Transparency International Anti-Corruption Helpdesk Answer

Criminalising sextortion: challenges and alternatives

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Recent work by International Association of Women Judges (IAWJ) and Transparency International, among other civil society organisations, have contributed to raising awareness about sextortion as a form of corruption that severely affects women, girls and vulnerable individuals across the world, and, more generally, jeopardises the provision of public services and undermines public confidence in institutions and the rule of law. Corruption perpetuates gender inequality and abuse of power, and sextortion, in particular, encourages other forms of gender-based violence (GBV), such as rape, sexual assault and abuse.

As both a form of corruption and a form of sexual abuse, sextortion lies at the intersection of the anti-corruption (AC) and GBV legal frameworks, both of which present a specific set of challenges for effectively prosecuting sextortion. For example, under the GVB framework, prosecutors face major evidentiary challenges around the issue of consent. Under the AC framework, some countries only criminalise corruption when monetary bribes are involved, and the victims can potentially be prosecuted as a bribe-giver. To prosecute sextortion, in most countries, law enforcement officials continue to rely on a patchwork of legislation that does not cover all the ways in which sextortion manifests itself. Specific legislation on sextortion being discussed in some countries in Latin America presents an alternative to addressing the problem. This paper presents the challenges involved in prosecuting sextortion under both frameworks and explores possible options to address those.

Query

How can sextortion be effectively criminalised? What are the possible paths to criminalising sextortion and how can this be achieved with a victim-centred approach? Please provide examples from around the world.

Contents

Main points

- The inadequacy of legal frameworks has been pointed to as one of the biggest challenges to prosecuting sextortion.
- Very few countries have adopted or even discussed specific legislation on sextortion, which could be used to fill legal loopholes and to raise awareness about the problem for society and law enforcement officials.
- The anti-corruption legal framework presents alternatives for investigating and prosecuting sextortion, but some of them risk criminalising the victims, while others offer only limited legal coverage.
- Gender-based violence legislation also presents some challenges and, often, does not cover all the ways in which sextortion manifests itself.

Introduction

Sextortion is a type of corruption that occurs when those entrusted with power use it to exploit those dependent on that power (Transparency International 2020: 2). It is a global problem and, despite not being often recognised or addressed as such, sextortion happens in every sector of life. From educational establishments to the workplace, from law enforcement to humanitarian disaster zones, the form of corruption where sex is the currency of the bribe happens to people in vulnerable positions everywhere (IBA 2019: 36).

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awareness about sextortion as a global problem that severely affects women and girls, and more generally, jeopardises the provision of public services.

The inadequacy of legal frameworks has been pointed to as one of the biggest challenges to prosecuting sextortion. As it comprises elements of corruption and sexual exploitation, sextortion often eludes prosecution as either (IAWJ 2017: 28).

Building on the IAWJ's 2017 Comparative Study of Law to Prosecute Corruption Involving Sexual Exploitation, the International Bar Association's 2019 Sextortion: A Crime of Corruption and Sexual Exploitation, Transparency International's 2020 Breaking the Silence around Sextortion, and the recently published Organisation for Security and Cooperation in Europe's Sexual Extortion As An Act of Corruption: Legal and Institutional Response, this answer intends to analyse the different ways in which sextortion may be criminalised, exploring the challenges and concerns each of them presents, based on examples from around the world.
This answer is, however, not a comprehensive assessment of countries' legislative framework.

What is sextortion?

The IAWJ defines sextortion as "the abuse of power to obtain a sexual benefit or advantage. Sextortion is the form of corruption in which sex, rather than money, is the currency of the bribe" (IAWJ 2017: 19).

Therefore, two components must be present for an act to constitute sextortion:

1. the sexual component – a request (implicit or explicit) to engage in any form of unwanted sexual activity, which should be understood beyond simply sexual intercourse. It also includes exposing private body parts, demanding pictures or pornographic material, and unwanted touching, among other conducts.
2. the corruption component – the person making the request must occupy a position of authority, which they abuse by exacting or accepting the sexual component/benefit in exchange for exercising the power that was entrusted to them. Sextortion perpetrators exercise authority for their own gain. There are, thus, three features to this component: i) abuse of authority, ii) a *quid pro quo*, and iii) psychological coercion (IAWJ 2017: 19).

Abuse of authority refers to the way in which the perpetrator uses the power entrusted to them for their personal benefit (IAWJ 2017: 20). This power may derive from a position of superiority held in a given hierarchy, from a legal or contractual provision that attributes the competency to make decisions over a certain matter or even from a custom that places in someone the responsibility to make these decisions.

Sextortion is said to occur "when those entrusted with power use it to sexually exploit those dependent on that power" (Transparency International 2020: 4). This understanding is in line with Transparency International's definition of corruption as "the abuse of entrusted power for private gain".

The element of the *quid pro quo* refers to the fact that the perpetrator demands or accepts a sexual activity from the victim, in exchange for a "benefit" that they are empowered to withhold or confer (IAWJ 2017: 20). However, in most cases, this is not a freely chosen exchange. Individuals may give in to sextortion demands to avoid being penalised or suffering a worse than fair treatment. In these cases, what victims *get* is not a benefit at all, but rather they avoid a disadvantage and are not deprived of a service they are entitled to. There are cases, however, where an individual may initiate the exchange and freely offer a sexual benefit to obtain preferential treatment.

Finally, psychological coercion is the result of an imbalance of power which allows the perpetrator to exert coercive pressure. This element is relevant in distinguishing sextortion from other forms of gender-based violence where physical violence or coercion is present (IAWJ 2017: 20). Psychological coercion can manifest itself through threats or blackmail. Threats can relate to subjecting an individual to an action which deviates from official duty (for example, unjustifiably sending an individual to solitary confinement in prison) or to the consequences of an omission from official duty (for example, withholding medical treatment or

water and food) if they do not provide sexual benefits. Similarly, if the official applies conditions of sexual benefits for access to education, citizenship or employment, they are threatening to withhold essential elements of a normal life from a person and are, thus, coercing the victims into providing sexual benefits.

