did not scream and consent was presumed. For example, in one case,⁶⁷⁶ the prosecutor concluded:

The complainant says that she screamed until she lost her voice then he raped her but at that place where N.B. [the accused] lives there are many people living around. Therefore, it is not understandable how she can scream to the point of losing her voice and not be rescued while it happened in day time.⁶⁷⁷

Such attitudes highlight how justice professionals continue to hold victims responsible for the lack of assistance of other people. It reveals the failure to recognise that women may call for help and not be heard, or even be heard but not be rescued. Each of these misconceptions about victim resistance are profoundly damaging to rape complainants. They reinforce the myth that women are prone to making false rape allegations (see Chapter 3) and dismiss women's experiences of sexual violence. They consequently aggravate the harms experienced by complainants while simultaneously contributing to the discharging of rape offenders.

Nevertheless, it is worth noting that there are legal practitioners in the Rwandan criminal justice system who are not categorical about the resistance requirement. A small minority of the elites interviewed appreciated that a rape victim may be unable to resist depending on the circumstances and that the lack of resistance should not bar conviction for rape. JUDGE11 stated that:

If the victim does not resist, this should not rule out rape because she may be unable to do so for various reasons.

JUDGE8 also remarked:

A woman may find herself in a state of defencelessness. In this situation she may submit because she had no other alternative. This is rape.

Unlike PROSEC5 and JUDGE6, JUDGE1 emphasised that: "If the victim says 'no' and the defendant proceeds with the sexual intercourse then he must be convicted of rape." Yet it was only this single judge who adopt the "no means no" model of rape explained above.

⁶⁷⁶ Prosecution case file RONPJ 009230/S2/15/BB/UJP.

⁶⁷⁷ Report on provisional closure of case file, p.2.

The review of the cases also revealed one exceptional judgment which did not require victim resistance to establish the lack of consent. The decision in *PP v. Uwizeyimana*⁶⁷⁸ is the only case of conviction without evidence of victim physical or verbal resistance identified out of the sample of 175 court rulings analysed in the present study. In this unique case the defendant did not use force to obtain sexual intercourse and the victim did not resist. The court convicted the defendant based on the following:

When *Uwizeyimana Jerome* [the defendant] was interrogated by the prosecutor, he confessed in these terms: ‘The girl had been told to sleep in the living room. She found me in the bedroom where I was sleeping and told me that she was feeling cold. She then came and shared the bed with me. I touched her tummy and she did not react, then I pulled up her skirt and went upon her without exchanging any word with her and immediately proceeded to have sexual intercourse.’ *Uwizeyimana Jerome* also confessed before the judge of detention that he had a sexual relationship with M.C. [the complainant] without mutual agreement.⁶⁷⁹

This judgment is very significant, although the case is unusual with respect to evidentiary matters because on top of the medical evidence provided, the defendant confessed and was later tried *in absentia*. It shows that the lack of consent does not always require victim physical or verbal resistance. Nevertheless, the decision is challengeable based on the state of current Rwandan law, which requires force, threat or fraud to prove the lack of victim consent.⁶⁸⁰ In this case it was found that the woman did not consent to the sexual intercourse but a strict application of the law would have dismissed the offence of rape despite the lack of consent because the defendant did not use force, threat or fraud.

The judgment reveals not only a gap in the law but also the misconception of consent among the majority of the legal practitioners interviewed. If one endorses the understanding of many professionals shown above, the victim’s passivity in this case may be interpreted as consent. This would be reinforced by the fact that the woman freely joined the defendant on his bed. If the defendant had been present and had not confessed,

⁶⁷⁸ *PP v. Uwizeyimana Jerome*, RP 0445/15/TGI/MHG, 28 January 2016.

⁶⁷⁹ *PP v. Uwizeyimana*, para 5.

⁶⁸⁰ Article 196 of the Penal Code (2012). See also Chapter 2.

these weaknesses would most likely have been exploited by his defence lawyer and they could perhaps have influenced the verdict.

Notwithstanding the potential legal challenge to this decision and the speculations about an alternative outcome of the trial, the *Uwizeyimana* judgment is outstanding. Its merits are that it did not focus on the complainant to enquire what she did to show non-consent or why she did not fight to avoid the rape. It found that consent was absent based principally on the actions of the defendant. This is what has been constantly advocated for by feminists to ensure women's sexual autonomy and preserve them from being the focus of the trials. Had this judge concentrated on the complainant's behaviour rather than the defendant's actions, he would possibly have acquitted him, given the tendency revealed above, since the complainant had not expressed non-consent. This would have been unfair because in spite of her passivity, this woman did not consent to the intercourse and was in fact raped.

The judge in this case seems to have adopted a position somewhere between the communication and the negotiation models. Both theories require communication between the parties about the sexual relationship. Therefore, the intercourse that happened in this case may not be legitimate under these models because communication never took place. This judge's stance better protected the victim's sexual autonomy because it did not infer sexual consent from the complainant's silence and passivity, her act of joining the defendant on the bed, and her willingness to sleep on the same bed with him the whole night. The "no means no" and the "affirmative consent" models would have failed the victim in this case because they could have allowed the above victim's acts to be interpreted as consent. This judgment is a signal that Rwandan law needs amendment in order to more effectively protect women against sexual violence.

5.3. VICTIM BEHAVIOUR AFTER RAPE

The literature on rape reveals traditional legal expectations in many jurisdictions that in the aftermath of rape the victim had to promptly report the assault to the authorities. The present section analyses this requirement in the broader literature before exploring the issue in the context of Rwanda.

1. The requirement of prompt complaint in other jurisdictions

The requirement of prompt complaint has been traced back to the 13th century.⁶⁸¹ The victims of rape in many common law jurisdictions were required to report swiftly the assault after its occurrence for their complaint to be valid.⁶⁸² This was a rule of practice but in some jurisdictions, it was codified in statute.⁶⁸³ For example, the United States Model Penal Code (1962) imposed a three-month prompt complaint rule.⁶⁸⁴ The rationale of the rule was the assumption that late complaints were false.⁶⁸⁵ The following conclusion by Wigmore illustrates this belief:

It was entirely natural, after becoming a victim of assault against her will, that she should have spoken out. That she did not, that she went about as if nothing had happened, was in effect an assertion that nothing violent had been done.⁶⁸⁶

Another example of this attitude is a judgment delivered by the Utah Supreme Court in the United States:

The natural instinct of a female thus outraged and injured prompts her to disclose the occurrence, at the earliest opportunity, to a relative or friend who naturally has the deepest interest in her welfare; and the absence of such a disclosure tends to discredit her as a witness, and may raise an inference against the truth of the charge.⁶⁸⁷

This requirement has persisted in many common law jurisdictions until the 1980s when it started to be challenged by feminist scholars and activists.⁶⁸⁸ Following this, it was abolished in many countries such as the United States and the United Kingdom.⁶⁸⁹ Many acknowledged that the rule was prejudicial to women and founded on false beliefs.⁶⁹⁰

⁶⁸¹ Anderson, M. (2004), "The legacy of the prompt complaint requirement, corroboration requirement, and cautionary instructions on campus sexual assault", *Boston University Law Review*. 84.

⁶⁸² Orenstein (1997).

⁶⁸³ Anderson (2004).

⁶⁸⁴ *Ibid.*

⁶⁸⁵ Orenstein (1997).

⁶⁸⁶ Quoted in Anderson, p.978.

⁶⁸⁷ Utah Supreme Court, 1900. *Ibid*, p.955.

⁶⁸⁸ Anderson (2004).

⁶⁸⁹ *Ibid.*

⁶⁹⁰ *Ibid.*

The literature has continued to reveal that the requirement of prompt complaint is fundamentally flawed because it does not take into account women's real experience in the aftermath of rape. It shows that a number of genuine reasons may prevent a rape victim from immediately reporting the assault. Firstly, previous research has revealed that many victims needed time for deliberation before making the decision to complain. Konradi's study as well as Patterson and Campbell's have indicated that many women experience anxiety after sexual assault and weigh various parameters before making the resolution to bring the complaint to police.⁶⁹¹

The majority of the rape survivors interviewed in Konradi's research (fifty-seven per cent) who decided on their own to report the assault needed time for reflection before taking the decision.⁶⁹² In this process, they weighed a number of factors such as the consequences of the complaint on their relationships with other people including the assailant especially in close relations, or the risk of retaliation by the assailant.⁶⁹³ The study provides several examples of fear of reprisal including a woman who informed her husband after being raped, but abstained from reporting to police for fear of reprisal against her family.⁶⁹⁴ The couple inquired into this risk and found after some time that it was very low. It is then that the woman decided to bring the case to the police. The study further reveals that victims' family members and friends played an important role in persuading them to report.⁶⁹⁵ In some cases total strangers supported and encouraged victims to refer the matter to police.⁶⁹⁶

Patterson and Campbell's study also found that more than one quarter of their sample was persuaded by other persons to file the complaint.⁶⁹⁷ One quarter refused to complain but other people did it for them without their authorisation.⁶⁹⁸ This shows that the decision to report rape is not easy. Therefore, it is not abnormal for a victim to spend some time before taking this step.

⁶⁹¹ Konradi (2007), p. 17; Patterson, D. and Campbell, R. (2010), "Why rape survivors participate in the criminal justice system", *Journal of Community Psychology*, 38(2), p.195.

⁶⁹² Konradi (2007), p.31.

⁶⁹³ *Idem.*

⁶⁹⁴ *Ibid*, p.27.

⁶⁹⁵ *Ibid*, p.17.

⁶⁹⁶ *Idem.*

⁶⁹⁷ Patterson and Campbell (2010), p.195.

⁶⁹⁸ *Idem.*

Secondly, uncertainty about the justice process may delay reporting.⁶⁹⁹ This doubt is more likely when the experience does not conform to the social construction of rape.⁷⁰⁰ Konradi's study reveals that the women who reported the assault without taking much time to reflect were mostly those whose experience conformed to the stereotype of "real rape."⁷⁰¹ Stewart et al.'s study compared the experiences of women who sought post-rape treatment within one month to those who delayed. It found that the women who were raped by a "friend" were more likely to delay treatment but those who resisted the assault physically were less likely to do so.⁷⁰² In Patterson and Campbell's study, some victims worried whether they would be believed by the police due to the nature of their experience which did not conform to public expectations about rape.⁷⁰³ Victims may also doubt if their violation matches the legal definition of rape despite being victimised.⁷⁰⁴ As Kranstuber points out, a woman may ask herself: "Was I raped?"⁷⁰⁵ Due to such hesitations, it is understandable that a victim may delay her complaint.

Thirdly, the fear of social stigma can also delay or prevent victims from reporting.⁷⁰⁶ Rape victims often worry about being blamed, branded as devalued or marginalised by their communities.⁷⁰⁷ The public disgrace accompanying rape in some communities is such that there are victims who choose to kill themselves instead of facing humiliation and stigma for the rest of their lives.⁷⁰⁸ Suicide in the aftermath of rape is reported to be a victim response conditioned by social norms in some societies.⁷⁰⁹ It may also be caused by post-trauma emotions.⁷¹⁰

Emotional trauma resulting from rape is another factor that can affect reporting of the assault. Such trauma is often called "Rape Trauma Syndrome" (RTS). This is a form of post-

⁶⁹⁹ Stefan, S. (1994), "Protection racket: Rape trauma syndrome, psychiatric labeling, and law", *Northwestern University Law Review*, 88, p.1333.

⁷⁰⁰ Konradi (2007).

⁷⁰¹ *Ibid.*, p.17. See meaning of "real rape" in the introduction chapter.

⁷⁰² Stewart et al. (1987), "The Aftermath of rape. Profiles of immediate and delayed treatment seekers", *The Journal of Nervous and Mental Disease*, 175(2)

⁷⁰³ Patterson and Campbell, p.195.

⁷⁰⁴ Kranstuber, R. (2017), "Equality is not enough: The importance of the due process clause in redefining consent to a sexual encounter", *The Capital University Law Review*, 45, p.765.

⁷⁰⁵ *Ibid.*

⁷⁰⁶ Stefan (1994), p.1333.

⁷⁰⁷ Berger (1977), p.23.

⁷⁰⁸ Webb, M. (2016), *Rape and its Aftermath in Augustine's City of God*, ProQuest Dissertations and Theses.

⁷⁰⁹ *Ibid.*

⁷¹⁰ Stephens (2016).

traumatic stress disorder which may affect victims in the aftermath of rape.⁷¹¹ RTS has been recognised in many judgments in the United States as a cause of delay in reporting rape.⁷¹² It has also been used as circumstantial evidence to corroborate the victim's account.⁷¹³

Despite its evidential benefits, this concept is nevertheless controversial.⁷¹⁴ Stefan's work cited above is possibly the most detailed critique of RTS.⁷¹⁵ Stefan argues that RTS pathologises victim responses to rape and that this runs the risk of creating a new set of rigid expectations about how a genuine rape victim would behave. Other studies have questioned the scientific value of RTS.⁷¹⁶ O'Donohue et al. simply recommend stopping its use in court.⁷¹⁷ They suggest addressing each rape case as unique rather than relying on the general concept of RTS because each individual victim may experience a subjective emotional response. However, in spite of this controversy there is no question about the *potential* of rape to cause immense emotional trauma to victims. Therefore, whether the condition is classified as RTS or not, this does not change the fact that the psychological distress caused by rape can affect a victim's decision-making and cause delay in reporting.

