

Protection Not Prison:

How the criminalization of sexual relations
outside of marriage promotes violence
against women

Action Research Report

Protection Pas Prison:

Comment la criminalisation des relations
sexuelles en dehors du mariage promeut les
violences faites aux femmes

Rapport de recherche-action

الحماية بدل السجن

إسهام تجريم العلاقات الجنسية خارج إطار الزواج
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Mobilising for Rights Associates or MRA - “woman” in Arabic - is an international non-profit organization based in Rabat and working across the Maghreb. Our mission is to contribute to changes in four domains - legal, structural, cultural and relational - to promote women’s human rights. We work for grassroots, micro-level changes in behaviors and practices to support our activism for macro level reform initiatives. Our multidimensional strategies are designed for various layers of sustainable transformation for women.

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English, French and Arabic versions of the report are available in PDF format on the MRA website.

Thank you

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Introduction

This report is the result of action research conducted by MRA Mobilising for Rights Associates in partnership with six local NGOs from different regions of Morocco: [Association Amal pour la Femme et le Développement](#) (El-Hajeb) ; la [Fédération des Ligues des Droits des Femmes](#) (Ouarzazate) ; [FADD- Fondation Anaouat Pour Droits et Développement](#) (Chichaoua) ; [Association Tafil Moubadarat](#) (Taza) ; [Association Mhashass pour le développement humain](#) (Larache) ; and [Association Voix de Femmes Marocaines](#) (Agadir).¹

The goal of this action research was to identify obstacles to the implementation of Law No. 103.13 on the elimination of violence against women, in particular the challenges posed by the criminalization of sexual relations outside of marriage.²

Enacted in February 2018, Law No. 103.13 defines and criminalizes certain forms of violence against women and establishes victim support units within public services. At the same time, Morocco's 1962 Penal code continues to criminalize sexual relations outside of marriage.³

The objective of this action research was to study and analyze the State response in cases involving the criminalization of sexual relations outside of marriage. This study highlights contradictions between the provisions of Law 103.13 on the elimination of violence against women on the one hand and the requirements of Moroccan Penal code articles 490-493 on the other. It describes how the latter articles impact negatively on public actor interventions in violence against women cases, and as a result, the extent to which the State fulfils or fails to fulfil its due diligence obligations to protect victims, prevent violence, prosecute and punish perpetrators, and provide adequate remedies and reparations.

The legal context: The Moroccan Penal code punishes any sexual relationship outside of marriage as well as adultery. In addition, an unmarried person who has sexual relations with a married person risks being prosecuted on two counts – the main offence and complicity in adultery. Proceedings for adultery are initiated only on the basis of a complaint from the offended spouse, who can always withdraw his or her complaint. The code also specifies the means of proof for these two offences.

Penal code Article 490	"Shall be punished by one month to one year imprisonment, any persons of different sexes who, not united by the bonds of marriage, have sexual relations with each other.»
Penal code Article 491	"Any married person convicted of adultery shall be punished by imprisonment for one to two years. Prosecution is initiated only upon the complaint of the wronged spouse. However, when one of the spouses is outside of Kingdom territory, the other spouse who, of public notoriety, has adulterous relations, may be prosecuted ex officio at the diligence of the Public Prosecutor's Office. »

¹ From May 2021 to April 2022.

² Kingdom of Morocco. Dahir no. 1.18.19 of 5 jourmada II 1439 (22 February 2018) promulgating Law No. 103.13 on the elimination of violence against women.

³ Kingdom of Morocco. Dahir No. 1-59-413 of 28 Jumada II 1382 (26 November 1962) approving the text of the Penal code, consolidated version 2018.

Penal code Article 492	"The withdrawal of the complaint by the wronged spouse terminates the prosecution of their spouse for adultery. Withdrawal occurring after a final conviction terminates the effects of that conviction on the convicted spouse. The withdrawal of the complaint never benefits the person accomplice with the adulterous spouse. »
Penal code Article 493	"Proof of the offences punishable under articles 490 and 491 shall be established either by a report of a finding of flagrante delicto ⁴ drawn up by a judicial police officer, or by a confession related in letters or documents emanating from the accused or by a judicial confession."

In practice and as illustrated below, in 2020 there were many more criminal cases for so-called "morality" crimes than for violence against women crimes.

CRIMINAL CASES, 2020⁵	
Violence against women crimes	So-called "morality" crimes
18,275 criminal cases against 19,570 persons, including: <ul style="list-style-type: none"> • 43 murders • 708 rapes • 6072 assault and battery • 1745 criminal assaults and battery • 493 sexual harassment in public spaces • 20 sexual harassment in the workplace • 153 technology facilitated harassment • 2 violations of a restraining order 	27,378 criminal cases against 31,799 persons, including: <ul style="list-style-type: none"> • 10,376 sexual relations outside of marriage • 2268 adultery • 141 homosexuality

The action research methodology was designed to be as participatory and inclusive as possible, targeting a diversity of actors in a systems approach. The six NGO partners organized a series of individual interviews and discussion groups, using detailed research protocols developed by MRA. The participants included a diversity of people within the institutions responsible for the implementation of Law 103.13, as well as women impacted by these laws.

Participants in this action research included:

- Actors from different public sectors, either in their individual capacity or within regional and local committees and units for support of women victims of violence, including law enforcement agencies (police, gendarmerie), the justice sector, the public prosecutor's office, medical professionals, social workers, and representatives of other relevant sectors, including civil society, *'adoul*, and the *Entraide nationale*.

⁴ Flagrante delicto means "caught in the act."

⁵ Annual report on the implementation of the penal policy and the improvement of the performance of the Public Prosecutor's Office, 2020.

- Women victims of violence, single mothers, and other women participating in NGO services and programs.

A total of 150 people participated in 48 individual interviews and 7 group discussions.

SECTOR	PARTICIPANTS - INDIVIDUAL INTERVIEWS	PARTICIPANTS - GROUP MEETINGS	DESCRIPTION
Health	9	3	<ul style="list-style-type: none"> ✓ Doctors in charge of units for support of women victims of violence ✓ Social workers in the units for support of women victims of violence
Law enforcement	6	4	<ul style="list-style-type: none"> ✓ Gendarmes ✓ Police ✓ Social workers
Public prosecutor	18	10	<ul style="list-style-type: none"> ✓ Prosecutors Presidents of local committees for support of women victims of violence (deputy prosecutors in the First Instance Courts) ✓ Prosecutors Presidents of regional committees for support of women victims of violence (deputy prosecutors in the Courts of Appeal) ✓ Social workers
Judges	10	4	<ul style="list-style-type: none"> ✓ First instance court judges (investigation, misdemeanors, minors) ✓ Family Court Judges ✓ Pro tempore judges assigned to the units for support of women victims of violence in the First Instance and Appeals courts ✓ Social workers in the First Instance courts ✓ Court clerks
Non-governmental associations	2	44	<ul style="list-style-type: none"> ✓ Local associations working with women victims of violence ✓ Associations members of local and regional committees for the support of women victims of violence
Lawyers	2	5	<ul style="list-style-type: none"> ✓ Lawyers' associations ✓ Lawyers
Professors and students in law schools	1	24	<ul style="list-style-type: none"> ✓ University professors ✓ Researcher on issues of violence against women
'adouls (notaries under Muslim law)		6	Active in committees for the support of women victims of violence
Entraide nationale		2	Members of committees for the support of women victims of violence

Research locations:

The group meetings and individual interviews were held in 16 towns and villages across six regions of Morocco – the northwest, Middle Atlas, Marrakech Tansift Al Haouz, Ouarzazate, Agadir Massa and the northeast.

