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Rape as Gender-Based Violence and Discrimination Against Women: Analysis of German and Georgian Criminal Law Through the Lens of the International Anti-Discrimination Framework

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Abstract

This article studies and examines the conceptualization of rape through the lens of gender equality, arguing that sexual violence must be understood as a form of discrimination against women. Against the backdrop of recent developments within the United Nations, particularly the renewed emphasis on women's rights and gender equality in the work of the General Assembly and the Commission on the Status of Women (2026), the study situates its analysis within the broader human rights and anti-discrimination framework.

The article critically engages with legislative developments in Georgia, specifically the removal of the concept of "gender" from legal discourse and its replacement with the narrower notion of "equality between women and men," which is based solely on biological sex. It argues that such a shift obscures the structural and gendered dimensions of sexual violence and undermines a comprehensive understanding of rape as a manifestation of inequality. Adopting a feminist legal perspective, the study conducts a comparative analysis of Georgian and German criminal law on sexual violence. Through this analysis, it demonstrates that framing rape as gender-based discrimination enhances both the conceptual clarity of the offence and the effectiveness of legal responses. The article further draws on key

contributions from feminist legal scholarship to support its normative and analytical framework.

The study advocates for the reintegration of gender as a central analytical category in legal discourse and for the development of legal frameworks that more adequately address the structural inequalities underpinning sexual violence.

Keywords: Gender equality, Gender-based violence, discrimination against women, patriarchal system, sexual violence

Introduction

This article aspires to explain the problem of sexual violence by presenting the intertwined position of legal, social and gender dimensions pertaining sexual assault and to deal with it respectively. The present research asserts that when discussing the essence of the issue of sexual abuse, including rape, the first and most important concept to consider is gender-based violence, which in turn is a visible expression of discrimination directed against women, and thus, this issue should be considered from the perspective of gender equality, along with the expectations that the achievement of substantial gender equality is the most important prerequisite for reducing this crime.

In the article it is assumed that perception of rape and other forms of sexual violence by the society of particular culture correlates with the accuracy of related legislation and its effectiveness, which overall defines the level of gender equality and anti-discrimination framework of the country. Thus, reducing sexual violence and achieving substantive equality is only possible through intensified fight against women's discrimination.

In this context, the research advocates for the development of legal frameworks and policies in the jurisdictions under consideration that more effectively address discrimination, enhance protection against sexual violence, and promote substantive gender equality.

Therefore, when dealing with the issue of sexual violence as one of the forms of gender discrimination, it is not only the legal regulations of the problem, that needs to be taken into account, but its social and cultural aspects too. Against this background, study aspires to scrutinize the sexual violence from the perspective of women 's discrimination in Georgian and German legal, judicial and socio-cultural context as well as under International Human Rights Law.

Sociology of rape is also one of the main lines of this research. It means interpreting rape culture as a concept to describe a setting in which rape is condoned due to societal attitudes about gender, sexuality and even

traditions. Acts such as victim blaming, statutory rape and reparatory marriage are the factors fostering to the impunity of the perpetrator.

The ultimate goal of the study is to analyze the legislation and practice in Georgia and Germany pertaining sexual offences taking into account the multidimensional approach to the problem and outline its discriminatory character. For these purposes, the problem in the study is analyzed in line with the Istanbul Convention and CEDAW committee documents.

Through its analytical framework, the study underscores the centrality of gender (in)equality in the interpretation of rape and demonstrates the necessity of moving beyond a narrow, consent-based understanding in legal doctrine and practice.

Despite the fact that sexual violence is not limited to rape, and Article 36 of the Istanbul Convention mentions the latter as part of sexual violence, due to the rationality of the scope of the study, it was considered appropriate to present, discuss and summarize sexual violence under the name of its extreme form - rape.

Given the plurality of approaches within contemporary feminist legal theory, this research deliberately adopts and consistently develops a single theoretical framework—namely, **radical feminist discourse**. This focused approach enables the study to maintain analytical coherence and to clearly distinguish itself from the broader spectrum of feminist legal perspectives. The aim of this research is not to present a balanced overview of competing legal interpretations, but rather to articulate and substantiate a specific theoretical position—one that conceptualizes rape primarily as an expression of gender inequality. Accordingly, the study develops this argument through a comprehensive normative and theoretical foundation. Its central objective is to advance a **radical feminist understanding** of sexual violence and to explore its implications for legal reform.

Methodology:

This study adopts a comparative approach, examining the extent to which Georgian and German criminal law legislation on sexual violence complies with international human rights law, particularly within an anti-discrimination framework. As such, it constitutes a **comparative legal study**. While the methodology is comparative by nature, the theoretical framework of the research is grounded in **feminist legal theory**.

Germany has been selected as the benchmark jurisdiction for comparison for a certain specific reason. As widely acknowledged in comparative legal scholarship, the purpose of a study determines the selection of jurisdictions (Bhat, 2015, p. 161). Accordingly, Germany was chosen due to its significant influence on the development of Georgian

criminal law, which is largely derived from German legal traditions. The choice of feminist legal theory as the theoretical framework is determined because of its focus on understanding the structural nature of women's subordination and proposing remedies to address such inequalities. As noted by Obiora and Perry (2001), feminist legal theory represents "a manifestation in the legal academy of a range of efforts to understand the nature of women's subordination and to propose remedies for this subordinate condition." This aligns closely with the aims of the present study. Furthermore, given that the research is grounded in feminist discourse, it incorporates a plurality of methodological approaches characteristic of feminist research. In this regard, contextual analysis constitutes one of the key methodological tools.

