# TRAINING MANUAL FOR JUDGES AND PROSECUTORS ON ENSURING WOMEN'S ACCESS TO JUSTICE


Prepared under the Project
"Improving Women's Access to Justice in the Eastern Partnership Countries"
Armenia, Azerbaijan, Georgia, the Republic of Moldova, Ukraine and Belarus

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Partnership for Good Governance


# Training Manual for Judges and Prosecutors on Ensuring Women's Access to Justice

## *General Part*

***Accompanied by four country chapters for Armenia, Azerbaijan, Georgia, the Republic of Moldova and Ukraine available on the gender equality website of the Council of Europe***

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## In the framework of the project

## Improving Women's Access to Justice in the Six Eastern Partnership Countries (Armenia, Azerbaijan, Georgia, the Republic of Moldova, Ukraine and Belarus)

The project "Improving Women's Access to Justice in the Six Eastern Partnership Countries (Armenia, Azerbaijan, Georgia, the Republic of Moldova, Ukraine and Belarus)" is a co-operative regional initiative between the Council of Europe and the European Union under the framework of the Partnership for Good Governance (PGG). In 2015-2016, the project was implemented in five of the six Eastern Partnership countries, with Belarus joining the project in 2017. The PGG is funded by the Council of Europe and the European Union and is implemented by the Council of Europe.

The project aims to identify and support the removal of obstacles to women's access to justice while also strengthening the capacity of each participating country to design measures to ensure that the justice chain is gender-responsive, with a focus on training for legal practitioners. This *Training Manual for Judges and Prosecutors on Ensuring Women's Access to Justice* was developed by a group of national and international experts with support from the Gender Equality Unit of the Council of Europe Secretariat. The manual includes a common general part and national chapters specific to Armenia, Georgia, the Republic of Moldova, and Ukraine.

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# ACRONYMS

| | |
|---|---|
| **ADR** | Alternative dispute resolution |
| **CEDAW** | Convention on the Elimination of All Forms of Discrimination Against Women |
| **CJEU** | Court of Justice of the European Union |
| **CoE** | Council of Europe |
| **CM** | Committee of Ministers of the Council of Europe |
| **CRC** | Convention on the Rights of the Child |
| **CSW** | Commission on the Status of Women |
| **DV** | Domestic violence |
| **ECHR** | European Convention on Human Rights |
| **ECtHR** | European Court of Human Rights |
| **ECOSOC** | United Nations Economic and Social Council |
| **ECSR** | European Committee of Social Rights |
| **ESC** | European Social Charter |
| **EU** | European Union |
| **FRA** | European Union Agency for Fundamental Rights |
| **GBV** | Gender-based violence |
| **GEC** | Gender Equality Commission |
| **GRETA** | Group of Experts on Action against Trafficking in Human Beings, under the Convention on Action against Trafficking in Human Beings |
| **GREVIO** | Group of Experts on Action against Violence against Women and Domestic Violence, under the Convention on Preventing and Combating Violence against Women and Domestic Violence |
| **HRC** | Human Rights Council |
| **ICCPR** | International Covenant on Civil and Political Rights |
| **ICESCR** | International Covenant on Economic, Social and Cultural Rights |
| **ICT** | Information and communication technology |
| **ILO** | International Labour Organisation |
| **NGO** | Non-governmental organisation |
| **NHRI** | National human rights institution |
| **PACE** | Parliamentary Assembly of the Council of Europe |
| **PGG** | Partnership for Good Governance |
| **SDG** | Sustainable Development Goals |
| **UN** | United Nations |
| **VAW** | Violence against women |

# INTRODUCTION

Improving the protection of women's human rights is underpinned by legal system reform, and there are many examples of how the legal landscape has undergone important change within recent decades at the international, regional and national levels. For instance, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) is not yet 40 years old. Yet during the Convention's lifetime more than half of the world's constitutions have been redrafted or amended, "an opportunity that has been seized upon by women to write gender equality into the legal fabric of their countries"[1]. Around three-quarters of national constitutions guarantee equality between women and men, and almost two-thirds of nations have passed laws on domestic violence,[2] paving the way for women the world over to claim redress for violations of their rights.

Activists for women's human rights and gender equality have long argued that ensuring equal rights and non-discrimination in the law is only half of the equation and that *de jure* or formal gender equality becomes meaningless without *de facto* or substantive equality. Very often, well-conceived legislation remains "on the books" and is not implemented. Thus, on its own, legislation has little impact on improving the lives of women. To achieve substantive gender equality, all forms of discrimination must be eliminated and specific measures should be adopted to redress the disadvantages and power imbalances that women experience.

International legal standards, such as those articulated in CEDAW, not only provide us with a clear articulation of how discrimination is manifested in all areas of life; they also stipulate that women and men must benefit from the equal protection of the law. States are required to protect women from acts of discrimination and also provide redress for human rights violations. Increasingly, the question is being raised about whether formal justice institutions — once viewed as gender neutral (and even gender blind) — are, in fact, equality accessible to women and men. Sex-disaggregated data about the number of applications lodged with the European Court of Human Rights (ECtHR), collected between 1998-2006, the most recent data available, show that women are substantially underrepresented as applicants, making up only 16 percent of the total[3]. There is no evidence to suggest that women's rights are violated less often than men's, and so the disproportionate number of female applicants to the ECtHR is a cause for concern. Furthermore, given the admissibility requirement that an applicant must exhaust all domestic remedies, this finding is a red flag, suggesting that national justice systems present significantly greater barriers to women.

Gender equality standards pertaining to equal access to justice for women are addressed by a variety of standards and grounded in four major treaties of the Council of Europe: the European Convention on Human Rights, the European Social Charter, the Convention on Action against Trafficking in Human Beings, and the Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention). Guaranteeing women's equal access to justice is in addition one of the five priority themes of the Council of Europe's work on gender equality. The Council of Europe (CoE) *Gender Equality Strategy for 2014-2017* highlights the disparity between efforts to strengthen legal protection of women's rights and the inequalities in accessing justice that women experience throughout the 47 member states. The European Union, likewise, has the promotion of women's rights as a strategic objective.[4] The CoE calls on member states to improve women's access to justice by increasing understanding of the barriers that women face and exchanging information about effective approaches and good practices. Within this framework, the Council of Europe Gender Equality Commission (GEC) has supported several initiatives, including the following[5]:

- A *feasibility study on Equal Access to Justice for Women*, based on case studies from four member states (2013)
- A series of three expert meetings focusing on various topics under the subject of women's access to justice (2013-2015)
- A *compilation of good practices to reduce existing obstacles and facilitate women's access to justice* (2015).

1. UN Women. 2011. *Progress of the World's Women: In Pursuit of Justice 2011–2012*. New York. p. 25.
2. Ibid. p. 29.
3. Françoise Tulkens. 2007. *Human rights, rights of women. Female applicants to the European Court of Human Rights*. Lecture delivered on 9 March 2007 at the Institute for European Studies at the Vrije Universiteit Brussel (VUB).
4. European Commission. 2015. *Strategic Engagement for Gender Equality 2016–2019*.
5. Publications and reports accessible on the website of the Gender Equality Unit of the Council of Europe: http://www.coe.int/en/web/genderequality/equal-access-of-women-to-justice.

The project "Improving Women's Access to Justice in the Six Eastern Partnership Countries", covering Armenia, Azerbaijan, Georgia, Republic of Moldova Ukraine, and as of 2017 Belarus, helped to identify obstacles to women's access to justice in the Eastern Partnership countries and to strengthen the capacity of each country to design measures to ensure that the justice chain is gender-responsive, including through the training of legal professionals. This manual is the result of joint efforts by international and national experts as well as the institutions responsible for the training of judges and prosecutors in the Eastern Partnership countries. Other outputs of this project include[6]:

- The publication of *National studies on barriers, remedies and good practices for women's access to justice in five Eastern Partnership countries*;
- Three working group meetings and two regional conferences that gathered experts to develop the current training manual;
- Two regional conferences providing a regional platform to identify good practices and challenges in promoting women's access to justice and the measures that need to be taken to make justice systems more gender-responsive in each of the Eastern Partnership countries; bringing together representatives of Ministries of Justice, national training institutions, legal professionals, and other representatives of national authorities and civil society;
- National training seminars on women's access to justice for more than 500 judges, prosecutors and candidates, piloted in Armenia, Azerbaijan, Belarus, Georgia, the Republic of Moldova, and Ukraine in partnership with national judicial and prosecutorial training institutions;
- Guidebook for civil society on advocating for women's access to justice.

## i. Purpose and structure of the training manual

Research conducted by the CoE prior to the launch of this project found that "training offered to judges [and prosecutors] on matters related to gender equality is not standard practice across Europe."[7] Case studies from Austria, Finland, Portugal and Sweden revealed that after their appointment, neither judges nor prosecutors receive training on gender equality, gender discrimination or gender-sensitive methods they can employ in their practice. The exception is dedicated training on the topic of violence against women, primarily domestic violence, which is offered to prosecutors and judges, as well as other relevant professionals. The issue of violence against women is central to a discussion of improving women's access to justice, but at the same time, the topic represents one of several categories of women's human rights violations. This approach to training for legal professionals very much reflects the situation in the five Eastern Partnership countries.

The present *Training Manual* has been designed with two central aims: to provide guidance for judges and prosecutors on steps that can be taken in their daily practice to improve women's access to justice and to provide a tool for national training institutions responsible for the training of judges and prosecutors in implementing initial and in-service curriculum on women's access to justice. This guidance is based on existing international, Council of Europe regional and national standards, as well as available good practices from member states of the Council of Europe. It therefore sensitises relevant legal practitioners to areas of gender inequality within the judicial process and to provide examples of good practices that can facilitate women's access to justice.

**Gender Mainstreaming and Gender Sensitivity**

Another way to describe the purpose of this manual is that it aims to assist judges and prosecutors to *mainstream* gender considerations into their practice.

6. Publications and reports accessible on the website of the Gender Equality Unit of the Council of Europe: http://www.coe.int/fr/web/genderequality/women-s-access-to-justice.
7. Council of Europe Gender Equality Commission. 2013. *Feasibility Study: Equal Access to Justice for Women*. para. 62.

**Gender mainstreaming**[8] is a term for the process of "(re)organisation, improvement, development and evaluation of policy processes, so that a gender equality perspective is incorporated in all policies at all levels and at all stages."[9] The ultimate goal of gender mainstreaming is to achieve gender equality.[10]

Gender mainstreaming is one of the five strategic objectives of the CoE Gender Equality Strategy (2014-2017), including in the area of justice. The CoE also recognises that mainstreaming a gender perspective is an important component of reforms that are aimed at strengthening the judiciary.[11]

Sometimes the process of gender mainstreaming is referred to as taking a **gender sensitive approach** to the administration of justice or applying a **gender perspective** to prosecution or adjudication.

Judges and prosecutors are the primary beneficiaries of this capacity-building tool, but the manual is also a reference tool for practicing legal professionals and law students. Likewise, while the manual responds to the identified needs of the Eastern Partnership countries, it may benefit a wider audience of legal practitioners throughout the CoE member states and beyond.

The *Training Manual* is structured in four main parts, which have been designed as independent training modules: Module I: The Conceptual Framework, Module II: The International and Regional Legal Frameworks, Module III: What Every Practitioner Should Know and Module IV: Promoting Women's Access to Justice through the Practice of Judges and Prosecutors. The first three modules provide general, but practical information on standards for women's access to justice, important concepts, such as women's human rights, gender stereotypes and bias and non-discrimination on the basis of sex and gender, and main themes and areas in which gender inequalities negatively impact women's ability to seek redress through the justice system for violations of their rights (violence against women, employment matters and family matters). The fourth module of the manual directly contributes to building the capacity of judges and prosecutors to administer justice in a gender-sensitive manner. It addresses points of criminal and civil law and procedure, and was informed by national analytical reports and input from national experts. The topic of gender stereotyping in judicial practice is approached as a cross-cutting issue, and therefore is addressed in a number of sections where relevant.

In addition to the general part, four country chapters have been developed for Armenia, Georgia, the Republic of Moldova and Ukraine, and are available on the website of the Gender Equality Unit of the Council of Europe.[12] The four country chapters are tailored to address the specific social contexts and legal frameworks in these countries and review the barriers to equal access of women to justice in different areas of law in the respective countries. The country chapters thus provide detailed and practical guidance and recommendations for actions that judges and prosecutors can take in their daily practice to improve women's access to justice.

The *Training Manual* is designed around modules in order to be flexible enough to allow trainers to develop a customised programme. It provides some examples of training exercises and aims to give trainers enough background information and methodological guidance that they can develop exercises to meet their targeted requirements. At the same time, the manual can be used as a form of handbook by legal practitioners, as it emphasises gender-sensitive practices in of the context of judicial decision-making but also in such areas as case-building, investigation, courtroom management, and remedies.