In light of the discussions above, it can be concluded that the ("natural") immediate reaction of most victims in the aftermath of rape is *not* to complain to police. Some report the assault promptly, others take time to reflect on the course of action, while many others are unable to file their complaint at all. In fact, the vast majority never report.⁷¹⁸ Therefore, conflating a delayed complaint of rape with a false allegation is a misconception. It is another manifestation of the myth that women are prone to making false rape allegations, discussed in Chapter 3. The requirement of prompt complaint underpinned by this assumption is consequently unfounded.

2. The requirement of prompt reporting in the prosecution of rape in Rwanda

⁷¹¹ Block (1990). See meaning of RTS in Chapter 4, section on circumstantial evidence.

⁷¹² *Ibid*, p.318.

⁷¹³ *Ibid*.

⁷¹⁴ Frazier, P. and Borgidat, E, (1992), "Rape trauma syndrome: a review of case law and psychological research", *Law and Human Behavior*, 16(3):293-311.

⁷¹⁵ Stefan (1994).

⁷¹⁶ O'Donohue, W. et al. (2014), "Examining the scientific validity of rape trauma syndrome", *Psychiatry, Psychology and Law*, 21(6):858-876; Frazier and Borgidat (1992).

⁷¹⁷ O'Donohue et al. (2014).

⁷¹⁸ See statistics in Chapter 1.

Although Rwandan law does not require prompt complaint of rape, analysis of the elite interviews as well as the exploration of prosecutors' and judges' written decisions revealed a persistence of this requirement in practice. Many legal professionals expected a "genuine" rape victim to: (a) complain to the first person available; (b) report promptly to the authorities; and (c) attend forensic medical examination without delay. These conditions are respectively discussed in the following sections.

a. Complaint to the first person accessible

The study revealed a disturbing tendency to require rape victims to report to people immediately available after the rape, irrespective of who they are. For example, in the case of T.J.⁷¹⁹ the prosecutor questionably decided as follows:

She [the complainant] never complained to the suspect's neighbour who saw her entering the house. She did not tell him what happened to her but she told other people after a certain time. All this creates doubts whether the rape happened, especially as the accused said that they were used to having consensual sex. Therefore, we decided to close this case for lack of evidence.⁷²⁰

In another case⁷²¹ the following conclusion was drawn:

She [the complainant] stated that she screamed and no one came for help but she did not attempt to tell the people who came after the alleged abuse... This was an opportunity to explain to them that she had been raped if she had really been raped.⁷²²

In *PP v. Ndayisaba* the judge declared that he did not understand why the woman did not complain to the defendant's neighbours:

⁷¹⁹ Prosecution case file RONPJ 009014/S2/14/BB/UJ.

⁷²⁰ Report on provisional closure of file, p.2.

⁷²¹ Prosecution case file RONPJ 45635/S3/14/NM/NM.

⁷²² Report on provisional closure of file, 26 June 2014, p.3.

The most confusing fact is that Ndayisaba Augustin may have raped M.J. at night and that she did not scream but went to tell U. [the complainant's brother] without telling Ndayisaba's neighbours who were closer.⁷²³

These passages show prosecutors' and judges' misapprehension of victims' condition in the aftermath of rape. They failed to understand that it may be uncertain, shameful or unsafe for a rape victim still in a state of shock to complain to unknown people; especially persons likely to be related to the accused. Previous studies have shown that victims are very conscious regarding to whom they are or are not comfortable disclosing their victimisation.⁷²⁴ So, it is not unusual that the complainants did not disclose to the persons cited as expected by the legal professionals.

The failure to understand victims' situations may sometimes raise a suspicion of insensibility on the part of the legal professionals. For example, in a gang rape case⁷²⁵ the victim stated that she did not report immediately to her employer because he used to say that an adult person cannot be raped. In spite of this, the judge noted:

Now that it [the rape] happened she [the complainant] should have told M. [the employer] that it happened, and see if he would not respond...

This misunderstanding (or insensibility) had serious implications on the outcome of the trial because it contributed to the acquittal of the defendant; the judge having concluded:

The court finds that if the complainant was raped, she would have informed her employer or other neighbours. She would not have kept silent while it is clear that this is an adult and bright twenty-three year young woman who would not be victimised and then go to sleep without telling anyone.⁷²⁶

⁷²³ *PP v. Ndayisaba Augustin*, RP 0259/15/TGI/NYGE 16/6/2015. Para. 10.

⁷²⁴ Stewart et al. (1987); Konradi (2007); Patterson and Campbell (2010).

⁷²⁵ *PP v. Kwizera Emmanuel and Bashaka Bosco*, 27 January 2012.

⁷²⁶ *Ibid.* para 5.

This expectation to tell the first person available after rape is aggravated by the requirement to swiftly bring the case to police.

b. Prompt complaint to official authorities

The next aspect of the requirement revealed in this study is the expectation of immediate report to police or other official authorities. The vast majority of the elite participants believed that a genuine rape victim must swiftly report the assault to the authorities and that a delayed reporting was indicative of a false accusation. For example, PROSEC3 claimed that late reports suppose that “some conspiracy to make a false accusation” must have been taking place meanwhile. Other elites such as JUDGE6 and 8 also believed that a delayed report is an indication that the alleged rape did not take place:

When the accusation is not made immediately we generally conclude that the sexual intercourse was consensual. (JUDGE6)

When the complainant delays to report the first idea that comes to our mind is that the offence did not take place because the natural reaction of a person affected is to act upon the problem immediately. (JUDGE8)

The words used by JUDGE8 show a striking similarity with the statement of the common law authorities mentioned above. In his original statement this judge used the French word “naturel”, meaning “natural” in English, to express his belief that a prompt report is the expected normal victim behaviour after rape. This is the same word used by Wigmore as well as the Utah Supreme Court in early 20th century (see above). Note that JUDGE8 did not quote them. This continues to show the similarities of beliefs about rape victims in the two contexts despite cultural differences.

In addition to the elites’ declarations, the study of the cases confirmed the same trend. Many prosecution cases were dropped because of delayed reporting. For example, in the case of N.E.⁷²⁷ the prosecutor closed the file on the following ground:

⁷²⁷ Prosecution case file RONPJ 54821/S1/16/MD.

There is doubt that I.G. [the complainant] was raped by N.E. [the accused] because she did not immediately complain to police. Instead, she returned home and went to police only after she met her parents. We believe that the sexual intercourse was consensual.⁷²⁸

Similarly, another prosecutor dropped a case⁷²⁹ for the following reason among others:

The fact that she accused him only after she discovered she was pregnant and that it was no longer possible to find evidence shows that the rape did not take place.⁷³⁰

These cases continue to show a lack of understanding of the victim's situation after rape on the part of the legal practitioners. They require immediate complaint while the victim's condition may not always allow this, as shown above. Paradoxically, while many cases have been dropped for not meeting this requirement, analysis of the files did not show any significant advantage in most instances where the victims complained to the first person met after the rape, or promptly reported to the police.

The flaws in the requirement of prompt complaint create a need for change in Rwanda. As has been demonstrated above, it does not take into account the real experience of most victims in the aftermath of rape. It is also based on an incorrect assumption: equating a delayed report with a false accusation has proved to be a misconception. Moreover, it is prejudicial for the victims whose complaints are unjustly dismissed. In addition, this requirement lacks legal basis. In Rwandan law the period of prescription for felonies, including rape, is ten years.⁷³¹ Consequently, requiring rape victims to report immediately amounts to a violation of their rights. Clearly, this requirement is unjustifiable in many respects. As the practice is based on fallacious beliefs rather than law, there is a need primarily for change of attitudes within the legal profession.

c. Requirement to attend forensic medical examination without delay

⁷²⁸ Report on provisional closure of case file, 6 April 2016, p.3.

⁷²⁹ Prosecution case file RONPJ 9035/S1/14/BB/NJ/MD.

⁷³⁰ Report on provisional closure of case file, 12 November 2014, p.2.

⁷³¹ Article 5, Code of Criminal Procedure 2013.

In the previous chapter it was revealed that most legal professionals considered medical evidence as superior to other forms of evidence in rape cases. As a result, rape victims were required to consult forensic medical examiners without delay. However, whilst it is true that medico-legal examination is essential in the investigation of rape, there is no legal requirement for victims to be examined. Despite this, the prosecutors sometimes penalised them for not attending such examination. For example, in the case of N.A. and S.⁷³² the prosecutor decided that:

It is *not necessary* to prosecute this case because although the complainant stated that she was raped there is no evidence especially that she never attended medical examination.⁷³³

This was a gang rape case where a local leader intervened and managed to arrest one of the three suspects. This suspect attempted to escape twice but he was again arrested. Clearly, the file contained preliminary evidence that could be built upon to continue investigations and possibly to prosecute the case in court. Therefore, the decision that it was “not necessary” to prosecute this case was unjustified. This lack of justification combined with the wording of the decision raises a suspicion that the closure of the file was a reaction to the victim’s non-attendance of medical examination.

In another similar case of a school-girl complaining of being raped by the school headmaster,⁷³⁴ the prosecutor noted:

...Afterwards she [the complainant] went home and revealed the incident long after: eight days later... They even asked her to go for medical examination but she did not do so promptly and went there after three days, showing that she was not affected.⁷³⁵

This is another case that betrays not only misconceptions about the victim’s condition after rape but also a possible insensitivity on the part of the prosecutor. This prosecutor should not have so lightly concluded that the complainant was “not affected” because she

⁷³² Prosecution case file 34956/S1/12/MR/GA.

⁷³³ Report on provisional closure of case file, 27 September 2012, p.2. (Emphasis added).

⁷³⁴ Prosecution case file RNPJ 45564/S3/14/NM/BMJ.

⁷³⁵ Report on provisional closure of case file, 24 February 2015, p.2.

complained of severe emotional trauma after the incident⁷³⁶ and the case file also contains a report disclosing trauma experienced by the young schoolgirl during the “late” medical examination.⁷³⁷ The report mentions that as she was being examined she heard a motorcycle running outside the medical centre and immediately lost consciousness. According to the report, this happened because the motorcycle reminded her of the alleged rapist who usually rode a motorcycle. This incident could be part of other circumstantial evidence corroborating the complainant’s account but it was not considered by the prosecutor.

The problem here may be a combination of the disregard of victim testimony and circumstantial evidence (see Chapter 4) and a lack of sensitivity because this incident shows that the school girl had a serious emotional condition which should not warrant the statement that she “was not affected.” An alternative explanation is that the prosecutor did not read the complainant’s statement and the report, which would be equally problematic. This prosecutor’s conclusion was uninformed because he failed to realise that victims are often worried about seeking treatment or attending forensic examination.⁷³⁸ This causes some victims to delay in consulting medical examiners.⁷³⁹

d. Understanding other victim behaviour after rape

The discussions above reflect a lack of understanding of victim behaviour in the aftermath of rape. It was noted that this failure was not limited to the issue of reporting. The study identified other types of victim conduct which were also misinterpreted but which could be comprehensible if the complainant’s circumstances and the social context of the offence were appropriately considered. For example, one victim stayed at the alleged rapist’s home for two days after the rape and wanted to marry the accused.⁷⁴⁰ Another stayed with the accused in his home after the assault and continued to have sexual intercourse with him until she became pregnant.⁷⁴¹ In these and other similar cases the prosecutors concluded that such behaviour was indicative of the absence of rape so they instantly closed the files.

⁷³⁶ Complainant’s statement of 7 February 2014, p.3-4, C.9.

⁷³⁷ Report DPU *Gisagara*, 17 February 2014, p.4, C.4.

⁷³⁸ Stewart et al. (1987), p.90.

⁷³⁹ *Ibid.*

⁷⁴⁰ Prosecution case file RONPJ 009824/S2/15/NJ/UJ

⁷⁴¹ Prosecution case file RONPJ 03150/S3/12/NR/NR.

Nevertheless, a close examination of the cases and a careful consideration of the context of the offence suggested that these victims were possibly conditioned by their circumstances to behave that way and that their conduct was not necessarily incompatible with rape. For example, in the case where the victim stayed two days with the alleged rapist, a cautious reading of her statement in light of the social context suggested that her conduct was plausible. She explained: "I was a virgin before the rape...he had raped me and I had no other choice."⁷⁴² She then expressed her wish to marry the alleged rapist. This complainant may have anticipated blame by her family, friends and the community, especially that the alleged rape took place at the assailant's home (see the effects of "*kwijyana*" in the first section of this chapter). In stating that she "had no other choice", she may have felt "despoiled"⁷⁴³ or rendered a "damaged good"⁷⁴⁴ in the eyes of society, and believed that she had lost her chances of marriage. In such circumstances, she may have preferred to become the rapist's wife instead of being a "social leper."⁷⁴⁵ The conduct she displayed is therefore plausible and it should not be automatically considered as incompatible with rape.

