



CHARACTER EVIDENCE IN RAPE TRIALS

*A Comparative Study of Rape Shield Laws and the
Admissibility of Character Evidence in Rape Cases*

A research note by Norton Rose Fulbright (South Africa) for the Bangladesh Legal Aid and Services Trust (BLAST)

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ANEESA BODIAT and LARA KERBELKER



TAMARA NACHMANI, ALESSIA KALISH and SHUBHREEN KAUR



POONGKHULALI BALASUBRAMANIAN, CHITRA NARAYAN and BHAVANA ELIZABETH ALEXANDER



BARRISTER USMAN A. MUGHAL

WHITE & CASE

MICHAEL CARRILLO, RACHAEL CRESSWELL, JESSE GREEN, CATRIONA HENDERSON, NICOLA HENSHALL, CHARLIE LIGHTFOOT, CAITLYN MCCARTHY and ALLEN WANG

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FOREWORD

Rape is a horrific crime committed everyday across the globe, but the Indian subcontinent continues to dominate headlines. In 2012, the brutal gang rape of a young student in New Delhi outraged the world, prompting mass demonstrations and calls for legislative change and harsher punishment. The dreadful episode prompted more rape victims to come forward to report the crime. In fact, in 2013, 34,000 rape offenses were reported across India, a 30% rise from the year before. Still, the number doesn't correctly capture the real extent of the problem, given that the majority of rape victims do not report the crime.

Significant cultural and legal obstacles stand in the way of real progress. They range from cultural misogynistic attitudes to weak legislative frameworks in regards to prosecution of the perpetrators of sexual violence.

Moreover, social stigma surrounding rape victims prevents many survivors from reporting violations and seeking redress. Victims are condemned to live in shame, with consequences ranging from the loss of family connections and employment, to the development of mental health issues that often remain untreated.

It is clear that the justice system must be dramatically strengthened to ensure that victims have the best chance of accessing justice. That's why the Thomson Reuters Foundation has facilitated legal support for the Bangladesh Legal Aid Services Trust (BLAST) to advocate for rape law reform in Bangladesh.

The Thomson Reuters Foundation is dedicated to strengthening women's rights through the rule of law. Our annual Trust Women Conference brings together leading experts and pioneers in the field of women's rights to forge tangible commitments to empower women and to fight human trafficking and modern-day slavery. TrustLaw, our global pro bono programme connecting the best law firms around the world with NGOs and social enterprises in need of free legal assistance, is also very active in putting the rule of law behind women's rights.

Through TrustLaw, we connected BLAST with Norton Rose Fulbright (South Africa), Blake, Cassels & Graydon LLP, JSA Advocates & Solicitors, Mughal Barristers and White & Case. Coordinated by Norton Rose Fulbright, the law firms conducted cross border research in seven countries to support BLAST in advocating for the removal of a Bangladeshi legislative provision which permits the use of character evidence in rape trials. This discriminatory provision transforms many rape trials into determinations of a victim's sexual morality rather than the defendant's guilt.

We are confident this research will support BLAST in their efforts to create a cohesive and united movement for reform in Bangladesh.



MONIQUE VILLA

CEO, Thompson Reuters Foundation

INTRODUCTION

The conviction rate for rape cases in Bangladesh is extremely low. Despite the existence of stringent laws criminalising rape, perpetrators routinely go unpunished. Social stigma surrounding rape prevents many survivors from reporting violations and seeking redress. A UN study on male violence in Asia¹, which surveyed perpetrators of rape, found that 95% of urban respondents and 88% of rural respondents in Bangladesh reported facing no legal consequences for raping a woman or girl. Where survivors do seek redress, protracted and adversarial court proceedings and challenges faced throughout the criminal justice system often results in the denial of justice.

One significant barrier to prosecuting rape cases is the defence's opportunity to impeach the victim's character at trial. [SECTION 155\(4\) OF THE EVIDENCE ACT OF 1872](#) sanctions the admission of character evidence in rape prosecutions. It states that "*when a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character.*"

The introduction of character evidence is humiliating and degrading for the victim. While a victim's character has no bearing on determining consent, statements about the victim's character made by the defence are taken into serious consideration by the courts. Any suggestion that the victim is "of easy virtue" may result in an acquittal for the defendant even if the court has found that non-consensual intercourse occurred.

The Bangladesh Legal Aid and Services Trust (BLAST) [🔗](#) is a specialised non-governmental legal services organisation which supports the poor and marginalised to access formal and informal justice systems in Bangladesh. As a part of this work BLAST also lead advocacy efforts for law and policy reform, with rape legislation being a key focus area. BLAST has previously led successful reform efforts relating to archaic

1 UN, 'Why Do Some Men Use Violence Against Women and How Can We Prevent It? Quantitative Findings from the UN Multi-country Study on Men and Violence in Asia and the Pacific', p.45

procedures for the collection of medical evidence in rape cases. BLAST is now seeking to amend laws that permit the consideration of character evidence in rape trials. This will create a stronger legal framework to protect rape victims from harassment or character assassination at trial.

BLAST partnered with TrustLaw, the Thomson Reuters Foundation's global pro bono service, to provide a legal analysis of rape shield laws and the admissibility of character evidence in rape trials. Through TrustLaw, BLAST was connected to lawyers in England and Wales, Canada, India, Pakistan, Singapore, South Africa and the United States. The research questions addressed were –

- Are there any character evidence provisions specific to rape trials in the relevant legislation?
- Where such provisions exist, has there been a reform movement? If so, what have been the key achievements of the reform?
- Where the law has been reformed to prohibit the use of character evidence at trial or if such provisions never existed, are there rape shield laws in place? If so, what is the extent of the protection afforded to rape victims?

BLAST is using this research as a part of their advocacy efforts to reform the aforementioned discriminatory provision of the Evidence Act in Bangladesh.

EXECUTIVE SUMMARY

Norton Rose Fulbright

We investigated seven jurisdictions and the general trend is for there to be a restriction on the admissibility of character evidence in rape and sexual assault trials. Where such evidence is allowed, there is usually a restriction on how the evidence may be provided. For example, the evidence may have to be provided in camera or in judge's chambers, and not in public.

Most jurisdictions went through or are going through a reform process to protect victims of sexual assault from attacks on their credibility and character at trial. These jurisdictions highlight the importance of protecting the victims of sexual crimes and recognise that it may be traumatic for the victim to be cross-examined, especially if character evidence is allowed.

These are highlights from the jurisdictions where the research was completed:

CANADA

1. Canada's current "rape shield laws" were enacted in 1992 with legislation that amended the Canadian Criminal Code providing strict guidelines for when and how previous sexual conduct could be used by a defendant at trial.
2. The law places the onus on the defence to demonstrate that the proposed evidence pertains to specific instances of the complainant's sexual activity. The judge must determine whether the evidence has significant probative value not outweighed by its prejudicial effects, taking into account the need to remove discriminatory biases from the trial process and the need to protect the complainant's dignity and privacy, among other factors. This legislation seeks to balance the accused's rights with those of the complainant. It also endeavours to protect society's interests in encouraging the reporting of sexual assaults.

INDIA

1. Character evidence has been made irrelevant in cases of sexual assault in India and questions regarding the moral character of the victim or her previous sexual experience are impermissible even during the course of cross-examination.

2. Judges presiding over rape trials will have to ensure that questions relating to the character of the victim are not allowed to be posed during the course of the trial.

PAKISTAN

1. In criminal proceedings the fact that the person accused is of good character is relevant.
2. In criminal proceedings the fact that the accused person has a bad character is irrelevant, unless evidence has been given that he has a good character, in which case it becomes relevant (the evidence is relevant in reply).

SINGAPORE

1. Although [SECTION 157\(D\) OF THE EVIDENCE ACT](#) (which allowed the credibility of a witness to be impeached by showing immoral character) was repealed, a victim's sexual history is still admissible in certain circumstances.
2. For example, evidence of prior consensual sexual activities between the two parties could be used to demonstrate the victim's state of mind toward the accused.
3. Importantly, the admissibility of a sexual assault victim's past sexual history depends on the relevance of such evidence to the issues in the proceedings and need not rest on an express provision to this effect.
4. This gives the court significant latitude to determine "relevance".

