

Strengthening Judicial Capacity to Improve Women's Access to Justice
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I. Introduction

Ensuring access to justice is ensuring access to fair, affordable, accountable and effective remedies in terms of contact with, entry to and use of the legal system. Equal access to justice implies:

- the right to an effective remedy
- the right to a fair trial
- the right to equal access to courts and the right to legal aid and legal representation which improve access to courts¹.

Key obstacles to women's access to justice are the combination of economic, cultural, legal and institutional elements. These obstacles are:

1) the mix of:

- a) lack of awareness of procedures - you have to know the procedure [meaning: you need to have access to legal aid and legal representation]
- b) lack of financial resources and restrictions on the availability of legal aid – funds needed [again] for legal aid and legal representation plus further costs (for judicial fees and taxes, for transportation to courts, accommodation, and in the realities of women's lives – for childcare and care for the dependent persons). Free legal aid usually depends on financial and social status. The victims of violence against women or discrimination are not expressly listed in the provisions on free legal aid.

Women are just the financially weaker party!

¹ More information on international legal framework, obstacles faced by women in access to justice in general, challenges for women in relation to criminal law (women as victims of crime women as offenders), to civil and family law, to public law, and the issue of women in the justice sector – see Feasibility Study Equal Access Of Women To Justice, Gender Equality Commission, Strasbourg, 28 May 2013, http://www.coe.int/t/dghl/standardsetting/equality/03themes/access_to_justice/GEC_2013_1_en%20rev_title.pdf. See also documents and materials of the conference "Towards guaranteeing equal access to justice for women", 15 - 16 October 2015, Bern, Switzerland, including Report and Compilation of good practices, <http://www.coe.int/en/web/genderequality/towards-guaranteeing-equal-access-of-women-to-justice>.

Legal aid and legal representation ensure equality before the law. Without ensuring access to affordable legal representation and adequate legal aid women's access to justice is a fiction. Furthermore legal aid and legal representation should be provided in a competent and gender-sensitive way.

2) Cultural barriers, fear and shame that are discriminatory attitudes, stereotypes² and prejudices. These are mostly reflected in relation to civil and family law (child support, parental responsibilities, guardianship, divorce proceedings and the division of property) – when men are seen as breadwinners and women as better carers. It is also true in relation to criminal law in cases of domestic violence and sexual violence. Prosecutors, law enforcement officials and other actors sometimes allow stereotypes to influence investigations and trials, especially in cases of gender-based violence. In cases of domestic violence women – victims often are the only “evidence” and the only witness and are left alone with the perpetrator. Such a situation results not only in ineffectiveness of the criminal procedure but also in lack of protection and help for the victim. For instance there is no recording of emergency calls, no taking photographic evidence of destruction of property and signs of violence and no reports from doctors or social workers and preservation of forensic evidence. And when women kill their male partners after years of suffering domestic violence, they are treated as murderers. The justice system and the existing concepts of self-defense do not take into account the reality of women who have been subjected to physical, sexual and psychological violence for years.

3) Emphasis placed on using alternative dispute resolutions (ADR) such as mediation. We all agree alternative dispute resolutions (ADR) such as mediation decrease the cost and time of litigation. But these procedures often leave women at a disadvantage. In cases of gender-based discrimination and violence against women including domestic violence, there is a need for “court” justice instead of mediation. Cases of violence against women, and other situations when the two parties have unequal positions need to be proceeded not in the mediation. Mediating disputes in families where there is a history of domestic

² In the very recent report concerning Poland the Commissioner for Human Rights of CoE says: “Despite measures taken to train police, prosecutors and judges, gender stereotyping reportedly also remains entrenched in the handling of cases by police and courts, a factor which has a negative impact on women’s access to justice, particularly in the fields of domestic violence, gender-based violence and trafficking in human beings”, Report by Nils Muižnieks, Commissioner for Human Rights of the Council of Europe following his visit to Poland from 9 to 12 February 2016, <http://www.coe.int/en/web/commissioner/-/erosion-of-rule-of-law-threatens-human-rights-protection-in-poland>.

violence inherently perpetuates inequality between the victim and the violent partner. It raises the question if women or mediators do not feel pressured to reach a settlement and preserve the family unity. In such cases mediation has failed to provide a truly accessible, fair, and empowering process for all.