Victim reactions such as this must be assessed, taking into account the individual circumstances of the victim as well as the social context of the offence. In evaluating such cases it is important to be conscious of many factors that may influence the victim's conduct in the aftermath of rape such as the fear of social stigma, shame, lack of family and institutional support and lack of resources (see Chapter 6). This approach may help to explain seemingly unusual behaviour such as a victim's wish to stay with her rapist and become his wife.

In sum, the study revealed a lack of understanding of the victim's situation after rape, among many prosecutors and judges. These professionals continued to expect of victims some pre-conceived behaviour which does not conform to reality. As a result, they took many biased decisions to the detriment of the complainants when these expectations were not met.

⁷⁴² Statement of I.M.R., 6 July 2015, p.5, C.6.

⁷⁴³ Berger (1977).

⁷⁴⁴ *Ibid.*

⁷⁴⁵ *Ibid.*

The issues revealed here aggravate the problems of evidence analysed in the previous chapter. In that chapter, it was revealed that there is a tendency to favour medical evidence and disregard victim and circumstantial evidence, which resulted in important evidence being discarded in many cases. Here it has been revealed that on top of this, the legal professionals often focus on victim behaviour to dismiss their complaints, sometimes regardless of the evidence available in the files. The combination of these two trends significantly affects attrition in rape cases in Rwanda.

As in many other jurisdictions, the problem of attrition for rape is critical in Rwanda and yet it is absent from academic or public discourse. Many prosecutors were satisfied that despite the supposed extreme difficulty of proving rape, they succeeded to win the majority of the cases prosecuted. In fact, a quick calculation based on the sample of the cases studied shows 79.5 per cent of prosecutions were successful in the first instance. This finding is consistent with the figures provided by the public prosecution office which reported an average conviction rate of 81.7 per cent for the same period (2012-2016).⁷⁴⁶ This figure is apparently not alarming; it may even be judged relatively satisfactory. If one relies on these statistics alone, the prosecutors' satisfaction may be justified to some extent. Nevertheless, consideration of the nature of the cases prosecuted and the attrition rate before trial prompts reservations about the positivity of these rates.

The nature and the numbers of rape cases selected for prosecution are deeply problematic. It has been revealed in the previous and the present chapters that the vast majority of the files transmitted to courts or successfully prosecuted are those containing medical evidence of genital or physical injury where the victim did not have a "bad" sexual reputation before the attack, had strongly resisted the assault and had reported promptly after it. Clearly, these are cases conforming to the "real rape" stereotype. The majority of other cases of rape outside these expectations were dropped or the defendants were acquitted. The average attrition rate (complaints dropped) at the stage of prosecution was 52.9 per cent during the period from 2013 to 2016.⁷⁴⁷ The rates and causes of attrition at police level are unknown, but the number of unreported rapes is estimated at 92.3 per cent.⁷⁴⁸ Based on these figures, it is likely that less than three per cent of all rape suspects

⁷⁴⁶ These statistics were specially compiled during the fieldwork.

⁷⁴⁷ *Idem*.

⁷⁴⁸ See Chapter 1.

are being punished. These realities suggest that there are serious issues of attrition in rape cases and under-reporting of this offence which need to be acknowledged and addressed.

CONCLUSION

This chapter analysed the tendency of justice professionals to hold false beliefs about the characteristics and conduct of rape victims and the practice of focussing on the victim's behaviour instead of the defendant's actions. The chapter revealed that similar to many other jurisdictions, particularly before the rape law reforms, Rwandan prosecutors and judges continue to hold pre-conceived beliefs about how a rape victim is supposed to behave before, during and after a sexual assault for the accusation of rape to be considered genuine. Before an assault, victims are expected not to show familiarity with an accused and to have a "good" sexual reputation. This results in a practice I called the "defence of prostitution", a specific manifestation of the focus on victim behaviour identified in the Rwandan context. During an assault, victims are supposed to resist physically or at least to scream in order to show their lack of consent. After rape, they are expected to disclose to the first person accessible, report the incident immediately to the authorities and attend forensic medical examination without delay. Victim behaviour contrary to these standards tends to prompt the conclusion that an allegation of rape is false.

Relying on previous research, the chapter demonstrates that in real-life many genuine victims of rape do not conform to these expectations. First, it explained that the assumption that sexually experienced women are necessarily not credible witnesses or are supposed to give sexual consent to the defendant is a misconception. Second, the chapter showed that in reality many rape victims do not scream or physically resist the assault due to various genuine reasons. Third, it provided evidence that most women do not report rape immediately for a number of understandable reasons. It was clarified that the pre-conceived beliefs about "genuine" victims' behaviour are mostly misconceptions connected essentially to the "real rape" myth and the myth of false allegations.

The chapter also revealed that the tendency to base the evaluation of rape cases on flawed assumptions about victim conduct proved very damaging for the victims. It results in unjust disqualification of many complaints and release of many accused. This is essentially because the focus of investigations is mostly on the conduct of the victims rather than the

actions of the defendants. Moreover, victim characteristics or conduct have a greater influence on prosecutors' and judges' decisions than the evidence of rape itself in many cases. The chapter provided some examples where despite the presence of the type of evidence normally accepted according to the prosecutors' and judges' own standards, the complaints were dismissed and the evidence was overlooked because of victim characteristics. This revealed a fundamental problem of attitude towards rape victims which should be addressed through education and legal reform.

Chapter 6

EXPLORING THE OUT OF COURT SETTLEMENTS OF RAPE CASES AND THEIR IMPACT ON THE LEGAL PROCESS

An out of court settlement is an agreement made between parties to a conflict, aimed at resolving the dispute outside the legal process.⁷⁴⁹ It normally implies negotiation and a degree of autonomous decision-making. The terminology “out of court settlement” used throughout this chapter does not necessarily conform to the definition above, because the chapter will reveal that the freedom of negotiation required in out of court settlements was often absent in this context. The terminology is used to reflect that people do make arrangements outside the legal system.

This thesis has thus far revealed that rape is infrequently resolved via the courts as few cases make it to trial. However, this may not be the end of the matter for some victims. The analysis of case files revealed that in some cases, the parties will attempt an “out of court settlement” as a method of resolving an accusation of rape. It was clear from the case files that such settlements directly impact the legal process for rape in Rwanda. In the sample of cases reviewed, seventeen files containing evidence of out of court settlement were identified. This number looks relatively low and does not reflect the real incidence of the “out of court settlements” of rape. Based on interview data, which revealed that such arrangements are made frequently but are not always recorded, it is likely that the prevalence of these settlements is high. The figure does not include undocumented settlements and other settlements that occurred prior to prosecution.

This chapter aims to examine the validity and usefulness of these alternative processes, as well as their impact on the outcome of the legal process in Rwanda. The chapter will analyse the nature of the “out of court settlements” to find out how they work and what outcomes they typically give rise to. It will then examine the criminal justice system’s response to these settlements.

6.1. THE NATURE AND OPERATION OF THE “OUT OF COURT SETTLEMENTS” OF RAPE CASES

⁷⁴⁹ Legal Dictionary, available at <https://legal-dictionary.thefreedictionary.com>, [accessed 7 March 2017]

To comprehend the nature of the processes of out of court settlements of rape cases, the study relied on the interviews with victims and the elites as well as the analysis of documents related to “out of court settlements” contained in the files identified. Other “out of court settlements” that possibly took place before the cases reached the prosecution service are not part of the following discussion.

The practice of “out of court settlement” of rape cases is that the offender and/or his relatives or friends approach the victim or her family members to seek an amicable solution through informal negotiations. For example, in the case of U.F.,⁷⁵⁰ the victim was invited to a meeting where the offender was present and six other people who “helped” in solving the matter out of court. At the end of the meeting, they drafted a document entitled: “Reconciliation between M.B. [the victim] and U.F. [the accused].”⁷⁵¹ These processes are not regulated by any written or customary law. The absence of a legal basis implies that there is no specific procedure for the negotiations. The setup and conduct of the negotiations depend on the participants. Sometimes the negotiations were informally “facilitated” by police, prosecutors or local authorities,⁷⁵² but in most cases it is the families of the offenders that played an important role in the processes. The study revealed that the victims played a passive role in the “out of court settlements” and that the outcome of these processes was the withdrawal of victims from the legal process in most cases. These two findings are discussed in the following sections.

1. The passive role played by victims in the processes: pressures on victims

Rape victims were mostly submissive in the “out of court settlements” and were often used to facilitate the release of offenders. This was rendered possible by pressure placed on them to participate in the negotiations or simply to withdraw their cases and/or recant. Many victims submitted to pressure due to their vulnerability but some resisted. The research study revealed that many victims found themselves in a state of vulnerability after the rape. This was caused by various factors, including hostile social attitudes, the fear of retaliation, a lack of financial resources and the absence of support from the justice system. The interviews revealed that many victim-survivors were marginalised in their

⁷⁵⁰ Prosecution case file RONPJ 009582/S1/15/NJ/NY.J.

⁷⁵¹ Case file, C.18.

⁷⁵² See discussion below about pressures on victims.

community and blamed for their rape. The victims were also in fear of being attacked again by their assailants. *HAGURUKA* files⁷⁵³ further revealed a number of rape victim-survivors complaining of death threats. In addition, many experienced a lack of financial resources to follow up their cases. All this combined with the absence of support from the criminal justice system (see Chapter 3), and other emotional effects of rape, put many victim-survivors in an additional state of vulnerability that facilitated the pressure put on them during the “out of court settlements.”

The pressure was mostly exerted by families and, in some instances, by prosecutors and local authorities who also intervened in the processes, directly or indirectly. The research revealed many instances of family pressures on victims to withdraw their complaint. Victims were subjected to pressure from offenders’ relatives and friends, or their own relatives (acting in complicity with offenders’ families). A number of elite interviewees acknowledged the passivity of victims in the “out of court settlements.” For example, PROSEC5 noted that:

...Families meet and make an agreement of reconciliation, and the woman writes a letter of forgiveness... it starts with close friends in both families, who influence other family members to do everything possible to avoid prosecution.

The following exchange with SURVIVOR1 shows her own passivity in the settlement of her case:

After it happened... his parents came home to ask for forgiveness. My parents agreed and forgave them, then asked them to use parental authority so that their child never again does such a thing. His parents said that they would discipline him. Afterwards, they comforted me. His mother asked for forgiveness and I forgave her.

Question: If your parents had not forgiven them, what would you have done?

Answer: I would not have forgiven him. I wish the judicial authorities continued the case and called me for follow up.

⁷⁵³ These are files from the NGO supporting victims, as explained in Chapter 1.

This exchange shows that SURVIVOR1 only acquiesced to her family's decision, but it was not her choice to "forgive" the assailant.

Family pressure on victims can be particularly compelling in cases of domestic sexual violence. LAWYER6 gave an instance of rape by a stepfather where the victim was obliged by her mother to withdraw and recant:

In one case I remember, the complainant's mother told her daughter not to continue accusing her husband otherwise she would expel her from home. When we went to court, the daughter changed her version and the court acquitted the defendant.

Pressures on victims may sometimes come from multiple sources and be very difficult to resist. For instance, SURVIVOR10 testified that she was pressured by both her own family, the offender's family and other people in the community, to the point that she escaped her home and her neighbourhood:

After the incident, my father harassed me because I caused the arrest of the offender who was influential in the local community. He told me: 'How do you dare cause the arrest of such an important person?' He wanted to force me to withdraw the complaint and to say that the rape did not take place...I did not do it. I left home and stayed with the neighbours until I fled to Kigali...

The offender's relatives told me to go to the police to testify that he did not rape me. I replied: 'If I change, it is me who will be arrested. Is that what you want?' That day I said yes. Soon after, I decided to leave the neighbourhood and went to Kigali to find a job. I escaped. Even my family did not know that I left. I was wanted by the offender's family and I was very scared, which is the reason why I escaped. A local authority told me that if I did not prompt the release of the suspect I would never have peace...

He was in jail and people were criticising me in the neighbourhood.

This survivor was able to resist the pressures but the price was very high because she left school and her home and escaped to the capital city. Luckily, she was found by a

government institution⁷⁵⁴ which has been supporting and protecting her. Further evidence of pressure on victims was found in a number of other case files (see examples given in the sections below).

In addition to family pressure, the present study examined the role of neighbourhood leaders and local authorities in the out of court settlements. Analysis of a sample of files revealed that in many cases, they were the first to receive the victims, even before the police and medical examiners. They typically supported victims and helped them to reach the police station. They sometimes gave information to the police to assist investigations. Nevertheless, at a later stage, when the offender or his relatives approached them to request assistance in settling the matter out of court, they also sometimes cooperated. On the one hand, it is fair to appreciate that local authorities make efforts to reconcile people within the community. However, in matters of rape, they should be careful not to pre-empt criminal proceedings. For example, in the case of N.M.,⁷⁵⁵ a local authority went as far as to write a “certificate to stop the accusation”⁷⁵⁶ containing the following statement:

Considering the letter written by I.D [the complainant] on 1st August 2013, and after hearing her in person...I certify that I.D. withdraws her complaint of rape against N.M. and that *she will never again accuse him* for any reason.⁷⁵⁷

The document was signed by the complainant, four other people and the local leader. It is unclear how the complainant was invited to sign this letter, whether she was summoned by the local authority, or brought there by the offender or his family members. Such intervention by local authorities presents the potential of intimidating complainants who may feel obliged to respect the authority.