SOUTH AFRICA

1. The sections on evidence relating to sexual assault trials provides that evidence of prior sexual history, other than evidence relating to sexual experience or conduct in respect of the offence which is being tried, may not be led or raised in cross-examination except with leave of the court, or unless evidence of prior sexual history has been introduced by the prosecution.
2. [SECTION 227 OF THE CRIMINAL PROCEDURE ACT](#) also provides factors which a court must consider in such an application. Despite this, a strong measure of judicial discretion is maintained. This discretion allows the court to balance the rights of the complainant with the accused's right to a fair trial, and to admit the evidence in the event that it is relevant to the accused's defence.

UNITED KINGDOM

1. In 1999 THE YOUTH JUSTICE AND CRIMINAL EVIDENCE ACT was introduced. It established the prima facie position that, except with the leave of the court, no evidence may be adduced and no evidence asked in cross-examination by or on behalf of the accused at trial about any sexual behaviour of the complainant.
2. In order for the court to grant such leave, it must be satisfied that refusing leave "might have the result of rendering unsafe a conclusion of the jury or... the court on any relevant issue in the case".
3. The Home Office commissioned a report evaluating the limitation on the use of sexual behaviour evidence relating to the complainant in rape trials and recommended further changes to the law.

UNITED STATES OF AMERICA

1. Various different states have differing rape shield laws. The differing laws can be categorised into four broad categories:
 - a. **LEGISLATED EXCEPTION** (evidence is admissible if they fit within certain legislated exceptions).
 - b. **CONSTITUTIONAL CATCH-ALL** (similar to legislated exceptions, but admissible if the U.S. Constitution requires. This is the federal law).
 - c. **JUDICIAL DISCRETION** (little to no guidance in the statute; court applies a standard relevance test and weighs probative value against the risk of prejudice).
 - d. **EVIDENTIARY PURPOSE** (the guidance varies based on the purpose for which the evidence is being offered)
2. Precluding evidence of a victim's sexual history involving people other than the defendant is consistent with the concept that a "victim's consent to intercourse with one man does not imply her consent in the case of another."
3. With respect to determination of whether evidence is admissible under any rape shield statute including judicial consideration, under any of the four categories, it is critical that the consideration be done so outside the hearing of the jury and also away from the public.

CANADA

BACKGROUND AND HISTORY

Canada's current "rape shield laws" were enacted in 1992 with legislation that amended the [CANADIAN CRIMINAL CODE](#)² providing strict guidelines for when and how previous sexual conduct could be used by a defendant at trial. Amendments were made to the provision that governs the admissibility of evidence of sexual activity, as well as refining the definition of consent to a sexual act and restricting the defence that an accused had an honest but mistaken belief that the accuser had consented. These amendments were the result of the previous rape shield laws (enacted in 1982) being struck down by the Supreme Court of Canada in 1991.

Under Canadian law, only evidence that is logically probative may be admitted and evidence may be excluded on the basis of a variety of evidentiary rules and policy grounds. In general, this balancing test involves a determination of whether the probative value of the evidence outweighs its prejudicial effect. The law and reform related to the admissibility of character evidence of the complainant in rape cases has focused on this balancing test.

REFORM PROCESS

Rape under the Common Law

- Rape was codified in the Criminal Code in 1982, up until which point it was a common law offence. Under the common law, marital rape was not recognized.

Studies conducted had showed widespread gender bias within the criminal law system³. For example, a woman's testimony under oath was often considered to be untrustworthy and such evidence alone would not lead to conviction. Similarly, complaints were regularly disregarding if the victim did not immediately report a rape after its occurrence.

- The prior sexual history of the complainant was also admissible on two grounds at common law: consent and credibility.

A woman's credibility as a rape victim often depended on her sexual reputation because her previous sexual conduct (both with the defendant and otherwise) were considered linked with the likelihood that she had consented or was lying⁴. Evidence of specific incidents of prostitution, opinion evidence that

2 Criminal Code, RSC 1985, c C-46.

3 K. Tang, "Rape Law Reform in Canada: The Success and Limits of Legislation" (1998) 42:3 International Journal of Offender Therapy and Comparative Criminology, 259.

4 P. Kobly, "Rape Shield Legislation: Relevance, Prejudice and Judicial Discretion" (1992) 30 Alta. L. Rev. 988.

the complainant was a prostitute and evidence that the woman habitually submitted her body to different men (for pay or not) were also considered to be relevant to the issue of consent at common law⁵.

Studies consistently showed that the admission of character evidence relating to the complainant was clearly prejudicial. For example, an increase in information received about the complainant's sexual history resulted in a correlated decrease in the perceived guilt of the accused⁶. As a result of the mounting body of evidence, beginning in 1975 major changes to the offence of rape were introduced.

The Criminal Code abolished "rape" and spousal immunity for rape, and a new crime of sexual assault was enacted, using three tiers in order to capture degrees of additional violence perpetrated against the victim. However the failure by the courts to implement the new legislation in a manner consistent with the purpose of the legislation called for further reform.

In response to criticism, new reforms were introduced in 1982 with the objectives of protecting the integrity of the complainant and eliminating sexual discrimination. The new legislation prohibited the introduction of any evidence on behalf of the accused that concerned the sexual activity of the complainant with anyone other than the accused, subject to three exceptions:

- a. evidence that rebutted evidence of the complainant's sexual activity or absence thereof that was previously adduced by the prosecution;
- b. evidence of specific instances of the complainant's sexual activity tending to establish the identity of the person who had sexual contact with the complainant on the occasion set out in the charge; or
- c. evidence of sexual activity that took place on the same occasion as the sexual activity that formed the subject-matter of the charge, where that evidence related to the consent that the accused alleged he believed was given by the complainant.

The legislation was subject to several constitutional challenges, primarily on the basis of the accused's rights under [SECTIONS 7 \(THE RIGHT TO LIFE, LIBERTY AND SECURITY OF THE PERSON\)](#) and [11\(D\) \(THE RIGHT TO A FAIR TRIAL\)](#) of the Canadian Charter of Rights and Freedoms (the "**Charter**")⁷.

All of these challenges led to confusion regarding the legal status of the legislation. Further reform came as a result of a 1991 Supreme Court ruling that struck down the legislation as unconstitutional. Parliament enacted new legislation that refined the definition of consent to a sexual act, restricted the defence for an accused who had an honest but mistaken belief that the complainant had consented, provided guidance to the courts on the question of relevance and attempted to provide a better balance

⁵ Quoted by L'Heureux-Dube, *J Re: Seaboyer v. The Queen; Re Gayme and the Queen*, [1991] 2 S.C.R. 577.

⁶ *Supra*, note 3.

⁷ *The Constitution Act, 1982*, Schedule B to the Canada Act 1982 (UK), 1982, c 11.

between the accused's Charter rights and the complainant's right to privacy. The new legislation was upheld as being constitutional in a 2000 Supreme Court decision and currently remains in force.

CURRENTLY

LEGISLATION

The rape shield provisions in Canadian law are governed under [S. 276, 276.1, and 276.2 OF THE CRIMINAL CODE](#). In 1992, [BILL C-49](#) was passed into law to amend s. 276. The section governs the admissibility of evidence of all sexual activity, including that between the complainant and accused.

The law places the onus on the defence to demonstrate that the proposed evidence pertains to specific instances of the complainant's sexual activity. The judge must determine whether the evidence has significant probative value not outweighed by its prejudicial effects, taking into account the need to remove discriminatory biases from the trial process and the need to protect the complainant's dignity and privacy, among other factors. This legislation seeks to balance the accused's rights with those of the complainant. It also endeavours to protect society's interests in encouraging the reporting of sexual assaults.

Section 276(1): Exclusion of Evidence

[SECTION 276 OF THE CRIMINAL CODE](#) creates a statutory rule of admissibility. The three cumulative requirements to engage the exclusionary rule are offence, subject matter and purpose.