## ii. Methodological Guidance

The *Training Manual* has been commissioned and supported by the Council of Europe and developed in close partnership with seven national training institutions responsible for the training of judges and prosecutors: the Justice Academy of Armenia, the Justice Academy of Azerbaijan, the High School of Justice of Georgia, the National Institute of Justice of the Republic of Moldova, the Office of the Chief Prosecutor of Georgia, the School of Judges of Ukraine and the Academy of Prosecution of Ukraine. The immediate institutional beneficiaries of

8. For more information on gender mainstreaming, see Council of Europe, Gender Mainstreaming conceptual framework, methodology and presentation of good practices - Final Report of Activities of the Group of Specialists on Mainstreaming (2004).
9. Council of Europe. *Gender Equality Strategy 2014-2017.* p. 13.
10. ECOSOC. 1997. 'Agreed Conclusions on Gender Mainstreaming' Report UN Doc A/52/3. Ch. 1, para A.
11. Council of Europe. 2016. Plan of Action on Strengthening Judicial Independence and Impartiality.
12. See the website of the Gender Equality Unit of the Council of Europe: http://www.coe.int/en/web/genderequality/publications

the *Training Manual* are the training institutions for judges and prosecutors in the Eastern Partnership countries, but it is hoped that other similar institutions in Council of Europe member states will also find it relevant. In particular, the general part of the manual is more widely relevant, while the four country chapters address country specificities. The intention is to offer this *Training Manual* as a tool and support for the inclusion of the topic of equal access of women to justice in the mandatory education for legal professionals, and in particular in initial or continuous training of judges and prosecutors. It is hoped that this approach will be prioritised by the national training institutions including in the development of further curricula.

## ii.a How to use the *Training Manual for Judges and Prosecutors on Ensuring Women's Access to Justice*

When using the *Training Manual* as support for a one-time training, the training institutions and the trainers will need to make a careful selection of the topics and materials, as the content of this manual far exceeds what can be covered in the scope of a short training event, ideally lasting two to three days). This scenario has been foreseen in the design of the manual and it is for this reason that the manual has been structured in modules and sections. One module is one independent part of the main four parts of the manual. Additionally, each main part has several sections. For example, Module I: The Conceptual Framework has four sections: (1) Access to justice; (2) Women's human rights; (3) Non-discrimination on the basis of sex and sex/gender equality; and (4) Gender stereotypes and bias. Module IV: Promoting Women's Access to Justice through the Practice of Judges and Prosecutors has thirteen sections. The intention of the commissioners and authors of the manual was for each training event to include at least one section from each of the main four modules of the manual. Therefore, however short, training on women's access to justice should include a module covering the conceptual framework, one related to international and regional legal frameworks, one thematic module and one module relating to aspects of the daily practice of judges and prosecutors. The choice of sections belonging to the different modules is left at the discretion of the training institutions and/ or the trainers, bearing in mind that certain sections in Module IV would be more relevant to particular themes in Module III. For example, if the employment field is chosen, then the section on evidentiary issues would be particularly relevant.

The manual enables trainers to develop and use both a thematic approach (focusing, for instance, on violence against women or employment matters) and one that focuses on standards and legal principles for women's access to justice that cut across a series of themes and areas of law (such as the principle of non-discriminatory access to justice or that of access to effective remedies). Indeed, each training event would be designed to integrate a combination of these approaches and it is left to the discretion of the trainers and the training institutions to select among the many possible topics.

When used to support initial training, the *Training Manual* can be more extensively integrated in the curricula of the training institutions, given that initial training is of longer duration (typically one academic year) and it gives scope for more topics to be covered. Initial training also offers more time for self-study and the *Training Manual* can be used as further reading or to develop additional exercises or assignments for self-study.

The manual is a comprehensive tool and a training event can be planned using this manual as one go-to resource. In this manner the general part provides the larger conceptual background and the applicable international standards and best practices, while the national parts provide the domestic legislation, procedures, practices and challenges that should be similarly addressed under each of the four parts. In addition, a number of resources are made available in Annex 3, including multimedia resources. Trainers are encouraged to review these resources, which can enhance the quality of the training. At the same time, the *Training Manual* is not operationalised to be directly used in a training, and for each training specific, presentations, exercises, group work tasks and case studies will need to be developed and adapted by the trainers. The manual includes some examples of exercises and discussion points for each topic, for example in the Annex 1, but the additional contribution of trainers is expected in order to prepare the specific materials of each training.

Training on women's access to justice, as all training for judges and prosecutors, should have a clear and practical approach, focused on the development of skills, rather than on traditional 'education', given that the participants in this type of training are highly educated adults. In addition to building specific skills, for example on gender-sensitive case and courtroom management (see module 4.8 of the *Training Manual*), training on women's access to justice has the goal of challenging attitudes and assumptions about the treatment of women in the justice system.

Training should not only transmit information about standards on women's access to justice, but also assist the participants being trained to apply that information in real life situations mindful of the challenges they may

encounter. The following section discusses in more detail some of the significant resistances that trainers, but also trainees may be confronted with when trying to address the topic of women's access to justice.

## ii.b Training as a tool for gender equality in access to justice

The ultimate goal of conducting training on women's access to justice for legal professionals is to challenge and change behaviours, practices or procedures that create obstacles to equal access to justice for women, as well as to promote those that ensure better access. A key element in reaching this goal is to challenge and address gender stereotypes within the judiciary. The *Training Manual* provides ample evidence that gender stereotypes are one of the main obstacles to equal access of women to justice. The manual also suggests a number of strategies that may be employed to support, empower and enable justice actors to avoid gender stereotyping in their work. However, "de-biasing minds is hard" and recent research suggests that gender training is more effective when it uses specific and purposeful strategies to challenge bias and provide alternative ways of thinking and behaving.[13] Bohnet recommends **refocusing the training on capacity building**. This means one should not raise awareness only, but also offer specific tools that help people make better decisions.

Trainers and training institutions that organise training on ensuring women's access to justice should also be mindful of the resistance they may encounter to such training. **Resistance to gender training** may take a number of forms, such as "denial of the relevance of gender equality policies, refusal to accept responsibility for dealing with gender equality policies or simply through non-implementation"[14]. Moreover, these different forms of resistances are located at different levels, from individual to institutional, and do not only involve commissioners and trainees, but also trainers themselves, as those may prove reluctant to question their own attitudes, methods or knowledge. As standards for women's access to justice are reinforced and elaborated by international or regional human rights frameworks, resistance can also stem from lack of knowledge of international law and the perception that international law is complicated and difficult to apply in the national context. In order to deal with resistance, participants may be encouraged to examine their own experiences and challenge their own assumptions. This requires a high level of trust in the group, as well as an open and flexible approach from the trainers. The following section includes some activities and exercises meant to help the trainers address gender bias or help participants in the training challenge gender stereotypes.

## A note on terminology

This manual uses a number of specific terms, most of which are defined in the Council of Europe *Gender Equality Glossary*. As needed, other terms are defined in the text.

**Sex and Gender: a review**

This manual uses the terms 'sex' and 'gender' when discussing concepts of equality and discrimination. In our everyday language, we often use these terms interchangeably, but they do have different meanings.

Remember that **sex** refers only to "the biological characteristics that define humans as female or male."[15] For this reason, we speak about *sex-disaggregated data*- meaning statistics that are collected for females or males (for example, the number of women who have brought claims before a specific court). *Sex-based discrimination* refers to differential and unfavourable treatment based on the sex of the person (for example, if a company hires only women for administrative posts).

**Gender**, on the other hand, is a social construct that refers to differences between women and men and the attributes associated with being female or male.[16] We speak about *gender analysis* or *gender impact assessment* — of draft legislation, for example — to refer to a process in which the possible consequences that a new law may

13. Iris Bohnet. 2016. *What Works. Gender Equality by Design.* Cambridge and London: The Belknap Press of Harvard University Press. p. 54.
14. Lucy Ferguson and Maxime Forest. 2011. OPERA Final Report: Advancing Gender+ Training in Theory and Practice. Deliverable of the research project Quality in Gender+ Equality Policies (QUING). See also: Maria Bustelo, Lucy Ferguson and Maxime Forest (eds.). 2016. *The politics of feminist knowledge transfer: gender training and gender expertise*. New York: Palgrave Macmillan.
15. Council of Europe. 2015. *Gender Equality Glossary.*
16. See, for example, Article 3 of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence for a definition of 'gender'.

have for women and men are analysed in advance, in order to ensure that the law does not discriminate against either sex. *Gender discrimination* is a broader concept than sex-based discrimination as it can include differential treatment on the grounds of sexual orientation/ sexual identity or based on gender stereotypes.

While sex discrimination and gender discrimination are prohibited under international law, the particular terms are not defined in treaties.[17] And under domestic law, the terms may have the same meaning. It is important that users of this manual are aware that 'gender' is a much broader concept than 'sex.

17. Note that Article 1 of CEDAW defines "discrimination against women", which is discussed in more detail in Module 1.3 of this training manual.

# MODULE I.
# THE CONCEPTUAL FRAMEWORK

Objectives: Module I introduces core concepts that should underpin any training on improving women's access to justice. These concepts are the framework with which a training would be introduced. Note that there is overlap between the conceptual approaches, and it is not necessary to choose one over the other. Trainees and readers of this manual should gain an understanding of the various lenses through which improving women's access to justice can be approached.

## 1.1 Access to justice

Democratic societies are built on respect for the rule of law, which is itself a system of neutral laws that are "equally enforced and independently adjudicated."[18] Core requirements of the rule of law are good governance and "a functioning justice system that carries out its duties fairly, without bias or discrimination"[19] and which is accessible to all. The conceptualisation of access to justice has evolved over time. Older approaches focused on the means by which individuals could protect their rights under the law through courts and tribunals, and initiatives centred on the development of legal assistance and specialised, and often simplified, legal procedures. Over time, *access to justice* has come to mean an approach that is concerned with ensuring "that legal and judicial outcomes are themselves 'just and equitable'"[20], with a greater emphasis on reforming the justice institutions themselves "in order to simplify them and to facilitate access to them."[21] The concept of 'access to justice' is not limited to the efficiency of the justice system. It encompasses processes to ensure that the whole system is *sensitive* and responsive to the needs and realities of both women and men and empowers them throughout the justice chain.

**Gender Sensitive v. Gender Blind Approaches[22]**

A **gender sensitive approach** is one that attempts to redress gender inequalities by taking into account the specificities of women's and men's experiences and needs. It requires paying attention to the different roles and responsibilities of women/girls and men/boys that are present in specific social, cultural, economic and political contexts. This approach is required if women are to be guaranteed universal human rights and to be free from discrimination.

In contrast, a **gender blind approach** is a failure to recognise that the roles and responsibilities of women/girls and men/boys are 'assigned' to them. In a world where disadvantage or privilege is attached to gender, a gender blind approach will not achieve substantive equality.

Ensuring access to justice requires co-operation between judicial entities and law enforcement bodies, and extends to administrative and civil society institutions.[23]

Within its commitment to achieve gender equality in the member states, the Council of Europe has underscored the fact that access to justice has a gender dimension.[24] Violations of women's rights themselves impede gender equality, but when women are denied access to justice to remedy human rights violations, they are also denied

18. UN Women. 2015. *Progress of the World's Women 2015-2016: Transforming Economies, Realising Rights*. New York. p. 11.
19. Ibid.
20. Jeremy McBride for the Council of Europe European Committee on Legal Co-operation. 2009. Access to Justice for Migrants and Asylum-seekers in Europe. para. 9.
21. Council of Europe Gender Equality Commission. 2013. *Feasibility Study: Equal Access to Justice for Women*. para. 6.
22. See Council of Europe. 2015. *Gender Equality Glossary* for further definitions of gender-sensitive and gender blind approaches.
23. Parliamentary Assembly of the Council of Europe. 2015. Resolution 2054 on Equality and non-discrimination in the access to justice.
24. See Council of Europe Gender Equality Strategy 2014-2017, Strategic Objective 3: Guaranteeing Equal Access of Women to Justice.

equality of treatment before the law. Ensuring access to justice enables women to enjoy their rights and hence contributes to gender equality.

### *1.1.1. Barriers to justice*

Women face persistent inequalities in both national and international legal systems. Some of the obstacles that women face in accessing justice are not specific to their sex but are experienced by groups of people who are marginalised, "who are particularly subject to discrimination and [who are] also less likely to know their rights and existing remedies".[25] Justice systems tend to reflect the power imbalances inherent in any society, and they "reinforce the privilege and the interests of the powerful, whether on the basis of economic class, ethnicity, race, religion or gender".[26] Because women do not hold the same power and privilege as men, they do not have the same protection of the law. Other barriers to justice, however, impact women exclusively.

Women encounter obstacles with respect to access to justice within and outside the legal system. In order to better understand the barriers that women face, it can be useful to divide them into those of a legal/ institutional nature and those of a socio-economic and cultural nature.[27]

| **TYPES OF OBSTACLES TO WOMEN'S ACCESS TO JUSTICE** |
|---|
| **1. The legal/institutional level** |
| Discriminatory or insensitive legal frameworks (including: legal provisions that are explicitly discriminatory; gender blind provisions that do not take into account women's social position; gaps in legislation concerning issues that disproportionately affect women) |
| Problematic interpretation and implementation of the law |
| Ineffective or problematic legal procedure (the lack of gender-sensitive procedures in the legal system) |
| Poor accountability mechanisms (this category can include corruption) |
| Under-representation of women among legal professionals |
| Gender stereotyping and bias by justice actors |
| **2. The socio-economic and cultural levels** |
| Lack of awareness of one's legal rights and legal procedures or of how to access legal aid (which can stem from gender differences in educational levels, access to information, etc.) |
| Lack of financial resources (including the means to pay for legal representation, legal fees, judicial taxes, transportation to courts, child care, etc.) |
| Unequal distribution of tasks within the family |
| Gender stereotypes and cultural attitudes |

Considering the charts above, note that the socio-economic factors all stem from an unequal distribution of power and resources between women and men. This inequality means that the obstacles that present challenges for anyone accessing justice, such as courts only being located in urban centres, have a greater impact on women who have fewer resources at their disposal, for example, the financial means and time needed to travel to city courts. Women's lower socio-economic position is often exacerbated by legal proceedings rather than challenged.