The interviews also uncovered allegations of pressure from prosecutors. Two survivors said that prosecutors pressured them to settle the matter out of court. SURVIVOR9 stated:

After I filed the complaint, I waited to be called by the prosecutor or the court. Once the prosecutor called me and asked if I forgave the offender. I answered that I never forgave him.

⁷⁵⁴ The name of the institution is concealed to protect anonymity of the interviewee.

⁷⁵⁵ Prosecution case file RONPJ 04378/S3/13/NR/UR.

⁷⁵⁶ Case file, C.27.

⁷⁵⁷ *Ibid.* Emphasis added.

It is very dubious for the prosecutor to call the complainant only to ask her if she forgave the accused. It was revealed in Chapter 3 that rape victims are generally marginalised and that prosecutors almost never question them. This sudden interest in the complainant and the enquiry about forgiveness of the accused are questionable.

SURVIVOR5 also denounced the prosecutor in charge of her case in these terms:

There was pressure. Yes. From the prosecutor's side. The prosecutor strongly asked me if I wanted to settle the case out of court. It was not best for me to accept the offer. It was humiliating.

In addition to interview data, there were a few case files where the victims complained that they had been influenced by criminal justice authorities to withdraw their complaint.⁷⁵⁸ It is concerning that some criminal justice personnel may contribute to influencing victims to settle their issue out of court. This is an indication of a limited understanding of the problem, given that the outcome of these settlements is often to serve the interests of the offenders to the detriment of the victims (see below). For this reason, prosecutors should not encourage the practice.

2. The outcome of “out of court settlements” of rape cases

a. Outcome for offenders: victims' withdrawal from the criminal justice process

The study found that the “out of court settlements” of rape cases generally aimed to avoid criminal repression of the accused, and rarely redressed the harm caused to victims. A possible outcome from settlements is for the victims to withdraw or recant their allegation. To withdraw means to “retract” or to “take back”, while to recant means to “disavow a statement.”⁷⁵⁹ In the following discussion, the former will be used when the victim retracts her complaint from the criminal justice process and the latter when the victim states that her rape complaint was false.

Data from the interviews revealed that victims' withdrawals and recantations are a frequent outcome of the out of court settlements:

⁷⁵⁸ For example, the case of S.A., RONPJ 05366/S3/14/NR.

⁷⁵⁹ Dictionary.com, available at: <https://www.dictionary.com/> [accessed 20 February 2018].

Out of court settlements of rape cases are frequent. They are negotiated within families and generally after agreement, the victim withdraws her complaint and informs the prosecution that the rape in question never took place. (LAWYER3)

I also noted cases where victims, defendants and their families agreed to settle the cases out of court... and when [the victims] come to court, they change their version. They simply say that they have never been raped. (JUDGE4)

Sometimes it is clear that the rape was committed and yet the victim writes saying that it did not occur. (JUDGE3)

The high rates of withdrawal and recantations were confirmed by the study of the files which revealed many cases where the victims withdrew and sometimes stated expressly that their accusations of rape were false. In total, the study identified seventeen cases of withdrawal including eight recantations or “confessions” of a false accusation. Out of the 101 files studied dropped by prosecutors, thirteen cases of victims’ withdrawal were identified, including six where the victim recanted. Among the 175 cases transmitted to courts for trial, there were four withdrawals, including two cases of recantation.

The cases of victim recantation were mostly treated by the legal practitioners as false allegations. This study scrutinised the contents of the files to explore whether beyond the recantations, there was further cogent evidence of fabrication in the files. Analysis of the eight cases of recantation showed that the facts documented in the case files did not support the recantations. The case of *Shumbusho*⁷⁶⁰ is a tangible example of this situation. In this case, W.K. (the complainant), a 19-year-old domestic servant, lived in the same house with *Shumbusho*, the employer, his wife and another person (Witness D.I.). According to the prosecution indictment, the night of 27 March 2014 while the wife was absent, *Shumbusho* returned home and forced W.K. to enter his room then raped her. *Shumbusho* was arrested and prosecuted. He pleaded not guilty and stated that the sexual intercourse in question was consensual. During the process, the complainant sent a letter to the prosecutor, stating the following: “I, W.K., forgive *Shumbusho Alphonse*. We had sexual intercourse by mutual

⁷⁶⁰ PP v. *Shumbusho Alphonse*, RP 0335/14/TGI/NYGE, 19 December 2014.

consent; it was not by force..."⁷⁶¹ Based on this recantation, the court dismissed the victim's complaint of rape and acquitted the defendant for the following reason:

On the evidence W.K. [the complainant] gave during investigations accusing *Shumbusho Alphonse* of rape, it cannot be relied upon because she contradicted those statements in her letter of 3 April 2014.⁷⁶²

Analysis of the case file revealed that, apart from the complainant's letter of recantation, the criminal file did not contain any evidence that suggested a false rape accusation. On the contrary, there was direct and circumstantial evidence in the file pointing to the occurrence of the rape. The case file contained a statement of a witness (D.I.) who was present in the house at the moment of the rape and personally witnessed the entire rape scene:

What I personally heard is that W.K. [the complainant] was fighting and crying. As all the doors were open, I went near the bedroom and saw everything that the boss [the defendant] did. He was on top of W.K., and was restraining her hands while W.K. was screaming and crying so loudly that she could be heard from outside. I feared to call for help because the boss was very violent and would hurt me.⁷⁶³

In the file, there are also testimonies that *Shumbusho* previously attempted to rape another girl. His wife who was disappointed by the rape of W.K., had accused *Shumbusho* of rape and adultery and given other information about the previous attempted rape and other domestic violence she was herself subjected to.⁷⁶⁴

Besides these facts which are far from confirming the victim's recantation, there is in the case file strong indication that the victim was pressured to withdraw and recant. Before the trial, the wife herself withdrew the complaint of adultery,⁷⁶⁵ which automatically stopped the proceedings for this charge, according to the law. The victim also withdrew but in the file, there is a statement of the victim complaining that she had been pressured to withdraw and recant. In an (unusual) interrogation subsequent to the letter of withdrawal, the prosecutor asked the victim about the recantation. She replied as follows:

⁷⁶¹ W.K.'s letter, 3 April 2014.

⁷⁶² *PP v. Shumbusho*, p.4.

⁷⁶³ D.I.'s statement, 28 March 2014, p.2, C.16.

⁷⁶⁴ Statement of N.M.J. 28 March 2014, p.3-4.

⁷⁶⁵ N.M.J.'s letter of forgiveness, 3 April 2014, C.37.

Shumbusho's wife told me to forgive him so that he may be released. I refused, cried, and told her that I could not write such thing; that she should herself write it if she wished. She wrote a letter and signed on my behalf but they refused the letter, then they called me so that I write myself. They came to pick me up, then I wrote it, afterwards she told me that he would be released immediately. The following day he was released. After his release, I left that home.⁷⁶⁶

In short, although the victim recanted in this case, analysis of the file contents does not suggest the possibility of a false accusation. On the contrary, the facts of the case provide reasonable grounds to believe that the rape occurred. Clearly, the victim's recantation in this case is not conclusive evidence of a false allegation. The court should have heard the victim to understand why she retracted, but she never appeared in court (see Chapter 3 for more detail about the issue of victims' lack of participation in the legal process).

A review of the remaining seven cases of recantation also revealed that none of them contained any facts suggesting that the rape accusation was false. All the cases contained evidence pointing to the occurrence of the rapes, except one which was incomplete and could not warrant adequate assessment. In one of the cases, the court convicted the defendant despite the victim's recantation as the case contained overwhelming evidence of rape.⁷⁶⁷ This suggests that victims' recantations should not be conflated with false accusations. Recantations must be taken with caution as qualitative evidence from this study showed that they can often result from pressure.

The cases of victim withdrawal without recantation were also analysed. The analysis revealed that most of them contained persuasive evidence of rape. Some files included offenders' confessions given during the settlements. For example, in the case of U.F.⁷⁶⁸ there is a "letter of reconciliation" stating that:

⁷⁶⁶ W.K.'s statement, 17 June 2017, p.2. C.40.

⁷⁶⁷ *Habiyambere Olivier v. PP*, RPA 116/13/HC/RWG, 30 April 2014. This case will be discussed in section 6.2. below.

⁷⁶⁸ Prosecution case file RPNPJ 009582/S1/15/NJ/NY.J.

A problem of sexual abuse/rape happened between M.B. [the victim] and U.F. [the accused]. U.F. confesses the offence and the victim forgives him because U.F apologised.⁷⁶⁹

The letter was signed by the accused, the victim and six other people who “helped” in the negotiations. This case was dropped, one of the reasons being that the victim “forgave” the offender.⁷⁷⁰

Clearly, the “out of court settlements” of rape cases are mostly centred on offenders’ interests. Instead of rendering justice to victims, these processes facilitate rapists to escape liability and put victims in a more vulnerable situation, especially when they falsely “confess” that they lied about the rape complaint. This makes them criminally liable because false testimony is an offence under Rwandan law.⁷⁷¹

b. Outcome for victims: Re-victimisation

An out of court settlement logically supposes that both sides of the dispute should make some concessions, but also benefit from the process. However, what appears to be most common is that victims are simply persuaded to withdraw from the criminal justice process. This is an illegal but significant gain for alleged perpetrators as it increases their chances of release or acquittal in court. There was little evidence to support victims gaining anything that met their needs from the settlements. On the contrary, interview data and file analyses indicated that the process serves as another form of secondary victimisation that further enhances victim vulnerability.

Despite this reality for many victims of rape, some legal professionals including PROSEC3 and LAWYER3 still believed that victims withdraw their cases and sometimes recant in exchange for money. However, analysis of the amounts of money given to victims during the “out of court settlements” and the conditions in which it was offered does not support the possibility that victims withdrew their complaints in exchange for financial gain. Scrutiny of eight case files containing information about money offered to victims reveals that the offers were so menial that it is unreasonable to believe that the victims would withdraw for such amounts of money. In four of the eight cases, the victims were offered

⁷⁶⁹ Letter of reconciliation, 6 October 2014, C.19.

⁷⁷⁰ Report on provisional closure of case file, p.2.

⁷⁷¹ Article 579 Penal Code 2012.

10,000 Frw or less (equivalent of twelve US dollars).⁷⁷² In one of these, this small amount of money was supposed “to restore the dignity” of the victim.⁷⁷³ In another case, the complainant was offered 50,000 Frw (the equivalent of sixty US dollars) to pay medical fees related to the rape.⁷⁷⁴ This was the maximum amount, except for one case in which the victim received 700,000 Frw (the equivalent of 840 US dollars).⁷⁷⁵ This is a very large amount compared to the previous offers but it is still below the average compensation granted by courts in the cases studied, which is 1,000,000 Frw (equivalent of 1,200 US dollars). The highest amount of compensation in the sample of cases was 2,700,000 Frw (equivalent of 3,440 US dollars), granted in a military judgment.⁷⁷⁶ Whether these amounts are sufficient to compensate rape is difficult to evaluate, but it is evident that the sums given to victims in the “out of court settlements” are, in most cases, so low as to be insignificant.

Why then do victims of rape accept compensations as low as twelve US dollars to “forgive” their assailants and sometimes to write a formal letter stating that they lied about the rape? The research data suggested that money paid little role in the outcome of cases. Instead the decision to resolve cases out of court were the result of a combination of the vulnerabilities explained above, the lack of support and lack of alternative options, and perhaps most significantly the pressures exerted on victims during the “negotiations.” As demonstrated above, many victims were coerced by family or other community members to withdraw their complaints and/or recant.

In some cases, the victims mentioned (apparently without being noticed by prosecutors) that they were not willing to take the money and that they accepted out of pressure. See the example of the case below where the victim was forced to accept 30,000 Frw (equivalent of thirty-six US dollars). Another example is the case of S.S.,⁷⁷⁷ where the victim was offered 15,000 Frw (equivalent of eighteen US dollars). She expressly stated

⁷⁷² The exchange rate is as of October 2017.

⁷⁷³ Prosecution case file RONPJ 009582/S1/15/NJ/NY.J.

⁷⁷⁴ *PP v. Nkurunziza Marcel*, RP 0378/15/TGI/MHG, 11 December 2015.

⁷⁷⁵ Prosecution case file RONPJ 36465/S1/14/RNG.

⁷⁷⁶ *PP v. Cpl Sinduhunga Jean Pierre*, RP 0088/09/TM, 24 June 2009.

⁷⁷⁷ Prosecution case file RPGR 42895/S3/2010/RG/UG/RG.

that she would never accept that money but she was threatened and this was the reason why she accepted the money.⁷⁷⁸

In other cases where victims took menial sums of money, pressure was not mentioned but the facts of the cases indicated that the likelihood of pressure was very high and that the victims could not withstand the pressure when it was exerted. For example, in the case of R.G.,⁷⁷⁹ the victim was only eighteen and the accused was sixty-one. On top of that, the accused was her employer. She was a domestic worker and lived in the accused's home. She was given 5,000 Frw (equivalent of six US dollars), money that he already owed her, and she left the home and her job, leaving a letter "begging forgiveness for having lied."⁷⁸⁰ This letter was signed by the victim, the accused and one other person. There was nothing else in the case file to create suspicion that she had lied but this letter was used to exonerate the accused.⁷⁸¹ The power imbalance in such a case is likely to have been great and the victim may have faced immense pressure in the absence of external support.