While relevant to explaining and exemplifying cases of sextortion, proving coercion is often not easy and it is a very subjective element. Including coercion in the legal definition of sextortion may offer a path for offenders to escape punishment since it forces the prosecution and the victims to prove they were under a certain level of duress or coercion, which is subjectively determined. When dealing with gender-based violence, subjectivity is informed by culturally biased (and often misogynistic) views about women in society.

It should be noted that "coercion" is not a part of the definition of the "bribery" offence, even though it may be present in most cases, especially in petty bribery cases. Coercion should be considered when determining whether to prosecute the bribe-payer, but it does not have to be an essential element of the offence.

Other definitions of sextortion

The meaning of sextortion in some countries and regions differs greatly from the one previously laid out. In the United States, for example, the Federal Bureau of Investigation (FBI) describes sextortion as "a crime that happens online when an adult convinces a person who is younger than 18 to share sexual pictures or perform sexual acts on a webcam" (FBI 2019). It follows a more literal understanding, which combines extortion and sexual circumstances.[1]

There is a similar issue in other English speaking countries. The United Kingdom's National Crime Agency (2021) defines sextortion as "a form of webcam blackmail, where criminals befriend victims online by using a fake identity and persuade them to perform sexual acts in front of their webcams". In Australia, the eSafety Commissioner (2022) defines it as "a form of blackmail where someone threatens to share intimate images of you online unless you give in to their demands".

The United Nations Children's Fund (UNICEF) uses "sextortion" and the term "sexual extortion of children" to refer to "coercing a child into producing sexual material on threat of exposure" (UNICEF 2019: 10). Europol also recognises the widespread use of "sextortion" to mean online coercion and extortion of children but notes that the "unqualified use of this term – an amalgam of 'sexual' and 'extortion' – can be problematic, as it can promote reductionist thinking […] [and it] can also lead to the development of ambiguous and sometimes paradoxical concepts" (Europol 2017: 15).

Both concepts of sextortion are said to have emerged at the same time, at the beginning of the 2010s when the IAWJ began its work on the issue, while internet-related crimes were gaining prominence.

Criminalisation as a tool for combating sextortion

Role of criminalisation

Criminal law, in general, serves different purposes. It prohibits conducts that unjustifiably or inexcusably cause harm to individuals or to society as a whole, and it warns people about a conduct that is subject to criminal punishment and about the severity of that punishment (Lippman 2018: 3). For sextortion, this is especially relevant if one considers the level of misogyny that is rooted in the history and present in the structure of most societies. Gendered attitudes about sex normalise abuse and violence and minimise the harm that sextortion causes.

Criminal law also distinguishes between serious and minor offences, and it imposes different forms of punishment that satisfy demands for retribution, rehabilitation and deterrence of future crimes. Further, it allows for the victim's interests to be represented at trial (Lippman 2018:)

[1] Federal legislation in the United States also uses sextortion in this meaning, as found, for example, in the Trafficking Victims Protection Act of 2017 and the Missing Children's Assistance Act of 2018.

As plainly stated by Susan Rose-Ackerman (2002: 3), however, "corruption cannot be fought solely through criminal law". The same can be said about sextortion. Understanding the role of criminalisation, its potential and limitations, however, is essential to determining how to improve anti-corruption (and anti-sextortion) efforts.

Rose-Ackerman lists ways in which criminalisation can play a role in deterring corruption and, by extension, sextortion. For example, penalties, if they are set in the proper levels, can achieve deterrence. But optimal deterrence levels depend not only on the penalty imposed in theory but also on the probability of detection and punishment (Rose-Ackerman 2002: 6). It is, thus, insufficient for countries to criminalise sextortion, even with increased penalties, if law enforcement agents do not investigate and prosecute cases. This will depend on other factors, such as adequate training and capacity building efforts, for the availability of resources and for raising awareness about the issue.

Effective enforcement also hinges on reports of sextortion being presented to competent authorities, either by victims or by whistleblowers. To achieve that, people must be aware that this is an actual crime and feel protected from retaliation. Reporting is also incentivised by thorough investigations and the punishment of offenders since that demonstrates the effectiveness of reporting systems.

Rose-Ackerman also notes that criminalisation provides law enforcement agents with the tools, such as plea bargains, to encourage offenders to cooperate, which may lead to uncovering corrupt transactions or other guilty parties (Rose-Ackerman 2002: 4). Where sextortion is committed by a number of individuals (for example, the coaching staff of a sports team or prison officers in a penal institution), these tools can be used to encourage offenders to collaborate with law enforcement officials in detailing the extent of the crime and of other parties involved in the offence.

In other instances, having a conduct formally considered to be a crime may be a pre-requisite for different forms of international cooperation. Dual criminality is a common requirement in international extradition law, so an individual found guilty of sextortion may only be extradited if that conduct is a criminal offence under the domestic law in both the requesting country and in the country from which extradition is sought.

Finally, the process of criminalising a conduct, in most countries, depends on the passing of legislation in parliament, which only happens after much debate. Bringing the subject of sextortion into parliament and, consequently, into the public debate contributes to raising awareness about the subject, demonstrating to society and, especially, to law enforcement officials that this is a relevant issue to be addressed.

This answer focuses on criminal law and the challenges and possibilities it provides in addressing sextortion. However, civil remedies can play a role in ensuring offenders are held accountable and victims' rights are somehow repaired. Civil lawsuits are governed by a lower burden of proof, and they can lead to the payment of compensatory damages, punitive damages, declaratory and injunctive relief (UN 2010: 54). They can be especially useful in cases of sextortion in the private sector when paths to prosecution are often narrower since private corruption is not considered a criminal offence in several countries.