Gender stereotypes at the cultural level also appear and have an impact at the institutional level. Attitudes and norms about what is considered 'appropriate' for women and men may act as a deterrent to women seeking justice. In the example above, the perceived impropriety of women travelling alone to courts in urban centres or

25. Parliamentary Assembly of the Council of Europe. 2015. Resolution 2054 on Equality and non-discrimination in the access to justice.
26. UN Women. 2015. *Progress of the World's Women 2015-2016: Transforming Economies, Realizing Rights.* New York. p. 11.
27. Council of Europe Gender Equality Commission. 2013. *Feasibility Study: Equal Access to Justice for Women*.

even traditions that women do not resolve their problems in public forums using the law. The CEDAW Committee has warned that: "Stereotyping and gender bias in the justice system have far-reaching consequences on women's full enjoyment of their human rights. They impede women's access to justice in all areas of law…"[28] Culturally-based obstacles can also be (re)produced in the legislative process and judicial decision-making. The topics of gender stereotypes and judicial bias are discussed in more detail in module 1.4.

**Discussion point**: It is important that legal professionals, especially prosecutors and judges, are aware of the full range of obstacles that women face in accessing justice because many are inter-related. **Judicial practitioners cannot address all the barriers to justice that women encounter**. Naturally, judges and prosecutors can have a greater impact on addressing the barriers that are associated with the legal/institutional sphere.

**On the other hand, are there ways in which the actions of prosecutors and judges can mitigate the effect of barriers of a socio-economic or cultural nature?** Consider several legal/institutional and also socio-economic or cultural barriers and discuss/brainstorm possible actions. For example, if offices of the prosecutor and courts produce and distribute brochures for women about their rights with simplified explanations of legal procedures, would this address a barrier to justice? Which barrier/barriers?

The barriers to justice that concern the legal/institutional sphere and are characteristic for the Council of Europe member states are explored in more detail below.

At the legislative level, barriers are created by **discriminatory provisions** in legislation. For example, in some countries, including those in the Eastern Partnership, women are legally excluded from certain forms of work based on stereotypical assumptions about the characteristics and roles of women. For example, as not suitable for jobs requiring physical strength or involving arms, or jobs harmful to their reproductive capacity. The definition of certain crimes may also be problematic, such as the case of rape in which one of the elements is force rather than consent.

While one way to address these problems is to amend the laws, the judiciary can also contribute to dismantling these barriers. Some of the provisions might be challenged in anti-discrimination proceedings, or brought to the Constitutional Court. Further, judges should interpret the provisions in line with substantive equality and international norms.

Legal practitioners do not always apply a gender perspective in their work. Indeed, one of the major barriers to access to justice for women is **discriminatory or gender insensitive interpretation of laws**. An example of gender insensitive interpretation of law is the insistence on requirements of proportionality and immediacy in interpreting self-defence in proceedings for the murder of a violent partner, without taking into account the specificities of the offenders' behaviour or past experience as a former victim of domestic violence.[29] Further, the best interest of the child in the context of custody proceedings is often interpreted as to require contact between a parent and a child, even when there is a history of domestic violence against the partner, and indirectly the child.[30]

**Gender-insensitive legal procedures** are another major obstacle for women to access justice. First, it is questionable how responsive the institutional and conceptual settings of justice systems are to women, particularly to the victims/survivors of gender-based violence.[31] Criminal proceedings are often extremely traumatising for victims, whose characters and behaviours are frequently scrutinised with reference to stereotypical assumptions about the 'ideal victim,' whereas victims of other crimes, including inter-personal violence, are not subjected to the same type of examination. Not all jurisdictions have legal provisions aimed at minimising trauma and protecting the privacy of victims of gender-based violence. Proceedings are often lengthy, which not only prolongs the trauma, but can have financial implications and may clash with women's childcare responsibilities. Hence, in order to comply with international standards on non-discrimination and access to justice, states should ensure that proceedings are handled in a gender-sensitive manner whereby victims and witnesses are protected from harassment, and women's voices are given weight.[32] States should also implement mechanisms to ensure that evidentiary rules, investigation and other legal procedures are impartial and not influenced by gender stereotypes or prejudice.[33]

28. CEDAW Committee. 2015. General Recommendation No. 33: Women's access to justice. para. 26. See also Guaranteeing Equal Access of Women to Justice in the Council of Europe Gender Equality Strategy 2014-2017. p.3.
29. The phenomenon of the 'battered woman syndrome' is discussed in more detail in module 4.9.2 of this manual.
30. Determining the best interest of the child is discussed in more detail in module 3.3.
31. Judith Lewis Herman. 2005. 'Justice from the Victim's Perspective' in *Violence against Women* 11. pp. 571-602.
32. CEDAW Committee. 2015, General Recommendation No. 33 on Women's access to justice. paras. 15(c) and 29(c)(i).
33. Ibid, para 18(e).

### *1.1.2. Components of access to justice*

The right to equality before the law is a universal human right that is enshrined in international conventions.[34] The elements that must be in place to guarantee non-discriminatory access to justice have been discussed at the national and international level, but it was only recently that the components of women's access to justice have been elaborated in detail. **General Recommendation No. 33** of the UN Committee on the Elimination of Discrimination Against Women, the body that monitors implementation of CEDAW, has articulated six interrelated and essential components of access to justice that are considered the basic elements of a justice system that is responsive to gender. See figure, below.


**Components of Women's Access to Justice in detail**[35]

**Justiciability** requires the unhindered access by women to justice as well as their ability and empowerment to claim their rights as legal entitlements.

**Availability** requires the establishment of courts, and other quasi-judicial bodies, in urban, rural and remote areas, as well as their maintenance and funding.

**Accessibility** requires that all justice systems are secure, affordable and physically accessible to women, and they are adapted and appropriate to the needs of women, including those who face **intersectional or compounded forms of discrimination.**

**Good quality of justice systems** requires that all components of the system adhere to international standards of competence, efficiency, independence and impartiality and provide, in a timely fashion, appropriate and effective remedies that are enforced and that lead to sustainable gender-sensitive dispute resolution for all women. Justice systems should be contextualised, dynamic, participatory, open to innovative practical measures, gender-sensitive, and take account of the increasing demands for justice by women.

**Provision of remedies** requires the ability of women to receive from justice systems viable protection and meaningful redress for any harm that they may suffer.

34. For example, Articles 2(3) (right to a remedy) and 26 (equality before the law) of the International Covenant on Civil and Political Rights and Article 6 (right to a fair trial) of the European Convention on Human Rights.
35. CEDAW Committee. 2015. General Recommendation No. 33 on Women's Access to Justice.

**Accountability of justice systems** is ensured through the monitoring of the functioning of justice systems to guarantee that they are in accordance with the principles of justiciability, availability, accessibility, good quality and provision of remedies. The accountability of justice systems also refers to the monitoring of the actions of justice system professionals and holding them responsible if they violate the law.

Ensuring women's access to justice is no less important in **conflict and post-conflict situations** than in times of peace. The beneficiary countries of this project all have direct experience of conflict within their territories. International humanitarian law expressly forbids discrimination on the basis of sex and upholds the principle of equality between women and men.[36] The UN Security Council calls on states to adopt measures to ensure the protection of and respect for the rights of women and girls in situations of armed conflict, with particular attention to gender-based violence, and to end impunity and to prosecute those responsible for crimes committed against women and girls.[37] In addition, states are urged to strengthen access to justice for women in conflict and post-conflict situations, including, but not limited to, "the prompt investigation, prosecution and punishment of perpetrators of sexual and gender-based violence, as well as reparation for victims as appropriate."[38]

The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence states that all its provisions apply in situations of armed conflict and peace.[39]

**Women's access to justice in conflict and post-conflict settings**

The CEDAW Committee has drawn attention to the complexity of addressing human rights violations during conflict and in post-conflict and transitional settings.

Even when formal justice systems are still functioning, "All barriers faced by women in accessing justice before the national courts prior to the conflict, such as legal, procedural, institutional, social and practical, and entrenched gender discrimination are exacerbated during conflict, persist during the post-conflict period and operate alongside the breakdown of the police and judicial structures to deny or hinder their access to justice."[40] There is a risk that violations of women's rights that occurred during conflict periods will not be punished or may even be 'normalised' in the post-conflict setting.

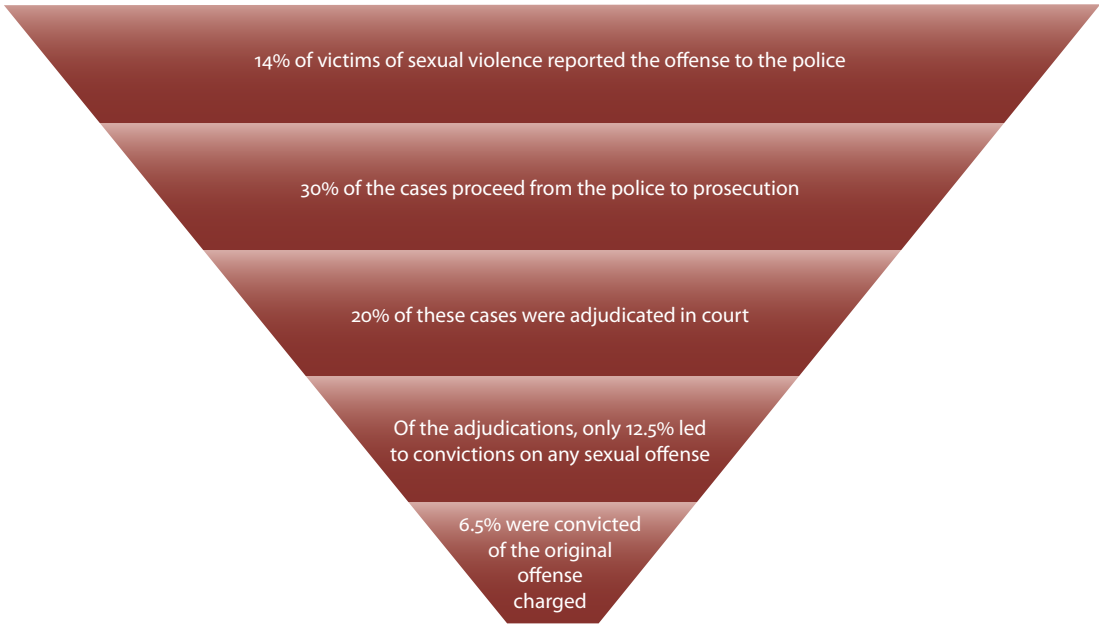
In order to ensure compliance with CEDAW, the Committee provides a number of recommendations that cover such issues as: ensuring that all gender-based violations are addressed, making transitional justice mechanisms and procedures gender-sensitive, and encouraging women's involvement in transitional justice, providing effective and timely remedies to women, and combating impunity.

### *1.1.3. The justice chain and attrition*

The six elements of access to justice take a bird's eye view of how justice systems work. When considering concrete steps to improve access to justice for women within a particular legal system or for a specific legal issue, it can be useful to consider the barriers to justice that a woman may encounter at different points when seeking redress. This approach envisages the entire justice system as a chain or series of interlinked steps. A woman's ability to progress along the justice chain depends on whether she encounters barriers on the way and the options she has to overcome them. Various factors contribute to why cases brought by women drop out of the justice system, and so it is helpful for practitioners to have an understanding of how the links in the justice chain connect to, and influence, one another.

Justice chain analysis has been especially useful to identify points of attrition in cases of gender-based violence. For example, a study of how cases of rape and sexual assault were handled by the legal systems of Australia, Canada, England and Wales, Scotland, and the United States over a 15-year period, showed the following pattern:[41]

36. As addressed in the four Geneva Conventions as well as the two Additional Protocols.
37. United Nations Security Council. 2000. Resolution 1325 on Women, peace and security.
38. United Nations Security Council. 2015 Resolution 2242 on Women, peace and security. para. 14.
39. Article 2(3).
40. CEDAW Committee. 2013. General Recommendation No. 30 on Women in conflict prevention, conflict and post-conflict situations. para. 74.
41. Kathleen Daly and Brigitte Bouhours. 2010. Rape and Attrition in the Legal Process: A Comparative Analysis of Five Countries in Crime and Justice Vol. 39:1. University of Chicago Press. pp. 565-650.




Of the 14% of cases that are reported to the authorities, only 8% of those go to trial, and of these, only 4.5% lead to convictions.[42]

Research conducted over an 11-year period (2004-2014) in Serbia of access to justice for women victims of domestic violence found that a considerable number of cases remained "invisible" to the criminal justice system.[43] Notably, the study uncovered several trends. Reporting of domestic violence to the police and/or Centres for Social Work had increased considerably during this period, which should be regarded as a positive development. Although most reports of domestic violence made to the police did not result in criminal charges, the majority were charged as misdemeanours, each year the number of criminal charges for domestic violence steadily increased. However, the rate of criminal prosecution decreased. For example, in 2013, the prosecutor dismissed the criminal charges in 45% of cases. Of the cases that were prosecuted during the research period, a small proportion ended in sentences of imprisonment. Courts were increasingly likely to impose suspended sentences (probation) on perpetrators of domestic violence.[44] Although victims were more and more likely to report domestic violence incidents, the latter most likely indicated their increased trust in legal system and/or an increased "sensitivity" of the police to women's claims, the criminal justice system was less and less likely to prosecute perpetrators or to sentence them to imprisonment.