There were some instances where the victims refused financial offers. For example, SURVIVOR5 who said above that she resisted the prosecutor's pressures, also refused money from the offender's family:

He [the offender's brother] offered to pay me money if I would say that it was a lovers' quarrel that went bad. For me, it was adding insult to injury.

SURVIVOR5 explained that she found strength to resist pressure, in her family support and her own standing. This survivor's resistance reinforces the finding that it is victims' vulnerability combined with pressures exerted on them that results in withdrawals and recantations.

Besides the offers of small amounts of money, in some settlements the victims were proposed other forms of "redress." Nevertheless, some of these still reflected the

⁷⁷⁸ Complainant's statement, 18 January 2010.

⁷⁷⁹ Prosecution case file RONPJ 03139/S3/12/NR.

⁷⁸⁰ Complainant's letter, 11 September 2012.

⁷⁸¹ The prosecutor decided to drop the case because "...there is a letter written by U.D. [the complainant] stating that she falsely accused R.G. of rape." Report on provisional closure of file, 19 October 2012, p.2.

imbalance and the position of vulnerability in which the victims were. For example, the offer to marry the rapist is unacceptably frequent:

...Families meet and make an agreement of reconciliation, and the girl writes a letter of forgiveness. ... And they request the release of their son so that he can marry the girl. Two such cases happened in the area of *Bigogwe*.
(PROSEC5)

Sometimes they tell the victim that he will marry her and therefore remove her shame. (JUDGE3)

In the case of R.J.B.,⁷⁸² the victim agreed to marry the offender.⁷⁸³ Whether such marriages are ever in the interest of the victim is profoundly doubtful. Rather, the marriage of victim and rapist is likely to cause immense trauma and is in direct opposition to the needs of victim-survivors.

In summary, the study found that victims gain nothing or very little in the “out of court settlements” of rape cases. Although there are sometimes agreements reached and declarations of “forgiveness” by victims, the conduct and outcome of the processes show that the victims are simply used as *objects* to facilitate offenders to escape justice. What then is the response of the criminal justice system to this often grossly unfair and potentially criminal practice. Note that in Rwandan law, it is a criminal offence to threaten or intimidate a person with intent to influence them “to lodge or withdraw” a complaint.⁷⁸⁴ Yet, this study found evidence that this is the primary objective and outcome of most “out of court settlements” in rape cases.

6.2. RWANDAN CRIMINAL JUSTICE SYSTEM’S RESPONSE TO “OUT OF COURT SETTLEMENTS” OF RAPE CASES

As it has been established that the “out of court settlements” of rape cases often constitute a re-victimisation of victims and an obstruction to justice, there is a reasonable expectation that the criminal justice system should discourage this unfair practice. However, the study revealed that prosecutors and judges mostly paid very little attention

⁷⁸² RONPJ 04487/S3/13/NR/UR

⁷⁸³ Complainant’s letter, 7 September 2013, C.18.

⁷⁸⁴ Article 572 of the 2012 Penal Code.

to these processes and often reacted to victims' withdrawal or recantation without enquiring about the causes. This amounts to a serious failure in the legal process. As pointed out earlier, it is important to note that Rwandan law assigns prosecutors the responsibility to complete cases that need further investigation. Judges can also take an active, inquisitorial role in trials. This means that they are not bound by victims' withdrawals or recantations so they can investigate these and take appropriate decisions.

Instead, the majority of the justice professionals (mostly prosecutors) tended to automatically dismiss cases where victims withdrew their complaints. A minority (mostly judges) handled such cases on merit of the evidence available, regardless of victims' withdrawal or recantation.

1. The majority tendency: Automatic discharge of the accused

Among the seventeen cases of victim withdrawal identified, thirteen were automatically dropped regardless of the evidence contained in the files. Analysis of these cases suggests two main reasons influenced such decisions: The suspicion of false accusations and concerns about the weakening of the cases.

Some prosecutors believed that victims' withdrawals, especially where victims recanted their earlier statements, was indicative of a false accusation. Therefore, they tended to discharge the accused, without further effort to make any verification. For example, in the case of J.P.N.,⁷⁸⁵ the families of both the accused and the victim reached an agreement and requested that prosecution of the case be stopped. The victim became pregnant following the alleged rape and the accused agreed to assume parental responsibilities. They subsequently wrote the following to judicial authorities:

We, representatives of the families of H.F. [the victim], and J.P.N. [the accused], after hearing their agreement that J.P.N. recognises to have impregnated F.N. and that he accepts to take care of the expected child, we request that the accusation be cancelled.⁷⁸⁶

The letter was signed by ten people from both families but the victim did not sign it. Although the letter mentioned that the victim agreed, there is no indication as to whether

⁷⁸⁵ Prosecution case file R0NPJ 08687/S2/14/BB/NJ.

⁷⁸⁶ Agreement between the families of H.F. and J.P.N., 26 May 2014, C.21.

she actively and freely participated in the negotiations or whether the agreement was in her best interest. Instead of investigating the role the victim played in this withdrawal, the prosecutor simply dropped the case, concluding that the rape did not take place:

The fact that the two families agreed shows that the complainant was not forced to have sexual intercourse.⁷⁸⁷

This case illustrates the prosecutor's lack of interest in the complainant's situation. It also shows how some prosecutors easily conclude that an allegation is false. Although there is no ground to suspect fabrication of the rape in this case, the prosecutor came to this conclusion as if it was obvious. Regrettably, this is typical of prosecutors' attitude in this situation.

Another example of a lack of concern about the complainant's condition and a superficial response of prosecutors to cases of withdrawal and recantation is the case of N.P.⁷⁸⁸ It is alleged in this case that on 31 January 2014, N.P. (the accused) went to visit N.M.R. (the complainant). They stayed outside the house, then the complainant entered the house to answer a phone call. Immediately the accused followed her into the house and attempted to rape her but the complainant successfully escaped, locked him inside the house, and called for help. The accused was then arrested. Later, the complainant wrote a letter of recantation, entitled "settlement of the issue I have with N.P." The letter reads:

I, N.M.R. [the complainant], confirm that what happened between N.P. [the accused] and me was mutually consented to, though he went beyond in some respects, which I forgive on my consciousness. This letter invalidates my previous statements. I write this letter without any pressure.⁷⁸⁹

Based on this letter, the prosecutor dropped the case, believing that "the letter is evidence that the offence did not take place."⁷⁹⁰

The prosecutor's decision in this case is based on a superficial assessment of the case because behind the complainant's letter of recantation is a process of forcible "out of court settlement" which should have been investigated thoroughly before taking the

⁷⁸⁷ Report on provisional closure of file, p.2.

⁷⁸⁸ Prosecution case file RONPJ 05168/S3/14/NR/MJ.

⁷⁸⁹ Complainant's letter of 6 February 2014, C.16.

⁷⁹⁰ Report on provisional closure of case file, 21 February 2014, p.2.

decision, but it was not. In fact, this complainant's letter was insufficient to conclude the attempted rape did not occur. Starting with the letter itself, it raised important questions that remained unanswered: What did the complainant consent to? What did the suspect do that was "beyond" the complainant's consent? What exactly was forgiven by the complainant?

Further, the case file contains a strong indication of pressures on the complainant which was not acted upon by the prosecutor. This complainant's letter was written three days after she complained to the police that she was being pressured by the suspect's relatives to withdraw her complaint. At the end of her statement, she clearly showed that she had no intention to "forgive" the accused: "Given the gravity of what he did to me, I do not forgive him otherwise I would not have accused him to the authorities."⁷⁹¹ The complainant made this statement subsequent to a previous "letter of forgiveness" she wrote the day before. In fact, she specifically went to police to clarify that this letter was written under coercion. The first letter reads:

I, N.M.R. [the complainant], forgive N.P. [the accused] for the mistakes he inadvertently committed because he did not do what we agreed. Because of my consciousness, I forgive him.⁷⁹²

Three other people signed the letter. In her statement of 3 February 2014, the complainant explained the conditions in which the letter was written. She declared that she was invited to a meeting in a bar to settle the matter out of court, in the presence of the offender's sister, the offender's uncle and one other individual they called "*afande*."⁷⁹³ She stated that during that meeting, they forced her to write the letter. The second letter was probably needed to secure the release of the accused who was then still in custody. The main difference between the two letters is that the second added the element of *mutual consent*. The legal implications of this element are evident.

This case shows how the victim was used as an *object* to facilitate the release of the accused and how the prosecutor's response was superficial. The complainant in this case was clearly in need of protection. Her situation reasonably dictated the prosecutor to take

⁷⁹¹ Complainant's statement of 3 February 2014, p.2.

⁷⁹² Complainant's letter of 2 February 2014, C.18.

⁷⁹³ *Afande* is not a proper name. It is a common noun used to show respect especially towards military or police superiors.

measures to protect her and investigate the likely obstruction of justice but he failed to do this, relying only on the complainant's letter of recantation to drop the case. The case also illustrates why, as I argued in Chapter 3, prosecutors and judges should be obliged by law to hear rape complainants before taking decisions on their cases as they have the obligation to hear the persons accused of rape. Had the complainant been heard by the prosecutor in this case, it is not certain that this prosecutor would have reacted as he did.

The "out of court settlements" of rape cases and the subsequent complainant withdrawals should be a cause of further suspicion of wrongdoing rather than a cause of suspicion of a false accusation. Whilst it is possible that an innocent accused person may seek an "out of court settlement" for fear of the implications of the legal process, as suggested by Hubbard,⁷⁹⁴ an "out of court settlement" logically indicates the possibility that some wrong happened. Therefore, it should not be considered as an indication that the rape accusation was false, unless there are strong reasons to suspect so. This means that prosecutors should normally be more inquisitive about the rape when an "out of court settlement" has taken place, rather than dropping the case.

A number of prosecutors have defended the choice to drop cases when complainants withdraw or recant. Their main argument is that the case is weakened in this situation, although there is no obligation on them to drop weaker cases. It may be conceded that cases where complainants withdrew become more delicate, but this fact must be put into context to understand the limited impact of complainants' withdrawal. It is argued that complainants' withdrawal should not lead to automatic closure of the case or acquittal of the defendant, for a number of reasons. First, it has been shown that rape complainants are routinely pressured to withdraw, meaning that the judicial authorities should be mindful of this possibility and therefore be more active in finding the truth in such cases. Second, the legal practice in rape cases has shown little interest in complainants' testimony, as the tendency is to give more value to medical evidence and direct evidence (see Chapter 4). It is questionable why victims' testimony would regain interest only when the victims withdraw. It was also revealed that prosecutors sought victims' cooperation very *rarely*. Why are they now concerned with a lack of victims' cooperation? The concern expressed by prosecutors about "essential" victims' collaboration seems to be an

⁷⁹⁴ Hubbard (1999).

intellectual explanation of the practice of dropping cases in which the victim withdraws, rather than a statement of facts. I have argued that victims' cooperation is undeniably essential, however given that rape victims are routinely excluded from the legal process in Rwanda, the recognition of their importance only when they withdraw is highly questionable. Although Chapter 3 criticised the marginalisation of victims from the legal process, the option to proceed with the cases despite victims' withdrawal appears more consistent, logical and useful.

2. The minority tendency: Proceed despite victims' withdrawal

Within this minority tendency, it is worth noting that some judges seem more inclined to rely on available evidence despite victims' withdrawal than prosecutors do. In their interviews, more judges defended the option to rely on available evidence in cases of victim withdrawal or recantation while the majority of prosecutors supported the decision to drop the cases. In practice, out of the seventeen cases of victim withdrawal, prosecutors dropped thirteen cases and sent to court three cases. One complaint was withdrawn while already in court. The judges convicted three defendants out of four. This suggests that prosecutors should not necessarily anticipate more difficulties in court in cases of victim withdrawal, and contradicts their belief that a victim's withdrawal necessarily weakens a case.

A few prosecutors and many judges acknowledged the possibility of pressures put on victims to withdraw, so they were more inquisitive. Speaking of victims' recantations, some judges said:

When a complainant changes her account of the rape, the judge must be cautious regarding complainant interrogation; they must verify other evidence and ensure if the complainant is saying the truth or not... (JUDGE5)

...When the complainant does not convince us, we do not accept such changes. (JUDGE3)

Many judges opted to ignore victim withdrawal or recantation. For example, JUDGE9 was categorical: "In such cases we rely on the evidence produced by the prosecution...and ignore her statement." As stated above, this tendency was verified in a number of

judgments. For example, in *Habiyaremye*⁷⁹⁵ the complainant wrote a letter stating that her rape complaint was false. The defendant was convicted at first instance despite that letter. He appealed on the ground that the first judge ignored the complainant's letter. The High Court simply decided that it could not rely on the complainant's letter of recantation because the case contained sufficient evidence of rape.⁷⁹⁶ In two other cases of withdrawal without recantation, the courts convicted the defendants, despite the "out of court settlements." In total three out of four defendants were convicted in cases of victim withdrawal.