The "offence" requirement is satisfied where the proceedings in which evidence is tendered relates to a listed offence, including sexual assault, sexual interference and invitation to sexual touching. The "subject-matter" requirement, as explained under [S 276\(2\)](#), is satisfied when the presented evidence is that "the complainant has engaged in sexual activity other than the sexual activity that forms the subject-matter of the charge, whether with the accused or with any other person". Finally, the purpose of introducing the proposed evidence must be to support either of two prohibited inferences grounded on the sexual nature of the activity:

- (i) that the complainant is more likely to have consented to the conduct charged; or
- (ii) that the complainant is less worthy of belief.

Where the purpose underlying the introduction of the evidence of extrinsic sexual activity is neither of the two above prohibited inferences, often referred to as the "twin myths", the exclusionary rule cannot be relied upon.

Section 276(2): Exception to the Exclusionary Rule

In order to qualify for the exception outlined under s 276(2), evidence of the complainant's extrinsic sexual activity must:

- (i) be of specific instances of sexual activity⁸;
- (ii) be relevant to an issue at trial; and
- (iii) have significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

In order to determine whether the evidence is admitted under this exception, the court follows the procedure described in [S 276.1](#) and [S 276.2](#).

Sections 276.1 and 276.2: Procedural Requirements

According to the procedural requirements outlined in s 276.1, an accused may make an application to the presiding judge for a hearing to determine the admissibility of otherwise prohibited character evidence. The judge considers this application without the presence of the jury or the public, and if satisfied, the judge may order such a hearing.

At the hearing the jury and the public are excluded, and the complainant is not a compellable witness. The judge must provide reasons for the ruling.

Section 276(3): Factors in Determining Evidence Admissibility

In determining whether evidence is admissible, the legislation has outlined several factors that the court should take into account, including:

- (i) the interests of justice, including the right of the accused to make a full answer and defence;
- (ii) society's interest in encouraging the reporting of sexual assault offences;
- (iii) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination;
- (iv) the need to remove from the fact-finding process any discriminatory belief or bias;
- (v) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;
- (vi) the potential prejudice to the complainant's personal dignity and right of privacy;
- (vii) the right of the complainant and of every individual to personal security; and
- (viii) any other factor that the judge considers relevant.

⁸ In *C. (A.R.)*, 2002 Carswell Ont 4921, the Ontario Superior Court of Justice held that where the accused does not seek to adduce evidence of specific instances of sexual activity but merely that there was sexual activity generally during the time period in question, the prohibition in s. 276(2) may not apply, and no application under s. 276.1 would need to be brought. However, the accused would still have to satisfy the Court that the evidence is relevant to an issue at trial and that its probative value exceeds any prejudicial effect.

CHARACTER EVIDENCE

The amended s 276 was upheld unanimously by the Supreme Court in *R v. Darrach*⁹ as constitutional.

1. The Supreme Court found that the section does not violate an accused's right to defend the charges because it only prevents the use of evidence of past sexual activity when it is offered to support one of the twin myths (as discussed in **the paragraph on Section 276 of the Criminal Code above**).
2. The rape shield provisions do not compel an accused to testify against himself, even though there is a procedural requirement under s 276.1 to present an application to introduce evidence. The requirement that the accused present an affidavit to the court does not equate to compelling him to be a witness or reveal his defence because it is a basic rule of evidence that the party seeking to introduce evidence must be prepared to satisfy the court that it is relevant and admissible. Lastly, the rape shield provisions do not hinder the right to a fair trial for the accused because the state still has the onus of proving all the elements of a sexual offence beyond a reasonable doubt.
3. Regarding the introduction of character evidence, the Supreme Court recognized that there are inherent "damages and disadvantages presented by the admission of such evidence"¹⁰. Therefore, under [S 276\(2\)](#), evidence of sexual activity must be significantly probative, substantially outweighing the danger of prejudice to the administration of justice. This requirement involves a balancing of probative value and prejudicial effect.

In more recent case law, the Ontario Court of Appeal wrote that the addition of the terms "significant" as descriptive of the probative value (e.g. the capacity of the evidence to establish fact) and "substantially" as the extent that significant probative value must prevail over prejudice to a fair trial, appears to require a more nuanced or qualitative assessment of the competing interests¹¹.

FUTURE DEVELOPMENT

Canada's current rape shield laws offer strong protection to the complainant, while at the same time balancing the accused's constitutional rights to a fair trial. Activists groups such as the Women's Legal Education and Action Fund, the Canadian Association of Sexual Assault Centres, the Disabled Women's Network Canada and the National Action Committee on the Status of Women applauded the Supreme Court for the 2000 decision upholding the rape shield legislation¹². Since the 2000 decision there have been no formal reports recommending further reform to the rape shield laws in Canada.

9 *R v Darrach*, 2000 SCC 46 [Darrach]; followed in *R. v. Solomon*, 114 W.C.B. (2d) 463; *R. v. Leslie*, 2012 BCSC 683; *R. v. Bird*, [2008] 8 W.W.R. 718.

10 Seaboyer, *supra*, at p. 634.

11 *R v T (M)*, 2012 ONCA 511, at para 43.

12 Leaf News Release, Online: *Women's Legal Education and Action Fund* [🔗](#)

INDIA

BACKGROUND AND HISTORY

Under the [INDIAN EVIDENCE ACT 1872](#), evidence could be given in any proceeding with respect to the existence or non-existence of every fact in issue and any other fact which was declared to be relevant under the law¹³.

The evidence regarding the character of the prosecutrix was often used in rape trials especially when the question of consent was a relevant fact in the trial proceedings. In order to establish the presence of consent or to overall discredit her testimony, the accused often adduced evidence about the immoral character of the prosecutrix or evidence regarding her past sexual history to show the presence of consent.

[SECTION 146 \(3\)](#) and [S 155 \(4\)](#) were the two provisions under the Indian Evidence Act 1872 which were used to lead evidence regarding the character of a rape victim and impeach her credibility.

1. Under [S 146](#), which deals with questions which may be put to a witness in the course of cross examination, it is permissible to ask any question which tends to “shake his credit, by injuring his character, although the answer to such questions might tend directly or indirectly to criminate him, or might expose or tend directly or indirectly to expose him to a penalty or forfeiture”¹⁴.
2. [SECTION 155 \(4\)](#), prior to amendment in 2003, read as follows: “when a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character”.

These provisions were used extensively by the accused to suggest that the act was consensual and to demonstrate that the prosecutrix was a woman of loose morals and unchaste and hence her version is to be discredited.

In 1980 the Law Commission of India in its 84th Report recommended amendments to make evidence regarding the character and past sexual history of the prosecutrix irrelevant in rape trials. The Criminal Law Amendment Act 2003 brought in some changes acting on these recommendations.

1. The commission noted that there was absolutely no justification to retain the provision at least with respect to past sexual relations with other persons and stated that even a “harlot or a prostitute is raped, her consent at the time of commission of the crime must be proved by evidence aliunde”.

¹³ Section 5 of the *Indian Evidence Act*, 1872

¹⁴ Section 146(3) of the *Indian Evidence Act*, 1872

2. The commission further noted that evidence regarding past sexual history and character cannot be adduced in cases where consent is not in issue. It stated that when consent is not in issue, evidence regarding the immoral character of the victim cannot be adduced to discredit her testimony. It noted that “it is wrong to assume that a female witness is less likely to tell the truth when she has a generally immoral character”.

In 2012, after the brutal gang rape in New Delhi, known as the ‘**Nirbhaya Rape**’, world-wide attention was drawn to the issue of safety of women in India and the need for law reform by various women’s groups and citizen’s movements across the country. The national and regional media also played a vital role in raising important questions regarding crimes against women. It was in this context that the government of India set up a commission to review the criminal laws and suggest amendments. The committee sought inputs from various experts, and stakeholder groups across the country undertook a detailed review of the laws in place and recommended further amendments which were given effect by the [CRIMINAL LAW AMENDMENT ACT 2013](#).