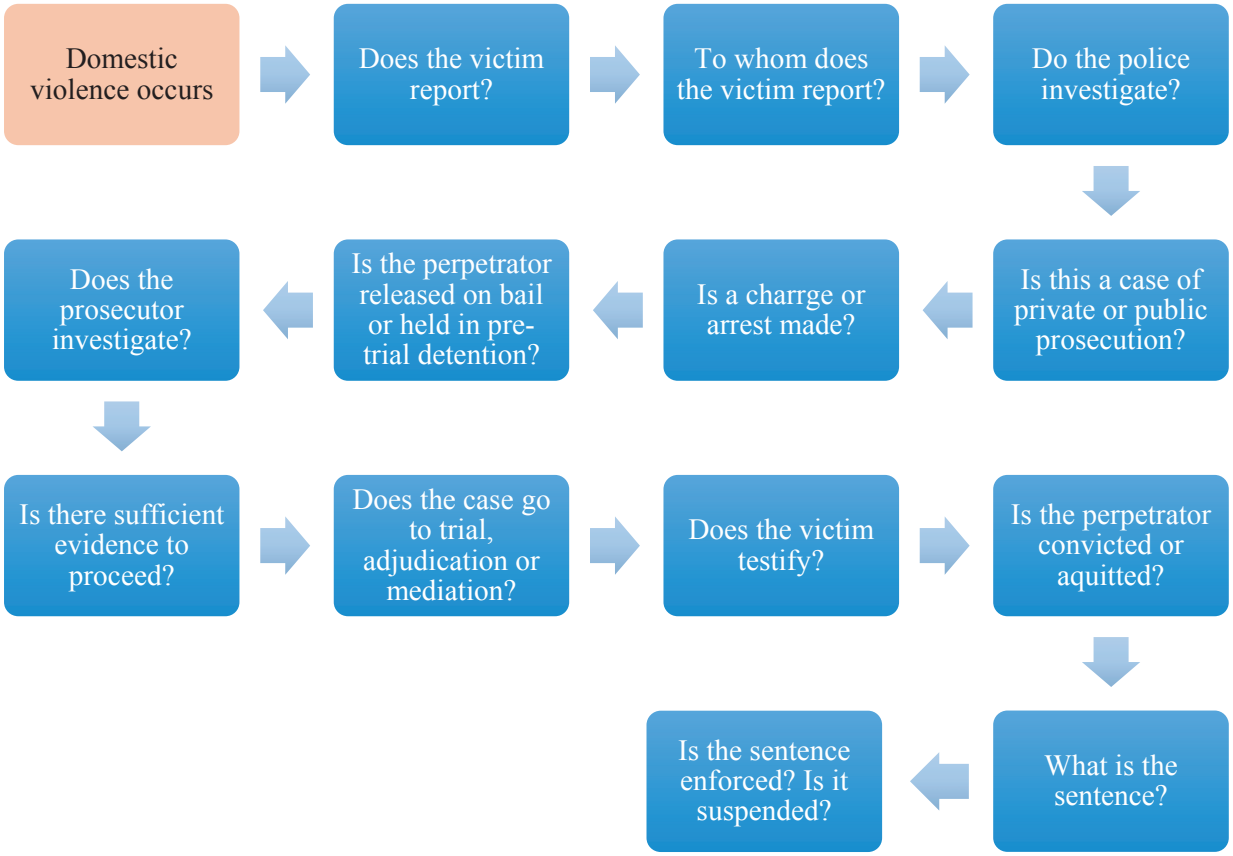
These studies illustrate the importance of careful analysis of where along the justice chain obstacles occur so that they can be addressed most effectively. Justice chain analysis can be used as the basis for legal amendments, the introduction of new policy or for targeted training.

**Discussion point**: Below is a **sample justice chain** involving an incident of domestic violence.

Practitioners can review the steps and ask themselves what are the implications of a 'yes' or 'no' answer at each point in the chain in terms of whether the victim has access to justice. For example, if the police take no action or the prosecutor closes the case and ends the investigation, what will be the impact on the victim? If the judge denies a request for pre-trial detention, what might be the effect on the victim in terms of her willingness to participate in the legal process?

Note that this exercise could be modified for group discussion using any human rights violation and involving a criminal or civil case.

42. Ibid. p. 568.
43. Biljana Brankovic. 2013. News from the Future: the Istanbul Convention and Responsibility of the State for Combating Violence against Women; General Services – Operationalisation of Due Diligence Principle. Belgrade. United Nations Development Programme (UNDP), UN Women and UNICEF. (in Serbian)
44. Biljana Brankovic. 2016. "Barriers to women's access to justice: Gaps in meeting the requirements of the Istanbul Convention", presentation at the regional conference Strengthening Judicial Capacity to Improve Women's Access to Justice, 24-25 October, Chisinau, Republic of Moldova.




## 1.2 Women's human rights

The phrase *women's human rights* gained popularity in the 1980s when campaigners used it to call for the application of a gender lens to international human rights standards. The phrase itself "is, at first sight, puzzling… as human rights, by definition, apply to all people."[45] We should remember, though, that universal human rights have largely been modelled on male experiences. Rights have been defined with reference to men's lives, and hence the non-discrimination norm, guaranteeing equal treatment to women, had not been particularly effective when applied to violations of the rights of women and girls. Abuses and constraints that are characteristic for women, such as domestic and sexual violence, were excluded from or marginalised in 'mainstream' international human rights law.

A person's sex or gender very often determines the form that a human rights violation takes. For example, the torture of a female prisoner may take the form of sexual violence; as noted in the preceding section, the denial of a fair trial to a woman is very often based on gender stereotypes or a misunderstanding of women's experiences. While women suffer violations that are also suffered by men, many of the violations of the human rights of women are sex-specific, and many happen in the private sphere.

The creation of a separate body of women's rights has been one of the most significant areas of progress toward addressing the neglect of women's experiences in general international human rights law, especially the nature of human rights violations that are based on the victim's sex/gender. The UN **Convention on Elimination of All Forms of Discrimination against Women (CEDAW)** entered into force in 1981, and it remains the most comprehensive international instrument addressing the various forms of discrimination that women encounter. CEDAW challenged the dominant conceptualisation of rights, state responsibility, equality and the public/private divide. However, addressing violations of women's human rights through dedicated instruments and mechanisms has also been perceived as risky. This tactic can lead to a situation in which women's issues become 'ghettoised', meaning that they are set apart from 'universal' rights and therefore given lesser status.

45. Hilary Charlesworth. 2014. "Two steps forward, one step back?: The field of women's human rights." in *European Human Rights Law Review.*

Hence, a new strategy emerged in the mid-1990s that aimed to incorporate women's rights into the mainstream human rights dialog under the slogan *women's rights are human rights*.[46] This strategy proposed gender mainstreaming as the "global strategy for promoting gender equality".[47]

## 1.3 Non-discrimination on the basis of sex and sex/gender equality

Equality is an underlying value of international law, and all major human rights treaties[48] contain a **prohibition on discrimination** on the basis of sex or gender, whether in the enjoyment of the rights enumerated in the document (e.g. Article 14 of the European Convention of Human Rights, ECHR), or as a free-standing norm (e.g. Protocol 12 to the ECHR). The European Social Charter (ESC) contains a non-discrimination clause that pertains to all rights of the Charter and discrimination on the grounds of sex.[49] Some instruments, such as the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) contain a norm guaranteeing equal rights of women and men. The national constitutions of the Eastern Partnership countries include this non-discrimination norm and also recognise that international treaty law is part of the domestic legal system.

Most conventions refer to the term *sex*[50] as a prohibited ground of discrimination. But during the 1990s, use of the term *gender* gained popularity at the international level as a way of distinguishing the cultural norms and expectations associated with biological sex.[51] Several treaties now recognise sex and gender as prohibited grounds of discrimination; for example the Council of Europe Convention on preventing and combating violence against women and domestic violence, Article 4(3).[52]

International human rights jurisprudence recognises several forms of discrimination, all of which are relevant to advancing gender equality.

**Direct discrimination** refers to a provision, criterion or practice constituting less favourable treatment that "relies directly and explicitly on distinctions based exclusively on sex and characteristics of men or of women, which cannot be justified objectively".[53] Examples of direct discrimination include prohibition of night work for women or exclusion of women from certain jobs such as certain areas of security or policing. Unfavourable treatment based on pregnancy, such as dismissals of pregnant women from a job, are also considered direct discrimination.

**Indirect discrimination** occurs when a law, policy, programme or practice does not appear to be discriminatory, but has a discriminatory effect when implemented and cannot be objectively and reasonably justified.[54] Indirect discrimination can occur, for example, when women are disadvantaged compared to men with respect to the enjoyment of a particular opportunity or benefit due to pre-existing inequalities. Applying a gender-neutral law may leave the existing inequality in place, or exacerbate it.[55]

Discrimination can be ***de jure*** when the text of a law or policy contains discriminatory provisions or ***de facto*** when the law or policy is not discriminatory in itself but its implementation and enforcement have a negative

46. Vienna Declaration and Programme for Action. 1993. Adopted by the World Conference on Human Rights and endorsed by the United Nations General Assembly Resolution 48/121.
47. Sari Kouvo. 2005. The United Nations and Gender Mainstreaming: Limits and Possibilities in Doris Buss and Ambreena Manji (eds), *International Law: Modern Feminist Approaches*. Hart Publishing, Oxford.
48. There are nine core human rights treaties, which are discussed in Module II of this manual.
49. European Social Charter, ETS No.163, Part V, Article E.
50. For example, ICCPR, ICESCR and CEDAW.
51. For example, the Beijing Platform for Action calls on governments to eradicate all forms of discrimination on the grounds of sex (para. 10), to develop gender-sensitive policies for the advancement of women (para. 19), and removal all obstacles to gender equality (para. 24).
52. In addition, the Committee on Economic, Social and Cultural Rights, the body that monitors the implementation of the ICESCR, recognised that the term 'sex' has evolved considerably to include also "the social construction of gender stereotypes, prejudices and expected roles" (General Comment no. 20, 2009) while the Human Rights Committee, the body that monitors the implementation of the ICCPR, identified both sex and gender as prohibited grounds of discrimination (General Comment no. 28, 2000).
53. Council of Europe. *Gender Equality Glossary*. p. 5.
54. The concept of indirect discrimination was developed in the EU in relation to the disadvantaged position of part time workers, the majority of whom are women. European Union Agency for Fundamental Rights and European Court of Human Rights. 2011. *Handbook on European Non-Discrimination Law*. p. 29.
55. Council of Europe. *Gender Equality Glossary*. p. 5.

impact on women or men. *De facto* discrimination can also result from broader practices, such as culture, traditions and stereotyping which deny women or men full equality and enjoyment of rights.[56]

**Intentional discrimination** is constituted by a provision or practice, the purpose of which is to discriminate, while **unintentional discrimination** is constituted by a provision or practice, the purpose of which might not be to discriminate, but which has a discriminatory effect. Note that direct discrimination does not need to be intentional.

**Case-law examples**: European Union law and policy have helped to clarify some further conceptions of discrimination in the employment context. In *S. Coleman v Attridge Law and Steve Law*, the Court of Justice of the European Union (CJEU) held that under EU non-discrimination law, there can be liability for a discriminatory act even when the victim does not possess the protected characteristics herself- known as discrimination by association. In the *Coleman* case, the CJEU found that the applicant was the subject of direct discrimination and harassment in her employment because she was the mother and primary care-giver of a child with a disability (her employment contract was terminated). The CJEU explained that **discrimination** (and harassment) **by association** occurs when a person is treated less favourably because they are linked or associated with a protected characteristic, which can include, for example, religion or belief, disability, age or sexual orientation. Many courts in EU member states have since interpreted national law to cover discrimination by association.[57]

EU directives establish that the effective implementation of the equality principle requires adequate judicial protection against **victimisation**- which refers to the protection of people who experience adverse treatment as a result of bringing a complaint concerning discrimination. For instance, in a case brought before a circuit court in Estonia, the applicant alleged that because he had previously submitted a complaint to the Commissioner for Gender Equality and Equal Treatment, he was subjected to additional discrimination (his employment contract was terminated).[58]

The dominant interpretation of a non-discrimination norm in international law is a liberal Aristotelian formula of 'treating alikes alike and unlikes unlike'. In the area of sex/gender discrimination, the dominant assumption is the similarity of sexes and prohibition of differential treatment, although different treatment does not constitute discrimination where there is an objective and reasonable justification.[59] However, according to the practice of the European Court of Human Rights, very weighty reasons need to be adduced for the difference in treatment: traditional assumptions about men and women's working lives and family roles do not suffice.[60]

**Case-law example**: In *Konstantin Markin v. Russia*, the ECtHR held that the reference to the traditional distribution of gender roles in society cannot justify the exclusion of men, including servicemen, from the entitlement to parental leave and that "gender stereotypes, such as the perception of women as primary child-carers and men as primary breadwinners, cannot, by themselves, be considered to amount to sufficient justification for differential treatment".[61]

Note that the ECtHR has held that discrimination occurs in situations in which persons in similar situations are treated differently without objective and reasonable justification, for example, in a case concerning the immigration rights of women and men[62], and that the non-discrimination norm can also be violated by a failure to treat persons differently from others when they are in significantly different situations, as in a case concerning discrimination on the basis of religion for example.[63] This second formulation has not yet been applied in the

56. UN Working Group on discrimination against women in law and in practice, see http://www.ohchr.org/EN/Issues/Women/WGWomen/Pages/SubmissionInformation.aspx.
57. European Commission. 2014. European Anti-Discrimination Law Review, Issue 10: July 2014. p. 25-36
58. Ibid, 57-58.
59. The approach of the European Court of Human Rights is to operate a generally phrased defence, in the context of both direct and indirect discrimination. In contrast, EU law provides only for specific limited defences to direct discrimination on the basis of sex ('genuine occupational requirement), and a general defence only in the context of indirect discrimination. EU Fundamental Rights Agency (2010) *Handbook on European Anti-Discrimination Law.*
60. See Ivana Radačić. 2012. The European Court of Human Rights' Approach to Sex Discrimination in *European Gender Equality Law Review* 1. pp. 13-23.
61. ECtHR, *Konstantin Markin v. Russia (Grand Chamber)*, Application no. 30078/06, judgement of 22 March 2012, para. 143
62. ECtHR *Adulaziz, Cabales and Balkandali v. The United Kingdom*, Applications nos.9214/80, 9473/81, 9474/81, judgement of 28 May 1995.
63. ECtHR, *Thlimmenos v. Greece* [GC], Application no 38365/97, judgment of 6 April 2000.

context of sex/gender discrimination claims, despite the fact that women and men are in different social positions, which can justify and also require the adoption of positive actions or affirmative measures.[64]

**Case-law example**: In a number of cases, the ECtHR has implied that affirmative measures could be justified where "factual inequalities are at issue".[65] For instance, in *Stec and others v. the United Kingdom*, the Court held that differences in the payment of certain retirement allowances to women and men did not constitute sex discrimination. The differential treatment was justified because it was being used to help to remedy social inequalities between men and women that were the result of historical differences in pension ages.