Harm to society and the need for victim-centred approach

There are significant interplays between sextortion and the concept of petty corruption,[2] including similarities in the way they harm society and victims. In fact, most cases of sextortion recorded in the literature can be considered examples of "petty corruption" since it is defined as "everyday abuse of entrusted power by public officials in their interaction with ordinary citizens, who are often trying to access basic goods or services in places like hospitals, police departments and other agencies" (Transparency International 2022)

[2] The very expression "petty corruption" is subject to heavy criticism because it "minimises its devastating effects and the high damage it has on the development of societies" (Bohórquez & Devrim 2012: 1).

For example, when women were asked for sex in return for assistance and provisions in cyclone hit Mozambique, when prison guards demanded sexual benefits in exchange for allowing medicine to be delivered to prisoners with HIV in Uganda and when asylum seekers had to engage in sexual conduct to obtain housing and jobs in Norway (IBA 2019; IAWJ 2017), these are all cases of petty corruption or even of petty bribery, if one considers non-monetary forms of bribery. This connection allows scholars and practitioners to note how sextortion produces very damaging consequences to society as a whole, as does petty corruption.

Small-scale corruption inflicts real and tangible harm on a very large number of victims, as the Global Corruption Barometer (GCB) consistently demonstrates. Some estimates point out that petty corruption could affect as many as 25 per cent of the world's population. Its victims are disproportionately poor people, meaning "petty bribery" has a regressive impact, increasing economic inequality (Chêne 2019: 2). In repeated instances, regional reports of the GCB have demonstrated that sextortion affects a vast number of girls and women, most of whom are poor. Individuals in situations of socioeconomic vulnerability have less money to spend on bribes, so corrupt officials are more likely to extort sexual bribes (Transparency International 2020: 20).

For all the reasons mentioned in this answer, impunity is rampant in sextortion cases, which increases the odds of serial offenders. A perpetrator of sextortion is much less likely to face prosecution than someone who solicits a monetary bribe, despite the fact that the former causes far more damage to the victim, with potential physical and psychological consequences (Transparency International 2020: 9)

Since it affects a large number of people directly and routinely, it contributes to undermining public confidence in institutions and in the rule of law (Steiner 2017). "Petty bribery" also has a negative impact on tax revenues since bribery can be used to facilitate tax evasion, hampering the progressivity of the tax system (Chêne 2019: 4).

"Petty corruption" also undermines the quality of the regulatory environment and the efficiency of the state apparatus since it creates incentives for corrupt bureaucrats to create more regulations and red tape to increase opportunities to extract bribes (Chêne 2019: 3). The same can be said for sextortion, considering officials may work diligently to multiply opportunities in which sexual conducts can be "extracted" from victims who are, in some way, subject to their whims. In this sense, it threatens equality and jeopardises the provision of public services as a whole (OSCE 2022: 10).

Lastly, "petty corruption" can contribute to the grand corruption problem. Networks of low-level officials demanding bribes can actually feed the whole system of corruption. Tolerance for small-scale corruption can also foster a culture of rule breaking, as well as legitimising and normalising wrongful behaviour (Steiner 2017). In summation, as Jacob Steiner puts it, "small-scale corruption harms people's well-being, increases inequality, degrades institutions, and helps feed other forms of corruption".

Corruption, as a whole, creates and perpetuates inequality, affecting vulnerable groups, such as women and girls, the hardest. They suffer from an above average risk of falling victim to coercive corruption (Transparency International 2021: 14). Tolerance for sextortion, in particular, encourages other forms of gender-based violence, such as rape, sexual assault and abuse. Demonstrating that sextortion, in most cases, is a form of petty corruption allows for a greater understanding of the systemic level impacts of sextortion to all of society.

On the other hand, it also highlights the fact that the risk of criminalising victims (of sextortion) through the anti-corruption legal framework is not altogether new. On the contrary, people who are said to pay petty bribes are often subject to very similar circumstances – economic and social vulnerability, duress, threat of injury or of death – as the ones endured by sextortion victims. They are subject to the abuse of entrusted power and the act of paying a bribe, in the form of money or sex, is not a result of a freely given consent but the consequence of these difficult circumstances.

Some countries do distinguish between the bribe-payer and the bribe-taker regarding the imposition of sanctions. In Colombia and Singapore, public officials who receive bribes have higher sanctions imposed than the individuals who bribed them (United Nations 2020: 17). Others provide for

exemptions in the case of extortion, as demonstrated below.

There is, however, some recalcitrance towards referring to people who pay "petty bribes" as victims. The use of the terms "active" and "passive" to describe bribery underscores this recalcitrance since they imply a willing bribe-payer and a passive bribe-taker, foregoing the possibility that the bribe-taker may have been the one who initiated the demand for a bribe, leaving the bribe-payer with little choice but to comply.

Even scholars that highlight the relevance of fighting "petty corruption" with as much emphasis as "grand corruption" and demonstrate the heavy burden this type of corruption places on poorer families stop short of referring to these people as victims. This is, however, how people who have to pay bribes to access public services, for example, consider themselves (UNODC 2017a: 35)

An example of this recalcitrance is the Intergovernmental Working Group on Asset Recovery's (2016: 6-7) discussion on good practices in identifying the victims of corruption and the parameters for their compensation. It lists a number of categories of victims – company, shareholders, unsuccessful bidder, a foreign state, society – but nowhere does it mention a person who had to pay a bribe to obtain running water or access to education.

An exception to this is the work done by Monica Bauhr and Naghmeh Nasirituosi. They distinguish between "need corruption" and "greed corruption". While "need corruption" occurs when services to which citizens are legally entitled are conditioned upon paying a bribe, "greed corruption" takes place when the bribe is given to gain personal advantages to which the briber is not entitled.