As a study developed within the framework of feminist legal theory, this research approaches law both as a mechanism for reform and as a site of broader socio-political struggle. In line with feminist inquiry, law is understood as "an ensemble of potential tactics for reform and, more generally, as a site of struggle for a broader political transformation" (Obiora & Perry, 2001). This perspective is particularly relevant in the context of contemporary political developments in Georgia.

The collection, processing, and analysis of data were conducted using the following research methods: (1) **library/desk research** and (2) **empirical research**.

Accordingly, the study employed the following techniques:

1. **Library/desk research**, which included: (a) analysis of legislative sources at both national and international levels in order to assess the compliance of Georgian and German domestic laws with relevant international legal standards; (b) examination of anti-discrimination practices as reflected in academic literature and legislation; (c) review and evaluation of policy documents and reports produced by governmental and non-governmental organizations.
2. **Empirical research**, which involved analysis of cases of sexual violence against women and girls, as reflected in judicial decisions at both national and international levels.

1. Why does gender equality matter in rape case analysis?

a) Historical discourse and general overview

Prominent feminist authors (Charlesworth et al. 1991) have long ago mentioned and vividly outline that:

International law has far largely resisted feminist analysis. The concerns of public international law do not, at first sight, have any particular impact on women: issues of sovereignty, territory, use of force and state responsibility, for example, appear gender free in their application to the

abstract entities of states. Only where international law is considered directly relevant to individuals, as with human rights law, have some specifically feminist perspectives on international law begun to be developed (p. 614). Accordingly, "challenging the silences of international law and exposing the invisibility of women as an integral part of the structure of the international legal order is an important first step in feminist engagement" (Chinkin, 2008, paragraph 5). Feminist argued that "the protection of private as a sphere of non-intervention was a dangerous ideology that legitimated ignoring many injustices, including "VAW" *as just domestic violence."* FitzGerald & Skilbrei, 2022, p.11). One of the obstacles to the elimination of violence against women is the fact that the legal systems of many countries consider violence between women and men not a crime, but a family dispute that should be resolved without the intervention of the state (Kurtanidze et al. 2016, p. 24). "One priority of 1970s feminism was to bring violations that take place in the home to the attention of politicians and to make sure that such crimes were illegal, on par with physical and sexual crimes that take place between strangers together" (May-Len Skilbrei et al. 2020. p.10). It is agreed, that the intimate relationships are the most common context for rape and thus physical and sexual violence overlaps very often, making victims vulnerable to both - intimate partner violence and rape.

b) Marital rape as an expression of structural gender inequality

"Wider societal awareness of rape in marriage rose gradually alongside second-wave feminism, the growing criticism of violence against women and the lack of state intervention in both the private sphere and in intimate relations" (Kotanen, 2020, p. 83). Finally, it led to the criminalization of marital rape in the different parts of the globe and notably, in the US. By the end of 1990-ies marital exemption rule finally declared to be void in the United States (People v. Liberta, 1984). Nor Germany has been the exception the from the legislation that justified marital rape, - a phenomenon, which has been indorsed in Germany until 1979 (Hörnle, 2023, p. 142). The historical acceptability of marital rape can be explained by a combination of socio-legal ideologies and attitudes to marriage, sexuality and gender inequality (Kotanen, 2020, p. 85).

Ironically, even though marital rape as a phenomenon has never been articulated in national legislation of Georgia as a justification for the removal of criminal charges from the perpetrator, - rape in marriage, as an offence has never been put forward in practice because of its's societal understanding, until very recently, when the Istanbul Convention induced the revision of the legislation.

Traditionally, as it is mentioned in the legal literature rape in marriage was perceived to be as impossible as a husband robbing himself (Kotanen, 2020, p. 85).

Same perception of marital rape has been accorded in Georgia too. Albeit, criminalized long ago in line with Georgian Criminal law, relevant data from police on reporting of such crime or data from prosecution office on prosecuting it - indicated that such a behavior is socially condoned insofar accepted as normal by the community. This bitter reality demonstrates once again how devastating can be cultural views and traditions for the development of the equal rights in the country, where women at large are thought to be subjected and submitted to their husband's sexual needs and desires.

c) Sexual domination as an exposure of systemic inequality within the public sphere

Inequality as a basis for the issue in sexual violence cases does not emerge only in intimate partner's relationships, but in the same vein, it reiterates well known and historically established pattern of male domination over women in all sexual assault cases. This is why achieving gender-equality must be the first and foremost aim of the policymaker in a quest to decrease sexual violence cases against women, which are clearly gendered and thus discriminating.

CEDAW addresses violence against women, including rape, as a form of discrimination against women following Recommendation 19 in 1992 (UN, 1979, 1992). Although attributing the concept of gender discrimination to violence against women is mostly ignored in practice and perhaps even not fully apprehended, - the legal literature, where it has been developed is noteworthy and highly considerable. Such development is observed in the work of MacKinnon (1979) on sexual harassment in employment, and yet another example of such discourse is that of Edwards (2008) on jurisprudence in UN human rights treaty bodies (Walby at al. 2015, p.117-119).

Moreover, and even on the broader scale**,** "in international criminal law, substantive sex equality concepts are being fielded in prosecutions for gender crime, including in the *ad hoc* tribunals for genocidal rape and in the International Criminal Court… bringing together human rights and international criminal law" (MacKinnon, 2016b, p. 745). Professor MacKinnon reasonably argues that in situations of widespread coercion, there are adequate grounds to classify unwanted sexual intercourse as rape, without requiring separate proof that the woman did not consent at this particular intercourse (MacKinnon, 2006, pp. 241–244).