The ECtHR reiterated that "a difference of treatment is, however, discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised".[66]

Another important development has been the recognition of **multiple/intersectional discrimination**, meaning that discrimination of women based on sex or gender is **"**inextricably linked" with or may be compounded by other factors.[67] In most cases of violations of women's rights, there is a complex interaction between sex and other elements of identity, such as, but not limited to:

- race/ethnicity[68]
- indigenous status/ language/ national origin
- migrant or refugee status; internally displaced persons
- religion or belief
- age
- health (e.g. HIV status)
- marital and/or maternal status
- sexual orientation/gender identity (being lesbian, bisexual, transgender women or intersex persons)[69]
- disability[70]
- urban/rural location
- socioeconomic status
- political affiliation

"Intersectional/multiple forms of discrimination arise from a combination of discriminatory treatments based on various grounds which produce compounded discrimination. [This concept] takes into account historical, social and political contexts and thus recognises the unique experience of women who have been targets of discrimination on more than one ground".[71] The combination of sex with other statuses puts some women in particularly vulnerable positions and means that "these women are often subjected simultaneously to one or several other types of discrimination".[72] Discrimination on the basis of sex or gender may affect women belonging to minority groups to a different degree or in different ways to men.[73]

64. See Council of Europe Recommendations on balanced participation of women and men in political and public decision making (2003, see Appendix, para.1) and on gender equality standards and mechanisms (2007, see paras, 15-iii, 62, 64).
65. See Ivana Radačić. 2012. The European Court of Human Rights' Approach to Sex Discrimination in *European Gender Equality Law Review 1*.
66. *Stec and others v. the United Kingdom*, judgement of 12 April 2006.
67. CEDAW Committee. 2010. General Recommendation No. 28 on the Core obligations of States parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women. para. 18, and CEDAW Committee. 2015. General Recommendation No. 33 on Women's access to justice, para. 8.
68. See Committee on Racial Discrimination. 2000. General Recommendation No. 25, Gender related dimensions of racial discrimination.
69. A transgender woman is a person "who was assigned 'male' at birth but has a gender identity which is female or within a feminine gender identity spectrum." (Council of Europe, 2011, Discrimination on grounds of sexual orientation and gender identity in Europe, 2nd edition). The term 'transsexual' woman is distinguished from a 'cissexual woman' (CIS woman), a woman who was assigned a female gender, and identifies with it.
70. See Article 6, Convention on the Rights of Persons with Disabilities.
71. UN Working Group on discrimination against women in law and in practice, see http://www.ohchr.org/EN/Issues/Women/WGWomen/Pages/SubmissionInformation.aspx.
72. Committee of Ministers of the Council of Europe. 2007. Recommendation CM/Rec(2007)17 on Gender equality standards and mechanisms. para. 59.
73. CEDAW Committee. 2010. General Recommendation No. 28 on the Core Obligation of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women. para. 18.

Legal practitioners should be aware not only of differences between women and men, but also to differences among women and the specific vulnerabilities that put women in minority groups at risk for certain human rights abuses. For example, the practice of forced sterilisation of Roma women in several Eastern European countries[74] illustrates how gender discrimination overlaps with aspects of racial discrimination

Women who belong to minority groups and have experienced multiple forms of discrimination face particular difficulties in accessing justice. Overlapping grounds of discrimination are generally not recognized in the law; most laws are not *both* minority and gender sensitive. Therefore, "minority women may have to make the very hard choice between seeking redress as women, or as members of a minority, or as individuals experiencing specific discrimination".[75]

In order to achieve equality of opportunity, it is sometimes necessary to treat women and men differently under the law. This practice is referred to as **positive discrimination**, sometimes also called *positive action*, *positive measures* or *special measures*. Such measures amount to preferential treatment of members of the historically disadvantaged or under-represented groups. They are usually temporary and can include positive actions or quota systems "to advance women's integration into education, the economy, politics and employment".[76]

**When is discrimination permissible?**

CEDAW foresees that achieving equality may require positive action on the part of the State. According to the Committee that monitors implementation of the Convention, positive action is not an exception to the norm of non-discrimination, but rather is "part of a necessary strategy by State Parties directed towards the achievement of *de facto* or substantive equality of women with men in the enjoyment of their human rights and fundamental freedoms".[77] The Committee further clarifies that "not all measures that potentially are, or will be, favourable to women are affirmative measures/temporary special measures. The provision of general conditions in order to guarantee the civil, political, economic, social and cultural rights of women and the girl child, designed to ensure for them a life of dignity and non-discrimination cannot be called temporary special measures".[78]

The Spanish Organic Act 1/2004 on Integrated Protection Measures against Gender Violence is an example of positive discrimination that is not a temporary measure. The law provides for a more severe penalty for crimes that are motivated by gender discrimination than for other forms of violent crime.

Policies that positively discriminate, such as providing educational scholarships only to girls or special recruitment campaigns aimed at employing more women in sectors where they are underrepresented, may be limited to a specific period of time until more balanced representation is achieved or other barriers to opportunities are removed.

A broader, substantive understanding of equality is hence not only concerned with equal treatment but also with equality of opportunity.[79] **Substantive equality** refers to an understanding that "historical inequalities, structural disadvantages, biological differences and biases in how laws and policies are implemented in practice" lead to unequal results and opportunities for women and men.[80] It includes the right to be different and it aims to transform social structures to reflect the experiences and needs of both women and men.[81] According to this understanding, equal/differential treatment and whether women are equal or different from men should not be the focus. Rather, the primary issue is the distribution of power.[82] The concept of substantive equality recognises that formal equality alone is not enough to ensure that women enjoy the same rights as men. Instead, this approach requires challenging laws and practices that perpetuate women's disadvantage.

While the equal treatment formula is often useful to challenge the different treatment that women or men still suffer due to stereotypes about their characteristics or roles in the family and workforce, it is not sufficient. The

74. See European Court of Human Rights, Factsheet, Roma and Travellers, pp.8-9, available from http://www.echr.coe.int/Documents/FS_Roma_ENG.pdf.
75. Tove H. Malloy. 2015. Minority women's hard choices when seeking redress for multiple discrimination. European Centre for Minority Issues Brief No. 36. p. 3.
76. CEDAW Committee. 1988. General Recommendation No. 5 on Temporary Special Measures.
77. CEDAW Committee. 2004. General Recommendation No. 25 on Temporary Special Measures.
78. Ibid, paras. 18-19.
79. The Council of Europe Gender Equality Strategy 2014-2017 adds that gender equality 'also means an equal access to and distribution of resources between women and men', see the introduction.
80. UN Women. 2015. *Progress of the World's Women 2015-2016: Transforming Economies, Realising Rights.* New York. p. 35.
81. Council of Europe Committee of Ministers. 2007. Recommendation CM/Rec(2007)17 on Gender equality standards and mechanisms.
82. MacKinnon, note 17.

equal treatment formula is based on a male comparator and is hence difficult to apply in cases where women differ from men, whether due to biological characteristics, i.e. pregnancy, or because of social disadvantage, i.e. disproportionate poverty, violation of reproductive rights, or violence against women. Moreover, since the sexes are not socially equal, treating them equally can exaggerate this inequality.[83] Finally, instituting maleness as the standard norm perpetuates male privilege and does little to challenge problematic social practices that contribute to maintaining unequal power relations.

## 1.4 Gender stereotypes and bias

### *1.4.1 Introducing gender stereotypes and stereotyping*

A stereotype is a generalised view or preconception about attributes or characteristics that are or ought to be possessed by, or the roles that are or should be performed by, members of a particular social group.[84] We are all exposed to stereotypes that prevail in society, and these can in turn influence our perceptions. Stereotypes may relate to age, ethnicity, disability, gender or other presumptions.

"**Gender stereotypes** are preconceived ideas whereby males and females are arbitrarily assigned characteristics and roles determined and limited by their sex".[85] Gender stereotypes are social and cultural constructions of women and men due to their different physical, biological, sexual and social functions.

Gender stereotypes are rooted in traditional notions about the roles and status of women and men in society. Although such views may have changed with time, the underlying assumptions about women's appropriate role in a family and community endure in many societies. For instance, a persistent stereotype is that men are or should be the heads of households and the main breadwinners, whereas women will or should prioritise family life and have children for whom they will be the main providers of care. Such stereotypes manifest in many areas of life ranging from education, employment, marriage and family relations, health and reproductive issues.

Gender stereotypes can be categorised as follows:

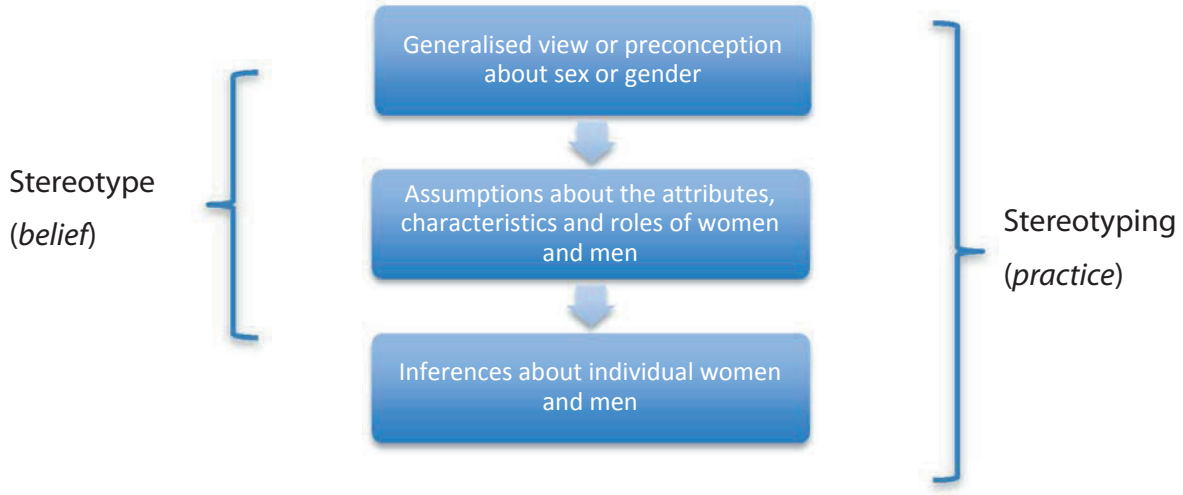
- **sex stereotypes** – a general view about the physical, including biological, emotional and cognitive, attributes of women and men (e.g. women are prone to lying)
- **sexual stereotypes** – a general view about sexual attributes of women and men (e.g. the notion that women want to be sexually possessed**)**
- **sex role stereotypes** – views about male and female roles (e.g. women take care of children and men are heads of households)

These different forms of gender stereotypes can also overlap.[86] **Intersecting and compounded stereotypes** result in intersecting discrimination, discussed in Section 1.3 above. The view that Roma women are promiscuous or that lesbian women are bad mothers are examples of intersecting and compounded stereotypes. Stereotypes about women with disabilities can prevent them from accessing justice when their rights have been violated. For example, women with mental disabilities may be denied access to justice on the presumption that they are not competent or credible witnesses. Furthermore, "in sexual assault cases, the general failure of society to see people with disabilities as sexual beings may result in judges and juries discounting the testimony of witnesses.

83. Catherine A. MacKinnon. 1987. 'Difference and Dominance: On Sex Discrimination' in *Feminism Unmodified: Discourses on Life and Law*. Harvard University Press, Cambridge.
84. Rebecca J. Cook and Simone Cusack. 2010. *Gender Stereotyping: Transnational Legal Perspectives*. Philadelphia: University of Pennsylvania Press. p. 9
85. See Council of Europe Gender Equality Strategy 2014-2017, Strategic Objective 1: Combating gender stereotypes and sexism; and the Council of Europe *Gender Equality Glossary.*
86. Simone Cusack. 2014. *Eliminating Judicial Stereotyping: Equal Access to Justice for Women in Gender-Based Violence Cases*. UN Office of the High Commissioner for Human Rights. p. 17.

On the other hand, complaints may be disregarded because of views and beliefs about some women with mental disabilities as hypersexual and lacking self-control".[87]

Gender stereotyping is the practice of ascribing to an individual woman or man specific attributes, characteristics, or roles by reason only of her or his membership in the social group of women or men.[88] The process of stereotyping is part of human nature. It is the way in which we categorise individuals into particular groups or types, often unconsciously, in part to simplify the world around us.[89] The diagram below represents the differences between a gender stereotype and the practice of gender stereotyping:[90]




In essence, stereotypes are beliefs that are held, whereas stereotyping involves acting upon such beliefs in practice.

