Expert Group Meeting

UN Special Rapporteur on violence against women: Report on rape as a grave and systematic human rights violation and gender-based violence against women

27 May 2020

**Presentation by Marceline Naudi, President of the Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO)**

I am here today speaking as the President of GREVIO, but before I start, allow me to speak as myself, Marceline Naudi…

Social Change is needed as Yasmeen Hassan said!

As long as women are perceived/seen/considered as property – submissive, objectified, dismissed, then…

We can have a model law… But if rapes are not reported, if they’re not prosecuted, if perpetrators are found ‘not guilty’ – leading to impunity plus normalisation of rape… then… where will that get us?

BUT as Christine Chinkin said, Laws can change mindsets…

So, with this firmly in mind…

What GREVIO Found

First of all, I need to emphasise that the Istanbul Convention which the GREVIO monitors, is a legally binding convention, meaning that states that have ratified are legally obliged to implement it.

GREVIO has completed the monitoring of 13 State Parties so far and we published a report of our activities in March – and we have another few countries in process of being monitored, the reports of which will hopefully by published within the next few months.

 I will start with the most relevant article of the Convention, Article 36, which requires Parties to criminalise all forms of non-consensual sexual acts, including rape. The central element of the Convention’s definition of sexual violence is the lack of consent given voluntarily by the victim. This definition certainly does not emphasise the offender’s use of force or threat. It also does not require proof of the victim’s physical or verbal resistance.

The Istanbul Convention’s emphasis on “consent” is enriched in its Art. 36 (2) which requires that the prosecution of sexual offences shall be based on a context-sensitive assessment of the evidence in order to establish on a case-by-case basis whether or not the victim has freely consented to the sexual act.

Article 36(1) describes the types of non-consensual sexual acts that State Parties must criminalise:

* It covers non-consensual vaginal, anal or oral penetrative sexual acts with any bodily part or object (Article 36(1a)).
* It also includes non-consensual non-penetrative sexual acts (Article 36(1b)).
* Moreover, it also covers the criminalisation of intentional conducts “causing another person to engage in non-consensual acts of a sexual nature with a third person” (Article 36(1c)).

This table shows the State Parties that have modified their legislation on sexual offences to get closer to what the Convention requires, and those that have not.

|  |  |
| --- | --- |
| State Parties that have modified their criminal legislation on sexual offences in an attempt to **criminalise all non-consensual sexual acts** | State Parties that did not modify their criminal legislation on sexual offences to **criminalise all non-consensual sexual acts** |
| Austria[[1]](#footnote-1) | Albania |
| Montenegro | Denmark |
| Portugal[[2]](#footnote-2) | Finland |
| Sweden | France |
|  | Italy |
|  | Monaco |
|  | Netherlands |
|  | Serbia |
|  | Turkey |

What were the changes made?

In Austria, in addition to the criminal offence of rape which requires the use of force, deprivation of liberty or a threat to life or limb, a provision entitled “violation of sexual integrity” came into effect in January 2016. This new provision covers instances of sexual intercourse or equivalent conduct “against the will of a person”, “under coercive circumstances” or “following an act of intimidation”. This is considered an important step towards holding rapists accountable, even when they do not use physical violence or threat. BUT GREVIO considered the current Austrian legislation as still not completely in line with the Article 36, as it may still not allow for prosecution in cases where the victim remains passive – so it may not cover situations where the victim does not say NO or does not clearly demonstrate her NO.[[3]](#footnote-3)

In Montenegro, the recent amendment to Article 204 has brought important changes to the criminal offence of rape with a view to aligning it with the requirement of the Istanbul Convention: the criminalisation of all non-consensual sexual acts. Rape and sexual violence provisions must be based on the notion that consent must be given voluntarily as the result of a woman’s free will and assessed in the context of the surrounding circumstances.[[4]](#footnote-4)

In 2015, in Portugal, the articles of the Penal Code on sexual coercion (art. 163) and rape (art. 164) were modified to cover sexual acts committed without violence or threat, and without having suppressed the victim’s ability to resist. BUT GREVIO still considered these legislative changes as not completely complying with the Convention, since the term “constrain” is still used in the penal code to qualify these sexual offences. This wording may well not be sufficient to definitively break away from the longstanding practice of Portuguese courts to require proof of the victim’s resistance in order to sentence the perpetrator. [[5]](#footnote-5)

In Sweden, a 2018 amendment to the Criminal Code now ensures that all non-consensual sexual acts are criminalised. The chapter on Sexual offences criminalises intercourse or any other sexual act with a person “who is not participating voluntarily”. In the Swedish Criminal Code, passivity cannot be per se considered a sign of voluntary participation.[[6]](#footnote-6)

Overall, there were three approaches noted.

The first is the two-tiered approach. This entails keeping the rape provision that requires the use of force/threat/coercion and adding another one that is based entirely on consent. The issue here is that the provision which requires the use of force will carry a harsher prison sentence compared to the other, which is tantamount to qualifying different types of rape more worthy of punishment than others and can be seen as promoting the idea of “real rape” vs. something else. An example of this is the Austrian legislation with its offence on rape and another on the violation of sexual integrity.