However, although this looks like an appropriate way of handling cases of withdrawal or recantation, the underlying drive of this tendency is dubious. In fact, one of the reasons why victim withdrawal or recantation has less effect on judges' opinions may be the disregard of victim evidence and the requirement of particularly strong evidence in cases of rape, to the extent that it may be clear that the rape happened although the victim recanted. Judges are only seeing a narrow subset of victim withdrawal cases which contain overwhelming evidence of rape. Chapter 4 denounced these practices so they are not proposed as permanent solutions to the issue of victim withdrawal.

A sustainable solution may be found in the following. The first priority is to adopt mechanisms to protect rape victims and to ensure that they are safe and free from pressure. In addition, prosecutors should start pursuing those who attempt to coerce victims to withdraw or recant because their actions amount to an offence, as noted above. This may discourage the "out of court settlements" that use victims to exonerate offenders. Also, instead of dropping such cases, prosecutors should pursue them to avoid unwanted exoneration of the alleged rapists. All this requires *education* and sensitisation, to change the attitudes towards rape. In fact, education will be the cornerstone of the change because the issue is fundamentally about attitude.

3. The fate of rape complainants who "confessed" to have lied

Interestingly, there was no tendency to prosecute the complainants who "confessed" that they lied. Neither the persons presumably falsely accused nor the prosecutors showed an

⁷⁹⁵ *Habiyaremye Olivier v. PP*, RPA 116/13/HC/RWG, 30 April 2014.

⁷⁹⁶ Para 5.

interest in prosecuting them. Perhaps the satisfaction of the accused and their absence of complaint de-motivated prosecutors to hold accountable the women supposed to have lied. In fact, if the accused is aware that the victim was pressured to recant, he is unlikely to push for her prosecution because his interest is only to escape criminal liability for the rape. Prosecution of the recanting victim may backfire on the accused as it may expose the truth about the pressure on the victim and the rape itself.

It is unclear why those who believed that the rape allegations were truly false did not prosecute the complainants while they had what could be perceived as evidence of a false accusation. Surely their prosecution should be a natural response, given the fear caused by the perception of widespread false rape allegations and the potential grave damages caused to innocent men falsely accused of rape. Strangely enough, this research did not come across information about a single case of prosecution of a false rape allegation. The interviewees who commented on this said that they “never” prosecute such cases. Some prosecutors said that it would be “useless.” This inaction against women who “confess” rape fabrications seems to be inconsistent with the fear of false rape allegations expressed by many legal professionals as well as lawmakers. It tends to reinforce the finding that the fear of false allegations is very much exaggerated compared to the reality.

CONCLUSION

This chapter has explored the “out of court settlements” of rape cases in Rwanda. It revealed that these settlements are largely centred on offenders’ interests and disregard the needs of the victims as they are mostly used to facilitate offenders’ escape from criminal liability. The study found that many victims are in a state of vulnerability caused by a hostile social attitude, fear, a lack of financial resources, the lack of support from the justice system, and other emotional effects of rape, which put them in a weak position of negotiation during the settlements. Taking advantage of this weakness, the offenders and their families exert pressure on victims to withdraw their complaints from the criminal justice system and state that they were never raped, in order to facilitate the defendants’ release. The study reviewed the cases of withdrawals and recantations and found that the files contain no information of any fact supporting the possibility of a false allegation. On the contrary, most include strong indications of the occurrence of the assault. In brief,

rape victims are used in the “out of court settlements” as *objects* to facilitate the release of the accused.

The victims are passive subjects and they gain almost nothing in the “settlements”, contrary to the belief of many Rwandan legal professionals that the withdrawals resulting from the settlements may be driven by financial gain. The study examined the cases containing financial offers and found that in most of them the amounts of money given to victims are so insignificant that it would be unreasonable to believe that the victims withdraw their complaints and/or recant for such menial offers. The study found that it is the combination of victims’ vulnerability and pressure exerted on them which result in the withdrawals and recantations.

The chapter also analysed other forms of “redress” proposed to victims and revealed that these offers are a reflection of gender imbalance and exploitation of victims’ vulnerability. A most unfair example is the agreement to marry the rapist, which is clearly a manifestation of victims’ great vulnerability and powerlessness as well as societal failure to protect them. In brief, rather than obtaining redress from the “out of court settlements”, most victims are severely re-victimised in these processes.

Analysis of the criminal justice system’s response to these settlements showed that prosecutors and judges tend to react to the victims’ withdrawals or recantations resulting from the “out of court settlements” without investigating the causes, although the law allows them to be inquisitive in such cases. The majority tendency of the legal professionals is to automatically dismiss the complaints. Only a minority of the cases of withdrawals result in prosecution and conviction, based on other strong evidence contained in the files. This is a serious failure because, by remaining superficial and abstaining to enquire about the causes of these withdrawals and recantations, the criminal justice system is failing to protect the victims against threats and other pressures. On the contrary, the accused are being discharged in the majority of cases, while victims’ withdrawals are wrongly reinforcing the myth that women tend to make false accusations of rape. Paradoxically, the system tends not to prosecute the victims who “confess” to have lied about the rape, despite the common perception about the gravity and the widespread character of false rape accusations. This suggests that the fear of false accusations is artificial.

Chapter 7

CONCLUSION

This thesis contributes to academic knowledge on the impacts of rape myths and gender bias on the legal process for rape in Rwanda. Rwanda has resolved to end the gender imbalance that has traditionally characterised society, but sexual violence remains a major obstacle to this effort. The high probability that rape myths are undermining the criminal justice system's response to sexual violence in Rwanda prompted this research which investigated, identified and revealed rape myths present in the legal process, and in doing so the thesis provides new knowledge that may serve to improve the system's response to rape in the future.

The thesis sought to answer the main question of whether the legal process for rape in Rwanda is influenced by rape myths. To address this key question, I adopted a socio-legal qualitative approach which triangulated three methods: interviews, observations and document analysis. I interviewed forty persons who have experience of the legal process for rape including judges, prosecutors, defence lawyers and rape victim-survivors. I also conducted ten court observations and analysed 276 files including 101 cases dropped by prosecutors and 175 tried in courts.

The empirical research provided a resounding answer to this research question. The study found that the legal process for rape in Rwanda is directly influenced by multiple rape myths. Similar rape myths, as identified in many Western jurisdictions, are present throughout the legal process for rape in Rwanda. Prosecutors and judges are influenced by myths about rape when handling rape cases and there are no special procedures as exist in other jurisdictions, that may limit the effects of rape myths in the legal process.

Below I summarise my key findings again and reflect further on how these findings are situated in the extant literature. Finally, I offer a number of recommendations to the relevant justice institutions tasked with responding to rape.

7.1. THE MAIN RESEARCH FINDINGS

Before presenting the empirical findings, the thesis begins with the analysis of Rwandan rape laws in Chapter 2, which reveals that after the genocide of *Tutsi* people in 1994,

sexual violence has been given a particular importance, which is reflected in the resolve to repress genocide rape and the reform of gender-based violence laws. Thousands of genocide rape offenders have been punished in the most severe way, using *gacaca* courts, despite the enormous difficulties experienced by rape victims in testifying before these courts due to their popular character. This is an unprecedented achievement of *gacaca*, as wartime and genocide rapes have historically remained unpunished across the world.

While addressing genocide crimes, Rwanda undertook the legal reform of gender-based violence laws in 2008, which introduced a number of positive changes. However, analysis of these amendments reveals some legal issues and the persistence of tolerance of violence against women within the law. The chapter further notes a number of foreseeable issues likely to result from the legal loopholes, such as the absence of special procedures that may limit the influence of rape myths on the legal process and the existence of a definition of rape which is not adequate to appropriately protect women against sexual violence. The effects of these were also investigated in the empirical research, which reveals the following main findings.

Finding 1. Rape complainants are not believed by most justice practitioners and are marginalised from the legal process. They play a minor role in the process while they should have an important place as both victims and witnesses.

The thesis presents in Chapter 3 the finding that most of the judges, prosecutors and lawyers interviewed believe that rape complainants tend to make false accusations. They express a profound distrust of rape victims, which leads them to dismiss many complaints, regardless of the contents of the criminal files which include strong indicators of rape in many cases. This confirms findings in other jurisdictions about the existence within the criminal justice system, of a myth that women are prone to making false allegations of rape although there is no evidence supporting this.

The thesis attempts to address a methodological issue existing in the literature on false accusations. Most studies rely only on perceptions of the legal professionals to analyse the belief about the existence of widespread false rape allegations. This research transcended such perceptions and scrutinised the contents of individual case files classified as false accusations by the legal professionals, in order to verify if these files contain evidence of

fabrication. The research further challenged the legal practitioners to give tangible examples of false reports, based on their experience. This provided greater understanding of the reasons *why* they believe a complaint is false, and to verify whether their beliefs could be supported with tangible evidence.

This approach provided extensive evidence of rape complaints that had been classified as “false” but where the case files did not provide any reasonable basis for such a conclusion. The thesis reveals that in most cases, the legal professionals mistakenly rely on stereotypical indicators of a false accusation, such as a late reporting, the victim’s sexual experience, victim withdrawal, or the absence of victim injury, to conclude a complaint is false. Rather than finding evidence of fabrication in the cases declared false, the scrutiny of case files mostly showed strong indicators of rape such as victim and witness testimonies, other circumstantial evidence and sometimes confessions by the accused themselves. More importantly, the thesis reveals that in *all* the cases reviewed, *no* prior deliberate investigation was conducted by the professionals to verify the falsity of the accusation before ascertaining this. The examples given by the legal practitioners during the interviews also confirm that prosecutors and judges usually rely on stereotypical indicators of a false accusation to classify specific reports as false, without supporting evidence.

The research approach proved instrumental in distinguishing perceptions from reality. In this way, the thesis contributes to the debate on widespread false allegations of rape. It provides strong evidence that, at least in Rwanda, the real (but unknown) prevalence rate of false rape allegations must be much lower than it is believed by the legal professionals. This is because of the exaggerated conflation of false allegations with other allegations which are erroneously classified as false. The distrust of victims has multiple implications as is demonstrated again in the next three findings.

In addition to this distrust, the thesis reveals that rape complainants are marginalised from the legal process. Their role is limited to reporting the crime to the police as they are almost entirely excluded from the remaining phases of the justice process. They appear very rarely before prosecutors or in court, as victims or witnesses of crime.

In most jurisdictions, victims of crime generally have a marginal place in the criminal justice process as their role is mostly limited to reporting the incident and providing testimony in court. This is due to the asymmetric nature of the criminal justice process, which is mostly concerned with criminal wrongs committed against the state and ensuring safe conviction of defendants. In the context of Rwanda, the situation is significantly exaggerated because the victims are usually excluded from the process after they report the crime to the police.

This practice has negative implications for justice for rape victims. It increases chances for offenders to escape liability because it deprives prosecutors and judges of substantial input that can improve the evaluation of cases. The practice also results in victims' dissatisfaction and deep distrust of the legal system. Some victims are frustrated despite their rapists being convicted, due to the lack of participation in the process. Moreover, many victims feel unsupported by the criminal justice system. This makes them more vulnerable and facilitates pressures to withdraw their complaints, as is explained again in finding 4.

Finding 2. Due to the distrust of rape complainants, prosecutors and judges have created biased evidential rules which are contrary to the law and negatively affect the outcome of cases.

This thesis revealed in Chapter 4 that the disbelief of rape complainants has been translated into biased rules of evidence. The judges, prosecutors and lawyers interviewed repeatedly insisted that victims' testimony is not reliable and that it must be corroborated by other evidence, in particular medical evidence, considered by most of them as superior and reliable. The legal professionals give more value to medical evidence due to the belief that rape is proved by genital injuries which can best be documented by a forensic medical doctor, despite previous research showing that genital (and bodily) injuries are not a necessary outcome of rape. This resulted in the relegation of victims' testimony, the requirement of medical evidence and the requirement of direct evidence, or testimony of witnesses who "saw the rape" being committed.

These rules of practice have been established by the justice professionals in spite of the law specifying the contrary. Evidence law and the jurisprudence of the Supreme Court of

Rwanda are clear that victim testimony, expert testimony and circumstantial evidence are all admissible forms of evidence and that there is no hierarchy among them. Moreover, there is no corroboration requirement or obligation to provide direct evidence in the law. While in many Western jurisdictions rape myths have influenced the creation of legal rules such as the corroboration requirement, in Rwanda the same myths have prompted similar practices, but which are contrary to the law. This shows the extent to which rape myths are powerful and affect different legal systems in different ways but with similar results.

Although there are many similarities between Western and Rwandan legal systems, the thesis reveals a specificity in the context of Rwanda regarding medical evidence. This is the exaggerated and biased role played by medical examiners in rape cases. They tend to provide excessive information and disproportionately influence the legal professionals. The research enriches the existing literature on medical evidence by demonstrating the influence of rape myths on forensic doctors and its immediate impact on the outcome of rape cases. The thesis reveals that many medical examiners are themselves influenced by the “real rape” myth and, in turn, they directly influence prosecutors and judges. In many instances, the doctors advise that there is no rape when they do not find genital or bodily injuries on the victims examined. Prosecutors and judges often adopt the doctors’ views, and automatically dismiss rape complaints which do not provide evidence of victim injury. This inappropriate and erroneous use of medical evidence aggravates the effects of the relegation of victim evidence in rape cases.