Region	Places covered by the research
Northwest	<i>Larache</i>
Middle Atlas	<i>Meknes, El Hajeb, Azrou</i>
Northeast	<i>Taza, Matmata, Msila, Guercif</i>
Marrakech, Tansift El Haouz	<i>Imintanoute, Marrakech, Chichaoua</i>
Ouarzazate	<i>Ouarzazate</i>
Agadir Massa	<i>Agadir, Inzegane, Ait Melloul, Taroudant</i>



Summary of key findings. This action research illustrates how provisions criminalizing sexual relations outside of marriage and adultery under articles 490 to 493 of the Penal code:

- Prevent victims from reporting violence, thereby depriving women of their rights to protection, prevention, and an adequate remedy and reparations;
- Enable, facilitate, permit and encourage violence against women, serving as a tool for perpetrators to commit a variety of forms of violence against women with impunity;
- Are often applied in cases where the women prosecuted lacked the necessary criminal intent ;
- Serve as a tool for men to shirk their legal obligations under the Family code;
- Cause significant and diverse forms of harm to children;
- Are applied more frequently than the provisions of Law 103.13 on the elimination of violence against women;

- Have a detrimental impact on the State response to violence against women by limiting public actors' scope of action and preventing thorough investigations;
- Constitute a form of discrimination against women;
- Unnecessarily drain public services' human and material resources, which would be better invested elsewhere.

The criminalization of sexual relations outside of marriage makes it difficult for the government to effectively address the problem of violence against women.

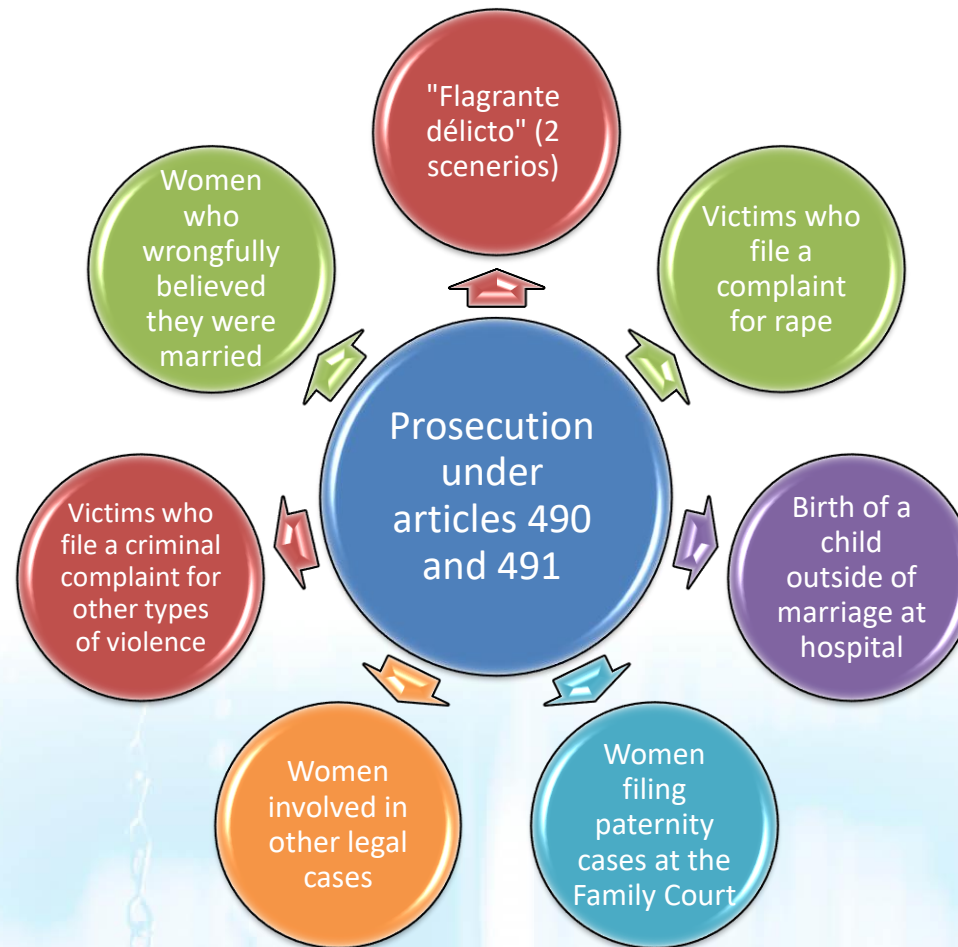
The report findings demonstrate the pressing and urgent need to reform laws, policies and procedures.

The final section of this report presents detailed recommendations from the action research participants for changes necessary to ensure that Morocco fulfils its obligations to promote and protect women's human rights.



1. Types of cases in which prosecution procedures for sexual relations outside of marriage or adultery are initiated

The action research revealed at least eight types of cases where women are at risk of being prosecuted for sexual relations outside of marriage or adultery.



Types of cases submitted to public authorities triggering the application of Articles 490 and 491	Public actor response to these cases	Results in these cases
1. Cases of "flagrante delicto" of sexual relations outside marriage under Penal code article 490, following a complaint or denunciation	<ul style="list-style-type: none"> • Most often the article 490 legal provisions are applied. • Some prosecutors try to act in the women's interests, by avoiding detention and in case of prosecution, ensuring that she remains at liberty pending the court hearings. <p><i>"We don't investigate the issue further, but rather turn a blind eye to certain aspects that could harm the victim or that could be considered an aggravating circumstance," said one deputy prosecutor.</i></p>	<ul style="list-style-type: none"> • Criminal prosecution of women accused of sexual relations outside of marriage. • If found guilty, sentenced; in practice most commonly to a suspended sentence of two to six months imprisonment and no fine. • If one of the two persons is married, the charge of complicity to adultery is added to the charge of sexual relations outside marriage, and the person is prosecuted for both offences.
2. Cases of "flagrante delicto" of adultery under Penal code article 491, following a complaint or denunciation	<ul style="list-style-type: none"> • Most often the Article 491 legal provisions are applied. 	<ul style="list-style-type: none"> • A majority of criminal prosecutions for adultery end with a sentence of imprisonment and a fine. • In practice, adultery is generally punished by 10 months to two years' imprisonment, in addition to compensatory damages to the civil party (the wronged spouse), with joint and several liability between the parties involved in the adultery. • In many cases, married men are not prosecuted because their wives withdraw the complaint. Wives most often renounce prosecuting their husbands for adultery, in order to avoid his imprisonment and the subsequent loss of his employment and the family income. • On the other hand, cases where husbands waive the prosecution of their wives accused of adultery are rare. Most husbands proceed with the criminal prosecutions and even call into question their children's paternity.