4) Gender neutral legislation and de jure discrimination

First, laws are generally formulated in gender neutral terms. Legislation is not assessed for its gender impact. It may also lead to systemic inequalities that are often unintended. Failing to take into account the daily and diverse reality of women's lives, this "neutrality" is an illusion misleading policies and actions. It can for instance result in situations where women dispose of equal rights, but since they do not possess the same access to opportunities enjoyed by men, they cannot successfully assert these rights. Moreover, there is still a persistence of discriminatory laws, the anti-discrimination legislation still contains gaps and not all of the forms of violence against women are criminalized in some countries.

5) The lack of gender balance and gender bias in courts and among law enforcement officials

Improving the gender balance in the judiciary can also be seen as a way of increasing women's trust and confidence in courts. Women should be represented equally in the judiciary but also in other law implementation mechanisms as prosecutors, public defenders, lawyers, administrators, mediators, law enforcement officials, judicial and penal officials and expert practitioners, as well as in other professions. But only increasing gender balance is not a solution. There is also a great need to provide the training on gender equality and anti-discrimination legislation at the level of the judiciary and of law enforcement agents. It is a key to ensuring a more gender-sensitive administration of justice.

These barriers affect even more women from the most vulnerable groups such as those belonging to a minority, rural women, elderly women, women with disabilities, lesbian/bisexual/transgender women, trafficked women, migrants, refugees, asylum seekers and undocumented women, and women from certain ethnic or religious groups.

II. EXISTING INTERNATIONAL MECHANISMS

1. United Nations

The right to equality of persons before courts and tribunals and the right to fair trial are stated by articles 2 and 14 of the International Covenant on Civil and Political Rights, Article 10 of the Universal Declaration of Human Rights, articles 2 (2) and 3 of the International Covenant on Economic, Social and Cultural Rights and Article 5(a) of the Convention on the Elimination of Racial Discrimination.

The United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW Convention) requires states parties to agree to prohibit discrimination of women through laws that carry some form of legal sanction, and to ensure effective legal protection of women's entitlement to enjoy rights on an equal basis with men (Article 2 (b) and (c)). It also requires states parties to "repeal all national penal provisions which constitute discrimination against women" (Article 2 (g) of the Convention). Moreover, Article 15 embodies the principle of women's equality before the law, which includes women's equal access to courts and tribunals, as well as their equal protection of the law³.

2. Council of Europe

The core Council of Europe gender equality standards pertaining to equal access to justice for women are provided in four major treaties. These are the European Social Charter, the Convention on Action against Trafficking in Human Beings, the European Convention on Human Rights and the Convention on Preventing and Combating Violence against Women and Domestic Violence (so-called Istanbul Convention)⁴. These last two are of high importance.

³ See also General Recommendation 33 (2015) on women's access to justice of CEDAW Committee and Beijing Platform for Action. In its recent General Recommendation 33 (2015) on women's access to justice, the CEDAW Committee identifies "six interrelated and essential components necessary to ensure women's access to justice: 1) justiciability, which refers to the ability and empowerment of women to claim their rights as legal entitlements; 2) availability of courts; 3) accessibility of all justice systems to women, including those who face intersectional or compounded forms of discrimination; 4) good quality of justice, which includes the requirement that justice systems be gender-sensitive; 5) provision of remedies; and 6) accountability of justice systems".

⁴ The Resolution 2054 (2015) "Equality and non-discrimination in the access to justice" of the Parliamentary Assembly of the Council of Europe (PACE) should also be mentioned. It called on member States to step up their efforts to remove legal, social, economic and cultural barriers to women's access to justice and for this purpose, it called on member States to sign and/or ratify the Istanbul Convention and carry out an in-depth analysis of the impact of gender on access to justice, in particular by collecting gender-disaggregated data, and adopt gender sensitive policies taking account of the specific barriers to access to justice encountered by women.

The European Convention of Human Rights provides in Article 6 for the right to a fair trial in relation to any civil litigation or criminal charges. It also provides for the right to legal assistance where the accused has no means to do so and where the interests of justice requires so. In Article 14, it also prohibits any sex discrimination in the enjoyment of the rights and freedoms set out in the Convention. Protocol 12 was later introduced to broaden this prohibition beyond the limits of the rights and freedoms of the Convention but has been ratified only by 18 member states of the Council of Europe.