### *1.4.2 State obligations to address gender stereotypes and stereotyping*

Two international human rights treaties contain express obligations concerning stereotypes and stereotyping: CEDAW[91] and the Convention on the Rights of Persons with Disabilities (CRPD).

> States Parties shall take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.[92]
>
> States parties have an obligation to expose and remove the underlying social and cultural barriers, including gender stereotypes that prevent women from exercising and claiming their rights and impeded their access to effective remedies.[93]

87. Rashida Manjoo. 2012. *Report of the Special Rapporteur on violence against women, its causes and consequences*, UN Doc. A/67/227. para. 41.
88. Simone Cusack. 2014. *Eliminating Judicial Stereotyping: Equal Access to Justice for Women in Gender-Based Violence Cases*. p. 17.
89. Rebecca J. Cook and Simone Cusack. 2010. *Gender Stereotyping: Transnational Legal Perspectives*. Philadelphia: University of Pennsylvania Press. p.10.
90. Simone Cusack. 2013. *Gender Stereotyping as a Human Rights Violation: Research Report*. Prepared for the UN Office of the High Commissioner for Human Rights. p. 9.
91. Article 5(a) is the key provision on stereotyping, and it is reinforced by Article 2(f). Other relevant CEDAW articles are the preambular para. 14, Art. 5(b) and Art. 10(c). The CEDAW Committee has recognised that there are implied obligations in CEDAW's substantive provisions to address gender stereotyping. This includes Art. 15(1) on equality before the law. See also General Recommendation 33 and General Recommendation No.25, para. 7.
92. CEDAW, Article 5(a).
93. CEDAW Committee. 2015. *General Recommendation No. 33 on women's access to justice.* para. 7.

CEDAW also imposes on States parties the duty to modify or transform "*harmful* gender stereotypes"[94] and "eliminate *wrongful* gender stereotyping."[95] These concepts can be summarised as follows:[96]

| Harmful gender stereotypes | Wrongful gender stereotyping |
|---|---|
| A generalised view or preconception about attributes or characteristics that are or ought to be possessed by, or the roles that are or should be performed by, women and men, which, *inter alia*, limits their ability to develop their personal abilities, pursue their professional careers and make choices about their lives and life plans. Harmful stereotypes can be both hostile/negative (e.g., women are irrational) or seemingly benign (e.g., women are nurturing). | The practice of ascribing to an individual woman or man specific attributes, characteristics, or roles by reason only of her or his membership in the social group of women or men, which results in a violation or violations of human rights and fundamental freedoms. The harm is caused by the *application* of a stereotypical belief to an individual in such a way as to negatively affect the recognition, exercise or enjoyment of their rights and freedoms. |

The marital rape exception in the criminal law of many jurisdictions is an example of wrongful stereotyping. This failure to criminalise marital rape discriminates against women because it violates their dignity, freedom and autonomy, and reinforces entrenched stereotypes of male sexuality, e.g. men want to dominate women sexually) and female sexuality, e.g. women want to be sexually possessed.

Regional human rights treaties also require State parties to eliminate stereotyping. The CoE Convention on Preventing and Combating Violence against Women and Domestic Violence sets out States' obligations to combat stereotyping.[97] The CoE Plan of Action on Strengthening Judicial Independence and Impartiality, adopted in April 2016, commits the Council of Europe and its member states to undertake efforts to fight gender stereotyping within the judiciary.[98]

These international and regional obligations to combat stereotypes and stereotyping apply to all branches of government, including the judicial branch.[99] Hence, justice actors must:

- refrain from stereotyping (obligation to respect human rights);
- ensure stereotyping does not infringe human rights (obligation to protect human rights);
- ensure persons can exercise and enjoy the right to be free from wrongful gender stereotyping (obligation to fulfil human rights).[100]

### *1.4.3 How judicial gender stereotyping undermines women's access to justice*

Discrimination against women, based on harmful or wrongful gender stereotypes can adversely impact their ability to access justice.[101] Although the legal system aims to safeguard justice and human rights, it can replicate prevailing social values, including discriminatory norms such as gender stereotypes. **Judicial gender stereotyping** occurs when judges and prosecutors:

- Ascribe to an individual specific attributes, characteristics or roles by reason only of her or his membership in a particular social group (e.g. women).

94. CEDAW Committee, *V.V.P. v. Bulgaria* (2012), Communication No. 31/2011, para. 9.6 [emphasis added].
95. CEDAW Committee, *R.K.B. v. Turkey* (2012), Communication No. 28/2010, para. 8.8 [emphasis added].
96. Simone Cusack. 2013. *Gender Stereotyping as a Human Rights Violation: Research Report*. Prepared for the UN Office of the High Commissioner for Human Rights. p. 17-19.
97. Articles 12(1) and 14(1).
98. See in particular Action 2.4 on countering the negative influence of stereotyping in judicial decision making. See also the European Charter on the Statute for Judges and Recommendation CM (2010)12 on judges: independence, efficiency and responsibilities.
99. CEDAW Committee. 2010. General Recommendation No. 28 on the Core Obligation of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women. para. 39.
100. Simone Cusack. 2014. *Eliminating Judicial Stereotyping: Equal Access to Justice for Women in Gender-Based Violence Cases*: *Research Report*, Prepared for the UN Office of the High Commissioner for Human Rights. p. 7. See also the Council of Europe *Plan of Action on Strengthening Judicial Independence and Impartiality* Action 2.4 on countering the negative influence of stereotyping in judicial decision making.
101. CEDAW Committee. 2015. *General Recommendation No. 33 on Women's access to justice*. para. 8.

- Perpetuate harmful stereotypes by failing to challenge stereotyping.[102]
- Allow stereotypes to influence or affect their decisions, regardless of the law and facts.

Judicial gender stereotyping can **compromise a variety of rights** such as the right to non-discrimination and equality, the right to an effective remedy, the right to a fair trial and equality before the law, thus affecting a single case in many ways. Ultimately, it violates key tenets of the justice system - its impartiality and integrity - and this can result in miscarriages of justice and secondary victimisation in the judicial process.[103]

Stereotyping can **compromise the impartiality** of judges' and prosecutors' decisions. "Women should be able to rely on a justice system free from myths and stereotypes, and on a judiciary whose impartiality is not compromised by these biased assumptions. Eliminating judicial stereotyping in the justice system is a crucial step in ensuring equality and justice for victims and survivors".[104] Note that the broader topics of impartiality and gender sensitivity are discussed in further detail in module 3.1, below.

Stereotyping can affect judges' and prosecutors' views about **witness credibility** and on the **legal capacity of witnesses**.

Stereotypes can **distort judges' and prosecutors' perceptions and understanding of gender-based violence and whether a human rights violation has occurred**. This is manifest in cases of sexual violence, where the law and criminal justice practices are saturated with stereotypes.

> "Examples of stereotypes applied to rape cases through gender-biased criminal rules of evidence and procedure are provided by cases where the following requirements or beliefs obtain: proof of physical violence is required to show that there was no consent; women are likely to lie, therefore evidence should be accepted only if corroborated; women can be assumed to be sexually available; women can be inferred to be consenting to sex even if forced, threatened or coerced, because they remained silent; previous sexual experience predisposes women to be sexually available, or to automatically consent to sex; women bear the responsibility for sexual attacks or invite them by being out late or in isolated places or by dressing in a particular manner; it is impossible to rape a sex worker; raped women have been dishonoured or shamed or are guilty rather than victimised."[105]

If prosecutors base their charging decisions on stereotypes or judges rely on stereotyping in their judgements, they may shift the burden to victims in cases of gender-based violence, and **offenders may not be held legally accountable**.

Finally, judicial gender stereotyping can **impede access to legal rights and protections**. Family law proceedings are rife with assumptions about family relationships and gender roles within families, particularly in relation to parenthood. For example, sexually active women might be seen as unfit parents. Stereotypes can violate the rights guaranteed by law of women who seek custody or supervised visits of their children to protect themselves and children from violent partners.

### *1.4.4 Protecting women's human rights by eliminating gender stereotypes and stereotyping*

Judges and prosecutors can dispel gender stereotyping in the judicial system by actively challenging stereotypes in a number of ways. They can challenge lower court decisions that are based on stereotypes.

> **Case-law example**: In the case of *R v. Ewanchuk*, concerning the sexual assault of a 17-year-old woman the Supreme Court of Canada challenged lower courts' decisions that had acquitted the defendant based on the defence of "implied consent". It found that the lower courts had engaged in gender stereotyping, and that the case was 'not about consent, since none was given'. The Supreme Court held that this case was about myths and stereotypes that it explicitly identified and debunked in its judgment: "either the complainant is less worthy of

102. Simone Cusack. 2014. *Eliminating Judicial Stereotyping, equal access to justice for women in gender-based violence cases*. p. 2.
103. See CEDAW Committee. 2015. *General Recommendation No. 33 on Women's access to justice*. para. 26.
104. Ibid para. 28.
105. Gabriella Knaul. 2011. *Report of the Special Rapporteur on the independence of judges and lawyers* UN Doc. A/66/289. para. 48 [citations omitted].

belief, she invited the sexual assault, or her sexual experience signals probable consent to further sexual activity […] the implication is that if the complainant articulates her lack of consent by saying 'no', she really does not mean it and even if she does, her refusal cannot be taken as seriously as if she were a girl of 'good' moral character. 'Inviting' sexual assault, according to those myths, lessens the guilt of the accused…."[106]

Judges can also declare as invalid, laws that replicate gender stereotypes and violate human rights and constitutional guarantees. In relation to involuntary sterilisations, for example, the ECtHR has held that the practice affected vulnerable individuals belonging to various ethnic groups and that "Roma women had been at particular risk due to a number of shortcomings in domestic law and practice at the relevant time."[107] Roma women are subjected to degrading stereotypes, often depicted as "fertile" and "promiscuous", thus making them particularly vulnerable to involuntary sterilization.[108] In these cases, the ECtHR addressed the impact of compounded stereotypes in connection with the involuntary sterilization of Roma women which it found amounted to a violation of their rights to private life and to freedom from inhuman or degrading treatment.[109]

Depending on the jurisdiction, prosecutors and judges may be empowered to deliver remedies that are transformative and seek to have an impact on broader society and beyond the individual case.[110] Underscoring this is an awareness that stereotypes can undermine the proper functioning of the justice system. It also entails recognising that factors such as sex and gender have long been used as means to discriminate against certain groups. The ECtHR has held that "references to traditions, general assumptions or prevailing social attitudes in a particular country are insufficient justification for a difference in treatment on grounds of sex", noting that States are prevented from imposing traditions that derive from the man's primordial role and the woman's secondary role in the family.[111] The Court held that "gender stereotypes, […] cannot, by themselves, be considered to amount to sufficient justification for a difference in treatment, any more than similar stereotypes based on race, origin, colour or sexual orientation".[112]

A number of strategies may be employed to support, empower and enable justice actors to avoid gender stereotyping in their work.[113] For instance:

- providing adequate and regular training on relevant international human rights law as well as on gender stereotypes and bias
- highlighting the harm of judicial stereotyping though evidence-based research
- advocating for legal and policy reforms that specifically address gender stereotypes to make laws more gender-sensitive, and monitoring the impact of such measures
- analysing judicial reasoning for evidence of stereotyping
- highlighting good practice examples of judges and prosecutors who have challenged gender stereotypes
- obtaining expert and *amicus curiae* briefs in order to provide information specialized information to guide the court in complex or unfamiliar topics.[114]
- improving the gender sensitivity of justice actors and judicial capacity to address gender stereotypes.[115] This can include conducting training that initiates behavioural changes in order to prevent and combat judicial stereotyping while also acknowledging that gender bias may be unconscious
- creating institutional behavioural interventions by changing practices and procedures that limit justice actors' opportunities to exercise bias.[116]

106. Canada, Supreme Court. R. v. Ewanchuk. 1999. 1 S.C.R. 330. L'Heureux-Dubé J, concurring. para. 95.
107. ECtHR, *N.B. v. Slovakia*, Application No. 29518/10, judgment of 12 June 2012. para. 96, referencing *V.C. v. Slovakia*, cited above, paras. 146-149 and 152-153); ECtHR, *I.G., M.K. and R.H. v. Slovakia*, Application No. 15966/04, judgement of 13 November 2012.para.143.
108. *Report of the UN Working Group on the issue of discrimination against women in law and in practice*, UN Doc. A/HRC/32/44 (2016), para. 57.
109. Nonetheless, the Court did not explicitly identity multiple and intersecting forms of discrimination that these women faced on the basis of gender and ethnicity, as a result of these stereotypes.
110. See Module 4.5 on remedies for discussion on the judiciary's potential role in delivering transformative remedies that seek to address bias and stereotyping at a structural level.
111. ECtHR, *Konstantin Markin v. Russia* [GC], Application No. 30078/06, judgment of 22 March 2012. para. 127.
112. Ibid para.143.
113. See Simone Cusack. 2014. *Eliminating Judicial Stereotyping: Equal Access to Justice for Women in Gender-Based Violence Cases*. Prepared for the UN Office of the High Commissioner for Human Rights. pp. 29-44.
114. *See* Module 4.10 on the role of experts and *amicus curiae* briefs.
115. See the Council of Europe Plan of Action on Strengthening Judicial Independence and Impartiality Action 2.4 on countering the negative influence of stereotyping in judicial decision making.
116. *See* Iris Bohnet.2016. *What Works. Gender Equality by Design.* Cambridge and London: the Belknap Press of Harvard University Press.