3. Complaint filed by a rape victim⁶	<ul style="list-style-type: none"> • If the prosecutor's office determines that evidence of rape exists, criminal prosecution for rape is brought against the perpetrator. • In the event of non-prosecution or closure of the rape case, the victim does not benefit from the protection measures for victims of violence provided for in Law 103.13. • If the investigation does not produce evidence of rape, the article 490 and/or 491 provisions may then be applied. • Given that the victim herself initially reported the crime, she generally remains at liberty during the investigation and trial phases. <p>"Some instances where women make a complaint are qualified as rape, unless the woman says that she knew the perpetrator," said one interlocutor from the Public Prosecutor's Office. Women who are raped are discouraged from saying that they knew the perpetrator, in order to avoid prosecution for sexual relations outside of marriage or adultery.</p>	<ul style="list-style-type: none"> • The perpetrator is convicted only if there is evidence of rape, in practice usually requiring physical injuries and a medical certificate indicating rape. • If rape is not proven, the woman risks being criminally prosecuted for sexual relations outside of marriage or adultery and faces imprisonment and an order to pay court fees and expenses. • If rape is not proven, the victim does not benefit from the protective measures provided for in Law 103-13. On the other hand, if the perpetrator denies knowing the woman, he is frequently acquitted.
4. Complaint filed by a victim of other types of violence, for example, physical or technology-facilitated violence. The interrogation or investigation reveals that the perpetrator and the victim had a relationship.⁷	<ul style="list-style-type: none"> • Criminal proceedings for sexual relations outside of marriage are sometimes initiated without a thorough investigation into the initial complaint of violence. • Sometimes public authorities inform the victim that she risks being prosecuted for sexual relations outside of marriage if she pursues her complaint for violence. 	<ul style="list-style-type: none"> • Criminal prosecution of victims of violence accused of sexual relations outside of marriage and imprisonment to 2 to 6 months under article 490 if found guilty.
5. Women involved in other unrelated legal cases, for example, prosecuted for a bounced check, or who have filed	<ul style="list-style-type: none"> • Often additional criminal proceedings for sexual relations outside marriage or adultery are initiated against a woman, who was originally prosecuted for another crime or was a complainant herself as a victim of another crime. 	<ul style="list-style-type: none"> • Criminal prosecution for sexual relations outside of marriage or adultery, in addition to prosecution in the original case.

⁶ Rape is criminalized by Penal code articles 485-488. See *Promoting State Responsibility for Sexual Violence against Women in Morocco* (MRA Mobilising for Rights Associates, 2021) for a detailed description of the difficulties and obstacles to proving rape.

⁷ See *Virtual Violence, Real Harm* (MRA Mobilising for Rights Associates, 2019); *Promoting State Responsibility for Intimate Partner Violence against Women in Morocco* (MRA Mobilising for Rights Associates, 2021).

<p>a complaint themselves against a third party for an unrelated matter, for example, for theft. The interrogation or investigation reveals that she has a relationship outside of marriage or an adulterous relationship with the man accused or otherwise involved in the case.</p>	<ul style="list-style-type: none"> • The majority of single mothers are treated ex officio as being involved in nonmarital sexual relations cases, even if they seek assistance from law enforcement for other legal issues. 	
<p>6. Women who mistakenly believed they were married, either misled by a "false husband" and/or married by "Fatiha"⁸</p>	<ul style="list-style-type: none"> • Criminal proceedings are often initiated against the woman for sexual relations outside of marriage and/or complicity to adultery. • Sometimes the judicial police or the Public Prosecutor's Office informs the women that they risk being arrested or prosecuted, and as a result the women are forced to withdraw any complaints they made for fraud. 	<ul style="list-style-type: none"> • If the women file and pursue a fraud complaint, they risk being convicted of sexual relations outside of marriage if fraud is not proven. • Some participants confirmed that there were numerous cases in which women had not been able to benefit from Penal code articles 526.1 on the dissipation of property acquired between spouses. In these instances, the women were victims of fraud by a man who led them to believe that the legal marriage procedures had been completed; in reality the man aims to steal the woman's property. The fictitious husband threatens the woman with the possibility of arrest under Penal code articles 490 and 491 if they file a complaint, thus depriving the women of the protection of Penal code article 526-1.⁹

⁸ Fatiha or orfi marriages are concluded verbally and without a written contract. They occur most frequently in rural areas far from public administration. In principle, Article 16 of the Family code sought to eliminate them and granted couples without a written contract a period of five years to apply for recognition of their marriage, a period then extended to ten years and again to fifteen years (until 2019). Dahir No. 1-10-103 of 3 Shaabane 1431 (16 July 2010) promulgating Law No. 08-09 amending Article 16 of Law No. 70-03 on the Family code.

⁹ Article 526-1 of the Penal code states: " Is punished by one month to six months imprisonment and a 2,000 to 10,000 dirhams fine or one of these penalties, the spouse who dissipates or transfers his property in bad faith, with the intention of harming the other spouse or the children or circumventing the provisions of the Family code concerning alimony, housing, rights due resulting from the breakdown of the marital relationship or the distribution of marital property. Prosecution can only be initiated upon a complaint

7. Single mothers who petition the Family Court to establish their child's paternity	Often the Public Prosecutor's Office initiates the procedure of investigation and criminal prosecution against the woman for sexual relations outside marriage.	<ul style="list-style-type: none"> • Denial of the child's paternity • Prosecution of the mother for sexual relations outside of marriage.
8. Notification of the authorities by a hospital that an unmarried woman has given birth	<ul style="list-style-type: none"> • Criminal proceedings are instigated against single mothers with newborns. Certain participants referred to the suspension of the application of a Public Prosecutor's Note that had previously discouraged such prosecutions, but the action research could not confirm these claims nor obtain a copy of that Note. 	<ul style="list-style-type: none"> • Prosecution of mothers for sexual relations outside of marriage, often resulting in a suspended sentence of 2 to 6 months imprisonment.

by the wronged spouse. The withdrawal of the complaint terminates the proceedings and the effects of the judicial decision having acquired the force of res judicata, if it has been pronounced.»

2. The impact of criminal prosecution for sexual relations outside of marriage or adultery on the women (and men) charged

Being accused, prosecuted, and/or convicted of sexual relations outside of marriage or adultery causes numerous types of harm to women. Among these, the action research participants cited:

- **Psychological harm**, such as depression, anxiety, stress, isolation, fear, and suicide attempts;
- **Social harm**, such as rejection and ostracism by their family, having to move homes or to a new town entirely, social stigmatization, and the stigmatization of one's entire family;
- **Professional harm**, such as loss of employment due to dismissal by the employer, difficulties finding work because of their criminal record, or abandonment of employment due to forced relocation;
- **Economic harm**, particularly in cases where women are victims of scams by fake husbands who steal their property and money, and are left without recourse to recover their property;
- **Educational harm**, including being expelled from or forced to drop out of school, or relocating elsewhere without being able to obtain a school attendance certificate;
- **Being subjected to diverse forms of violence without any protection**, from her family, and if married, from her husband, who benefits from extenuating circumstances provided for in the law.¹⁰

The action research also revealed numerous harms caused to women related to **their children and to their parental rights**:

- The conviction of a single mother for sexual relations outside of marriage eliminates the possibility of negotiating the child's legitimate paternity with the biological father;
- A woman prosecuted for adultery risks being deprived of her children, including loss of custody and denial of visitation rights;
- When a mother is prosecuted for adultery, the husband often questions their children's paternity;
- In some instances, single mothers are forced to flee and abandon their newborn children in hospitals;
- Fleeing the hospital or avoiding it altogether during childbirth results in a lack of health care and the risk of serious health complications for the woman and/or her child.¹¹

In contrast, the action research revealed a virtual absence of consequences for men involved in cases involving Penal code articles 490 and 491. In adultery cases, Article 492 provides that the withdrawal of the complaint by the wronged spouse terminates the prosecution; this is the most common result when the wife is the wronged party and hence most husbands are not prosecuted. In many instances this leaves the unmarried woman partner alone to bear the consequences of the relationship, as she risks being convicted on both charges of sexual relations outside of marriage and complicity to adultery. Men are prosecuted only in cases of flagrante delicto or acknowledgment of a sexual relationship outside of marriage, or in the rare instances where his wife does not withdraw her complaint.