It is fact that nowadays women's right is protected by numerous of international and national legal instruments worldwide. Nonetheless, their gender continues to carry negative significance in the lives of many women, particularly within communities, where women are socialized from birth to be silent about their circumstances, simply because they were born female

(Papp, 2013, p.115). This issue is directly related to and reinforces gender roles and gender stereotypes, and hence makes the discrimination sustainable, which on its turn, prevents from the achievement of gender equality.

d) Gender equality as a normative foundation of the legal concept of rape

In a book "stopping rape", its authors suggest a new holistic approach in which they argue that using a broad, institutional, complex-systems approach is necessary in theorizing about and preventing rape (Bjørnholt, 2020. p.10). Nonetheless, gender equality is the main pillar of issue. Walby et al. (2015) clarify that:

The principles underpinning the law on rape have been developing, drawing on concepts of human rights and gender equality, although not uniformly so. The definition of rape in law has been developing, albeit unevenly, removing marital exceptions and moving towards a consent-based definition (p.111).

Even though the latest attempts on massive elaboration of the "consent based" model of sexual assault are being grounded on protection of sexual autonomy, still "rape is a crime of gender inequality" (MacKinnon, 2016a, p. 431). The spirit and roots of above-mentioned statement, made by its author, a prominent scholar and radical feminist professor Catherine MacKinnon, depicts the reasonable comprehension of the furtive damage of inequality in the sustainability of sexual violence.

Professor MacKinnon poses the concept of social hierarchy as a central organizing principle for substantive equality (Fredman, 2016, p.747), which makes a great sense in understanding unequal power relationships in the case of sexual assault cases too. In contrast to MacKinnon, Friedman contends opposing opinion, that characterizing "substantive equality solely in terms of hierarchy obscures the multi-facetted ways in which inequality manifests" as far as power relationships are not only vertical, as hierarchy would suggest, but they are also diagonal, horizontal, and layered (Fredman, 2016, p.747). "Despite listing violence as a substantive factor, Friedman avoids equality analyses of sexual abuse" (MacKinnon, 2016b, p. 745). Nonetheless, what stands in the center of sexual violence analysis, is hierarchically gendered social meaning of the issue. Albeit first has been perceived, named and regulated as such in the United States, as time passed such understanding has been spreading over the world.

As MacKinnon (2016a) comments:

Authorities around the world increasingly recognize the reality that **sexual violation** is **socially gender-based**, whether that understanding is predicated on the large numbers and vast disproportion by sex between perpetrators and victims, on gender roles and stereotypes of masculine and

feminine sexuality, or on the hierarchically gendered social meanings and consequences of sexual victimization and perpetration (p.433).

e) Patriarchy as a systemic structure of gender inequality underpinning sexual violence

The foregoing demonstrates the necessity of analyzing sexual violence through the lens of patriarchy as a systemic structure. In turn is does not surmise ignoring perpetrators as individuals on individual level. Instead, they are included as participants in a larger system rather than being treated as the beginning and end of everything (Johnson, 2005, p. 93). Nonetheless understanding on how this system fosters sexual assault, as a form of gendered based violence and thus discriminating again women is the first and fundamental step for understanding the essence of the issue.

Professor MacKinnon's analysis of sexual violence encourages scholars, including myself, to demonstrate why gender inequality matters in the analysis of sexual assault, whilst there is trending shift solely to "consent based" understanding of sexual offences in the legislations of the western countries removing gender inequality from the discourse if favor of personal autonomy.

2. Germany

a) Assessing recent changes to German sexual law under gender equality prism

In German criminal code and related legislation, the "consent" has taken the central place in sexual assault definition with the main target – person's autonomy to be protected from intrusion. Also, as Germany conveys in its ninth periodic reports to CEDAW Committee: "Women and girls are, for instance, protected against violent attacks under the provisions relating to offences against sexual self-determination (sec. 174ff. Criminal Code (StGB)" (CEDAW Committee, 2021, para. 104). While individual autonomy is significant, gender equality acquires a distinct and greater analytical value when considered at a broader structural level and thus, it outweighs any analysis, interpretation, or judgment grounded solely in the individual's consent. As professor MacKinnon correctly notes: "when power is unequal, consent to sex is unlikely to be meaningful, or it becomes impossible to tell" (MacKinnon, 2016a, p. 463). Thus, it is crucial to understand the implication of gender inequalities in rape cases; it is equally important for all - for an individual and for society, for a state and for a government too, because without recognizing and respecting gender equality, the right to women self-determination and autonomy will never be protected.

Notwithstanding of numerous international or national acts, despite of loudly applauded agreements and signatures on the documents on gender equality, it is yet to be achieved. And yes, women do have rights… victims of sexual violence too! But here the question arises to what extent are those

rights realized, respected and upheld? Unfortunately, the response is overly simple, particularly in light of the fact that patriarchal structures are deeply entrenched, historically persistent, and resistant to meaningful change. It is true what is said in literature, that women have right on paper, not in practice (Wolf & Werner, 2021, pp. 800 – 816). The same holds true for the gender equality clause - equality exists ostensibly at the formal level, yet remains unrealized in practice.