"Need corruption" happens in a context of coercion and extortion, but "greed corruption" depends on collusion for mutual benefits. The authors argue that these two forms of corruption require different approaches from anti-corruption policymakers. One should also be mindful of how and if criminal law applies in each scenario, due to the risk of people subject to "need corruption" being prosecuted (Bauhr & Nasirituosi 2011: 3).

Approaches for criminalising sextortion

There are very few examples of legislation specifically dedicated to sextortion, meaning that, in most countries, law enforcement officials resort to either anti-corruption legislation or anti-gender-based violence legislation to investigate and prosecute offenders. While these paths to criminalising sextortion have proven useful, there is no consensus on the best alternative: whether to adopt laws specifically tailored to address sextortion or to amend the laws that are currently in effect to minimise the issues and challenges they present.

The goal of this section is to provide an assessment of the challenges and opportunities each approach to the criminalisation of sextortion brings to the table.

Anti-corruption legal framework

Efforts to criminalise corruption in countries around the world gathered steam in the past decades, and international treaties (along with the implementation of review mechanisms) have sought to instil some uniformity in national legislation. Though there are common elements to the definitions of corruption enshrined in these treaties, there are also important differences, with impacts on the way this legislative framework may be applicable to sextortion.

The anti-corruption legal framework can be used to investigate and prosecute sextortion cases, though it has only been rarely used for this purpose (IBA 2019: 26). While there are a number of different criminal offences within this framework which may be used to prosecute offenders, there are also several obstacles that must be considered when determining the best path to avoiding impunity and ensuring justice for the victims.

Criminalisation in the public and private sectors

As noted, sextortion happens in a host of areas that can be either private or public, depending on the organisation of the economy and the state – education and health care, for example. The notion

that identical conducts should not be treated differently solely because they happened in different settings motivates the concern that cases of sextortion in the private sector be investigated and prosecuted similarly to the ones in the public sector. This is underscored by an understanding of what constitutes abuse of authority that is applicable both to the public and the private sectors.

In practice, however, jurisdictions treat public and private corruption differently. Varying definitions of corruption not only affect the theoretical possibility of this type of legislation being used to criminalise sextortion but also, from a practical perspective, how and if law enforcement agents approach cases of sextortion. For example, private corruption is not considered a criminal offence in many countries, and this affects how and if a case of sextortion in a private setting may be prosecuted according to the anti-corruption legal framework.

The United Nations Convention against Corruption (UNCAC) determines that state parties must criminalise active and passive bribery (art. 15). UNCAC uses different terminology for bribery in the private sector. It determines that state parties "shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally in the course of economic, financial or commercial activities" (art. 21).[3] The convention then describes active and passive bribery in the private sector in terms very similar to the ones used for public bribery. Along with trading in influence, abuse of functions and illicit enrichment, bribery in the private sector falls under the category of "non-mandatory offences"[4] in UNCAC. This means that countries are recommended to have those conducts criminalised, but they are not legally required to do so (UNODC 2012: 76).

In this, the 1999 European Criminal Law Convention on Corruption is stricter because it does not differentiate between state parties' legal obligations concerning the criminalisation of bribery in the public sector and in the private sector. It also employs terminology with a wider scope, referring to "private sector entities" in general and the circumstance in which bribery may occur as "in the course of business activity" (art. 7 and 8). The same can be said for the African Union Convention on Preventing and Combating Corruption, which describes public and private corruption (art. 4, 1, (2)) in similar fashion and instructs member states to criminalise both (art. 5, 1).

Conversely, the Inter-American Convention against Corruption does not make any reference to private corruption (art. VI), as is the case with the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which focuses on public corruption (art. 1.1).[5]

Therefore, there is no consensus as far as international treaties go regarding the criminalisation of private corruption. This is relevant because, as will be demonstrated, in many countries, sextortion is said to be criminalised through the anti-corruption legal framework. If private corruption is not a criminal offence, then the anti-corruption framework will not be applicable to cases of sextortion that do not involve public officials.

In Morocco, for example, there is a difference in the definition of corruption for the public sector and for the private sector. The corruption of (public) officials is defined as the solicitation or receipt of donations, presents or other benefits – or, as stated in the Arabic version, "anything else that interests her/him" (art. 248, Criminal Code). On the other hand, corruption of private company employees is defined as the solicitation or acceptance of gifts, presents, commissions, discounts or bonuses (art. 249, criminal code). In this sense, as TI Morocco (2022: 11) notes, "it will be difficult for the judge to accept that the request of sexual favors is a counterpart that may justify

[3] Art. 16 of the UNCAC uses similar terminology as it seeks to extend the reach of public bribery definitions to include foreign public officials and officials of public international organisations.
[4] The high number of non-mandatory crimes is considered "an obvious weakness of the Convention" (Benestad 2020: 2).
[5] Mentions of private corruption can be found in the OECD Guidelines for Multinational Enterprises, a non-binding document that states "In particular, enterprises should: Not offer, promise or give undue pecuniary or other advantage to public officials or the employees of business partners. Likewise, enterprises should not request, agree to or accept undue pecuniary or other advantage from public officials or the employees of business partners". This, however, adopts a rather narrow view of private corruption.

incrimination of corruption on the basis of Article 249".

Definition of bribe and 'undue advantage'

The criminalisation of sextortion through the anti-corruption legal framework also depends on the definition of bribery. For "sexual activity" to be included in the scope of a bribery offence, the legal definition of bribery must be sufficiently wide as to not limit its understanding only to financial advantages. This is not the case in many jurisdictions surveyed by the IAWJ, which make property gain or financial harm an element of the corruption offence. In Argentina, for example, the courts interpret "benefit, favour, promises and advantages" to mean only monetary benefits, while, in Mexico, the courts require the trading of money in exchange for the exercise of official authority (IAWJ 2017: 20-22).