In many instances, men involved in these cases even stand to gain and come out on top. Given that rape cases are very difficult to prove, perpetrators are frequently acquitted or not even prosecuted. "Fictitious" husbands evade the financial and other duties and obligations arising from a legal marriage. And perpetrators of all types of crimes – rape, other forms of violence, extortion, theft – gain in confidence, continue to take advantage of legal and procedural loopholes, and continue to reoffend.

¹⁰ Penal code articles 418, 420.

¹¹ There have been 20 prosecutions for murder of a newborn, according to the 2020 report of the Presidency of the Public Prosecutor's Office on the implementation of criminal policy, an increase of 162.50% compared to 2019, in which eight such prosecutions were recorded.

3. The impact of Penal code articles 490 - 493 on the State response

A. Constraints related to evidentiary standards

As illustrated in the diagram below, Penal code article 493 provides two means of proof for establishing article 490 and 491 offences: flagrante delicto or confession. It is worth recalling the legal definitions of these two terms:

Flagrante delicto: A crime or offence is flagrante:

- 1 ° When a criminal act is committed or has just been committed;
- 2 ° When the perpetrator is still pursued by public outcry;
- 3 ° When the perpetrator, at a time very close to the action, is found carrying weapons or objects presuming his participation in the criminal act, or when traces or clues establishing this participation are found on the perpetrator.

A flagrante crime or offence is any crime or offence which, even in circumstances not provided for in the preceding paragraphs, has been committed in a house where the head of the household requires the public prosecutor or a judicial police officer to ascertain it.¹²

Judicial confession: Confession, like any other means of proof, is subject to the discretion of the judge.

Any confession that is proven to have been extracted by violence or coercion is not valid.

In addition, the perpetrator of violence or coercion is liable to the penalties provided for in the Penal code.¹³

The results of this action research illustrate how:

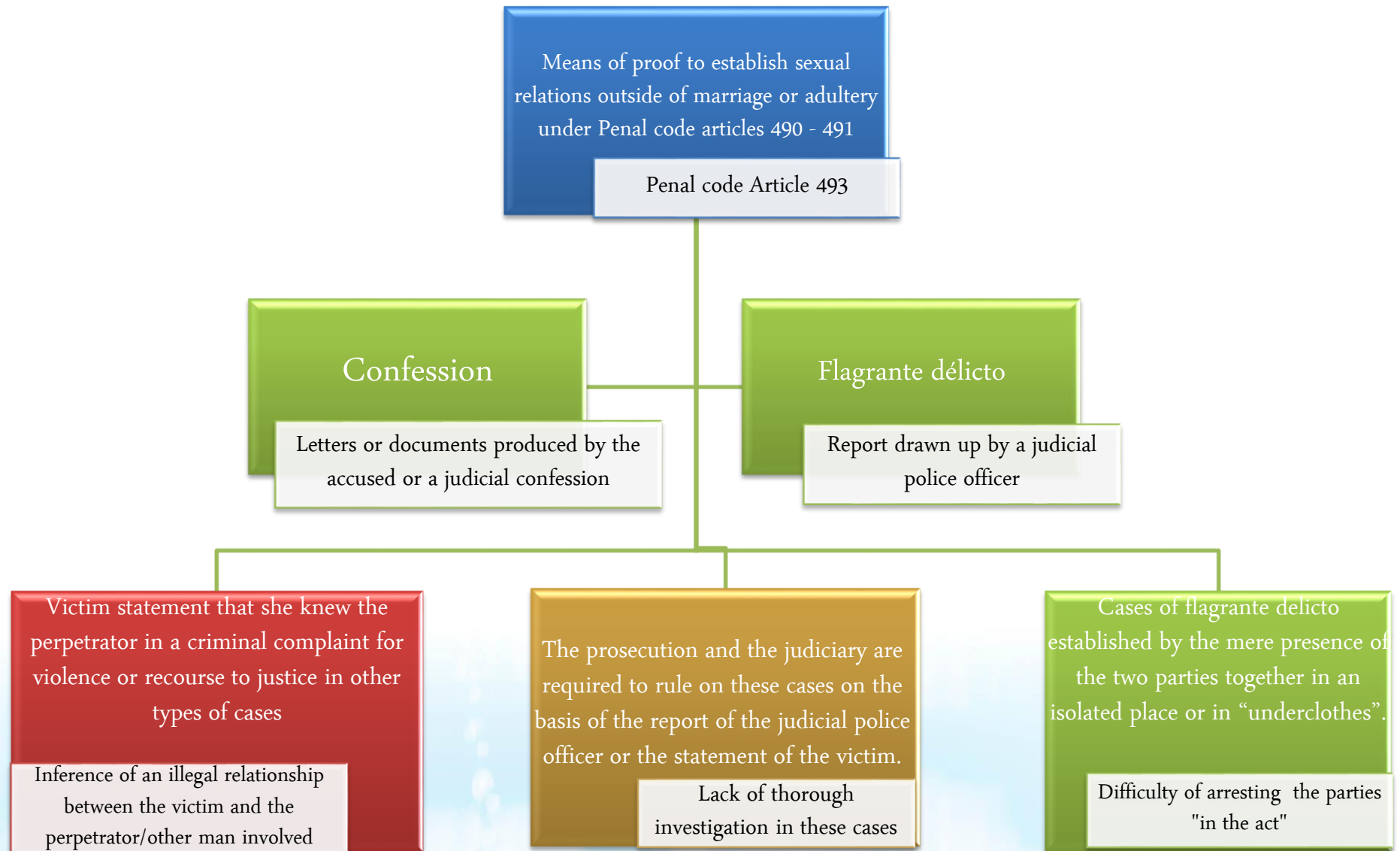
- A significant number of "flagrante delicto" cases are based solely on the report drawn up by law enforcement officers describing indirect, subjective and inconclusive circumstances, rather than having actually caught two people engaged in sexual activity. This broad interpretation of flagrante delicto in practice and acceptance of the law enforcement report during the prosecution and trial phases excludes any thorough investigation and risks leading to abuses of power.
→ *This refers to Types 1 and 2 in the above table describing cases involving these articles.*
- A significant number of "judicial confessions" are based on criminal complaints filed by women victims of violence, in instances where they had a previous relationship with the perpetrator or simply knew him. Despite the fact that these women are crime victims who file a complaint to claim their rights and seek protection, they end up being treated as criminals who have "confessed."¹⁴
→ *This refers to the other six instances – numbers 3 to 8 in the above table describing the types of cases involving these articles.*

Such applications of the Penal code article 493 evidentiary standards may explain in part the high rates of prosecutions for sexual relations outside of marriage and adultery described above.