Whilst Germany's nine periodic report to CEDAW states that since 13 December 2019 examinations of injured parties in relation to sexual offences have been conducted by an investigating judge and an audio-visual recording is also made of the examination, which can then be used in the main hearing instead of hearing the injured party in person (CEDAW Committee, 2021, para. 105), the CEDAW Committee is concerned, however, that in practice: "Audiovisual interviews are rarely granted, subjecting survivors to further victimization" (CEDAW Committee, 2023, Para 17 (a)). Under such circumstances a rape is better to be understood not as intrusive solely to person's autonomy, but as "assault upon human dignity, an action, that constitutes a denial of any concept of equality for women (R.v. Osolin, 1993, pp. 595, 669).

Thus, perception of the sexual violence (including rape) as a form of gender - based violence is a first and foremost step for the comprehension of the issue. In this relation it's important to remind the reader that "under the European Convention on Human Rights, a new sex equality jurisprudence is developing in application to rape and, most stunningly, to domestic violence" (MacKinnon, 2016b, p. 745). Hence, a second, equally important consideration is the recognition of the close alignment and overlap between domestic violence and sexual violence, which predominantly occur between intimate partners or spouses as forms of gender-based violence, yet remain largely unreported and rarely prosecuted or adjudicated. Correspondingly, both of them (domestic violence and sexual violence) are regarded to be acts of gender-based violence as they "result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life" (Council of Europe, 2011, Istanbul Convection, Article 3).

b) The gendered "chain" in rape: from gender-based discrimination to inequality

The UN Special Rapporteur on violence against women and girls, its causes and consequences in 2015-2021 years, Dubravka Šimunović has clearly referred to such nexus (Šimonović, 2014):

While being unique in terms of its scope and approach, which is based on a gendered understanding of violence against women the Istanbul

Convention outlines the explicit linkage between the gender stipulated violence and discrimination – an interaction – which the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) failed to accomplish, even though this inaccuracy was redressed later on through the General Recommendation No. 19. This particular recommendation is considered to be one of the most important general recommendations of the CEDAW Committee because it clarified the relationship between discrimination against women and gender-based violence against women (pp. 601-602). It was the most significant document to show that the CEDAW convention prohibits any kind of sex-based discrimination. In this recommendation the Committee interpreted that the definition of discrimination against women given in Article 1 of the Convention "includes gender-based violence, which is, violence, that is directed against a woman because she is a woman or that affects women disproportionately" (CEDAW committee, GR No. 19, 1992, Article 6). Gender-based violence is identified as "a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men". According to the CEDAW committee gender-based violence includes "acts that inflict physical, mental, or sexual harm, or suffering, threats of such acts and other deprivations of liberty". The view that the recommendation connects gender-based violence to the international prohibition of discrimination has gained broad acceptance (Kherkheulidze, 2017, p.18).

General Recommendation No. 19 reinforced the anti-discrimination spirit of the CEDAW so boldly, that it has been regarded as an important document establishing "the missing link" between discrimination and violence (Shin, 2007, p.229).

In her work MacKinnon (2016a) demonstrates how inequality forms the foundation of the crime of rape:

In 2006, the Secretary General of the United Nations, in a conclusion to which "the link between violence against women and discrimination was key," observed that violence against women, including rape, had been established as "global, systemic and rooted in power imbalances and structural inequality between men and women" (p.435). "Sexual violence as a distinct expression of gender-based inequality was further recognized in two corresponding resolutions in 2013 - one from the CEDAW Committee, and another by the UN Security Council, "converging human rights with humanitarian law, both recognizing gender-based violence as a substantive form of sex inequality and a threat to international security and peace" (MacKinnon, 2016b, p. 746).

Nevertheless it has not been until the elaboration of the Istanbul Convention, when the notion of gender-based violence against women has

been defined separately in a legally binding international instrument (Council of Europe, 2011, Istanbul Convection, Article 3(d)). Defining it as "violence that is directed against a woman because she is a woman or that affects women disproportionately", enables for analyzing sexual violence from the prism of equality, insofar discrimination against women is nothing but for the mere expression of historically entrenched inequality between the sexes.

Moreover, the Istanbul Convention not only codifies, embraces and develops understanding of violence against women as elaborated in the CEDAW General Recommendation No. 19, but it also goes further and defines it as both "a human rights violation and as discrimination against women", equating them to all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life (Council of Europe, 2011, The Istanbul Convention, Article 3(a)). Even during the wartime sexual abuses, which, at first glance, is regulated by IHL and ICR, IHRL is still applicable in the view of recognition of the gender-based violence against women as a violation of human rights (Moore & Chinkin, 2018, p. 179). Rape in war is now reorganized as a violation of women human rights under CEDAW as well as under CAT and the ICCPR (Moore & Chinkin, 2018, p.194).

Thus, is it important to draw attention to the gendered nature of the issue.

Nonetheless, as Report of the German Women Lawyers Association on the Implementation of the Istanbul Convention in Germany ((djb), 2021) outlines:

Even though *The Atlas on Equality between Women and Men in Germany* from the year 2020 contains a chapter on intimate partner violence, in which victims of intimate partner violence are listed according to gender and the respective Land, still it does not contain any further details on gender-based violence (p.9).

It is essential that even some of the relevant EU Directives to be interpreted from a gender perspective.