The second is the “no-means-no” approach. This does not require the use of force/threat/coercion but rather requires for sexual intercourse to have happened “against the will of a person”. For criminal proceedings this means it must be established with certainty that the act took place “against the will of the person”. The risk here is that criminal proceedings will focus on this as a central element, thereby placing undue attention on the behaviour of the victim, possibly resulting in non-conviction for rape where the lack of consent cannot be clearly established. The Austrian law may also be seen as an example of this.

The third approach is the “only-yes-means-yes” approach. This is based on consent but clearly places the onus on the perpetrator – it is for him to establish that the act is consented to rather than for the victim to demonstrate consent or lack thereof. The wording is different from the “no-means-no” approach because it criminalises intercourse or any other sexual act with a person “who is not participating voluntarily”, as opposed to “against the will of a person”. The aim of this approach is to ensure that the criminal proceedings will focus on the behaviour of the perpetrator (What did he do to establish consent etc.) rather than that of the victim. Sweden uses this approach and they further also introduced “negligent rape”, which would allow convictions for those perpetrators who ought to have known (but did not) that the victim did not consent. This means there is no more room for excuses. GREVIO highly praised this approach. It can also be considered a “one-crime model” as it offers only one definition of rape that is based on the lack of consent. Where violence or force is used, aggravating circumstances may apply.

Another article of the Istanbul Convention that is relevant to the area we are discussing today is Article 25 that deals with support for victims of sexual violence. This article requires State Parties to take the necessary legislative or other measures to provide for the setting up of appropriate, easily accessible rape crisis or sexual violence referral centres for victims in sufficient numbers, to cover medical and forensic examination, trauma support and counselling for victims.

In its monitoring, GREVIO found the following examples, and possible issues:

* In Denmark**,** highly professional services for rape victims are located across the country – residential and non-residential, provide medical and forensic services for all victims above the age of 15, whether they intend to report the rape or not. BUT **–** only a low number of psychological treatment sessions per victim are offered and long-term psychological counselling is not always available to victims of sexual offences.
* In Turkey**,** the authorities offer support to child victims of sexual abuse to prevent child victims’ secondary trauma, and they plan to extend the coverage of these specialist units. BUT there is a gap in service provision for adult victims of sexual violence.
* In Austria, they have specialised counselling services for victims of rape and sexual violence BUT there are some issues in relation to the lack of the regional spread of support services due to a lack of sufficient long-term funding.
* In Sweden, sexual violence referral centres exist in some dedicated hospital settings and medical practitioners are able to administer a rape kit and collect forensic evidences, BUT the service does not ensure the offer of supportive counselling services to victims.
* In Portugal**,** a first centre for women and girls victims of sexual violence was inaugurated in Lisbon in 2016 and 2 more are planned BUT there is a need to develop rape crisis centres and sexual violence referral centres in sufficient numbers, and make sure they provide both short term support (forensic examination and medical care) as well as longer term (counselling).
* Albania and Montenegro, have no rape crises or sexual violence referral centres, medical and forensic examination are offered in hospital, BUT one needs to keep in mind the traumatic nature of sexual violence and the importance of ensuring a sensitive response by trained and specialised staff.

And the last relevant article that I will mention, briefly due to time constraints, is Article 16 on treatment programmes for sex offenders. In relation to this article GREVIO found some state parties with no information on treatment programmes devoted specifically to sex offenders and aimed at preventing them from reoffending (e.g. Albania and Montenegro). Some countries run specific treatment programmes for sex offenders in prisons (such a Portugal and Turkey), whereas others run them as part of the probation services (e.g. Austria). And finally, others (e.g. Sweden and Denmark) run these specific treatment programmes in both prisons and the probation services. These programmes are important since they can help towards prevention in the future.

I would like to thank the Special Rapporteur on Violence against Women and it Consequences, as well as Equality Now for giving us this opportunity to exchange information, and seek a way forward to rid our societies of rape and sexual abuse.

Thank you.

1. Despite this legal change, Austrian criminal legislation only partially complies with Article 36 of the Istanbul Convention, because it does not capture all non-consensual sexual acts. [↑](#footnote-ref-1)
2. Despite this legal change, Portuguese criminal legislation only partially complies with Article 36 of the Istanbul Convention, because it does not capture all non-consensual sexual acts. [↑](#footnote-ref-2)
3. First Baseline Evaluation Report by GREVIO in relation to Austria, paragraph 140, available at: https://rm.coe.int/grevio-report-austria-1st-evaluation/1680759619. [↑](#footnote-ref-3)
4. First Baseline Evaluation Report by GREVIO in relation to Montenegro, paragraph 179, available at: https://rm.coe.int/grevio-report-montenegro/16808e5614. [↑](#footnote-ref-4)
5. First Baseline Evaluation Report by GREVIO in relation to Portugal, paragraph 173, available at: <https://rm.coe.int/grevio-reprt-on-portugal/168091f16f>. [↑](#footnote-ref-5)
6. First Baseline Evaluation Report by GREVIO in relation Sweden, paragraphs 181-184, available at https://rm.coe.int/grevio-inf-2018-15-eng-final/168091e686. [↑](#footnote-ref-6)