CASE LAW

1. In the case of *State of U.P. v Pappu Yunus and Anr*¹⁵, the court said that “even assuming that the victim was previously accustomed sexual intercourse, that is not a determinative question. On the contrary, the question which was required to be adjudicated was did the accused commit rape on the victim on the occasion complained of. Even if it is hypothetically accepted that the victim had lost her virginity earlier, it did not and cannot in law give license to any person to rape her. It is the accused who was on trial and not the victim. Even if the victim in a given case has been promiscuous in her sexual behaviour earlier, she has a right to refuse to submit herself to sexual intercourse to anyone and everyone because she is not a vulnerable object or prey for being sexually assaulted by anyone and everyone. It is well settled that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted without corroboration in material particulars. She stands at a higher pedestal than an injured witness. In the latter case, there is injury on the physical form, while in the former it is physical as well as psychological and emotional.”
2. In the case of *Narender Kumar v State*¹⁶ the court dealt with a case where the allegation was that the victim of rape herself was an unchaste woman, and a woman of easy virtue. The court held that so far as the prosecutrix is concerned, mere statement of prosecutrix herself is enough to record a conviction, when her evidence is read in its totality and found to be worth reliance. The Court held that “In view of the provisions of sections 53

¹⁵ AIR 2005 SC 1248

¹⁶ NCT of Delhi, MANU/SC/0481/2012

and 54 of the Evidence Act 1872, unless the character of the prosecutrix itself is in issue, her character is not a relevant factor to be taken into consideration at all.”

CURRENTLY

SECTION 53A OF THE INDIAN EVIDENCE ACT 1872 was inserted by the CRIMINAL LAW AMENDMENT ACT 2013. It reads as follows:

In a prosecution for an offence under SECTION 354, SECTION 354A, SECTION 354B, SECTION 354C, SECTION 354D, SECTION 376, SECTION 376A, SECTION 376B, SECTION 376C, SECTION 376D or SECTION 376E of the INDIAN PENAL CODE or for attempt to commit any such offence, where the question of consent is in issue, evidence of the character of the victim or of such person's previous sexual experience with any person shall not be relevant on the issue of such consent or the quality of consent.

The Criminal Law Amendment Act 2013 also substituted the following as the proviso to section 146 which reads:

Provided that in a prosecution for an offence under SECTION 376, SECTION 376A, SECTION 376B, SECTION 376C, SECTION 376D or SECTION 376E or an attempt to commit any such offence, where the question of consent is in issue, it shall not be permissible to adduce any evidence or to put questions in the cross examination of the victim as to the general immoral character or previous sexual experience, of such victim with any person for proving such consent or quality of consent.

CHARACTER EVIDENCE

In view of all of the above, character evidence has been made irrelevant in cases of sexual assault in India and questions regarding the moral character of the victim or her previous sexual experience are impermissible even during the course of cross-examination.

Going forward, it is left to the judges presiding over rape trials to ensure that questions relating to the character of the victim, however remote, are not allowed to be posed during the course of the trial and evaluate the facts and circumstances and ensure that sentencing is also not influenced by the past sexual history and character of the victim.

PAKISTAN

BACKGROUND AND HISTORY

Honour killings, burnings, and rapes in Pakistan indicate inadequate legal protection for women.

In 1979 Pakistan passed into law the [HUDOOD ORDINANCE](#), which made all forms of extra-marital sex, including rape, a crime against the state. During the time the Hudood Ordinance remained on the statute books, Human Rights Watch documented extensive sexual abuse against female bonded labourers.

The [OFFENCE OF ZINA \(ENFORCEMENT OF HUDOOD\) ORDINANCE 1979](#) described the offences of *Zina* (fornication and adultery) and *Zina bil jabbar* (rape). They were defined separately in the ordinance prior to the [WOMEN PROTECTION \(CRIMINAL LAWS AMENDMENT\) ACT 2006](#).

No case could be proven under the ordinance due to its stringent evidentiary stipulation of four independent male witnesses who were present at the time of the offence.

Punishments were awarded under the [TAZIR PROVISION](#) of the Hudood Ordinance.

Prior to [QANUN-E-SHAHADAT ORDER 1984](#) the law regarding evidence enforced was the [EVIDENCE ACT 1872](#). However in 1984 the 1872 act was repealed.

CURRENTLY

The [2006 ACT](#) has now totally deleted *Zina bil jabbar* from the Hudood Ordinance and inserted [SECTIONS 375](#) and [376](#) for rape and punishment respectively in the [PAKISTAN PENAL CODE \(PPC\)](#) to replace it.

Primary punishment is defined in Section 376 of PPC, punishable with death or imprisonment for a term which shall not be less than ten years or more than twenty-five years, and shall also be liable to a fine.

When rape is committed by two or more persons each person will be punished with death or imprisonment for life.

CHARACTER EVIDENCE

Questions relating to character or credit are dealt with in terms of the following sections of the [QANUN-E-SHAHADAT ORDER 1984](#):

67. In criminal proceedings the fact that the person accused is of good character is relevant.
68. In criminal proceedings the fact that the accused person has a bad character is irrelevant, unless evidence has been given that he has a good character, in which case it becomes relevant (the evidence is relevant in reply).

Procedural law related to evidence – *Qanoon e Shahadat Ordinance, 1984*

SEC 151 (4) allows for impeaching the victim's character in the context of rape

REFORM PROCESS

- Reform recommended by Shariat Court and Law Commission
- No reform undertaken so far

SINGAPORE

BACKGROUND AND HISTORY

Singapore does not yet have a rape shield law.

However, in a step forward the Singapore Ministry of Laws repealed the section of the Evidence Act that allowed the credibility of a victim to be impeached by showing “immoral character.”

CURRENTLY

[SECTION 157\(D\) OF THE EVIDENCE ACT](#) was repealed on 1 August 2012.

The law stated that:

“The credit of a witness may be impeached in the following ways by the adverse party or, with the consent of the court, by the party who calls him... (d) when a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character.”

The Ministry of Law agreed to repeal this section because it was “out of date”.

CHARACTER EVIDENCE

Although Section 157(d) of the Evidence Act was repealed, a victim’s sexual history is still admissible in certain circumstances.

1. For example, evidence of prior consensual sexual activities between the two parties could be used to demonstrate the victim’s state of mind toward the accused.
2. Importantly, the admissibility of a sexual assault victim’s past sexual history depends on the relevance of such evidence to the issues in the proceedings and need not rest on an express provision to this effect.
3. This gives the court significant latitude to determine “relevance”.

SOUTH AFRICA

BACKGROUND AND HISTORY

CHARACTER EVIDENCE RULES SPECIFIC TO RAPE TRIALS IN SOUTH AFRICA PRIOR TO 1989

Prior to 1989, [SECTION 227 OF THE CRIMINAL PROCEDURE ACT](#) provided that in sexual offences cases, the admissibility of character evidence of any woman was to be determined by the application of the common law. The common law position was that an accused person in a rape trial could adduce evidence of the complainant's reputation for lack of chastity.

The defence could question a complainant about her previous sexual history with the accused. Although the defence was prohibited from leading evidence on the complainant's sexual relations with other men, such evidence could be elicited in cross-examination of the complainant.

REFORM IN SOUTH AFRICA

The South African Law Commission *Report on Women and Sexual Offences* (1985) raised several problems with the common law position. Evidence of this nature was inadmissible in other cases, and there were no grounds for admitting it in rape or indecent assault cases. The possibility of cross-examination may deter victims from reporting sexual offences and be traumatic for victims.

As a result, section 227 of the Criminal Procedure Act was amended to require the accused to apply to the court for leave to adduce evidence of prior sexual history, or to question the complainant on her prior sexual history. Leave could only be granted if the accused could satisfy the court of the relevance of the evidence. Despite the amendment, judges still had unfettered discretion to determine the admissibility of evidence.