European Institute for Gender Equality illustrates the importance of gender-analysis regarding the issue:

The purpose of undertaking a gender analysis is primarily to make visible the fact that gender relations are likely to impact the solution to a problem, to indicate the form that impact will take and to propose mitigating factors or alternative courses of action ("Analysis of EU directives from a gendered perspective" section).

c) Significance of implicating gender dimension for dismantling rape misconceptions

The inclusion of the gender dimension is essential to the assessment of the issue from both - substantive and procedural criminal law perspectives, as it constitutes a prerequisite for ensuring effective investigations and the delivery of fair and proportionate punishment. Even though in Germany prosecution authorities (public prosecution offices and police) are required by law to investigate every criminal offence (known as the "principle of mandatory prosecution", section 152 (2) Code of Criminal Procedure" (CEDAW Committee, 2021, para. 104), studies indicate (Lea et al. 2003, p.583), that in Germany (Wolf & Werner, 2021, pp. 805-807) as in many other countries the issue of holding perpetrators accountable is often left unresolved as a consequence of case attrition in rape proceedings (Daly & Bouhours, 2010, p. 565-569). This is a common problem for many countries, including Georgia (Dekanosidze, 2020, p.15).

As Walby indicates in her research, most rapists are not convicted, resulting in impunity (Walby et al. 2015, p.5), which may ultimately be attributed to the persistence of gender stereotypes. Also, during wartime sexual offences, "stereotypes persist leading to lack of prosecutions, reluctance of victims and witnesses to come forward to testify and to acquittals" (Moore & Chinkin, 2018, p.202). Considering all these challenges the Istanbul Convention explicitly mandates the parties to ensure "that interpretations of rape legislation and the prosecution of rape cases are not influenced by gender stereotypes and myths about male and female sexuality" (Council of Europe, 2011, Explanatory report to the Istanbul Convention, para. 192).

At a societal level it is also crucial to confront so called "rape culture". In corresponding literature (Phipps et al.2018) "rape culture" is interpreted as:

A set of general cultural beliefs supporting men's violence against women, including the idea that this violence is a fact of life, that there is an association between violence and sexuality, that men are active while women are passive, and that men have a right to sexual intercourse (p.1). Expressed attitude, in turn generates prevalent "rape myths" such as that women enjoy being raped, and reinforces the idea that lines around consent are vague, which has established widespread mistrust of rape victims and low conviction rates of perpetrators (Phipps et al. 2018, p.1).

As it is stated in the literature concerning procedural aspect of the sexual assault law in Germany, "in cases where rape myths and gender stereotypes come into play, gender stereotyped arguments have actually been used to influence the margin of appreciation of the court and the outcome of the trial" (Wolf & Werner, 2021, pp. 806).

According to contemporary studies, “there is still considerable ‘attrition’, which means that many cases of rape reported to the police do not lead to a conviction” (Walby et al. 2015, p.111). In general, “rape myths are understood as descriptive or prescriptive beliefs about sexual aggression, that usually used for the denial, downplaying and justifying men’s sexually aggressive behavior towards women” (Gerger et al. 2007, p. 425). Also, in relation to underreporting of sexual violence, *The EWL’s “Barometer on rape”* found, that the low levels of reporting were associated with gender roles, as far as gender stereotypes, coupled with societal expectations with regard to women and men’s behavior, thereby fostering an environment in which date rape is both possible and socially acceptable (Amnesty International Report, 2018, p.25). Culturally legitimate violence plays a huge pole in rape cases as it creates both - culturally legitimized crime and culturally legitimate victim. In such a society gender role stipulates forming typology of a perpetrator and its victim. Various cultures describe certain forms of sexual violence that are condemned and other forms that may be tolerated to a degree, the culturally legitimized forms of violence (Baron & Straus, 1989, p.32). The risk of rape victimization for women is heightened by cultural and structural factors that create a predisposition toward such behavior. In Criminology “a positive correlation is found between powerlessness, deprivation and the frequency of criminal victimization. Cultural stigmatization and marginalization also enhance the risks of criminal victimization by designating certain groups as “fair game” or as culturally legitimate victims” (Fatta, 2000. p.32). Hence, it is obvious why in the society of male dominance and women powerlessness, the women in general are deemed to be “legitimate” victims of sexual desires to men. That is why the equal power relations as a guarantor of gender equality at the same time safeguards the reduction of the sexual violence against women (Kherkheulidze, 2025, p.143).

Even in the context of conflict-related rape and sexual violence - regulated and condemned under three overlapping branches of international law, such as international humanitarian law (IHL), international criminal law (ICL), and international human rights law (IHRL) - the protection afforded to civilians remains limited. Expanding the number of applicable legal frameworks or involving additional international bodies does not, in itself, ensure more effective protection for victims. Rather, the central issue lies in the failure of states to comply with their existing international obligations. This includes, foremost, addressing the structural power inequalities that enable rape both in times of peace and during armed conflict. As scholarship emphasizes, the prosecution of individual cases by institutions such as the ICC or other international, hybrid, or national tribunals is insufficient to

transform the broader, gendered conditions embedded in everyday life that perpetuate sexual violence in wartime (Moore & Chinkin, 2018, p. 203).

This reasoning can be used as auspicious arguments to insist that it is historically unequal power relations between man and women, that breeds and sustains the rape, concurrently linking such an inequality to the discrimination against women on structural level.

d) Some steps taken toward gender-equality in Germany – do they suffice?

The web-site of Federal Ministry for Education, Family Affairs, Senior Citizens, Women and Youth of Germany (n.d.) provides information on the gender equality situation in the country:

Germany's *Grundgesetz* (Basic Law) states that women and men are equal and that the state has to promote substantive, *de facto* gender equality. Germany is also committed to fulfilling its gender equality obligations under European law as well as international human rights law, for example by having ratified the CEDAW Convention and its Optional Protocol ("Gender equality" section).