Another form of evidence that can potentially assist in the prosecution of rape cases is circumstantial evidence, yet it is also regularly disregarded. The thesis demonstrates the importance of circumstantial evidence in rape cases and shows that this type of evidence can legitimately and effectively help prove rape if it is carefully gathered and evaluated. Instead, circumstantial evidence is disregarded in most cases, the prosecutors and judges requiring only direct evidence.

These biased, unwritten, rules created by the legal practitioners in Rwanda have very detrimental effects on the legal process because many cases which do not include the types of evidence unfairly required, are simply dismissed despite other legally admissible evidence contained in the files. This is affecting justice for the victims of rape in Rwanda and is potentially facilitating many rape offenders to escape punishment.

Finding 3. While handling rape cases, prosecutors and judges focus on victim characteristics and behaviour rather than the defendant's actions. These justice practitioners erroneously expect the victims to behave in a pre-conceived way so that they can accept that the rape was committed. When the victim's conduct does not conform to these expectations, the accused are generally released. Many of these cases contain strong indicators of rape but they are overlooked. This results in many rape defendants being released or acquitted in an unjustified way.

The thesis reveals in Chapter 5 that Rwandan legal professionals, in many respects, react in a similar way to many Western jurisdictions, particularly reflecting pre-1970s practices. They continue to hold pre-conceived beliefs about a "genuine" rape victim's conduct before, during and after the assault. Before rape, victims are expected to have a "good" sexual reputation and not to have shown any form of familiarity with the assailant. During the attack, they are expected to express their non-consent by physical resistance or at least by screaming. After the assault, they must disclose to the first person available, promptly complain to the police and attend medical examination. A victim's behaviour contrary to these expectations tends to lead to the conclusion that she made a false allegation, despite previous research showing that these pre-conceived ideas about a "genuine" rape victim are a misconception. In many cases reviewed, the prosecutors and judges openly declared that the accusations were false, based only on the absence of the above expectations and despite strong indicators that the rape was committed.

This finding presents similarities with the chastity requirement, the resistance requirement and the requirement of prompt complaint caused by the influence of rape myths in many Western jurisdictions. Some of these requirements have been part of the law in other jurisdictions, such as the requirement of prompt complaint in the United States. In Rwanda, none of them is integrated in the law, but they prevail in the prosecutorial and judicial practice.

It is worth noting that these practices in Rwanda are unlikely to have been influenced by Western laws. This is because Rwandan law does not adopt them and there is no sign of such an influence. Moreover, the Rwandan legal practitioners never cite Western laws to support their practice. Clearly, it is the influence of rape myths that results in these biased

practices, not the influence of Western laws. This continues to demonstrate that rape myths similarly influenced both Western and Rwandan systems sometimes through different mechanisms.

Nevertheless, this research study reveals specific types of myths in Rwanda such as “*kwijyana*,” which is an inference of sexual consent from a victim’s visit to someone’s home. Another specific manifestation of the focus on victim behaviour identified in the Rwandan context is what I termed the “defence of prostitution”, a very prejudicial practice allowing defendants and their lawyers to routinely argue without evidence, that the victim is a prostitute, in order to show that the rape did not take place.

This practice is comparable to the admission of sexual history evidence in many Western jurisdictions but it is more exaggerated in Rwanda. Some scholars have attributed the negative effects of the admission of sexual history evidence to the adversarial system of criminal proceedings, but a more pronounced malpractice which is the “defence of prostitution” is found in Rwanda, a traditionally inquisitorial system. This is another indicator that rape myths may similarly influence the justice system across different legal systems.

The malpractices summarised in finding 3 aggravate those explained in the previous two findings, resulting in a system where only “real rape” cases are likely to go through the legal process and to secure conviction. But this is not the end of the matter for many victims, as explained in finding 4.

Finding 4. Many cases of rape are resolved out of court but during these processes many victims are pressured to recant and/or withdraw their complaints from the criminal justice process in order to facilitate the release of the accused. These withdrawals and recantations are interpreted by most prosecutors and some judges as evidence of false rape allegations. This results in the majority of the cases of withdrawal being dropped even when these contain tangible signs of rape.

This finding reported in Chapter 6 reveals the existence of the practice of out of court settlement of rape cases which is based on a cynical exploitation of victims’ vulnerability whereby the complainants are simply used to facilitate the release of the accused. Many victims are pressured to withdraw their complaints from the justice system and

sometimes to change their initial report and state that they were not raped, in order to allow the defendants to escape criminal liability. The pressure is mostly exerted by members of the accused's family, sometimes in connivance with the victim's family. They take advantage of the situation of vulnerability in which many victims find themselves after rape. This vulnerability stems from many factors including community stigmatisation, the lack of financial resources, the fear of retaliation by the assailant, the lack of support by the criminal justice system, and other emotional condition resulting from the assault. The thesis reveals that it is the combination of this vulnerability with the pressure exerted on the victims which cause many to withdraw their complaints from the legal process and to recant.

This unacceptable situation is often misinterpreted by most legal professionals who tend to believe that these withdrawals and recantations are conclusive evidence of false accusations. Yet, the study reveals that this is not the case. Analysis of the cases of withdrawal demonstrates that they do not contain any information supporting the possibility of a false accusation but, on the contrary, most include evidence that the rapes took place. Despite this, most of these cases are dropped and no measure is taken to prevent or stop pressures on victims. Clearly, this is a failure by the justice system to protect rape victims and to give them justice.

This finding seems unique to the context of Rwanda as the broader literature does not reveal its existence in other jurisdictions. Perhaps the same situation may be prevailing in societies with a similar socio-economic situation but, to my knowledge, this is not yet revealed by research. The thesis contributes to the existing literature by providing concrete evidence that a victim's withdrawal or recantation is not a sure indicator of a false accusation.

7.2. IMPLICATIONS OF THE RESEARCH FINDINGS AND RECOMMENDATIONS

All the biased practices revealed in this thesis combined result in a justice gap for female victims of rape. Although the conviction rate for rape is apparently high at approximately 80 per cent, the figure is misleading as this thesis reveals that successful prosecutions are mostly composed of cases conforming to the "real rape" myth, and many defendants are unjustly acquitted. Moreover, the cases dropped by prosecutors are 52.9 per cent, most of which are erroneously dismissed as demonstrated in this research. Previous research also

reveals that the figures of unreported rape cases are alarming: they are estimated at 92.7 per cent. Based on these statistics, it is likely that less than three per cent of potential rape suspects are being punished in Rwanda. Although this failure cannot be entirely imputed to the legal system alone, the justice system has an important role to play in addressing the problem.

In summary, this thesis reveals fundamental issues in the prosecution and trial of rape cases in Rwanda. The four key findings presented in the thesis are evidence that justice in rape cases is beyond the reach of most victims, despite many efforts made by the government to repress sexual violence. There is a profound influence of rape myths on the legal process in Rwanda, which is seriously undermining the prevention of rape by the prosecution service and the courts. Due to these misconceptions, many rape offenders are unjustly escaping criminal liability as the cases that secure conviction are mostly those which conform to the “real rape” myth. This ineffective tackling of rape constitutes a hindrance to Rwanda’s campaign against gender-based violence and the promotion of gender equality. Therefore, these efforts need to include strategies that are designed to counteract rape myths within the public and the criminal justice system.

The thesis confirms that similar rape myths identified in many Western jurisdictions exist in the legal process for rape in Rwanda despite different cultural and socio-economic contexts. This is an indication that patriarchal societies may share common beliefs about rape and rape victims in spite of cultural differences. The thesis also reveals that the influence of rape myths may result in the creation of unwritten rules of evidence that are similar despite different legal systems. Indeed, there are findings specific to the local context, which were not revealed in other jurisdictions. The thesis found evidence of rape myths playing out in often unique and more exaggerated ways in the Rwandan context.

This thesis demonstrates that rape myths still appear to persist in Rwanda’s legal system which is traditionally inquisitorial as in the adversarial system, despite this significant system difference. The issue is, therefore, not the type of the legal system in place but the influence of rape myths on the legal process. This is a warning that the tendency mentioned above to embrace adversarial system in Rwanda may not necessarily improve the system, particularly concerning prosecution and trial of sexual offences.

The findings of this research may be of interest for other countries, especially African societies, which are likely to experience similar phenomena due to similar socio-economic situations. The study findings are surely of particular interest for Rwanda. To my knowledge, this thesis is the first research study that exposes the effects of the influence of rape myths on the legal process for rape in Rwanda. Therefore, the research study can be an inspiration for policy change and a key reference point for further research in Rwanda.

The following recommendations are made specifically to Rwandan institutions that can act upon the issues revealed in the study, and to researchers.

Challenging social attitudes

A sustainable solution to the problems caused by the influence of rape myths on the legal process lies in the change of attitudes because the issue is fundamentally about attitudes towards women, rape victims and rape. Government institutions, including the Ministry of Gender, which have already started an awareness campaign against gender-based violence more than a decade ago, may need to readjust public education strategies accordingly, by including themes and methods aimed at eradicating rape myths from public perceptions.

The need for legal reform

Although the problem of rape myths is primarily about beliefs, the study reveals many issues that need to be addressed by a legal reform. The biased prosecutorial and judicial practices revealed in the thesis including the corroboration requirement, the chastity requirement, the resistance requirement, and the requirement of prompt complaint can be curtailed by legislation. Other practices such as the marginalisation of victims from the legal process and the unfair “out of court settlements” can also be corrected by law.

A new reform of rape laws is therefore needed to protect women against sexual violence in a more effective way. The change would include the following four aspects: a new definition of rape that adequately protects women’s (and men’s) sexual autonomy, the enactment of a law allowing greater participation of rape victims in the legal process, the adoption of special procedures which limit the effects of rape myths on the legal process,

and the regulation of out of courts settlements with the view to protecting the interests of both the victims and the defendants.

Changes to strategy and public policy

Before any further legal reform and based on the current law, justice institutions can take significant steps in response to the issues revealed in the thesis. These steps would include: taking immediate measures to protect victims of rape from pressure; adopting a long term sensitisation strategy that is designed to change the justice practitioners' attitudes towards rape victims; developing a specific training program for the legal professionals, focused on pre-emption of the influence of rape myths; adopting directives aimed at encouraging victims' participation in the legal process and discouraging the "defence of prostitution"; providing guidelines on thorough investigation of cases of victims' withdrawals and recantations.

Remaining gaps in knowledge

Many important questions can be raised from this thesis and be of interest for further research. They include the following:

- (1) What education strategies can be adopted to change the attitude of the public towards rape victims?
- (2) What types of "rape-shield" laws are appropriate to the context of Rwanda?
- (3) How to eradicate rape myths among legal practitioners?
- (4) What is the extent of the influence of rape myths at the level of judicial police investigation?
- (5) How the "out of court settlements" of rape cases can be channelled to protect the interests of both the accused and the victims?

Research to answer these questions among others, is needed in order to inform Rwanda's continuous endeavour to eradicate violence against women and achieve gender equality. Actually, the lack of adequate knowledge is one of the "major challenges" to this effort.⁷⁹⁷

⁷⁹⁷ Ministry of Gender and Family Promotion (2017), p.25.

Prosecutors and judges are working hard to provide justice, without knowing that the influence of rape myths negatively affects the outcome of their work. Indeed, there are fundamental issues of justice for rape victims. Borrowing a term used by Kelly et al. (2005), it is not an exaggeration to state that this thesis reveals an invisible “chasm” in the prosecution of rape in Rwanda. The legal system is failing rape victims while the country is making significant achievements in the promotion of gender equality and has resolved to end sexual violence. If this grave issue is to be eradicated, it is crucial to limit the effects of rape myths on the legal process. I hope that the knowledge acquired in the present thesis will contribute to this national campaign.

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APPENDICES

Appendix 1: PARTICIPANT INFORMATION SHEET

University of Sussex

STUDY TITLE: “*Are Rwandan Rape Trials Influenced by Rape Myths?*”

INVITATION

You are being invited to participate in this research. Before you decide whether or not to take part, it is important that you understand the rationale for this research, the objective behind doing the research and indeed what this research will involve for you. Please take time to read the following information carefully.

WHAT IS THE PURPOSE OF THE STUDY?

This study is conducted as part of a PhD program at the University of Sussex. The aim of the study is to investigate how rape trials are conducted in Rwanda and what are the factors that influence the trial process and outcomes. It is hoped that the findings of the study will be used by policy makers and legal professionals to improve the quality of rape trials in Rwanda. The study started in September 2014 and is scheduled to end in September 2017.

WHY HAVE I BEEN INVITED TO PARTICIPATE?

You have been invited to participate because you have an experience of a rape trial. Twenty-four other people will take part in the research. Your views and opinions are very important for this study.

DO I HAVE TO TAKE PART?