¹² Kingdom of Morocco. Law No. 22.01 on Criminal Procedure as amended, version updated on 18 July 2019, Section 56.

¹³ Kingdom of Morocco. Law No. 22.01 on Criminal Procedure as amended, version updated on 18 July 2019, Section 293.

¹⁴ According to one prosecutor, based on the Article 493 evidentiary standards, videos made by others are not considered a "confession."



B. How do Penal code Articles 490 to 493 affect the ability of different public actors to act effectively?

This section examines how Penal code articles 490 to 493 impact negatively on the work of the health, law enforcement and justice sectors. Specifically, it explores how these legal provisions don't allow public actors to respond effectively, limit their scope of action, and effectively prevent them from handling cases, especially violence against women cases, as they should. The systems approach used here solicited and describes the perceptions and experiences of actors working in each sector in the system, in order to promote collective and cross-sectoral solutions.

SECTOR	IMPACT ON THEIR WORK
Health sector	<ul style="list-style-type: none">• The obligation to notify the competent authorities in the event of a birth outside of marriage prevents health professionals from being able to provide unwed mothers and their children with all necessary services and medical care.• Prosecutions under Penal code articles 490 and 491 prevent health professionals from providing victims of violence with adequate counseling services and medical treatment, particularly since accused women are often escorted to the hospital by the judicial police.• Some health professionals described feeling helpless, since not all of them are authorized to issue a medical certificate proving sexual assault, especially in the absence of visible physical injuries. As a result, victims find themselves alone trying to prove the rape, and if they don't succeed, they become vulnerable to prosecution for sexual relations outside of marriage.¹⁵• Some health professionals indicated that the high number of cases referred to the hospital by the judicial police, combined with the obligation to speed up a diagnosis and issue a medical certificate urgently, do not allow them to conduct a thorough and professional clinical examination in each case.• Many health professionals stated that they devote a significant portion of their time to dealing with issues related to Penal code articles 490-491, including the obligation to contact and inform law enforcement of a birth out of wedlock, conducting genetic expertise, or referring the victim to a psychologist because of the trauma of being prosecuted as a criminal. These challenges are often exacerbated by a lack of human resources within health facilities.
Law enforcement	<ul style="list-style-type: none">• Some officers, with the intent to help victims of violence, advise women that they risk being prosecuted for sexual relations outside of marriage if they file a complaint. As a result of these laws, therefore, law enforcement agencies are forced to protect women from criminal prosecution by the State instead of being able to protect them from the perpetrator and from violence.• Some officers avoid further investigations in certain complaints of violence, in order to avoid learning about a prior relationship between the victim and the perpetrator that would trigger criminal proceedings under Penal code articles 490-491.

¹⁵ Only doctors authorized to give a medical certificate for sexual violence can do so, and this only by order prior of the prosecutor.

	<ul style="list-style-type: none"> • Even when a victim wants to file a complaint for violence, given the challenges of conducting a thorough investigation and common sex stereotypes, especially about single mothers, at times law enforcement simply writes a report with an implicit or explicit accusation of sexual relations outside of marriage or adultery against her.¹⁶ • Many participants pointed out how extremely difficult it is to catch people in the act in cases of sexual relations outside of marriage. As a result, in practice the determination of flagrante delicto is frequently made solely on the basis of the judicial police report, rather than actually arresting the parties during the act itself. Many such reports are limited to a description of «the two parties were together in an isolated place" or were in "underclothes." • Challenges faced by law enforcement include the lack of human resources, requests from the Public Prosecutor's Office to speed up investigations and avoid a backlog of cases, difficulties obtaining convincing evidence of violence, and a high number of responsibilities related to other categories of offences. As a result, violence against women cases are often not thoroughly investigated, and instead wrongly classified as cases of sexual relations outside of marriage. • Some participants described how they could not devote much time to each case and handle them as they would like because of prosecutorial requests to speed up the proceedings and avoid a backlog of files. • Some reported that they receive a total of three or four cases per month related to Penal code articles 490 and 491, in addition to other types of criminal cases, and therefore do not have more than 10 days to review each case. • In the event of a birth outside of marriage, law enforcement must devote time to travel to the hospital and write reports on these cases.
Public prosecutor's office	<ul style="list-style-type: none"> • Most participants stressed that the provisions of Penal code article 493 oblige them to prioritize implementation of articles 490 and 491, without ordering thorough investigations into the potential existence of other crimes, such as violence. In many cases involving sexual relations outside of marriage or adultery, the Public Prosecutor's Office initiates criminal proceedings against women on the basis of either (a) the victim's preliminary statement to the judicial police that she knew the violent perpetrator, or (b) reports from the judicial police on births to an unwed mother. Often, article 490 or 491 proceedings are launched without any additional procedures or further investigation into the circumstances of the case or the victim's situation. • A few participants indicated that in some cases they did not limit themselves to the victim's declarations, but ordered further investigation. • Some described how the protective measures provided for in articles 88-3 and 88-1 of Law 103.13 on the elimination of violence against women are not clear and therefore not applicable. Participants cited, among others, challenges to and a lack of clarity on how to enforce no-contact orders in practice, or how to monitor the perpetrator's compliance with a restraining

¹⁶ Circular from the Presidency of the Public Prosecutor's Office, January 12, 2018 <https://www.pmp.ma/%d9%85%d9%86%d8%a7%d8%b4%d9%8a%d8%b1-%d9%88%d8%af%d9%88%d8%b1%d9%8a%d8%a7%d8%aa/#>

	<p>order. In contrast, the provisions of Penal code articles 490-491 are clearer, and therefore more applicable and more prevalent in practice.¹⁷</p> <ul style="list-style-type: none"> Prosecutors find themselves in a dilemma between their desire to help and protect women victims of violence under Law 103.13 and their obligation to apply the law in accordance with the provisions of Penal code articles 490 and 491. Given this conflict, prosecutors often end up applying the latter, given their mandatory and clear nature. On the other hand, the Law 103.13 provisions, such as protective measures, are vague, general and optional. As a result, even when women are victims of extortion, rape, physical assault, harassment and other forms of violence, prosecutors are forced to choose the criminalization of the woman over her protection. Some participants explained how, out of sympathy in some specific cases, such as following a recent birth, they seek the application of mitigating circumstances and a suspended sentence without a fine. Some participants stated that nearly 10% of the work of the Public Prosecutor's Office is devoted to dealing with cases of violence against women. In comparison, they also estimated that half of their working time was spent solving problems related to cases of sexual relations outside marriage and adultery.¹⁸ Despite the large number of cases brought before the Public Prosecutor's Office for sexual relations outside of marriage or adultery, many participants indicated that they did not spend much time on them because in the majority of the cases either the women had "confessed" or a birth to an unwed mother was noted in police reports. Despite the high number of these cases, some participants estimated that depending on the case it only took them 30 minutes to half a day to process each one.
Judges	<ul style="list-style-type: none"> In violence against women cases, as soon as the victim declares that she and the perpetrator had a prior relationship, the judge is obligated to convict her of sexual relations outside of marriage, since the confession is considered irrefutable evidence. Judges in these cases are bound by Penal code article 493 and do not appear to have much room for manoeuvre. Trials of rape cases frequently suffer from the deficiencies of the laws as concerns the definition of rape and evidentiary standards. Strict enforcement of the law results in convictions for sexual relations outside of marriage or adultery instead of rape. Some participants explained that Penal code article 490 and 491 cases are not subject to the judge's discretion to rule on the basis of his or her own conviction, as is the case in other offences such as assault and battery. In cases of sexual relations

¹⁷Article 88-3 states that « In case of prosecution due to committing one of the crimes stipulated in article 88-1 herein, the Crown Prosecution, the Investigating Judge or the court if necessary, may give an order prohibiting the prosecuted from contacting the victim, approaching the victim's whereabouts or communicating with the victim by any means whatsoever. Such order may also be issued at the victim's request, and shall remain in effect until the court issues its final decision. ».