This happens despite instructions from the Legislative Guide for the Implementation of the UNCAC: "undue advantage may be something tangible or intangible, whether pecuniary or non-pecuniary" (UNODC 2012). When assessing the implementation of the UNCAC, an excessively restrictive definition of bribes has been noted as an issue in some countries (UNODC 2011: 12). In fact, the UNODC (2017b: 19) states that "the term advantage is intended to apply as broadly as possible and also to cover instances where intangible items or non-pecuniary benefits (such as, honorary positions and titles, preferential treatment or sexual favours) are offered".

Of course, the fact that a given legal text may allow for sexual activities to be understood within the broader meaning of "undue advantage", for example, does not mean that it will be interpreted in such a manner.[6] For example, in the UK, while legislation uses the term "other advantage", there is a clear focus from prosecutors on commercial bribery (IBA 2019: 27).

How to avoid criminalising the victims of sextortion as bribe-payers?

While there are a number of offences within the anti-corruption framework that may be applicable to sextortion, it is most often investigated and prosecuted under the offence of bribery. A concern that quickly arises in those cases is the unwanted criminalisation of the victims of sextortion, since they are technically providing the sexual activity that is the currency of the bribe.[7] This is a well-founded concern considering that most countries, following the instructions of international anti-corruption treaties, criminalise active bribery in terms similar to the ones used for passive bribery (IBA 2019: 28).

A way of addressing this concern is to look at the defences that can be presented by victims of sextortion. Criminal statutes generally provide for specific (to each offence) or generic justification defences. They allow for recognising that all elements of an offence may be present, but no punishment is required since the justified conduct causes a legally recognised harm or evil but avoids greater societal harm (Robinson 1982: 220).

They have the same internal structure: triggering conditions that allow for a necessary and proportional response. Triggering conditions "are the circumstances which must exist before the actor will be eligible to act under a justification". In line with previous examples, a prisoner with HIV is not provided with medicine and the prison guards require sexual benefits from their family members. The necessity requirement "demands that the defendant act only when and to the extent necessary to protect or further the interest at stake" (Robinson 1982: 216-218). Family members of the prisoner, in that scenario, can comply with the request to ensure the prisoner gets the medicine they need. If they were, however, to perform sexual activities to ensure the prisoner got a better cell or more food, for example, they would no longer comply with that requirement.

[6] Applying a gendered lens when interpreting gender neutral parts of the UNCAC's wording is a path towards mainstreaming gender in the convention and ensuring the criminalisation of sextortion (Kaunain 2021: 6).

[7] There are cases of sextortion in which the bribe-payer freely initiates the exchange and offers a sexual benefit in exchange for preferential treatment – and, in these cases, they are not victims of sextortion but rather parties to a corrupt exchange. However, the literature demonstrates that this is the exception, not the rule. In most instances, the person providing the sexual benefit is subject to some type of coercion and does not freely consent. She is, thus, a victim of sextortion.

Duress and necessity may be the most relevant justification defences for sextortion cases. While duress refers to instances where an individual was somehow forced to commit a crime by someone else, necessity leads a person to commit a crime in order to prevent more significant harm (Justia 2022).

As previously mentioned, though seldom used, the FCPA allows for an "extortion defence" in rare cases. Similarly, the UK Ministry of Justice's (2011: 19) Guidance on the 2010 Bribery Act recognises the "duress defence" in that "there are circumstances in which individuals are left with no alternative but to make payments in order to protect against loss of life, limb or liberty".

When assessing the adequacy of the bribery offence for investigating and prosecuting cases of sextortion, therefore, it is also relevant to note how prosecutorial discretion may also be used to prevent such a scenario. In many jurisdictions, prosecutors are required (or allowed) to consider the particular circumstances of each case and decide not to present charges. This, however, does not go as far as considering these people victims but as bribe-payers who should not be penalised for some reason.

The UNCAC recommends countries "endeavour to ensure that any discretionary legal powers […] relating to the prosecution of persons […] are exercised to maximise the effectiveness of law enforcement measures in respect of these offences and with due regard to the need to deter the commission of such offences" (art. 30, 3).

The level of prosecutorial discretion will vary from jurisdiction to jurisdiction. As noted in the UNCAC, it is not only (or even centrally) a matter of justice, in the sense of avoiding the meting out of punishment against people who did little or nothing wrong, but also of efficiency, as limited resources available to law enforcement authorities make it a necessity for them to focus on crimes with bigger impacts.

In the UK, for example, prosecutors are required to decide whether a prosecution is in the public interest. The more serious the offence, the more likely that prosecution will be required (UK Ministry of Justice 2011: 19).

Extortion

The distinction between extortion and bribery is not straightforward and it varies between jurisdictions, especially when discussing the so-called "extortion under colour of official right" or "extortion under colour of office", historically defined as the type of extortion when a public official seeks or receives an unjustified payment because of their office or their ability to influence official action.[8]

Transparency International's (2022) definition of extortion encapsulates: "Extortion is an act of utilising, either directly or indirectly, one's access to a position of power or knowledge to demand unmerited cooperation or compensation as a result of coercive threats".