In Ninth periodic report submitted by Germany to the CEDAW Committee, important steps towards eradication discrimination and fostering gender equality are mentioned. In this regard the documents also refer to publishing a new handbook entitled "Rightfully Gender Equality! CEDAW Manual" – in 2019 in a consultation version and in 2020 in an expanded version (CEDAW Committee, 2021, para.15). It contains translations of the Convention and the Optional Protocol thereto and the more recent general recommendations of the Committee. However, in its *concluding observations* "the Committee notes with concern the lack of sufficient explicit references to the Convention and the Optional Protocol thereto in judgments of national courts" (CEDAW Committee, 2023, para. 9).

German Institute for Human Rights (DIMR) has also published an article pertaining the scope and significance of the CEDAW Convention in German law, "thereby lending key support to the handbook as a practical guide for politics and the judiciary" (CEDAW Committee, 2021, para.16). It is also important to mention, that the same institute (DIMR, 2023) was tasked to monitor policies and measures to prevent and combat all forms of violence covered by the Istanbul Convention in line with "Concept for a National Rapporteur Mechanism on gender-based violence":

The National Rapporteur Mechanism on gender-based violence will first compile and then assess the available quantitative and qualitative data and findings in this field in and for Germany, thereby facilitating the design of policy at the federal and Länder level that is robust, evidence-based and better coordinated and coherent (p.6).

As it is stated in the ninth periodic report of Germany to CEDAW: "nationwide gender equality policy cooperation and coordination aimed at securing equal living conditions and opportunities are backed by a number of Federal Government/Länder working groups and the Standing Conference of Equality and Women's Affairs Ministers and Senators (GFMK)" (CEDAW Committee 2021, para. 19).

"The decisions of the GFMK provide the baselines for a common gender equality policy across the Länder. The Federal Government, represented by the BMFSFJ, is a permanent guest of the GFMK and reports on women's and gender equality policy measures and trends. The decisions of the GFMK have no direct legal effect, but they do have political weight and clout" (CEDAW Committee 2021, para. 20). Establishment of Federal Foundation for Gender Equality aspires to boost gender equality policy also at the structural level. Germany's Ninth periodic report to the CEDAW Committee (2021) informs that:

The Bundestag passed the Act establishing the Foundation on 15 April, the Bundesrat on 7 May 2021. The objective of the Federal Foundation is to accelerate gender equality policy at all levels across Germany through providing information, supporting practitioners, networking stakeholders in a "House of Gender Equality" and backing the development of innovative ideas on implementing gender equality" (para.57).

From above-mentioned commitments it becomes obvious that Germany has made a range of solid steps toward attainment of gender equality. However, the question remains whether equality is given the same level of consideration in sexual assault cases? Or even within the private sphere of intimate relationships, where rape and other forms of sexual violence against women occur? Regretfully, the answer weather gender equality analysis is used in relation to sexual offences in the practice is still ambiguous. Hence, this article aspires to persuade reader in inevitability of inclusion of gender equality analysis in sexual assault cases.

The rationale behind such an approach is the comprehension of the core of the issue – inequality. In order to understand the real value as well as applicability of equality principle in sexual violence case analysis one should very carefully follow the explanations of the professor MacKinnon, where she questions analytical rigor of the most commonly cited sexual violence cases (*M.C. v. Bulgaria, 2003* & *Karen Tayag Vertido v. Philippines, 2008*) observing a notable absence of equality-based reasoning in favor of an extended focus on consent. In her point of view, which constitutes the reasonable and gender-sensitive interpretation of the case, the analyses of the aforementioned cases were deficient in their treatment of gender equality, which had been considered only marginally and in a constrained, superficial

manner. In other words, the rationales of those two cases, given by the respective bodies - ECtHR and CEDAW) Committee - albeit involuntarily, but still undermined the real bases of the issue – gender inequality - due to building their adjudications and judgements on confrontation between consent – on one hand and the force, threat or a coercion, on another hand (MacKinnon, 2016a, pp. 463-464). What is noteworthy in such approach is how it constructs the essence of rape: "when rape is recognized as a crime of gender inequality, gender belongs on the list of inequalities that, when drawn upon as a form of power and used as a form of coercion in sexual interactions, make sex rape" (MacKinnon, 2016a, p. 469).

In a view of the foregoing analysis, professor (MacKinnon, 2016a) reasonably suggests that:

The transnational definitions of sexual assault that take inequality into account can be combined to redefine rape domestically as: a physical invasion of a sexual nature under circumstances of threat or use of force, fraud, coercion, abduction, or of the abuse of power, trust, or a position of dependency or vulnerability" (p. 474).

However, without recognizing patriarchy as the structural foundation of inequality, any attempt to engage with professor MacKinnon's analysis of sexual assault remains incomplete. Correspondingly, one should genuinely understand what patriarchy is and how it shapes the behavior.

Sometimes the confusion and resistance to feminist approaches arises just because people could not differentiate between patriarchy as a kind of society and the people who participate in it. That's why it is important to comprehend that it is a system, that influence much on societal meaning of different occurrences and phenomena within the society. In this relation it is important to think about how could such kind of system run us, or do we have anything to do with shaping it and if so, how? (Johnson, 2005, p.76). Engaging with this perspective within sexual violence analysis allows for a more comprehensive understanding of the ways in which systemic inequality forms the foundation of sexual assault, thereby situating it as a manifestation of gender-based violence.