CURRENTLY

In 2007, [SECTION 227](#) was amended. The section now reads as follows:

"227 Evidence of character and previous sexual experience

- 1. Evidence as to the character of an accused or as to the character of any person against or in connection with whom a sexual offence*

as contemplated in the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, is alleged to have been committed, shall, subject to the provisions of subsection (2), be admissible or inadmissible if such evidence would have been admissible or inadmissible on the 30th day of May, 1961.

- 2. No evidence as to any previous sexual experience or conduct of any person against or in connection with whom a sexual offence is alleged to have been committed, other than evidence relating to sexual experience or conduct in respect of the offence which is being tried, shall be adduced, and no evidence or question in cross examination regarding such sexual experience or conduct, shall be put to such person, the accused or any other witness at the proceedings pending before the court unless-*
 - a. the court has, on application by any party to the proceedings, granted leave to adduce such evidence or to put such question; or*
 - b. such evidence has been introduced by the prosecution.*
- 3. Before an application for leave contemplated in subsection (2) (a) is heard, the court may direct that any person, including the complainant, whose presence is not necessary may not be present at the proceedings.*
- 4. The court shall, subject to subsection (6), grant the application referred to in subsection (2) (a) only if satisfied that such evidence or questioning is relevant to the proceedings pending before the court.*
- 5. In determining whether evidence or questioning as contemplated in this section is relevant to the proceedings pending before the court, the court shall take into account whether such evidence or questioning-*
 - a. is in the interests of justice, with due regard to the accused's right to a fair trial;*
 - b. is in the interests of society in encouraging the reporting of sexual offences;*
 - c. relates to a specific instance of sexual activity relevant to a fact in issue;*
 - d. is likely to rebut evidence previously adduced by the prosecution;*
 - e. is fundamental to the accused's defence;*
 - f. is not substantially outweighed by its potential prejudice to the complainant's personal dignity and right to privacy; or*
 - g. is likely to explain the presence of semen or the source of pregnancy or disease or any injury to the complainant, where it is relevant to a fact in issue.*
- 6. The court shall not grant an application referred to in subsection (2) (a) if, in its opinion, such evidence or questioning is sought to be adduced to support an inference that by reason of the sexual nature of the complainant's experience or conduct, the complainant-*

- a. *is more likely to have consented to the offence being tried; or*
 - b. *is less worthy of belief.*
7. *The court shall provide reasons for granting or refusing an application in terms of subsection (2) (a), which reasons shall be entered in the record of the proceedings."*

CHARACTER EVIDENCE

The section now provides that evidence of prior sexual history, other than evidence relating to sexual conduct in respect of the offence which is being tried, may not be led or raised in cross-examination except with leave of the court, or unless prior sexual history evidence has been introduced by the prosecution.

Section 227 also provides factors which a court must consider in such an application. Despite this, a strong measure of judicial discretion is maintained. This discretion allows the court to balance the rights of the complainant with the accused's right to a fair trial, and to admit the evidence in the event that it is relevant to the accused's defence.

The importance of this discretion was illustrated in the case of *S v Zuma*¹⁷, where the court allowed an application in terms of section 227. The court stated that:

"In my judgment the purpose of the cross-examination and the evidence the defence wanted to lead concerning the complainant's behaviour in the past was not to show that she misbehaved with other men. In fact it was aimed at showing misconduct in the sense of falsely accusing men in the past. The cross-examination and evidence are relevant to the issue of consent in the present matter, the question of motive and indeed credibility as well. It was not aimed at showing that the complainant was a woman of questionable morals. It was aimed at the investigation of the real issues in this matter and was fundamental to the accused's defence.¹⁸"

¹⁷ 2006 (2) SACR 191 (W)

¹⁸ 204G-H, 2006 (2) SACR 191 (W)

UNITED KINGDOM

BACKGROUND AND HISTORY

In general, evidence is admissible in English criminal cases where it is relevant to the question of whether a defendant is guilty or innocent. However, problems arose in rape cases with irrelevant evidence as to the complainant's past sexual history being used to discredit the complainant, influence findings on consent and subject the complainant to humiliation and distress. Legislation limiting the use of such evidence was therefore introduced.

REFORM PROCESS

In 1975, the [HEILBRON REPORT](#)¹⁹ expressed concern "about the extent to which, in a rape trial, the personal history and character of a rape victim can be introduced". Following recommendations made in that report, legislation²⁰ was introduced which forbade the defence from adducing evidence or asking any question in cross-examination about any of the complainant's sexual experiences other than with the defendant unless the judge gave it leave to do so. Any application for such leave had to be made in the absence of the jury and the judge could only give leave if satisfied that to refuse it would be unfair to that defendant²¹. However, this discretion was broadly interpreted by the courts and as a result the statute did not achieve its object of preventing the illegitimate use of prior sexual experience in rape trials²².

The House of Lords more recently have expressed the view that "the structure of this legislation was flawed. In respect of sexual experience between a complainant and other men, which can only in the rarest cases have any relevance, it created too broad an inclusionary discretion. Moreover it left wholly unregulated questioning or evidence about previous sexual experience between the complainant and the defendant even if remote in time and context. There was a serious mischief to be corrected".

¹⁹ *Report of the Advisory Group on the Law of Rape to the Secretary of State for the Home Department*, Cmnd. 6352, 1975.

²⁰ *The Sexual Offences (Amendment) Act 1976*, section 2.

²¹ This legislation was introduced "to avoid the assumption too often made in the past that a woman who has had sex with one man is more likely to consent to sex with other men and that the evidence of a promiscuous woman is less credible", per Lord Slynn in *R v. A* [2001] UKHL 25, paragraph 3. Lord Steyn in the same case said at paragraph 27 "[s]uch generalised, stereotyped and unfounded prejudices ought to have no place in our legal system. But even in the very recent past such defensive strategies were habitually employed. It resulted in an absurdly low conviction rate in rape cases. It also inflicted unacceptable humiliation on complainants..."

²² Lord Hope in *R v. A*, at paragraph 57 explained "statistics showed that the object of that measure, which was to protect complainants against unnecessary evidence and questions about their previous sexual experience, was not being achieved. They raised doubts as to whether it was satisfactory, in this very difficult and sensitive area, to leave the decision whether leave should be given entirely to the trial judge."

In 1998 a Working Group set up by the Home Office published a Report which concluded that there was “overwhelming evidence that the present practice in the courts is unsatisfactory and that the existing law is not achieving its purpose” and proposed that the law be changed. This Report led to the legislation which is currently in force.

CURRENTLY

LEGISLATION

In 1999 the [YOUTH JUSTICE AND CRIMINAL EVIDENCE ACT \(“YJCEA”\)](#) was introduced²³. It established the prima facie position that, except with the leave of the court, no evidence may be adduced and no evidence asked in cross-examination by or on behalf of the accused at trial about any sexual behaviour²⁴ of the complainant.

In order for the court to grant such leave, it must be satisfied that either [SECTION 41\(3\)](#) or [41\(5\)](#) applies (see **paragraphs on Section 41(3)** and **Section 41(5)** below) and that refusing leave “might have the result of rendering unsafe a conclusion of the jury or... the court on any relevant issue in the case”.

[SECTION 41\(3\)](#) applies if the evidence or question relates to a relevant issue in the case and either:

- (a) that issue is not an issue of consent; or
- (b) it is an issue of consent and the sexual behaviour of the complainant to which it relates is alleged to have taken place at or about the same time as the event which is the subject matter of the charge against the accused; or
- (c) it is an issue of consent and the sexual behaviour of the complainant to which the evidence or question relates is alleged to have been so similar:
 - i. to any sexual behaviour of the complainant which (according to the relevant evidence) took place as part of the event which is the subject matter of the charge against the accused, or
 - ii. to any other sexual behaviour of the complainant which (according to such evidence) took place at or about the same time as that event,
 - iii. that the similarity cannot reasonably be explained as a coincidence.

[SECTION 41\(5\)](#) applies if the evidence or question:

- (a) relates to any evidence adduced by the prosecution about any sexual behaviour of the complainant; and

²³ See in particular sections 41–43 of the YJCEA 1999.