A way of conceptually differentiating both criminal conducts is that, in extortion, the receiver threatens some sort of harm towards the extorted party, unless they receive what was requested. In the case of bribery, the bribed party will do something in the briber's interest. While the briber received better than fair treatment, the extorted party is merely seeking to avoid worse than fair treatment. Thus, in extortion, there is an offender, who uses coercion and a victim who is intimidated into paying the offender. According to this rationale, there is no coercion in bribery and, since the bribed party and the briber both act voluntarily, they can be held liable for bribery (UNODC 2018).[9]

This logic is put to the test in cases of petty bribery where assessing the true voluntariness of this exchange is difficult. People depend on basic services, such health and education, so is it a choice to pay a bribe when that is the only way to obtain them? The line between bribery and extortion is blurred when someone expects a bribe for conducting an action that they are otherwise

[8] The other type of extortion is extortion by threats or through fear (coercive extortion), which refers to any illegal use of threat or fear to obtain properties or advantages from another, short of the use of violence, as that would be qualified as robbery – or sexual assault or rape, in case said advantage was a sexual conduct. (Lindgren 1992: 1965).

[9] There are those, on the other hand, that state that the difference between bribery and extortion means little because both parties must agree before corruption occurs (Rose-Ackerman 2002: 7).

required to perform (UNODC 2018). Also, determining the metrics of what constitutes *fair* treatment may be difficult – conducting an official duty efficiently, which is an obligation for civil servants, may constitute a better than fair treatment, depending on the standards considered.

Besides, the conceptual definitions of extortion may not match legal definitions in some jurisdictions. So, it may be the case that the criminal offence of extortion encompasses mostly elements of "regular" extortion, where there is a higher bar for proving duress. In these cases, it will be more difficult for cases of corruption or sextortion to be prosecuted under such aegis.

One typology of corruption that seems to consider these issues is the one that differentiates between "contractual corruption" and "extorted corruption". In the case of the former, parties have a prior agreement and, thus, the act of corruption is committed with their mutual consent. It usually involves "insiders" and their clients, who jointly agree to derive an undue advantage over other competitors. Powerful figures in the political and economic life are often involved in this type of corruption, where there is little or no imbalance of power between the parties (OSCE 2022: 5)

In the case of extorted corruption, one of the parties is responsible for direct/open or indirect/covert extortion of the other party, which may be considered a victim. This type of corruption usually involves marginalised groups in society who do not have access to power or money (OSCE 2022: 5).

Despite the differences, extortion has been included in the "corruption umbrella" as a type of bribery by some organisations. The International Chamber of Commerce's Rules of Conduct and Recommendations on Combating Extortion and Bribery defines extortion as the demanding of a bribe coupled with a threat if the demand is refused. Nonetheless, it considers extortion as a form of bribery (ICC 2005). The OECD Guidelines for Multinational Enterprises has a chapter on combating bribery, bribe solicitation and extortion, but it makes no distinction between the three.

While the UNCAC does not explicitly mention extortion, when discussing conducts that fall under the guise of art. 15 of the UNCAC ("bribery of national officials"), the UN Anti-corruption Toolkit includes extortion along with embezzlement, nepotism and conflicts of interest (UNODC 2004). A key distinction is made when the UNODC (2004: 14) highlights that "in extortion cases, however, a further 'victim' is created, namely the person who is coerced into cooperation". No attention is paid, though, to how this caveat relates to the ways in which the criminalisation of active bribery may lead to the punishment of victims in borderline extortion-bribery cases.

This issue has received some attention at the national level. The US DOJ's FCPA Resource Guide states that "situations involving extortion or duress will not give rise to FCPA liability because a payment made in response to true extortionate demands under imminent threat of physical harm cannot be said to have been made with corrupt intent or for the purpose of obtaining or retaining business" (US Dept. of Justice 2020: 27). As such, mere economic coercion does not amount to extortion. It should be noted, however, that extortion is not explicitly mentioned in the FCPA, the "true extortion" defence has rarely been raised by defendants[10] and it has never been recognised by the courts (Cassin 2020).

A number of other jurisdictions do exempt people from liability of the active bribery offence if the solicitation reaches the level of extortion. Egypt offers exemption possibilities to the bribe-payer, while Mongolia exempts people who were pressed to pay off officials in exchange for accessing public services if they voluntarily confess to the competent authorities (UNODC 2020:17). Similar legislation requiring the bribe-payer to present a report of the bribe in a timely fashion can also be found in Romania, Lithuania and Armenia (OECD 2016: 23).

[10] One possible explanation for this level of rarity is that law enforcement officials recognise situations of duress under which payments were made and refuse to move forward in prosecuting them (Cassin 2020). For example, on January 2022, the DOJ issued an FCPA opinion procedure release in which it declared that payment to a third party did not satisfy the elements of an FCPA violation because an employee of the requestor was under threat of injury or death. Thus, it stated it would not pursue enforcement action against the requestor (Steinman 2022).

Where reporting corruption is considered necessary for exempting the victim from punishment, one should be especially concerned for the adequacy of reporting systems for sextortion victims, considering all victims of sexual abuse face major reporting challenges.[11] Women are generally less likely to report corruption and, in the case of sextortion, this is aggravated by the trauma and the fear of stigmatisation. (Camacho 2021: 13).

Abuse of authority and other criminal offences

Nevertheless, bribery is not the only criminal offence under anti-corruption frameworks that can be used to investigate and prosecute sextortion. Another type of criminal offence that may be applicable is *concussion* (in French) or *concussão* (in Portuguese).

French legislation defines *concussion* as "Any acceptance, request or order to pay as public duties, contributions, taxes or impositions of any sum known not to be due, or known to exceed what is due, committed by a person holding public authority or discharging a public office" (art. 432-10). It therefore restricts the application of this criminal offence to situations where there was a pecuniary advantage obtained. On the other hand, in Brazil, the criminal code defines *concussão* as the conduct of a public official when "demanding an undue advantage, for oneself or for another person, directly or indirectly" (art. 316). As with the bribery offence, the definition of "undue advantage" is open to a broader interpretation that allows cases of sextortion to be included in its parameters.