The standards of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence constitute a core element of ensuring equal access of women to justice. The Istanbul Convention includes numerous provisions aimed at facilitating the access of victims of violence to justice, in particular by requiring states parties:

- 1) to provide adequate legal information (Article 19),
- 2) to encourage reporting (Article 27),
- 3) to provide victims with adequate civil remedies (Article 29), and compensation (Article 30),
- 4) to criminalize or otherwise sanction a broad range of forms of violence against women (Articles 33-40),
- 5) to ensure that investigations and judicial proceedings are carried out without undue delay (Article 49),
- 6) that prosecutors can initiate and continue proceedings, even if the victim withdraws the complaint (Article 55),
- 7) that evidence relating to the sexual history and conduct of the victim is permitted only when relevant and necessary (Article 54),
- 8) that mandatory alternative dispute resolution processes or sentencing, including mediation and conciliation, are prohibited (Article 48),
- 9) that victims are protected at all stages of investigations and judicial proceedings (Article 56)
- 10) that they have access to legal assistance and to free legal aid (Article 57).

The Plan of Action on “Strengthening Judicial Independence and Impartiality” should also be mentioned. The Plan of Action was adopted by the Committee of Ministers of the Council of Europe on 13 April 2016. It includes objectives and actions aimed at advancing gender equality in the justice system and implementing gender mainstreaming and it commits the

Council of Europe and its member states to seek a gender balance in the judiciary and to undertake efforts to fight gender stereotyping within the judiciary⁵.

3. European Union

The most important instrument in this regard is the Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, also called the Victims' Directive. The objective of the Directive is to ensure that across the EU:

- victims are treated with respect, and that police, prosecutors, and judges are trained to deal with them properly;
- victims receive information on their rights and their case in a way that is understandable to them;
- victim support exists in every Member State;
- victims can participate in proceedings if they wish to and are helped to attend the trial;
- victims are protected while the police investigates the crime and during court proceedings;
- vulnerable victims are identified – for instance children, victims of rape or intimate partner violence, or those with disabilities – and are properly protected.

Hence the objective of the Directive is to ensure that victims receive the support they need, that they can participate in proceedings and receive and understand relevant information, and that they are protected throughout criminal investigations and court proceedings. Some victims are particularly at risk of secondary and repeat victimisation or of intimidation and retaliation by the offender during criminal proceedings. Through individual assessments, carried out at the earliest opportunity, such a risk should be effectively identified. Particular attention should be paid to certain groups of victims, including victims who have suffered a crime committed with a bias or discriminatory motive which could, in particular, be related to their personal characteristics; and victims whose relationship to and dependence on the offender make them particularly vulnerable. In this regard, victims of gender-based violence, sexual violence, violence in a close relationship, shall be duly considered.

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http://www.coe.int/t/dghl/standardsetting/cdcj/Judicial%20independence%20and%20impartiality/Conference%20documents/PREMS%20060916%20GBR%202017%20Plan%20d'action%20TXT%20A5%20BAT%20WEB_web.pdf.

III. CONCLUSIONS

To conclude, the standards of great importance are:

- 1) access to free legal aid for women by ensuring that eligibility criteria for legal aid is formulated on the basis of gender considerations so as to take into account the diverse realities of women's lives;
- 2) addressing the power dynamics between men and women in alternative dispute resolution processes to ensure that women are respected and their voices and concerns heard;
- 3) ensuring of the possibility of legal standing for NGOs to bring proceedings before the court;
- 4) raising awareness among law enforcement officials on gender equality and to eliminate the gender-based stereotypes;
- 5) ensuring of the resources and powers to equality bodies which could monitor and secure the equal access of women to justice;
- 6) taking special measures at the legal or practical level in order to address the needs of vulnerable women and enhance their access to justice.

There are the barriers and the international mechanisms listed above. The mechanisms are the full response for the barriers. Hence, **the first step Member States need to take should be simply ensuring full implementation of international and regional human rights treaties to make equal access to justice for women a reality⁶.**

⁶ As I presented in Tallin this year at the conference "Are we there yet? Assessing progress, inspiring action - the Council of Europe Gender Equality Strategy 2014-2017" a tool to fulfilling this could be a creation of Women's Access to Justice Index. The Women's Access to Justice Index could be a tool to: 1) promote the issue (better communication), 2) track compliance with international standards and recommendations, 3) measure the issue and assess how far a given state is from reaching equal access of women to justice, 4) support decision-makers in planning and implementing the strategy created in order to reach it. A first step has already been done – see "A Framework for Measuring Access to Justice Including Specific Challenges Facing Women" has been prepared, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680631f55>.