²⁴ For the purposes of this provision, the term “sexual behaviour” is defined in section 42(1)(c) of the YJCEA.

- (b) in the opinion of the court, would go no further than is necessary to enable the evidence adduced by the prosecution to be rebutted or explained by or on behalf of the accused.

For all of these exceptions to the prima facie rule, the evidence must relate to specific instances of sexual behaviour. This means that evidence as to sexual reputation is unlikely to be admissible.

Applications for leave are heard in private and in the absence of the complainant. The judge must state in open court, but in the absence of the jury, the reasons for giving or refusing leave and the extent to which evidence may be adduced or questions asked.

PROCEDURAL RULES APPLICABLE TO APPLICATIONS FOR LEAVE

An application for leave to adduce evidence of or ask evidence in cross-examination relating to a complainant's sexual behaviour must be made in writing within 28 days of the prosecutor complying or purporting to comply with its duty of disclosure.

The application must give particulars of the evidence the defence wants to adduce and the questions it wants to ask, and identify:

- (a) the issue to which the complainant's sexual behaviour is relevant;
- (b) the applicable exception in the YJCEA (i.e. under SECTION 41(3) OR 41(5)); and
- (c) the name and date of birth of any witness whose evidence of the complainant's sexual behaviour the defendant wants to adduce.

CASE LAW

The House of Lords case *R v. A*²⁵ provided guidance on the application of SECTION 41 OF THE YJCEA. The issue was whether a sexual relationship between a defendant and complainant could be relevant to the issue of consent so as to render its exclusion under section 41 of the YJCEA a contravention of the defendant's right to a fair trial.

The House of Lords held that on ordinary principles of statutory interpretation section 41 of the YJCEA was incompatible with the right to a fair trial²⁶, in that it made evidence which may be relevant to consent inadmissible (in this case, evidence of a prior consensual relationship between the complainant and the accused) as such evidence did not fall within the limited exceptions in sections 41(3) or (5). As such, the HUMAN RIGHTS ACT 1998 required section 41 of the YJCEA to be read as subject to an implied provision that evidence or questioning which relates to a relevant issue in the case and which is required to ensure a fair trial by virtue of ARTICLE 6 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS should not be inadmissible.

²⁵ [2001] UKHL 25.

²⁶ Article 6 of the *European Convention on Human Rights*, as set out at Schedule 1 to the *Human Rights Act 1998*.

This will be a matter for the trial judge's determination and Lord Steyn explained the test as follows: "due regard always being paid to the importance of seeking to protect the complainant from indignity and from humiliating questions, the test of admissibility is whether the evidence (and questioning in relation to it) is nevertheless so relevant to the issue of consent that to exclude it would endanger the fairness of the trial under article 6 of the Convention. If this test is satisfied the evidence should not be excluded."²⁷

In *R v White*²⁸, a case in which the defence sought to adduce evidence that the complainant was a prostitute, the court distinguished *R v A* on the basis that it concerned evidence relating to the complainant's sexual history with the accused (rather than with third parties). It held that "*R v A* is not authority for any wider reading of [SECTION 41](#) by force of [SECTION 3 OF THE HUMAN RIGHTS ACT](#) in a case where sexual acts of the complainant with men other than the appellant are sought to be adduced than is justified by application of conventional canons of construction", and refused to grant leave to admit this evidence.

CHARACTER EVIDENCE AND FUTURE DEVELOPMENT

R v A prompted considerable debate and, as a result, the Home Office commissioned a report evaluating the limitation on the use of sexual behaviour evidence relating to the complainant in rape trials. Its findings included recommendations that:

1. There should be a clear statement in the legislation that sexual behaviour evidence should not be admitted other than in the exceptional circumstances set out in the legislation.
2. It should be emphasised that it is not generally reasonable to form a belief on consent based on past sexual history.
3. There should be a new exception to the prima facie rule allowing for evidence of previous or subsequent sexual behaviour with the defendant to be adduced, which could have a time limit.
4. It should be made clear that "sexual behaviour" and "sexual experience" include implied as well as express behaviour.
5. Court rules should be followed, in particular the requirement that all applications for permission to adduce sexual history evidence be made in writing pre-trial. Applications made at trial should be accepted only if the defence could show that they were unaware of the information on which the application is based until trial. Applications made at trial should also have to be made in writing, and the prosecution should be given time to consider the application and an adjournment allowed for this purpose if

²⁷ Para 46, [2001] UKHL 25.

²⁸ [2004] EWCA Crim 946.

necessary. Judges should be required to give their decisions and reasons for them in writing to both sides.

6. Consideration should be given to permitting complainants to be present at hearings of applications, if they wish. This would ensure that allegations about sexual behaviour can be tested and that judges can make informed rulings. It would also mean that complainants would know what was in store in any ensuing trial.
7. There should be a prosecution right of appeal against decisions to permit the introduction of sexual behaviour evidence.

UNITED STATES OF AMERICA

BACKGROUND

Various different states have differing rape shield laws.

CURRENTLY

The differing laws can be categorised into four broad categories:

(a) Legislated Exception (evidence is admissible if they fit within certain legislated exceptions)

States with legislated exceptions generally prohibit the admission of reputation or opinion evidence concerning the past sexual behaviour of an alleged victim of the sexual offense, unless it falls within an exception.

Common exceptions include past sexual behaviour with persons other than the accused, offered by the accused upon the issue of whether the accused was or was not, with respect to the alleged victim, the source of semen, pregnancy or injury, as well as evidence of past sexual behaviour with the accused on the issue of consent.

Many states provide that a court shall not admit such evidence unless it determines at a hearing that the evidence is relevant and the probative value of the evidence outweighs the danger of unfair prejudice. While this is the same standard a court would use in the judicial discretion category of rape shield statutes, the benefit of legislated exceptions is that they limit the discretion of the trial court and provide clear guidelines as to what evidence is admissible and not admissible during trial.

DATE ENACTED: the first jurisdiction to enact a Legislated Exception style of rape shield law was Michigan in 1974. Since then, 38 other jurisdictions have also enacted laws including similar provisions.

Legislative exceptions may bar evidence in a variety of circumstances, for example:

1. In *State v. Herrera*²⁹, even when a prosecutor opened the door to evidence of victim's prior sexual history, evidence that victim had allegedly engaged in a prior sexual relationship was not admissible under rape-shield law to impeach victim; the evidence was not relevant and material to a fact in issue in the case.

²⁹ 307 P.3d 103 (Ariz. Ct. App. 2013)

2. In *State v Peite*³⁰ evidence that the victim consented to sexual acts with men that she met at bars was not relevant to whether she consented to sexual acts with defendant, whom she met at a bar;
3. In *Smelcher v. State*³¹, evidence that concerned the past sexual behaviour of the victim could only be introduced into evidence when the court finds the past sexual behaviour directly involved the participation of the accused.
4. In *People v LaPorte*³² the provision of statute which bars evidence of a rape complainant's reputation for un-chastity and past sexual conduct does not unconstitutionally deny the defendant the right to effectively confront witnesses.