This is why sexual assault cases should not be restricted to individual behavior or reduced to the actions of a particular man and woman. "From individualistic perspective we might ask why a particular man raped, harassed or beat a woman… but we would not ask however, what kind of society would promote persistent patterns of such behavior?" (Johnson, 2005, p.77). The better approach would have been to focus on gender hierarchy which is pertinent to patriarchal structure and thus affects women as a class.

e) Problematic judicial practice and lacunae in German law

Given article reflects and supports radical feminist theories, in which sexual violence is viewed as an expression of gendered power relations (Bjørnholt, 2020, p.23). To make this statement persuasive and summarizing, the analysis will be built on gender equality prism pertaining one German case, which, in my opinion failed to meet the contemporary standards for the interpretation of sexual assault cases because of neglecting and excluding gendered character of the case.

Lawyers who argue for the practicability and validness of "consent-based model", believe that in this way gender equality is protected too. However, they miss the very important point that "saying yes to unwanted sex that goes with it, is fundamental to consent as a concept, as if embracing it effectuates sex equality guarantees" (MacKinnon, 2016a, p. 465). To demonstrate the consistency of MacKinnon's reasoning in practice, a specific case should be examined. The dismissal of the charges in the following case resulted from the failure to consider inequality in the legal analysis.

In German legal literature (Hörnle, 2023), the scenario of the contested rape case is described as follows:

The defendant worked as a case manager at the state employment agency. During an appointment in his office, he asked a young female client to perform oral sex on him, which she refused. He nevertheless opened his pants and guided his penis into her mouth while she remained frozen. The BGH ruled that this was not a criminal offence" (p.142). This case, as an example shows, that the sole reliance on the consent, meaning - reliance on the word "no", or searching for some gestures – meaning "no", has led the court to the wrong decision. Whilst assessing the case from a gender-inequality perspective would have clearly revealed its gender-based nature and exposed its discriminatory character against women.

Hence, in a view of such background, the position of the CEDAW Committee, asserting that, German courts are to some extent ineffective in sufficient implication of gender perspective in their decisions (CEDAW Committee, 2023, para. 9), is to be supported. This is why the Committee recommends that Germany: "increase its efforts to encourage the direct application of the Convention and the Optional Protocol thereto by national courts, law enforcement agencies and lawyers**,** including through capacity-building for judges, prosecutors and lawyers" (CEDAW Committee, 2023, para. 10). Although professor Hörnle does not engage in equality analysis - as a basis of gender-based discrimination - pertaining the mentioned case, she nonetheless finds the dismissal of charges incorrect and points to several prosecutable scenarios arising from the facts of the case (Hörnle, 2023, p.142).

Finally, as it correctly stated in the Parallel Report Istanbul Convention by German Women Lawyers Association (2021, (djb)):

Gender-based motives should be included as a circumstance to be taken into consideration for the penalty in Section 46(2) of the German Criminal Code. Such motives are present, for example, if the offence is directed against a woman because she is a woman, or if it is characterized by ideas of gender inequality (p.6).

3. Georgia

a) Recent legislative amendments to Georgian laws as a regression in women's rights

In deference from Germany, where above-mentioned motives, as alleged by the corresponding report, had been lacking from legislations, in Georgia, until 2025 such motive had been already incorporated in article 53 [1] of Georgian Criminal Code as "aggravating circumstances" in line with the article 46 of the Istanbul Convention. Since 2017, the last year, both – "gender" and "gender identity" had been acknowledged as well-known aggravating circumstances enhancing punishment for the perpetrators acting with such motives.

However, on April the 2nd, 2025, the Georgian Parliament adopted a set of legislative amendments that removed all references to "gender" as well as to "gender identity" from a range of laws (Parliament of Georgia, 2025). Not surprisingly such changes affected key fields, such as anti-discrimination law and criminal law - two main areas, this article rests on.

The amendments have a devastatingly sweeping effect on anti-discrimination laws, as they significantly altered a number of related laws, particularly those addressing gender-based violence against women. Namly, three main pillars underpinning legal framework for combating gender-based violence in Georgia: laws on "Gender Equality", "Elimination of All Forms of Discrimination" and "Prevention of Violence against Women and/or Domestic Violence, as well as the Protection and Assistance of Victims of Violence - had been significantly altered.

As experts in gender equality and non-discrimination (Dekanosidze, 2025) correctly point out:

The removal of "gender" undermines existing legal and policy frameworks aimed at addressing inequality and discrimination against women. Gender-based violence laws are at risk of being weakened, as they depend on the recognition of harmful gender stereotypes and structural inequality. The amendments contradict Georgia's international human rights obligations, including under CEDAW, the Istanbul Convention, which require states to recognize and address gender-based discrimination (pp.1-2).

This regressive legal reform replaced the term “gender” with “equality between women and men,” framing “gender” as an externally imposed construct associated with Western liberal influence (The Parliament of Georgia, Explanatory Note, 2025). With a view of such attitude Georgian legislators not only foster to the demolishing anti-discrimination legal framework in Georgia, but also to isolating the country from the Western world. While resting on draconic Law named “Foreign Agents Registration Act”, adopted last year (The Parliament of Georgia, 2025), they also deliberately shrinking space for women human right’s advocates, raising their voices against gender inequality and discrimination against women.

Above mentioned amendments were enacted without meaningful public consultation and have faced widespread criticism from civil society and international actors (Dekanosidze, 2025, p.1). One of such organizations acting in Georgia, “Social justice center”, reasonably interpreted for the broader public that, grasping the profound social, legal, and political implications of removing the concepts and principles of gender and gender equality from the legal framework required to first examine the underlying foundations of gender equality in a systematic way (“WOMEN’S RIGHTS / Statement” section), 2025).