¹⁸ The Office of the Public Prosecutor recorded a total of 31,799 prosecutions for crimes related to the family and public morality, half of which were for sexual relations outside of marriage, for a total of 15,886. In contrast, only 19,570 prosecutions were recorded for crimes committed in cases of violence against women (Report of the Presidency of the Public Prosecutor on the implementation of penal policy and the improvement of the performance of the Public Prosecutor's Office, 2020).

outside of marriage and adultery, the judge is obliged to apply the provisions of Penal code article 493.

- Some judges in First instance courts reported that they base their decisions on the police reports, which limits their work to merely ruling on the case without opening an investigation. This reduces the time spent on such cases, unlike appellate court judges, who may have the time to open an investigation and rely on a variety of evidence.
- Some judges noted that the predominant trend in court cases where the parties are an unmarried woman and man is to conclude that they have had sexual relations outside of marriage, and this despite the parties' oaths to the contrary or the absence of any confession or evidence.

4. Findings and Conclusions

- **The criminalization of sexual relations outside of marriage and adultery prevents victims of violence from reporting it. As a result, these provisions deprive women of their rights to protection, prevention, and an adequate remedy and reparations.**

Women victims of violence rarely report violence to the public authorities. According to the High Commissioner for Planning, "following the most serious incident of physical and/or sexual violence experienced by women in the last 12 months, 10.5% of victims of violence (nearly 18% for physical violence and less than 3% for sexual violence) filed a complaint with the police or other competent authority".¹⁹

This low reporting rate is due in part to Penal code articles 490 to 493, which create a threat of prosecution that discourages women from seeking public services or claiming their rights.

Most women who had a previous relationship with the perpetrator do not seek help from the authorities to benefit from the provisions of Law 103.13 on the elimination of violence against women, regardless of the form of violence they experienced - physical, technology-facilitated, or otherwise.

Most rape victims specifically, whether or not they knew the perpetrator, do not report it because of the risk of being transformed themselves from a victim into a criminal.

In the exceptional cases when women did report violence to the authorities, it appears that they had been unaware of the Penal code provisions criminalizing sexual relations outside of marriage.

A woman was raped by a close friend who mutilated her buttocks with a razor blade. She went to the police and stated that she had been in a relationship with the rapist, but withdrew her complaint as soon as the police informed her that she could be prosecuted for sexual relations outside of marriage, despite a medical certificate proving the assault.

- **The criminalization of sexual relations outside of marriage and adultery permits, facilitates, authorizes and encourages violence against women. These provisions serve as a tool for perpetrators to commit diverse forms of violence against women with impunity.**

The criminalization of sexual relations outside of marriage makes women vulnerable to persistent and ongoing violence. After committing an initial act of sexual violence, perpetrators use the threat of being prosecuted for sexual relations outside of marriage as a control mechanism to intimidate and isolate women, and continue to subject them to subsequent non-consensual sexual acts.

In addition, these provisions create an opportunity for men to steal, extort, threaten, exploit and defraud women. Several women accused of sexual relations outside of marriage or adultery were originally victims of deceit and fraud by a married couple coveting the former's property. In these cases, at first a con artist couple tricks a woman into believing that marriage procedures were concluded between the man and the victim, with the consent of the first wife. The fictitious husband then takes the victim "second wife's" property. Victims are unable to file a complaint against the couple for theft or fraud, since if they do so they risk being arrested for sexual relations outside of

¹⁹ Communiqué of the Office of the High Commissioner for Planning on the occasion of the national and international mobilization campaign for the elimination of violence against women (2019), https://www.hcp.ma/Communique-du-Haut-Commissariat-au-Plan-a-l-occasion-de-la-campagne-nationale-et-internationale-de-mobilisation-pour-l_a2411.html,

marriage and complicity in adultery. On the other hand, the accomplice first wife would merely withdraw the criminal prosecution against her husband.

A widowed mother of two children owned property bequeathed to her by her late husband. Her neighbor proposed marriage to her in the presence of his first wife, who was ill and unable to have sexual relations. The widow agreed to marry him via the "Fatiha" pending the expiration of the legal waiting period following her first husband's death. The new "husband" extorted her money under the pretext of investing it for the benefit of the family.

When the victim asked her new "husband" to speed up the marriage recognition procedures and demanded her money, he threatened to have her prosecuted for sexual relations outside of marriage and complicity in adultery. Under this plan, the first wife would file a complaint of adultery against both the victim and her husband, and then withdraw the prosecution against him. The victim contacted law enforcement to try to recover her money, but was told that she was at risk of being prosecuted for sexual relations outside of marriage and complicity in adultery. She turned to the media, and was met with humiliation and ostracism in her community. As a result, she faced difficulties finding housing where she and her children could live.

- **In many cases, criminal intent is lacking in women prosecuted for sexual relations outside of marriage or adultery, despite the fact that it is a required element of the offence.**

A good number of women believed they were legally engaged or married by "Fatiha", unaware that the "fiancé" or "husband" was already married, or were led to believe that he was separated from his legal wife and in the middle of a divorce. These women were thus very surprised when they were arrested for sexual relations outside of marriage. Additionally, in the majority of these cases the men's legal wives withdrew the complaint against their husband, leaving the woman victim of this fraud the only party prosecuted.

It is notable that marriages by "Fatiha" - long tolerated to the point of renewing the legal period of five years to regularize these marriages on three different occasions - have now been turned into a criminal offence.²⁰

A woman contracted marriage through "Fatiha" with a farmer after he assured her that he had divorced his wife but could not conclude a legal marriage contract. He claimed that he could not renew his national identity card because of a problem with a bounced check. The victim was surprised when the gendarmes arrived one night when she was with the "husband" and arrested them on adultery charges. The legal wife of the purported husband withdrew charges against her husband, but the woman was sentenced to 10 months in prison.

- **Penal code articles 490 to 493 are used as a tool by men to escape their legal obligations under the Family code**, such as responsibilities towards their children or polygamy authorization procedures.

Several women prosecuted for sexual relations outside of marriage or for adultery lacked information about the legal marriage procedures and/or believed they were legally married. In some cases, the husbands were already married and wanted to avoid the legal procedures for petitioning for authorization to take a second wife. Here the men lied to the women by claiming to have

²⁰ Family code, Dahir no. 1-04-22 of 12 hijra 1424 (3 February 2004), article 16.

completed all marriage procedures, including in some instances going so far as to take her to a fictitious office to meet someone claiming to be an 'adoul authorized to draw up a marriage contract. In these cases, the fake "husbands" use threats of prosecution for sexual relations outside of marriage or adultery to force victims to renounce their rights under the Family code, such as financial support for her and her children.