It is your full discretion whether or not to take part in this research. If you do decide to take part, you will be given a consent form for you to sign. You are at liberty to withdraw from participating in this research at any time and without giving a reason.

WHAT WILL HAPPEN TO ME IF I TAKE PART?

Taking part will involve an interview with you which will be audio taped or by note taking. The interview will last approximately one hour at a time convenient to you. It will be conducted in a safe place agreed upon with the researcher.

WHAT ARE THE POSSIBLE DISADVANTAGES AND RISKS OF TAKING PART? (WHERE APPROPRIATE)

It is expected that this research work will not have any risk or disadvantage on you. In every circumstance, care will be taken not to do anything that may be detrimental to you. However, during the interview, it is possible for you to revive past experience which may cause distress to you. You can stop at any stage the interview if you feel uncomfortable and you can refuse to answer any questions that you feel are too distressing. The researcher will make arrangements to ensure that appropriate support may be obtained promptly if needed.

You will incur some costs such as transport fare to reach the place of interview. You will also give your time to travel and participate in the research. Nevertheless, this cost will be reimbursed by the researcher.

At the end of the interview you will have a chance to tell what your experience of participating in the research was like, and this will be taken into consideration for this and future studies.

WHAT ARE THE POSSIBLE BENEFITS OF TAKING PART?

Your participation to this study will be an opportunity to express your views and opinions on this very important topic. It will contribute to improving the understanding of rape trials in Rwanda.

WILL MY INFORMATION IN THIS STUDY BE KEPT CONFIDENTIAL?

All the information collected about you during the course of the research will be kept strictly confidential. The data you will give will be anonymised. This means that your proper name will never appear in any draft or in my thesis. Starting from data transcription, your name will be replaced by a pseudonym and during text drafting, anything that could link data to you will be avoided. You will also have the right to

withdraw your data if it is linked to you but withdraw will no longer be possible once data has been included in the final draft of the thesis, which is scheduled in August 2017.

The only limits to this confidentiality would be if you were to tell something that suggested that there would be a reason to be worried about harm to yourself, or to someone else. In these circumstances it would be important to share this information appropriately. Please note that this is likely to be a very rare occurrence.

It is intended that the interview will be audio-recorded, transcribed and used exclusively during the analysis of data. If you wish, you will be given a transcript of data concerning you for approval before being included in the write-up of the research. Recorded data shall be kept on a secure computer and will not be shared with any other person or for any other purpose but this study; and such information will be completely deleted from any storage by the end of the project.

WHAT ABOUT MY SAFETY?

In the course of this study, nothing will be done directly or indirectly which is capable of putting your name, family, community, work, contact, discussions, recordings, and opinion in jeopardy. Likewise, nothing will be included in this study which will affect your job, your integrity or your safety.

WHAT SHOULD I DO IF I WANT TO TAKE PART?

If you intend to take part, you can email, call or text me, or inform me via any means of communication. You will keep this information sheet and sign a consent form. Afterwards we shall agree on how and where you shall participate.

WHAT WILL HAPPEN TO THE RESULTS OF THE RESEARCH STUDY?

The result of this research will be submitted as a PhD thesis to the School of Law, Politics and Sociology of the University of Sussex. Subject to academic information dissemination of the University of Sussex, the findings of the research will be published by the School and will be available in the school's data base subject to regulation on access of information. I am also willing to provide you with a copy of my thesis when I finish, if you wish. Well after completion of the PhD program, the findings of this research will be published in Rwanda.

WHO IS ORGANISING AND FUNDING THE RESEARCH?

I am conducting this research as a PhD candidate in the School of Law at University of Sussex in the United Kingdom. This research is funded by the Government of Rwanda.

WHO HAS APPROVED THIS STUDY?

The research has been approved through the School of Law, Politics and Sociology ethical review process.

CONTACTS FOR FURTHER INFORMATION

Below are my contact details as well as the contact details for my supervisors. If you have any concerns about the way in which the study has been conducted, you may contact my supervisors in the first instance.

My contact details:

Christophe Bizimungu

Email chrisbizimungu@gmail.com

Tel number (UK) +44 7553653321

Tel number (Rwanda) +250 788301798

My supervisors' contact details

Dr Mark Walters

Appendix 2: CONSENT FORM FOR PROJECT PARTICIPANTS

University of Sussex

PROJECT TITLE:

"Are Rwandan Rape Trials Influenced by Rape Myths?"

Project Approval

Reference: **CB/HC/21412375**

I agree to take part in the above University of Sussex research project. I have had the project explained to me and I have read and understood the Information Sheet. I understand that agreeing to take part means that I am willing to:

- Be interviewed by the researcher
- Allow the interview to be audio taped and transcribed

I understand that the researcher will keep my identity anonymous and will not mention either my name or any other thing that will directly disclose my identity as the respondent. I also understand that, all records will be kept safely by the researcher and will be used strictly and reasonably for the purpose of this research and that all voice records or document emanating from me will neither be transferred to other persons or bodies outside the purpose of this research.

AND

I understand that, if I make a request, I will be given a transcript of data concerning me for my approval before being included in the write up of the research.

I also understand that I can withdraw at any time from participating in this research and I can as well request that all information I have given to be excluded from any part of this research, and be destroyed.

I understand that my participation is voluntary, that I can choose not to participate in the project, and that I can withdraw at any stage of the project until August 2017 without being penalised or disadvantaged in any way.

I consent to the processing of my personal information for the purposes of this research study. I understand that such information will be treated as strictly confidential and handled in accordance with the Data Protection Act 1998.

Name _____

Signature _____

Date _____

Appendix 3: INTERVIEW GUIDES

A. Questions (and some follow-up questions) for prosecutors, defence lawyers and judges

1. Can you tell me what experience you have as a judge/prosecutor/defence counsel presiding over/working on rape trials?

2. Can you describe to me the process of cross-examination during rape cases?

a. What types of question are commonly asked of the complainant during cross-examination?

b. Do defence lawyers ever question complainants about their prior sexual history?

i. Does this include the sexual history between the complainant and defendant and/or the sexual history between the complainant and other individuals not party to the case?

c. Do defence lawyers ever enquire into what clothing the complainant was wearing during the incident?

d. How often does the issue of intoxication of the complainant come into cross-examination?

i. How are questions regarding intoxication usually framed during such questioning?

e. Are there any other common types of questions asked during this phase of the trial process that we have not discussed?

i. perhaps relating to whether women have the propensity to lie or not about rape?

ii. the failure of the victim to report the incident to the police immediately?

f. In your experience how do prosecution lawyers usually respond to defence lawyers' line of questioning?

3. If you have ever experienced a case where a complainant became upset during court proceedings, can you explain to me what happened?

a. Why do you believe the complainant became upset?

- b. Was anything said by the prosecutor/defence lawyer or judge that particularly upset the complainant?
- c. How was the incident dealt with by the court?
 - i. was there a break in proceedings
 - ii. did the judge provide any guidance?

4. Can you tell me a little more about the most common types of cases that result in a conviction of rape defendants?

- a. What are the common features in these cases?
 - i. Is the complainant known or unknown to the defendant?
 - ii. Is physical violence used?
 - iii. Are intoxicants ever used?
 - iv. Are there any common features amongst victims? Such as their age, social background etc...?
- b. What are the most common forms of evidence present when a judge convicts a defendant of rape?

5. What factors influence the penalties imposed on convicted rapists?

- a. What are the most commonly accepted mitigating factors in rape cases and how they influence sentencing decisions?
- b. What are the most common aggravating factors and how do they influence sentencing decisions?

6. Based on your experience what are the most common reasons why a defendant is acquitted of rape?

- a. What are the common features in these cases?
 - i. Is the complainant known or unknown to the defendant?
 - ii. Is physical violence used?
 - iii. Are intoxicants ever used?

- iv. Are there any common features amongst victims? Such as their age, social background etc...?
- v. What are the forms of evidence often missing when a judge acquits a defendant of rape?

7. Can you explain to me your experience about the provision of evidence used to show that the victim did not consent to sexual intercourse?

- a. How important is the use of physical violence to the issue of consent?
- b. How does the court deal with cases where the victim did not physically resist to the assailant?
- c. What happens in cases where the victim said NO but the defendant nevertheless proceeded with the sexual intercourse?

8. What is your general opinion about how well the legal process works in rape trials?

- a. What are the processes that you think have proved useful to the good conduct of rape trials?
- b. Do you think that there is any legal procedure in rape trials which needs amendment?
- c. Is there any practices in rape trials that you believe should be changed to improve their effectiveness?

Thank you for all that valuable information.

Is there anything else you would like to add before we end?

Questions added during fieldwork based on initial findings

1. How often do rape victim-survivors appear in court to give testimony?

- a. In which circumstances are the victims generally invited to give testimony?

- b. When victims do not appear in court, what are the reasons for this?
- c. What are the advantages of victims' lack of participation in the trial?
- d. What are the disadvantages of victims' lack of participation in the trial?
- e. What does the law say about victims' testimony in court?

2. Have you ever experienced cases where a rape victim solved "amicably" the offence with her family or the defendant's family member(s)?

- a. How often does it happen?
- b. In which form did the matter come to your attention?
- c. How did you handle the issue as lawyer, prosecutor or judge?
- d. Do such agreements have any impact on the legal/trial process and its outcome?

B. Questions (and some follow-up questions) for rape survivors who participated in the trial

1. Can you tell me a little bit of background information about your case? Where did the incident occur? How long did it take before it went to court?

2. Can you tell me about the testimony you gave in court?

3. What type of questions did the prosecutor and judge ask you during the trial?

4. What questions were you asked during cross-examination by the defence lawyer?

5. How did you feel about the way you were cross-examined?

- a. Were there any questions you felt uncomfortable answering?

b. Were there any questions that you felt were not relevant to the incident? Can you recall what these questions were?

c. Can you remember whether the prosecutor and/or the judge reacted to any of the questions posed by the defence lawyer?

6. How did you find the attitude and behaviour of prosecutors, defence lawyers and judges towards you during the trial?

a. Did you feel that the defence lawyer was polite to you during the case?

b. Did you feel that the prosecutor was supportive to what had happened to you?

c. Did you feel that the judge dealt with your evidence sensitively?

7. Were there any particular events that happened during the trial which you found especially comforting or discomforting?

a. Can you explain what happened? What caused this experience? How did the judge/prosecutor/defence lawyer deal with the situation?

b. At any point during the trial process did anyone ask any question or make any gesture towards you that you felt was unfair and/or offensive?

8. What expectations did you have about how you would be treated by the court during the trial?

a. Were your expectations met?

b. Do you think that the lawyers, prosecutors or judges treated you respectfully?

c. Were you given an adequate opportunity to express what you wanted them to know about the offence committed against you?

d. Was there anything about the trial that you felt could have been done better?

Thank you for all that valuable information.

Is there anything else you would like to add before we end?

C. Questions for rape survivors who did not participate in the trial (questions formulated during fieldwork based on initial findings)

1. Can you tell me a little bit of background information about your case?

2. Have you been informed about the trial of your case?

- a. Did the police/prosecution inform you that the case was transmitted to court?
- b. Did the prosecution/court invite you to give testimony in court?
- c. If you were invited to attend court, why did you decide not to?
- d. Were you informed about the outcome of the trial?

3. Your case has been tried without your participation. What do you think about your absence in court?

- a. Did you want to attend the court to give your testimony?
- b. Do you think that beyond your statement made in the police/prosecution, the court could have benefited from hearing your testimony?

In what ways do you think your testimony would have been useful for the court?

- b. Is there any other personal reason why you would like to appear in court?
- c. Do you think you would have been supported to give testimony in court?

4. Did you seek damages in a lawsuit? If not, why did you abstain from doing so?

- a. Are you informed about your right to seek damages?

5. Have you ever been approached by either the offender, his family member(s) or your own family member(s) asking you to solve the issue?

- a. If so, who approached you and what was their offer?
- b. How did you react to the offer?
- c. Did anyone put any pressure on you to accept the offer?
- d. What was the stand of your parents/family members?
- e. Did you reach any agreement on the amicable settlement of the issue?

6 If there has been no agreement. Why did it fail?

- a. Who refused the settlement?
- b. What have been the reasons for refusal?
- c. Have you been personally affected by the failure to reach the agreement? If so, how?
- d. Have you been threatened? If so, what was the nature of the threat and how did you manage the threat?

6(bis). If there is any agreement between you or your family and the offender's family, how did it work?

- a. How did you reach the agreement?
- b. What are the terms of the agreement?
- c. Has any damages been given?
- d. If so, who received the damages and what was the value of the damages?
- e. What personal commitments have you taken due to the amicable settlement?

7. Do you know whether the agreement has been used to influence the trial process?

- a. Have you informed the prosecution/court about the agreement? In which way?
- b. What has been the reaction of the prosecution/court?

- c. Did you withdraw your case or change your original statement to influence the course of the legal process?
- d. Has the intervention had any effect on the outcome of the trial?

8. What is your situation now?

- a. Are you personally satisfied with the solution of the offence?
- b. Do you feel safe now?
- c. What is the state of relations between you and your family or the offender's family now?

Thank you for all that valuable information.

Is there anything else you would like to add before we end?