# MODULE II.
# THE INTERNATIONAL AND REGIONAL LEGAL FRAMEWORKS

Objectives: Module II is an overview of the international and regional legal frameworks that apply to women's human rights. Note that because the Eastern Partnership countries are members of the Council of Europe, this manual focuses on international and CoE legal standards but does not provide an overview of European Union law. However, some EU case-law concerning employment discrimination is included in the manual to provide additional information on legal reasoning and standards.

Trainees or other users of this manual are expected to already have some background knowledge of key international and regional human rights conventions. Thus, Module II aims to familiarise them with the core documents and standards that apply to access to justice and the legal issues that disproportionately impact women. Note that greater detail about international standards relevant to the most common violations of women's human rights in the beneficiary countries is provided in Module III. National legislation is described in the country chapters to this manual.

## 2.1 The United Nations human rights system

The United Nations (UN) system is based on two pillars: charter-based and treaty- based bodies.

Under the **UN Charter**, the responsibility for the promotion of human rights is given to the General Assembly and the Economic and Social Council (ECOSOC). In 2006, the General Assembly empowered the **Human Rights Council** (HRC) to address human rights violations and promote effective coordination and mainstreaming of human rights as a successor to the Human Rights Commission. The HRC is an inter-governmental body that consists of 47 member states. Its primary mechanism is **Universal Periodic Review**,[117] but it can also examine individual complaints.

In addition, the Human Rights Council's special procedure mechanism, supports independent experts with mandates to examine human rights issues relevant to a specific topic or theme.[118] There are two such thematic experts with mandates that are particularly relevant to gender equality: the **Special Rapporteur on violence against women** and the **Special Rapporteur on trafficking in persons, especially in women and children**. There is also a **Working Group on the Issue of Discrimination against women in law and practice** (a body of five independent experts). All three bodies examine individual complaints and issue urgent appeals to governments; they also as undertake country visits and prepare annual reports for the HRC.

The **Commission on the Status of Women** (CSW), established in 1946 by ECOSOC, is a Charter-based body with the primary responsibility of advancing women's rights and gender equality. It is an inter-governmental body composed of 45 member states. The CSW prepares recommendations to the ECOSOC on urgent problems, produces conclusions on priority themes and is responsible for organising and following up on world conferences on women.

In the UN system, there are nine core **human rights treaties** (see Annex 4 for full list and ratifications). All of these treaties prohibit discrimination on the basis of sex/gender, while the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights also guarantee equal rights to men and women (Article 3). The Convention on the Rights of Persons with Disabilities (Article 6)

117. Universal Periodic Review (UPR) is a process by which the United Nations member states submit information about the actions they have taken in the areas of human rights promotion and protection, including on gender equality and non-discrimination. The UPR process is an important instrument for assessing the human rights practices of individual states and also for documenting best practices.
118. The special procedures of the Human Rights Council are independent experts who report and advise on human right issues, based on thematic or country mandates. There are roughly 40 such experts, or rapporteurs, in each category.

recognises that women with disabilities are subjected to multiple discrimination, and State parties have an obligation to address these forms of inequality. The **Convention on the Elimination of All Forms of Discrimination against Women** (CEDAW), sometimes referred to as an "international bill of rights for women," is the treaty that defines discrimination against women and sets forth the agenda for national action to end such discrimination.

Each of these treaties establishes treaty monitoring bodies—committees of independent experts that review State reports on the implementation of the relevant convention. The committees issue concluding observations/comments that note areas of progress and point out concerns about failures to fulfil treaty-based obligations. The majority of treaty bodies also have the authority to examine individual communications, or complaints, about violations of the rights protected by a specific treaty[119]. Some treaty bodies can undertake inquiry into gross or systematic violations of rights in the State that has accepted its competence[120], and some can consider requests for urgent action or early-warning procedures in order to prevent or halt serious human rights violations.[121] In addition, treaty monitoring bodies issue general comments/recommendations on specific rights or issues under the convention in which they explain in more detail the content of the right and the State's obligations.

Views of such committees on individual complaints and general comments or recommendations are not considered to be binding on States. However, these opinions are well-reasoned interpretations of the relevant treaties and, therefore, they provide legal practitioners, such as prosecutors and judges, with important explanations about how the treaty obligations should be upheld through national law and practice.

**A Closer Look at CEDAW**

CEDAW embodies a comprehensive vision of substantive equality between women and men, requiring State parties to undertake wide-ranging measures to ensure the prohibition of all forms of discrimination against women. As defined in the Convention, **discrimination against women** is "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field." (Article 1). CEDAW requires State parties to establish competent national institutions to make the prohibition on discrimination effective in practice.

In its wide coverage, the treaty transcends the traditional divides between civil and political rights and economic, social and cultural rights as well as the public/private distinction. CEDAW explicitly addresses the role of culture in perpetuating inequality and contains obligations to address gender stereotyping.

As of 2016, the CEDAW Committee has issued 34 general recommendations, including on the topics of violence against women (No. 19), women in conflict prevention, conflict and post-conflict situations (No. 30), harmful practices (No. 31), and women's access to justice (No. 33). Under the Optional Protocol to the treaty, the CEDAW Committee has also reviewed a number of individual complaints, including two from countries of the former Soviet Union (Belarus and Georgia, 2009[122]).

## 2.2. The Council of Europe human rights system

The Council of Europe is the international body responsible for promoting human rights, democracy and the rule of law in Europe. The core human rights instrument of the Council of Europe is the **Convention for the Protection of Human Rights and Fundamental Freedoms** (ECHR). The ECHR has been supplemented with 15 protocols, some of which include additional rights, such as the right to education as a social right, and others reform the implementing mechanism. The ECHR contains a provision prohibiting discrimination in the enjoyment

119. A state party to a treaty must accept the relevant committee's competence to consider individual complaints by ratifying an optional protocol to the treaty.
120. These are the CEDAW Committee, the Committee Against Torture, the Committee on the Rights of Persons with Disabilities, the Committee on the Rights of the Child, the Committee on Economic, Social and Cultural Rights, and the Committee on Enforced Disappearances.
121. The Committee on the Elimination of Racial Discrimination, the Committee on the Rights of Persons with Disabilities, and the Committee on Enforced Disappearances.
122. CEDAW Committee, *Inga Abramova v. Belarus* (2011), Communication No. 23/2009; and *X and Y v. Georgia* (2015), Communication No. 24/2009.

of the rights of the Convention, Article 14. **Protocol No. 12** to the ECHR includes a general prohibition of discrimination on *any* ground, e.g. sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status, by removing the limitations in Article 14 of the Convention.

The **European Court of Human Rights** (ECtHR) is the body to whom individuals can apply alleging violations of their rights under the ECHR, provided they have met procedural requirements such as the exhaustion of domestic remedies. Although the ECHR is a gender neutral instrument, the ECtHR, interpreting the Convention as a living instrument, has established jurisprudence on women's rights, including on violence against women: domestic violence, sexual violence, forced gynaecological examinations, human trafficking; reproductive rights: abortion, sterilisation, medically assisted reproduction; and sex discrimination: employment, social benefits, jury service.[123] The ECtHR has established several important principles of women's equal access to justice in cases concerning violence against women, some of which are summarised in the relevant sections of this manual.[124]

**The European Social Charter (ESC)** is the counterpart to the ECHR in the field of economic and social rights. The Charter guarantees the enjoyment of rights in the areas of housing, health, education, employment, legal and social protection and movement of persons without discrimination on any ground, including sex. The Charter was revised in 1996 to include new rights, some of which are of particular relevance to women (for example, the right to protection against sexual harassment in the workplace, and rights of workers with family responsibilities to equal opportunities and equal treatment). At the same time, the Charter was amended to reinforce the principle of non-discrimination and improve protection of gender equality in all fields addressed by the original treaty. The European Committee of Social Rights (ECSR) monitors the extent to which member states comply with the Charter through two complementary mechanisms: a reporting system and through a procedure of collective complaints.[125]

Two other CoE conventions address the particular issue of violence against women. The **Convention on Action against Trafficking in Human Beings** has a comprehensive scope that covers preventing and combating trafficking in women, men and children for the purpose of sexual, labour or other types of exploitation, as well as at protecting victims and prosecuting traffickers. It includes a non-discrimination provision and the obligation for state parties to promote gender equality and use gender mainstreaming in the development, implementation and assessment of measures to implement the Convention (Article 3). An independent monitoring mechanism assesses how States are putting the provisions of the convention into practice. This monitoring mechanism consists of two pillars: the independent Group of Experts on Action against Trafficking in Human Beings (GRETA) and the Committee of the Parties.

The **Convention on Preventing and Combating Violence against Women and Domestic Violence** (Istanbul Convention)[126] is a far-reaching and comprehensive treaty that addresses human rights, gender equality and criminal law. The Istanbul Convention sets forth the minimum standards that State parties are required to implement to effectively address violence against women. The Istanbul Convention has a two-pillar monitoring mechanism to assess and improve the implementation of the Convention: the independent Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), and the Committee of the Parties.

## 2.3 Overview of Selected Case-Law of the European Court of Human Rights

The European Court of Human Rights has delivered a significant number of judgements that demonstrate the barriers women experience in accessing legal protection and remedies and that formulate standards in the

123. Thematic factsheets on ECtHR cases-law on topics such as gender equality, violence against women, domestic violence and reproductive rights can be accessed at: http://www.echr.coe.int/Pages/home.aspx?p=press/factsheets&c=
124. For further information, see Council of Europe. 2015. *Equal access to justice in the case-law on violence against women before the European Court of Human Rights*. Available at: http://www.coe.int/en/web/genderequality/equal-access-of-women-to-justice.
125. Decisions adopted by the European Committee of Social Rights can be accessed from the European Social Charter Case-law Database (HUDOC Charter): http://hudoc.esc.coe.int.
126. Information about the Istanbul Convention, including the Convention text in all CoE languages, can be accessed from: http://www.coe.int/en/web/istanbul-convention/home.

sphere of women's access to justice. Key judgements were issued particularly in cases concerning violence against women, gender equality, and judicial gender stereotyping.[127]

After providing a non-exhaustive overview of the relevant cases, this section is organised around major principles and standards for women's access to justice discussed in relation to the thematic areas in which these principles and standards have been developed. It provides, for each, excerpts from the key decisions of the ECtHR that have upheld these principles and standards.

**Violence against women**

The ECtHR has examined a significant number of cases of violence against women committed by both state actors and private individuals. These cases concerned the following:[128]

- ***Ill-treatment in detention***: Juhnke v. Turkey (2003)
- ***Police violence***: Aydin v. Turkey (1997); Y.F. v Turkey (2003); Maslova and Nalbandov v. Russia (2008); Yazgül Yilmaz v. Turkey (2011); B.S. v. Spain (2012); Izci v. Turkey (2013); Afet Süreyya Eren v. Turkey (2015); Dilek Aslan v. Turkey (2015)
- ***Rape and sexual abuse***: X and Y v. the Netherlands (1985); Aydin v. Turkey (1997); M.C. v Bulgaria (2003); Maslova and Nalbandov v. Russia (2008); P.M. v. Bulgaria (2012); I.G v. The Republic of Moldova (2012); M. and Others v. Italy and Bulgaria (2012); P. and S. v. Poland (2012); D.J. v. Croatia (2013); O'Keeffe v. Ireland (2014); W. v. Slovenia (2014); M.A. v. Slovenia and N.D. v. Slovenia (2015); S.Z. v. Bulgaria (2015); I.P. v. the Republic of Moldova (2015); Y. v. Slovenia (2015); B.V. v. Belgium (2017); M.G.C v. Romania (2016).
- ***Domestic violence against women:*** Kontrovà v. Slovakia (2007); Branko Tomašić and Others v. Croatia (2009); Opuz v. Turkey (2009); A v. Croatia (2010); Haiduová v. Slovakia (2010); Kalucza v. Hungary (2012); Eremia and Others v. the Republic of Moldova (2013) ; Mudric v. the Republic of Moldova (2013) ; B. v. the Republic of Moldova (2013); N.A. v. the Republic of Moldova (2013); Valiulienè v. Lithuania (2013); T.M. and C.M. v. the Republic of Moldova (2014); Durmaz v. Turkey (2014); Rumor v. Italy (2014); Civek v. Turkey (2016); Halime Kiliç v. Turkey (2016); M.G v. Turkey (2016); Talpis v. Italy (2017); Balsan v. Romania (2017).
- ***Violence by private individuals, who are not intimate partners or family members:*** Sandra Janković v. Croatia (2009); Ebcin v. Turkey (2011).
- ***Risk of ill-treatment in case of expulsion*** for fear of
  - female genital mutilation: Collins and Akaziebie v. Sweden (2008, decision on admissibility); Izevbekhai v. Ireland (2011, decision on admissibility); Omeredo v. Austria (2011, decision on admissibility), Sow v. Belgium (2016); Bangura v. Belgium (2016, strike-out decision)
  - crimes in the name of honour: A.A. and Others v. Sweden (2012); R.D. v. France (2016).
  - social exclusion N. v. Sweden (2010); W.H. v. Sweden (2015, Grand Chamber); R.H. v. Sweden (2015).
  - trafficking in human beings L.R. v. the United Kingdom (2011, strike-out decision); R.D. v. France (2011, decision on admissibility); F.A. v. the United Kingdom (2013, decision on the admissibility); O.G.O. v. the United Kingdom (2014, strike-out decision).
- ***Trafficking in human beings:*** Rantsev v. Cyprus and Russia (2010); L.E. v. Greece (2016).