The essence of gender equality, along with its significance, was also thoroughly elucidated by them (Social justice center, 2025), mentioning that: Gender equality is a broad concept that recognizes that inequality is not limited to biological differences but also encompasses social roles, expectations, and power structures that contribute to the discrimination, oppression, and marginalization of women. This definition of gender is based on the recognition of women's historical and multifaceted oppression, and it asserts that policies protecting women's rights and promoting gender equality must address the patriarchal social roles, expectations, and historically established political, economic, and cultural power hierarchies (“WOMEN’S RIGHTS / Statement” section). The correct approach, also expressed by them, prioritizes a more complex and intersectional perspective to gender, analyzing the interrelated nature of various social categories and markers. In the context of developing just policies and advancing gender equality, the adoption of gender-sensitive approaches is considered essential, as it enables a critical assessment of existing social hierarchies (Social Justice Center, 2025, “WOMEN’S RIGHTS / Statement” section).

The foregoing reasoning aligns with the prioritization of a gendered understanding of rape, framing it as a form of gender-based violence that constitutes discrimination against women when analyzed through the lens of gender equality.

b) The need for reconceptualizing rape within the Georgian criminal code

Yet another contentious issue in Georgian legislation, also reflecting gender stereotypes, is an outdated definition of rape (Kherkheulidze, 2024, pp. 182-195). Georgia's criminal code still continues to require the use of violence/coercion as constituent elements of crimes of sexual violence (including rape). Regardless which model Georgia adopts in the future for the regulation of sexual offences - the "only yes is yes" or "no means no" approach – gender analysis must be applied in the process of the practical exercise of the law.

Legislative strategy amending Georgian law on sexual offenses in the future, could also avail from the guideline principles on sexual violence, namely - *The Hague Principles on Sexual Violence*, derived from Civil Society Declaration on Sexual Violence (Women's Initiatives for Gender Justice, 2019), explaining the substance of such a crime as of act that:

Involves singular, multiple, continuous, or intermittent acts, which, in context, are perceived by the victim, the perpetrator, and/or their respective communities as sexual in nature. This includes acts that are committed forcibly or against a person who is unable or unwilling to give genuine, voluntary, specific, and ongoing consent ("key principles for policymakers on sexual violence" section, principle 2, p.105).

However, none of the strategies will work unless the inequality as a core problem, creating coercive atmosphere, is taken into the account both, during the elaboration of the draft law or adjudication of a case on sexual assault.

It is also extremely important to consider that "consent is not voluntary or genuine and it does not have any significance when it is expressed in a coercive environment (Dekanosidze at al. 2020, p.11). In a view of this, opinion or an assertion that inequality does not establish coercive environment, together with socially prescribed gender stereotypes, amounts to the ignorance of the range of international treaties on human rights at large.

Sole reliance on consent expressed in words "yes" or "no", will bring neither law nor the judiciary to the justice. As professor MacKinnon assesses: "It seems that these international adjudicators imagine that if consent is the rule, what the woman says she said or felt at the time will determine the legal outcome - a view that, at minimum, lacks basis in reality" (MacKinnon, 2016a, p.464). Thus, the issue of gender equality needs to be promoted in the political agenda of both countries, as it has been articulated in this article.

Conclusion

Sexual crimes, and in particular rape, which continue to generate divergent scholarly perspectives in Western legal discourse, cannot be adequately evaluated or explained from a single standpoint. While such conduct is primarily regulated within criminal law and therefore falls within its scope, this legal framing alone is insufficient. Given that rape constitutes a form of gender-based violence, disproportionately affecting women, its social and cultural context cannot be disregarded. The socio-cultural dimension is closely intertwined with gender, as it plays a central role in the formation of gender norms and the reproduction of hierarchical relations between women and men.

Ultimately, such an unequal distribution of power is harmful to women's rights (Freeman et al. 2012, p.25). Hence, this study broadens the apprehension of criminal law due to its inevitable entanglement with feminism, which has developed in the merits of social movement.

Consequently, study advocates and calls for considering Nordic experience in regulating sexual offences through implicating feminism into criminal law as an instrument for achieving gender equality. Such an interrelatedness between feminism and criminal law enables to view the rape not only as the result and expression of gender inequality, but also as an attack on and something that is detrimental to gender equality (May-Len Skilbrei et al. 2020, p.4).

Thus, while supporting “consent - based” approach in the regulation of sexual violence as it is called upon by the Istanbul Convention, the policy-makers as well as judges should bear in mind that, “under unequal conditions, many women acquiesce in or tolerate sex they cannot as a practical matter avoid or evade” (MacKinnon, 2016a, p. 465).

In certain situations, women tend to feel obliged to consent to sex. Hence, sexual compliance under particular circumstances can be regarded as a consent to unwanted sex (Torenz, 2021, p. 721). Such consent does not render the sexual act consensual in a meaningful sense, nor does it establish equality between the parties involved (MacKinnon, 2016a, p. 465). Eventually all these leads to the unequal power relations, which is constitutes the main basis for gender inequality.

Against this background, the removal of the term “gender” from Georgian legislation and the Criminal Code will definitely significantly undermine the protection of women from gender-based violence.

Yet at an extended scale it “reflects a broader pattern of democratic backsliding and disregard for inclusive and rights-based framework in Georgia “reflects a broader pattern of democratic backsliding and disregard for inclusive and rights-based framework in Georgia” (Dekanosidze, 2025, p.2). Therefore, the protection of gender equality within a country not only

contributes to the recognition of women's rights and the fair adjudication of sexual violence cases, but also serves as an indicator of the country's political trajectory and its overall human rights situation.

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