A woman gave all of the documents necessary for marriage to her partner, who took her to a fake office to conclude the contract in exchange for a forged receipt.

A woman waited a long time to obtain a copy of her marriage contract, but the "husband" gave her ongoing excuses to justify not giving it to her. When she gave birth to a child, she went to court to register her daughter. Subsequently, the husband abandoned her, informing her that there was no marriage contract and that he already had another wife and three children. Out of fear of being prosecuted for complicity to adultery, she decided to register her daughter in the civil registers by declaring herself a single mother.

- **Penal code articles 490 to 493 cause significant harm to children.**

These articles discourage women from filing cases with the Family Court relating to their children's rights, including parentage and financial support.

Husbands who accuse their wives of adultery commonly go so far as to question their children's parentage and attempt to shirk their legal responsibilities upon divorce, among others financial support and housing for their children.

A large number of children are abandoned because of these provisions criminalizing sexual relations outside of marriage and adultery. Penal code articles 490 – 493 prevent single mothers from declaring their pregnancy, giving birth in hospital, or going to court to establish their child's parentage. In order to avoid the risk of being arrested, prosecuted and imprisoned, some women see no alternative but to leave their child on the street immediately after birth.

- **Penal code articles 490 to 493 are applied more frequently than the provisions of Law 103.13 on the elimination of violence against women.**

Participants in this action research attributed this to various reasons:

- The lack of office space, human resources and training for VAW unit members in public services contributes to the lack of a thorough investigation into cases of violence against women perpetrated by an intimate partner, and promotes the application of Penal code articles 490 and 491 instead;
- The ease and clarity of evidence in cases relating to sexual relations outside of marriage and adultery – limited to flagrante delicto and confession – contrast with the vague nature of the legal texts related to and the difficulties in proving violence against women.
- Certain participants referred to the suspension of the application of a Public Prosecutor's Office Note that is said to have previously discouraged prosecution in cases of births to unwed mothers. This action research was unable to confirm these claims or obtain a copy of this Note. The suspension of the application of such a Note, if that is the case, could also contribute to the high number of prosecutions for sexual relations outside of marriage, considering an illegitimate birth as proof.

- **Penal code Article 493 impacts negatively on the work of public authorities by limiting their scope of action in investigations and prevents them from seeking and using a variety of evidence to determine the innocence of the victim and the guilt of the perpetrator.**

Penal code articles 490 and 491 offences are only proven by a written judicial police report or a confession. Even when the couple has not been caught in the middle of the prohibited act, the report is generally accepted without further investigation. Similarly, the mere declaration by the woman of having known the perpetrator is deemed a confession, to the exclusion of any genetic expertise or any presumption that may be in the victim's interest.

Many participants noted that investigations in violence against women cases are often limited to determining whether the perpetrator and the victim knew each other previously and the nature of their relationship, and do not go any further into the presence or absence of the elements of the offence.

- **Penal code articles 490 to 493 constitute a form of discrimination against women.**

This action research illustrates how women are more likely to be prosecuted for sexual relations outside of marriage or adultery than men are.

In cases where a woman victim of violence reports it to the authorities, in the absence of a thorough investigation, it is very likely that there will not be enough evidence to pursue the case. Yet her statement that she knew the perpetrator is deemed a judicial confession and she risks being considered a criminal herself. On the other hand, in the absence of confession or other evidence, it is unlikely that the perpetrator will be prosecuted under these articles.

In cases where the husband is accused of adultery, women's precarious economic situation and financial dependence on the husband turns Penal code article 492 into a means of blackmail used by men to force their wives to withdraw their complaint. In contrast, women accused of adultery rarely benefit from this provision; instead of renouncing their complaint, husbands take advantage of it by trying avoid their obligations to their children.

As a result, in most cases of adultery, the wife withdraws the complaint against her husband for adultery but the husband rarely renounces prosecution of his wife. This leads to a very strange situation where a person – a single woman who has had sexual relations with a married man – risks finding herself guilty and imprisoned as the accomplice of the main offence of adultery that is not prosecuted or punished itself.

In conclusion:

The outdated provisions of the 1962 Penal code articles 490 to 493 render other, more recent legislative advances meaningless, including Law 103.13 on the elimination of violence against women (2018) and the Family code (2004).

These Penal code provisions encourage and facilitate further violence against women by (a) preventing reporting and promoting impunity for abusers, and (b) providing men with a tool to threaten, exploit and control women.

The lack of thorough investigations both in cases of violence against women and in cases of sexual relations outside of marriage or adultery, risks to lead to erroneous and unjustified prosecutions and convictions.

Instead of being able to act to protect victims from perpetrators and from violence, empathetic public actors are forced to act to protect women from prosecution and imprisonment by the State.

The criminalization of sexual relations outside of marriage makes it difficult for the government to effectively address the problem of violence against women.

The large number of cases in the eight scenarios described in this report where prosecutions for sexual relations outside of marriage and adultery are triggered represents a waste of time, public funds, and human and material resources within public services.

The criminalization of sexual relations outside of marriage is a form of policy violence. These legislative decisions have harmful impacts on women and make them even more vulnerable to violence and other crimes. The "morality" of public policy choices that support and aggravate violence against women must be called into question.



5. Recommendations for reforms to laws, policies and procedures

The above results and conclusions from this action research illustrate the pressing need for reforms to laws, policies and procedures. Such reforms should be designed to:

- Ensure that Morocco fulfils its international obligations to:
 - Act with due diligence in violence against women cases to protect victims, prevent violence, prosecute and punish abusers, and provide adequate remedies and reparations;
 - Eliminate all forms of discrimination against women.
- Effectively implement Law 103.13 on the elimination of violence against women.

During consultations for this action research, participants made numerous proposals and recommendations for reforms to laws, policies and procedures.

A. Main recommendations

- The most effective, permanent and sustainable solution is to **repeal Penal code articles 490 to 493**. The legislative branch may establish adultery as a conjugal offence between spouses in civil cases if it wishes, but sexual relations outside of marriage and adultery do not in any event warrant imprisonment, a criminal fine, or a criminal record.

Pending this legislative solution, which should be taken as soon as possible, other temporary regulatory and institutional measures should be taken immediately:

- Issue instructions that victims of violence or other criminal acts cannot be prosecuted on the basis of statements made in the context of a complaint, and that such statements do not constitute a "judicial confession."²¹
- Issue instructions to ensure strict application of a limited definition of "flagrante delicto." Clarify that a law enforcement report cannot state "flagrante delicto" based on circumstantial elements, and that in all cases the report should not have probative force that precludes a thorough and complete investigation.
- Issue instructions that criminal proceedings for sexual relations outside of marriage or adultery cannot be initiated on the basis of a birth to an unwed mother, of a Family court case relating to children's rights, or in cases when criminal intent is lacking, such as in unregistered marriages.

²¹ In the same vein, it is worth noting Article 448.14 of Dahir No. 1-16-127 of 21 Kaada 1437 (25 August 2016) promulgating Law No. 27-14 on combating trafficking in persons, which provides that " The victim of trafficking in persons shall not assume any civil or criminal responsibility of any act committed by such victim under threat, if the act is directly linked to the fact that the person is personally a victim of trafficking in persons. However, the victim shall assume the civil and criminal responsibility if s/he committed a criminal act of free will without being under any threat."