EXCEPTION	JURISDICTIONS IMPLEMENTING THE EXCEPTION
Sexual behavior involving the accused, when consent is at issue	Alabama, Arizona, Colorado, Connecticut, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Jersey, New York, North Carolina, North Dakota, Ohio, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Wisconsin, Wyoming
Evidence of specific instances of sexual activity showing the source or origin of semen	Arizona, Colorado, Connecticut, Florida, Hawaii, Idaho, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Missouri, Montana, Nebraska, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Wisconsin
Evidence of specific instances of sexual activity showing the source or origin of pregnancy	Arizona, Colorado, Connecticut, Florida, Michigan, Minnesota, Missouri, Montana, New Jersey, New Mexico, Ohio, Oklahoma, South Carolina, Vermont, Virginia, Wisconsin
Evidence of specific instances of sexual activity showing the source or origin of disease, injury or trauma	Arizona, Colorado, Connecticut, Florida, Hawaii, Idaho, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Wisconsin
Evidence that supports a claim that the victim has a motive in accusing the defendant of the crime	Arizona, Maryland, Oregon, Texas, Virginia,
Evidence offered for the purpose of impeachment when the prosecutor puts the victim's prior sexual conduct in issue	Arizona, Connecticut, Maryland, New Mexico, Tennessee, Virginia
Evidence of false allegations of sexual misconduct made by the victim against others	Arizona, Idaho, Minnesota, Oklahoma, Vermont, Wisconsin
Evidence that tends to establish a pattern of conduct or behavior on the part of the victim which is so similar to the conduct or behavior in the case that it is relevant to the issue of consent	Florida

30 839 P.2d 1223 (Idaho 1992)

31 520 So. 2d 229 (Ala. Crim. App.1987)

32 303 N.W.2d 222 (Mich. App. 1981)

Evidence of sexual behavior with parties other than the accused which occurred at the time of the event giving rise to the sex crime charged	Idaho
Any evidence directly pertaining to the offense charged	Kentucky
Evidence of immediate surrounding circumstances of the alleged crime	Missouri
Evidence relating to the previous chastity of the complaining witness in cases, where, by statute, previously chaste character is required to be proved by the prosecution	Missouri
Evidence that proves or tends to prove that the victim has been convicted of an prostitution within three years prior to the sex offense which is the subject of the prosecution	New Mexico
Evidence of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant	North Carolina
Similar sexual acts in the presence of the accused with persons other than the accused which occurs at the time of the event giving rise to the sexual offense alleged	Oklahoma
Evidence necessary to rebut or explain scientific or medical evidence offered by the state	Oregon, Tennessee, Texas
Evidence of specific instances of sexual activity which would constitute adultery and would be admissible under rules of evidence to impeach the credibility of the witness may not be excluded	South Carolina
Evidence of a pattern of sexual behavior so distinctive and so closely resembling the defendant's version of the alleged encounter with the complainant as to tend to prove that such complainant consented to the act or acts charged or behaved in such a manner as to lead the defendant reasonably to believe that the complainant consented	North Carolina, Tennessee
Evidence that the witness has been convicted of a felony or a crime involving moral turpitude	Texas
Evidence of sexual behavior offered as the basis of expert psychological or psychiatric opinion that the complainant fantasized or invented the act or acts charged	North Carolina

(b) Constitutional Catch-All (similar to legislated exceptions, but admissible if the U.S. Constitution requires. This is the federal law).

States with constitutional catch-all provisions provide, as an additional legislative exception, the admissibility of evidence required by the federal and applicable state constitutions.

Other states have recognized constitutional limitations on rape shield statutes, notwithstanding the absence of such a provision.

The exception does not equip courts with concrete standards for implementation. Because the constitutional exception is both ill-defined and arguably superfluous, it is not recommended.

DATE ENACTED: the first jurisdiction to enact a Constitutional Catch-All style of rape shield law was Connecticut in 1982. Since then, thirteen other jurisdictions have also enacted laws including similar provisions: Hawaii, Idaho, Illinois, Indiana, Iowa, Nebraska, New Hampshire, North Dakota, Oregon, South Dakota, Tennessee, Texas, and Utah.

Courts have recognized that the rape shield law must yield to the defendant's constitutional rights in certain factual circumstances. For example in *State v Crespo*³³, the court said that when the trial court excludes, under the rape shield statute, defence evidence that provides the defendant with a basis for cross-examination of the state's witnesses, despite a sufficient offer of proof, such exclusion may give rise to a claim of denial of the constitutional rights to confrontation and to present a defence; in *State v Calbero*³⁴ the court said that where the sexual assault complainant allegedly made statements concerning her past sexual experience to the defendant in the course of the encounter between them which gave rise to charges against the defendant, the defendant had a constitutional right to testify as to what the complainant told him notwithstanding the rape shield rule, insofar as the complainant's alleged statements were relevant to issue of consent.

Note that a state may find that the rape shield statute must yield to constitutional law, notwithstanding the absence of such a provision. See *Lewis v State*³⁵ in this regard.

(c) Judicial Discretion (little to no guidance in the statute; court applies a standard relevance test and weighs probative value against the risk of prejudice).

States with rape shield laws with a pure judicial discretion approach have no legislated exceptions. They simply grant to judges the broad discretion to admit or bar evidence of a woman's sexual history. Some jurisdictions provide further guidance to courts in the form of a few enumerated exceptions.

The states with rape shield laws falling under the pure "judicial discretion" approach lack legislated exceptions for admissibility of evidence in rape cases. Without any explicit exceptions, in these states it is up to the court to use its discretion in deciding whether to admit or block evidence of a rape victim's sexual history. These determinations are made in hearings either in-camera or in-chambers, and not before the jury or any spectators.

33 35 A.3d 243 (Conn. 2012)

34 785 P.2d 157 (Haw. 1989)

35 591 So. 2d 922 (Fla. 1991)

Though these statutes provide some protection of the victim in that the hearing is before the court only, these are not ideal formulations of “rape shield” laws because they generally equate to applying ordinary evidentiary standards of probative value and risk of prejudice. That is, the court makes a determination of relevance and decides whether the probative value of the proposed evidence outweighs the risk of prejudice.

DATE ENACTED: the first jurisdiction to enact a Judicial Discretion style of rape shield law was South Dakota in 1979. Since then, eleven other jurisdictions have also enacted laws including similar provisions.

PROTECTIONS AND KEY EXCEPTIONS	JURISDICTIONS
<p>GENERAL JUDICIAL DISCRETION TO ADMIT OR PRECLUDE EVIDENCE RELATED TO SEXUAL HISTORY OF THE VICTIM</p> <ul style="list-style-type: none"> — Court conducts an in-camera hearing to determine admissibility — Applies the general evidentiary standard of weighing the probative value of the evidence against whether it would cause prejudice — If evidence is admitted, Court may limit the type of questions permitted to be asked of the victim (true in most of these jurisdictions) <p>SPECIAL NOTE ON ALASKA</p> <ul style="list-style-type: none"> — Calls for the evidence not to be an “unwarranted invasion of the privacy of the complaining witness” — Presumes that sexual history evidence more than one year prior to the offense is inadmissible without a persuasive showing otherwise <p>SPECIAL NOTE ON KANSAS</p> <p>Merely calls for a determination that the evidence is “relevant and is not otherwise inadmissible as evidence”</p> <p>SPECIAL NOTE ON RHODE ISLAND</p> <p>Only requires the Court to determine admissibility of evidence that the victim has engaged in sexual activities with other persons</p> <p>SPECIAL NOTE ON WYOMING</p> <p>The statute “does not limit the introduction of evidence as to prior sexual conduct of the victim with the actor”</p>	<p>Alaska, Arkansas, Kansas, New Mexico, Rhode Island, South Dakota, Wyoming</p>
<p>Judicial discretion to admit or preclude evidence related to sexual history of the victim, provided the evidence fits within certain broad exceptions, such as the following:</p> <ul style="list-style-type: none"> — Sexual conduct with the defendant (e.g. Colorado, Massachusetts, South Carolina) — Whether defendant was the source of semen, pregnancy, or disease (e.g. Colorado, Connecticut, Massachusetts, South Carolina) <p>The court generally holds an in-camera hearing to determine admissibility of evidence fitting in those exceptions based on the probative value / prejudice standard.</p> <p>SPECIAL NOTE ON SOUTH CAROLINA</p> <p>Evidence of adultery to impeach a victim’s credibility cannot be excluded if it is admissible under the standard rules of evidence</p>	<p>Colorado, Connecticut, Massachusetts, South Carolina</p>
<p>JUDICIAL DISCRETION TO ADMIT OR PRECLUDE EVIDENCE OF HOW THE VICTIM WAS DRESSED, IN THE INTERESTS OF JUSTICE (no mention in the statute of what purpose the evidence would be for)</p>	<p>New Jersey</p>

In Massachusetts, the Massachusetts Supreme Court has elaborated on the reason for the Massachusetts rape shield law to consider the admissibility of evidence related to a victim's sexual conduct with the defendant, but not evidence related to a victim's sexual conduct with other people. See *Commonwealth v. Harris*³⁶, (noting that "such evidence has little probative value on the issue of consent"). Precluding evidence of a victim's sexual history involving people other than the defendant is consistent with the concept that a "victim's consent to intercourse with one man does not imply her consent in the case of another."³⁷

The Massachusetts Supreme Court further explained the importance of the judicial discretion model, highlighting the "important policies underlying the rape-shield statute." *Id.* at 727. One key risk for the judge to consider is "the potential that the jury may misuse the [evidence of a prior] conviction of a sexual offense as indicative of the complaining witness's consent, and the risk that the complaining witness may be subjected to needless humiliation."³⁸

(d) Evidentiary Purpose (the guidance varies based on the purpose for which the evidence is being offered).