The advantage of *concussion* against bribery for prosecuting sextortion is that it does not require the corresponding criminalisation of the individual that provided the "undue advantage". *Concussion*, however, is a criminal offence that may only be committed by public officials, meaning cases of sextortion in the private sector would not be covered under its current definition.

Another criminal offence under which sextortion may be prosecuted is "abuse of authority", which is also known as "abuse of discretion", "abuse of powers", "abuse of functions", "breach of trust", "malfeasance or misconduct in public office". It is one of the UNCAC's non-mandatory offences. In it, "abuse of functions" is defined as "the performance of or failure to perform an act, in violation of laws, by a public official in the discharge of his or her functions, for the purpose of obtaining an undue advantage for himself or herself or for another person or entity" (art. 19). Abuse of authority provisions are, in a number of jurisdictions, the criminal offence that best captures the various elements of sextortion. They are not as narrowly defined as anti-corruption offences, but they are usually only applicable to public officials' misconduct (IAWJ 2017: 21).

Combining both abuse of authority and sexual misconduct legislation is also possible. For example, the Romanian criminal code includes a criminal offence called abuse of power for sexual gain, which establishes a penalty of six months to three years of imprisonment and a ban from holding public office for the "the action of the public servant who, for the purpose of committing or not committing, speeding up or delaying the performance of an act related to professional duties or for the purposes of committing an act contrary to such duties, solicits or is awarded sexual favours by a person who has a direct or indirect vested interest in that professional act" (art. 299). Removing the element of *quid pro quo*, it also criminalises the "requesting or obtaining favours of a sexual nature by a public official who makes use or advantage of a position of authority or superiority over the victim, arising from its position".

Similar legislation can be found in other Balkan countries. Macedonia has a "sexual assault by position abuse" offence and Montenegro has a "forced sexual intercourse by abusing a position of authority" offence, while Bosnia and Herzegovina has a "sexual intercourse by abuse of position" offence. In both countries, sextortion would not be covered if the sexual component was not categorised as a sexual intercourse. In Slovenia, there is a "violation of sexual integrity through abuse of authority" offence (OSCE 2022: 31-34).

[11] Transparency International (2020: 34) has put forth a number of recommendations for reporting mechanisms in sextortion cases.

While there is no specific criminal offence in the UK's legislation, Her Majesty's Inspectorate of Constabulary (HMIC) defines abuse of authority for sexual gain as a type of serious corruption, whereby police officers or police staff abuse their powers to sexually exploit or abuse people. Its 2016 Report on Police Legitimacy demonstrated this to be a pervasive problem in the UK with more than 400 reported allegations in the previous two years (UK HMIC 2016).

Ethical rules and professional codes of conduct can also be applicable to cases of sextortion, though enforcement of these rules is usually a responsibility of administrative bodies and the sanctions available to them are rather limited in scope (for example, suspension from duty, licence revocation, removal from office) (IAWJ 2017: 24).

Gender-based violence legal framework

The sexual component of sextortion may allow cases to be investigated and prosecuted under gender-based violence laws, but they often require very specific elements to be present, which leaves many sextortion cases unaddressed.

Sexual harassment laws often cover a broader range of conducts than rape or sexual assault laws, but they are usually designed for specific contexts (for example, workplaces and schools) and are, thus, not applicable to a host of situations where sextortion happens, such as interactions between citizens and public officials. Sometimes, they carry less severe penalties, such as civil or administrative sanctions. Brazil, Taiwan and the UK are exceptions to the rule as jurisdictions where sexual harassment is a criminal offence (IAWJ 2017: 23).

Rape laws and sexual assault legislation may be applicable to sextortion cases, but they only cover certain types of sexual conducts and do not cover other types of unwanted contact or sexual demands. Sexual/child abuse laws and statutory rape legislation are only applicable if the victim is of a certain age or younger. While these legal frameworks carry significant penalties – often bigger than the ones for corruption – there are also obstacles for ascertaining the guilt of the offender (IAWJ 2017: 24).

Anti-gender-based violence legislation in most countries requires some form of evidence that the sexual activities were not consensual or free from coercion. The burden of proof, therefore, lies with the accuser, no matter the asymmetry of power between the offender and the victim. Since most of these cases occur without witnesses, it is difficult for the victims to prove they did not consent. In fact, the victims themselves may not be aware that the vitiated consent[12] extracted from them through coercion is not valid and does not prevent charges from being filed.

In some countries, the anti-gender-based violence legislation requires physical force and/or threats of death or injury to have been used to prosecute the offender for rape and other forms of sexual violence. This type of legislation assumes that, if a victim did not physically resist, they consented to the sexual act. This is troubling because many experts have noted that involuntary paralysis or freezing are a very common psychological and physiological responses to sexual assault (Amnesty International 2020).

In turn, consent-based rape legislation rests on recognising that there is a broad range of coercive circumstances where consent cannot be voluntary, genuine or willing and where the victim is incapable of giving consent. This type of legislation allows for the prosecution of offenders even in cases where no physical force or threats were employed against the victim (Equality Now 2021).

A recent survey from Amnesty International (2018) demonstrated that only eight out of 31 countries in Europe had consent-based rape legislation. This means that, in most European countries, the absence of consent is not enough to constitute sexual violence. That scenario is in direct contradiction with the Council of Europe Convention on preventing and combating violence

[12] Consent may be vitiated, and, thus, considered invalid (or insufficient to exculpate an individual accused of sexual assault, for example) due to the application of force, threats or fear of the application of force, fraud and the exercise of authority against the victim. There are a number of other circumstances which may vitiate consent, such as sleep, intoxication, immaturity and lack of intellectual capacity (Bryant 1989).

against women and domestic violence (also known as the Istanbul Convention), which instructs states to adopt legislation based on consent (art. 36).