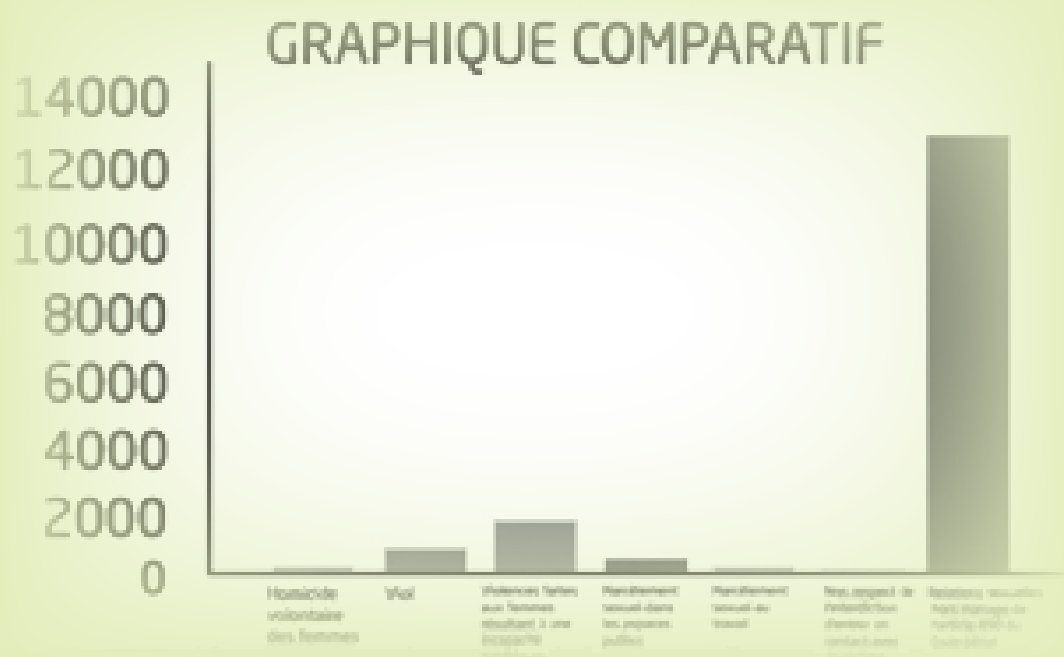
B. Detailed recommendations from sectoral participants during the action research

While this action research and subsequent advocacy primarily targets the criminalization of sexual relations outside of marriage and adultery, participants also made recommendations for connected issues related to improving the public services response to violence against women cases in general. As a result, all of the diverse proposals collected are presented here.

SECTOR	RECOMMENDATIONS ARTICLES 490 – 493	RECOMMENDATIONS VIOLENCE AGAINST WOMEN
Police and gendarmerie	<ul style="list-style-type: none"> • Interview the victim without qualifying her statements as a judicial confession proving one of the article 490 and 491 offences • Broaden the means of evidence instead of limiting them to the exclusive rules of Penal code article 493 • Do not take into consideration statements made by victims of violence under psychological pressure or compel her to make statements that would trigger prosecution under these articles 	<ul style="list-style-type: none"> • Provide specialized human resources with specific and professional resources and working mechanisms • Provide special spaces that respect the privacy and meet the needs of women victims of violence • Take the time to conduct a thorough investigation, with the arrest of the perpetrator until the facts of the offence are established
Public prosecutor	<ul style="list-style-type: none"> • Abolish both articles in order to keep up with the development of society • Revise/amend/abolish article 492 of the Penal code, which allows discrimination in the application of the law with regard to adultery and the possibility of withdrawing the complaint • Rethink the standards of evidence set out in section 493 • Recall the Law on Combating Trafficking in Persons and its provisions to protect crime victims in cases of violence • Prevent women victims' statements from being deemed as evidence against them • Do not initiate prosecution of women who file complaints for other cases • Clarify the existence of and if necessary reactivate the 	<ul style="list-style-type: none"> • Define the tasks of the members of the Units for the care of women victims of violence, and limit the members' work exclusively to the care of women victims of violence • Activate and apply the effective implementation of the various protection provisions provided for in Law 103.13 • Do not limit the duration of the treatment of these cases, but rather give each one the necessary and sufficient time to make a complete and thorough investigation • Shift the burden of proof to the perpetrator in cases of violence against women • Accelerate access to legal aid in cases of violence against women and grant it automatically • Work in specializations within the prosecutor's office and provide specialized assistants in these cases within each court

	<p>General Prosecutor's Office Note to avoid prosecution for sexual relations outside of marriage or adultery of single mothers who give birth in hospital.</p>	<ul style="list-style-type: none"> • Adopt a local penal policy, where each prosecutor draws up a penal plan adapted to the circumstances of the area of jurisdiction in order to take into account the area's specificities • Provide adequate and qualified logistical, technical and human resources, e.g., forensic science and technology • Unify approaches to working on these issues at the national level • Work jointly among different actors in sexual assault cases • Facilitate procedures to enable social workers working in associations to accompany women victims of violence to all court proceedings • Revamp the criminal justice system as a whole rather than simply making piecemeal changes • Address violence against women from a public law perspective and prosecute cases even when victims withdraw the complaint
Judges	<ul style="list-style-type: none"> • Repeal or amend Penal code articles 491-492 • Begin to adopt and rely on a social inquiry before deciding on issues related to articles 490 and 491 • Invoke the Trafficking in Persons Law to address cases when women are victims of violence, and therefore considered witnesses and entitled to receive the necessary protection • Repeal article 490, not only to prevent abuse of victims of violence accused of sexual relations outside of marriage, but to broaden the evidence relating to parentage as well • Criminalize infringements of a person's privacy • Establish new legal mechanisms to prove sexual relations outside of marriage and adultery instead of relying on current mechanisms 	<ul style="list-style-type: none"> • Work in a specialized manner within the judiciary and provide specialized judges for these cases within each court • Adopt an approach involving victims in order to determine their needs, while enforcing the law against the perpetrator of any type of violence • Issue a platform for the application of protective measures in order to clarify how to apply the provisions of Articles 88-1 and 88-3, such as the procedures for a restraining order and non-contact of the perpetrator with the victim. • Put in place provisions that guarantee reparations to women victims of violence
Health sector	<ul style="list-style-type: none"> • Establish the mandatory availability of hospital psychologists, given the importance of diagnosing the psychological state of women victims of violence instead of 	<ul style="list-style-type: none"> • Focus on genetic expertise with its procedure as soon as possible • Facilitate the obtention by women victims of sexual violence of

	<p>being limited to their initial declaration of knowing the perpetrator to condemn them</p> <ul style="list-style-type: none"> • Adopt a system of permanent coverage and immediate examinations during weekends and holidays to treat sexual violence cases and collect necessary evidence 	<p>medical certificates highlighting non-consensual sexual acts, using all means adopted to show that women have been victims of violence, and this without their relationship with the perpetrator having an impact on the conclusions of the medical examination</p> <ul style="list-style-type: none"> • Ensure coordination between all actors involved in cases of violence to ensure effective protection and safety for the victim • Assign medical staff to the Units for the care of women victims of violence in all hospitals, with social workers who work exclusively with women victims of violence • Ensure the necessary treatment free of charge for all victims of violence • Provide the necessary equipment in each hospital to perform the required examinations in such cases
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