States determine the admissibility of a woman's sexual history based on the purpose for which the evidence is offered at trial. The primary focus is on whether evidence can be admitted (1) to show consent of the victim or (2) to question the victim's credibility. A few jurisdictions include provisions that govern other purposes.

A number of jurisdictions include other purposes in their statutes, including three that refer to potential admissibility for the purpose of proving the source of semen, pregnancy, or disease.

Some of these purpose-oriented exceptions are very similar to the exceptions explicitly enumerated in many of the Legislated Exception jurisdictions listed above.

Generally, the court makes a determination of the admissibility in a hearing outside of the presence of the jury, in accordance with the usual relevance, probative value, and prejudice standards for evidence.

DATE ENACTED: the first jurisdiction to enact an Evidentiary Purpose style of rape shield law was Delaware in 1979. Since then, ten other jurisdictions have also enacted laws including similar provisions.

³⁶ 443 Mass. 714, 722-23 (2005)

³⁷ *Id.* (citation omitted).

³⁸ *Id.* at 727-28.

PROTECTIONS AND KEY EXCEPTIONS	JURISDICTIONS
<p>SEXUAL HISTORY EVIDENCE IS NOT ADMISSIBLE to prove that the victim consented, unless it relates to the victim's sexual conduct with the defendant</p> <p>SPECIAL NOTE ON CALIFORNIA</p> <p>Evidence of the victim's manner of dress is not admissible to prove consent unless the court, outside the hearing of the jury, determines it to be relevant and in the interests of justice</p> <p>SPECIAL NOTE ON GEORGIA</p> <p>Evidence of sexual history between the victim and defendant that supports an inference the defendant could have reasonably believed the victim consented may be admissible</p> <p>SPECIAL NOTE ON WASHINGTON</p> <p>Sexual history evidence may be admissible when the defendant and victim have had a sexual history and the past behavior is material to the issue</p>	<p>California, Delaware, Georgia, New Jersey, Oklahoma, Washington, West Virginia</p>
<p>SEXUAL HISTORY EVIDENCE MAY BE ADMISSIBLE for the purpose of determining that the victim consented, without an explicit limitation to sexual history between the victim and the defendant</p>	<p>Nevada, Puerto Rico</p>
<p>SUBCATEGORY OF CONSENT: evidence of the victim's mental incapacity is admissible to prove that the consent was not intelligent, knowing, or voluntary</p>	<p>Florida</p>
<p>SEXUAL HISTORY EVIDENCE MAY BE ADMISSIBLE for the purpose of proving the source of semen, pregnancy, or disease</p>	<p>New Jersey, Florida, Oklahoma</p>
<p>SEXUAL HISTORY EVIDENCE MAY BE ADMISSIBLE to attack credibility of the witness</p> <p>SPECIAL NOTE ON NEVADA</p> <p>Only if the prosecutor has presented evidence or the victim has testified regarding prior sexual conduct, the defendant can use such evidence to challenge the victim's credibility, limited to rebuttal of the evidence so provided</p> <p>SPECIAL NOTE ON WEST VIRGINIA</p> <p>evidence of instances of the victim's sexual conduct with people other than the defendant, reputation evidence, and opinion evidence is admissible only if the victim makes the previous sexual conduct an issue by introducing the evidence</p>	<p>California, Delaware, Mississippi, (Nevada), Puerto Rico, West Virginia</p>
<p>SEXUAL HISTORY EVIDENCE IS NOT ADMISSIBLE to attack credibility</p>	<p>Washington</p>
<p>ASSORTED PROHIBITIONS:</p> <ul style="list-style-type: none"> — Evidence of the victim's manner of dress is not admissible to prove that it incited the charged offense — Evidence of the use or requested use of a prophylactic is irrelevant to consent or occurrence of the charged offense 	<p>Florida</p>
<p>REGARDLESS OF PURPOSE, REPUTATION OR OPINION EVIDENCE IS INADMISSIBLE</p>	<p>Oklahoma</p>
<p>SEXUAL HISTORY EVIDENCE MAY BE ADMISSIBLE to:</p> <ul style="list-style-type: none"> — prove false allegations of sexual offenses — prove similar acts that occurred with other people in the presence of the defendant at the time of the charged offense 	<p>Oklahoma</p>
<p>IF SEXUAL HISTORY HAS ALREADY BEEN PRESENTED BY THE PROSECUTION, the defendant may cross-examine the victim on that evidence</p>	<p>Washington</p>
<p>For cases in which LACK OF CONSENT IS BASED ON THE VICTIM BEING BELOW A CRITICAL AGE and therefore lacking capacity to consent, sexual history evidence of the victim is inadmissible</p>	<p>West Virginia</p>

CHARACTER EVIDENCE

Precluding evidence of a victim's sexual history involving people other than the defendant is consistent with the concept that a "victim's consent to intercourse with one man does not imply her consent in the case of another."

With respect to determination of whether evidence is admissible under any rape shield statute including judicial consideration, under any of the four categories, it is critical that the consideration be done so outside the hearing of the jury and also away from the public. For example, California passed legislation in 2004 requiring sexual history evidence to be discussed under seal in pre-trial motions. This was after the famous *People v Bryant* case, an open and public rape trial against Kobe Bryant, included the defence publicly asking permission to allow the introduction of various sexual history evidence, which the defence listed in detail. The public request made its way into the news and the Internet, effectively bypassing the rape shield law.

Deborah Tuerkheimer, Professor at Northwestern Law, has commented on the use of sexual history evidence to prove consent, noting that "there may indeed be times when a court should allow this evidence" so that the defendant may exercise the "right to present a meaningful defense."³⁹ She states that a victim's sexual history should be admissible for consent only "if the prosecutor's case-in-chief has somehow enhanced its probative value, infusing it with significance beyond the prohibited inference that consent begets consent."⁴⁰ In other words, she advocates the position that the door to sexual history evidence for the defendant should be opened only if the prosecutor has done so first—that the defendant may only use such evidence as rebuttal.⁴¹

CONCLUSION AND RECOMMENDATION

1. Based on this brief overview of the rape shield legislation passed in each jurisdiction of the United States, it appears that a combination of the strong points from three of the four categories may be ideal. The only category we suggest avoiding is a Constitutional Catch-All, which tends to be poorly defined and fails to provide clarity.
2. The policies underlying the Judicial Discretion category provide the flexibility required for courts to reach fair decisions in what are always highly fact-intensive cases. This flexibility can gain structural strength if combined with the reasoning leading to the carefully constructed Legislated Exceptions and Evidentiary Purpose rape shield laws, which provide examples of key considerations in rape cases.

³⁹ Tuerkheimer, *Judging Sex*, 97 Cornell L. Rev. 101, 137 (2012)

⁴⁰ *Id.* at 137-8.

⁴¹ *Id.* at 138-9.

FRONT COVER PHOTO A woman sits between carriages as the train travels to Mymensing from Dhaka September 20, 2009. REUTERS/Andrew Biraj



**THOMSON REUTERS
FOUNDATION**

Thomson Reuters Foundation

30 South Colonnade

London E14 5EP

United Kingdom