Similarly, the European Court of Human Rights has determined, in M.C. v. Bulgaria, that "requiring proof of physical resistance in all circumstances risks leaving certain types of rape unpunished and thus jeopardising the effective protection of the individual's sexual autonomy". The UN Committee on the Elimination of Discrimination against Women (CEDAW) has also instructed countries to place the lack of consent at the centre of its rape legislation.

Furthermore, as the Explanatory Report to the Istanbul Convention notes, a sensitive assessment of the evidence in sexual violence cases includes analysing circumstances such as coercion, duress and threats. This, in turn, may lead to cases of sextortion being prosecuted under anti-gender-based violence legislation.

There is no universal definition of consent, but some useful guidance for the discussions around sextortion can be found in the Rule of Procedure and Evidence of the International Criminal Court. It notes that "consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the victim's ability to give voluntary and genuine consent" (Rule 70).

In some jurisdictions, the "abuse of authority" by the offender voids any consent. In Canada, the criminal code establishes that "no consent is obtained where the complainant submits or does not resist by reason of the exercise of authority" (art. 263, (3) (d)). Similarly, the criminal code of Queensland (Australia) states that "a person's consent to an act is not freely and voluntarily given if it is obtained by the exercise of authority" (art. 348 (2) (d)).

To avoid the above-mentioned issue of the burden of proof in sexual violence cases, the Handbook for Legislation on Violence against Women recommends legislation requires "that the act take place in 'coercive circumstances' and includes a broad range of coercive circumstances" (UN 2010: 26). In this case, the presence of such circumstances would be enough to constitute sexual violence.

Alternatively, the handbook suggests that legislation require the existence of "unequivocal and voluntary agreement" and proof by the accused of steps taken to ascertain whether the complainant was consenting (UN 2010: 26). Reversing the burden of proof has been discussed in New Zealand (Independent UK 2014), and it has been implemented in some instances in the states of New York and California in the US (Hilgert 2016).

Emerging legislation specifically dedicated to sextortion

In India, the Jammu and Kashmir Criminal Laws (sexual offences) (amendment) Act, 2018 established the offence of sextortion in the Indian state. It was defined as the abuse of authority or fiduciary relationship, or the misuse of an official position, to employ physical or nonphysical forms of coercion to extort or demand sexual benefits from any woman in exchange of some benefits or other favours that such a person is empowered to grant or withhold. It defined sexual favour as "any kind of unwanted sexual activity ranging from sexual suggestive conduct, sexually explicit actions such as touching, exposure of private body parts to sexual intercourse, including exposure over the electronic mode of communication".

Previously, a move in this direction had already been taken in the Indian state with the Prevention of Corruption (amendment) Act, 2018, which determined that the word "gratification" in the bribery offence was not restricted to pecuniary gratification or to gratifications estimable in money. It is notable that the definition of sextortion is not limited to the public sector but determines that only women can be victims of this offence. This legislation is no longer in force because Jammu and Kashmir lost its state status in October 2019.

In Peru, the president introduced a bill of law in November 2021 to increase the penalties for public officials that sought or received an undue advantage constituting a sexual conduct or an act of sexual connotation. The Bill of Law nº 678-2021 determines that the penalty for corruption of public officials could be increased for up to a third of the maximum prison sentence if the undue advantage

obtained is sexual in nature or is an act with sexual connotations. The bill does not cover cases of sextortion in the private sector.

The Peruvian bill of law also determines that several public entities, including the Ministry for Women, should conduct training and awareness raising activities aimed at judges, prosecutors, public defenders, police officers and other law enforcement agents on gender-related issues. Finally, it instructs the national police, the prosecutor's office and the judiciary to obtain and compile data on police records, investigations and criminal cases relating to the application of this aggravating circumstance.

In Chile, a bill of law was presented in 2019 to criminalise the solicitation of sexual favours by public officials. The offence is defined as "the public official who, because of his office, solicits or accepts sexual favours to perform or not to perform an act that is of his responsibility", imposing a penalty of imprisonment, a ban from holding public office and a fine.

In Brazil, a recently introduced bill of law seeks to criminalise sextortion, establishing a penalty of two to six years in prison (Bill of Law nº 4,534/2021). The criminal conduct is described as "conditioning the provision of a service or the practice of an official duty to the performance of a sexual activity that involves carnal intercourse or the practice of any other lewd act". The offender may be any individual that uses his/her employment or position of supremacy or superiority, even if only momentarily, over the victim. It is, thus, not restricted to public officials, covering cases of sextortion in the private sector too.

When explaining the reasons for introducing this piece of legislation, the authors noted the problematics of criminalising the victim's behaviour as active bribery if the offender were to be punished for passive bribery. A new type of criminal offence was said to be needed to ensure sextortion in the private sector did not go unpunished. There are several criminal offences such as *concussão*, which may be applicable to sextortion cases, but they are all included in a section of the criminal code that only applies to the public officials' wrongdoing (Câmara dos Deputados 2022).

In the United States, the state of Pennsylvania recently criminalised the act of "sexual extortion", with a larger scope than that of the above-mentioned definition of sextortion. Act nº 100 of 2019 defines sextortion as: "a person commits the offense of sexual extortion if the person knowingly or intentionally coerces or causes a complaint, [including by] holding out, withholding or threatening to withhold a service, employment, position or other thing of value" to engage in sexual conduct, the simulation of a sexual conduct or a state of nudity. In theory, this legislation covers sextortion cases in the private sector.

It should be noted, however, that this law exemplifies how the different meanings of sextortion (or sexual extortion) in different countries, especially in common law jurisdictions, may lead to confusion over its definition since it includes a range of conducts more closely related to extortion than to corruption *per se*. The same can be said for H.R. 5749 – the Interstate Sextortion Prevention Act, which seeks to criminalise different forms of coercing individuals into engaging in sexual acts or conduct.

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