**Gender equality**

Furthermore, the ECtHR has issued judgements in a significant number of cases in the sphere of gender equality. These cases engaged possible violations of the following rights under the Convention[129]:

***Prohibition of discrimination on the ground of sex (Article 14) in conjunction with other rights under the European Convention of Human Rights:***

127. For an example of a case dealing with judicial gender stereotyping, see the recent judgment of the European Court of Human Rights in *Carvalho Pinto de Sousa Morais v. Portugal* (2017). The Court found a violation of Article 14 in conjunction with Article 8, in a case in which a woman was originally granted lowered compensation by national courts due to the reasoning that an older women's sexuality was less important. Gender stereotypes are also discussed in *Emel Boyraz v. Turkey* (2014); and *Konstantin Markin v. Russia* (2010).
128. See: Press Unit of the European Court of Human Rights. 2017. Factsheet - Violence against Women; and the Factsheet – Domestic Violence, 2017. See also the website of the Council of Europe dedicated to the Istanbul Convention and Action against Violence against Women and Domestic Violence: http://www.coe.int/en/web/istanbul-convention/home (particularly the section on the European Court of Human Rights).
129. For an overview of these cases, see: Council of Europe Gender Equality Unit. 2017. Compilation of Case-law of the European Court of Human Rights on Gender Equality Issues.

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| *Article 8 (right to respect for private and family life)*<br>Carvalho Pinto de Sousa Morais v. Portugal (2017); Mitzinger v. Germany (2017); Di Trizio v. Switzerland (2016); Emel Boyraz v. Turkey (2014); Tuncer Güneş v. Turkey (2014); Hulea v. Romania (2012); Genovese v. Malta (2011); Losonci Rose and Rose v. Switzerland (2010); Konstantin Markin v. Russia (2010); Schwizbegel v. Switzerland (2010); Wagner and J.M.W.L. v. Luxembourg (2007); Unal Tekeli v. Turkey (2004); Odièvre v. France (2003); Petrovic v. Austria (1998). |
| *Article 3 (prohibition of inhuman and degrading treatment) in a number of domestic violence cases)*<br>Opuz v. Turkey (2009); A v. Croatia (2010); Eremia and Others v. the Republic of Moldova (2013); Rumor v. Italy (2014); M.G. v. Turkey (2016). |
| *Article 4(3)(d) (prohibition of slavery and forced labour)*<br>Zarb Adami v. Malta (2006); Karlheinz Schmidt v. Germany (1994) |
| *Article 6 (right to a fair trial)*<br>García Mateos v. Spain (2013); Abdulaziz, Cabales and Balkandali v. the United Kingdom (1985); Muñoz Díaz v. Spain (2009). |
| ***Right to respect for private and family life (Article 8)***<br><br>Gözüm v. Turkey (2015); Hanzelkovi v. the Czech Republic (2014); Konovalova v. Russia (2014); Ivinović v. Croatia (2014) ; A.K. v. Latvia (2014) ; L.H. v. Latvia (2014); Radu v. the Republic of Moldova (2014) ; Söderman v. Sweden (2013); A.K. and L. v. Croatia (2013); P. and S. v. Poland (2012); V.C. v. Slovakia (2011); Khelili v. Switzerland (2011); R.R. v. Poland (2011); A., B. and C. v. Ireland (2010); Ternovsky v. Hungary (2010); Özpinar v. Turkey (2010); K.H. and Others v. Slovakia (2009); Evans v. the United Kingdom (2007); Tysiąc v. Poland (2007); Grant v. the United Kingdom (2006); Y.F. v. Turkey (2003); Odièvre v. France (2003); M.S. v. Sweden (1997); Halford v. the United Kingdom (1997); Z. v. Finland (1997); Kroon and Others v. the Netherlands (1994). |
| ***Right to a fair trial (Article 6)***<br>García Mateos v. Spain (2013); Cudak v. Lithuania (2010); Keegan v. Ireland (1994); Airey v. Ireland (1979). |
| ***Prohibition of inhuman and degrading treatment (Article 3)***<br>I.G., M.K. and R.H. v. Slovakia (2012); N.B. v. Slovakia (2012); V.C. v. Slovakia (2011); Hossein Kheel v. the Netherlands (2008); N. v. the United Kingdom (2008); Price v. the United Kingdom (2001); Jabari v. Turkey (2000). |
| ***Freedom of expression (Article 10)***<br>Women on Waves and Others v. Portugal (2009); Open Door and Dublin Well Woman v. Ireland (1992). |
| ***Right to respect for freedom of thought, conscience and religion (Article 9)***<br>Osmanoğlu and Kocabaş v. Switzerland (2017); S.A.S. v. France (2014); Staatkundig Gereformeerde Partij v. the Netherlands (2012, decision on admissibility); Dogru v. France and Kervanci v. France (2008); El Morsli v. France (2008); Kurtulmuş v. Turkey (2006); Leyla Şahin v. Turkey (2005); Dahlab v. Switzerland (2001, decision on admissibility). |

In a number of key judgements, the European Court of Human Rights has formulated or upheld important principles that lay the foundation for securing equal access to justice for women.

Violations of women's human rights tend to be perpetrated by private individuals, in contrast with violations of men's human rights, which tend to be perpetrated by State actors. In this respect, the Court has significantly increased women's access to justice by recognizing that forms of violence against women perpetrated by private individuals constitute violations of particular rights protected under the Convention (importantly, the right to life and the prohibition of torture and inhuman and degrading treatment). Furthermore, the ECtHR case-law illustrates the importance that the Court assigns to the developing **doctrine of positive obligations** – a doctrine which applies regardless of whether the perpetrator is a private individual or a state official.[130]

Several leading cases before the European Court of Human Rights marked significant progress in the way the Court understood violence against women and its specific forms and viewed states' obligations in this area. By now, the case-law of the ECtHR has stated a positive state obligation to penalise sexual violence (*M.C. v. Bulgaria* (2003)), domestic violence (*Opuz v. Turkey* (2009), intentional bodily harm to the person (*Sandra Jankovic v. Croatia* (2009)), and trafficking in human beings (*Rantsev v. Cyprus* and Russia (2010)).

130. Patricia Londono. 2010. Chapter 7. Defining Rape under the European Convention on Human Rights. Torture, consent and equality in McGlynn, Clare, and Munro, eds. *Rethinking rape law: International and comparative perspectives*. Routledge.

Famously, in the case of *Opuz v. Turkey* (2009), the Court found that the domestic violence suffered by the applicant, Nahide Opuz, and her mother, who was killed by the applicant's husband, "may be regarded as gender-based violence which is a form of discrimination against women".[131] The Court observed that:

> "[…] the alleged discrimination at issue was not based on the legislation per se but rather resulted from the general attitude of the local authorities, such as the manner in which the women were treated at police stations when they reported domestic violence and judicial passivity in providing effective protection to victims." (para. 192)

The Court then held that:

> "Bearing in mind its finding that the general and discriminatory judicial passivity in Turkey, albeit unintentional, mainly affected women, the Court considers that the violence suffered by the applicant and her mother may be regarded as gender-based violence which is a form of discrimination against women. Despite the reforms carried out by the Government in recent years, the overall unresponsiveness of the judicial system and impunity enjoyed by the aggressors, as found in the instant case, indicated that there was insufficient commitment to take appropriate action to address domestic violence […]." (para. 200)

The **principle of non-discrimination** is a key principle of the Convention, which encompasses non-discrimination in access to justice and access to judicial remedies without any discrimination. The principle of non-discrimination was upheld in a number of decisions regarding domestic violence cases that followed *Opuz v. Turkey*. In *Eremia and Others v. the Republic of Moldova* (2013), the Court held that:

> "[…] the authorities' actions were not a simple failure or delay in dealing with violence against the first applicant, but amounted to repeatedly condoning such violence and reflected a discriminatory attitude towards the first applicant as a woman. The findings of the United Nations Special rapporteur on violence against women, its causes and consequences (see paragraph 37 above) only support the impression that the authorities do not fully appreciate the seriousness and extent of the problem of domestic violence in Moldova and its discriminatory effect on women." (para. 89)

The same approach was followed in Mudric v. the Republic of Moldova (2013); B. v. the Republic of Moldova (2013); and N.A. v. the Republic of Moldova (2013).

To date, the ECtHR has not reached a similar decision in a case of rape, which means that the articulation of sexual violence as an issue of sex-based discrimination is absent from the ECHR jurisprudence.[132] However it may develop in this direction as the Court increasingly takes into account the Istanbul Convention, which recognises that violence against women is a form of discrimination against women (Article 3).

The ECtHR has upheld the principle of non-discrimination in a number of cases regarding **employment matters**.

For example:

European Court of Human Rights, *Emel Boyraz v. Turkey*, (Appl. no. 61960/08), Judgment of 2 December 2014, paras. 50-56

[The applicant, a Turkish national, was appointed to the post of security officer in a branch of a State-run electricity company. She worked on a contractual basis for almost three years before being dismissed in March 2004 on account of her sex. She was informed that she would not be appointed because she did not fulfil the requirements of "being a man" and "having completed military service". In February 2006, the courts dismissed Ms Boyraz's case, taking into consideration an earlier decision by the Supreme Administrative Court, which had held that the requirement regarding military service demonstrated that the post in question was reserved for male candidates and that this requirement was lawful given the nature of the post and the public interest. The ECtHR rejected these arguments and found that there had been a violation of Article 14 of the Convention (prohibition of discrimination) read in conjunction with Article 8 (right to respect for private and family life), partly on the following grounds:

131. ECtHR, *Opuz v. Turkey*, Application No. 33401/02, judgment of 9 June 2009, para. 200. Note that the approach initiated by the Court in Opuz has since been followed in a number of other cases of domestic violence.
132. Patricia Londono. 2010. Chapter 7. Defining Rape under the European Convention on Human Rights. Torture, consent and equality in Clare McGlynn, , and Vanessa E. Munro, eds. *Rethinking rape law: International and comparative perspectives*. Routledge.

50. The Court reiterates that in order for an issue to arise under Article 14 there must be a difference in the treatment of persons in comparable situations. Such a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The notion of discrimination within the meaning of Article 14 also includes cases where a person or group is treated, without proper justification, less favourably than another, even though the more favourable treatment is not called for by the Convention (see Abdulaziz, Cabales and Balkandali v. the United Kingdom, 28 May 1985, § 82, Series A no. 94 and Vallianatos and Others v. Greece [GC], nos. 29381/09 and 32684/09, § 76, ECHR 2013).

51. The Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment (see Ünal Tekeli v. Turkey, […] and Vallianatos and Others v. Greece [GC], […]). The scope of the margin of appreciation will vary according to the circumstances, the subject-matter and the background to the case (see Ünal Tekeli, cited above, § 52), but the final decision as to observance of the Convention's requirements rests with the Court (see Kafkaris v. Cyprus [GC], § 161). Where a difference of treatment is based on sex, the margin of appreciation afforded to the State is narrow and in such situations the principle of proportionality does not merely require that the measure chosen should in general be suited to the fulfilment of the aim pursued, but it must also be shown that it was necessary in the circumstances. The Court further reiterates that the advancement of gender equality is today a major goal in the member States of the Council of Europe and very weighty reasons would have to be put forward before such a difference of treatment could be regarded as compatible with the Convention (see Konstantin Markin v. Russia [GC], no. 30078/06, § 127, ECHR 2012 (extracts)).

52. In the present case, the Court observes at the outset that both the administrative authorities and the Twelfth Division of the Supreme Administrative Court considered that the post of security officer in the Batman branch of TEDAŞ was reserved for men and that therefore the applicant, being a woman, was not suitable for the post. In the Court's view, this is a clear "difference in treatment", on grounds of sex, between persons in an analogous situation.

53. As regards the question of whether the difference in treatment between women and men was objectively and reasonably justified under Article 14, the Court takes note of the Government's submissions concerning the nature of the service carried out by security officers in the Batman branch of TEDAŞ and the working conditions therein (see paragraph 48 above). […] The Court observes in this connection that the main consideration in these explanations is that the activities of security officers carried certain risks and responsibilities as the security officers had to work at nights in rural areas and since they had to use firearms and physical force in case of an attack on the premises they were guarding. It appears that the administrative authorities considered that women were unable to face those risks and assume such responsibilities. There is, however, no explanation in the submissions of the administrative authorities or the Government as to this purported inability. What is more, the decisions of the Twelfth Division of the Supreme Administrative Court did not contain any assessment of those considerations on the part of the administration. Nor did the Twelfth Division give any other reasoning as to why only men were suitable for the post in question.

54. The Court is aware that there may be legitimate requirements for certain occupational activities depending on their nature or the context in which they are carried out. However, in the instant case, neither the administrative authorities nor the Twelfth Division of the Supreme Administrative Court substantiated the grounds for the requirement that only male staff be employed in the post of security officer in the Batman branch of TEDAŞ. […] **The Court, for its part, also takes the view that the mere fact that security officers in Batman had to work on night shifts and in rural areas and might be required to use firearms and physical force under certain conditions could not in itself justify the difference in treatment between men and women.**

55. Moreover, […] there is nothing in the case file to indicate that the applicant failed to fulfil her duties as a security officer in TEDAŞ because of her sex.

56. In sum, it has not been shown that the difference in treatment pursued a legitimate aim. The Court concludes that this difference in treatment, of which the applicant was a victim, amounted to discrimination on grounds of sex.

Another important principle arising from the ECtHR case-law is the **principle of gender equality**. The European Court of Human Rights ('the Court') has consistently held that the 'equality of sexes is one of the major goals in the member states of the Council of Europe' (*Abdulaziz, Cabales and Balkandali v. UK* (1985) Series A, No. 94, at

para. 78) and has proclaimed gender equality as one of the key underlying principles of the Convention (*Leyla Sahin v. Turkey* [GC], (2005), Reports 2005, para. 115).[133]

As early as 1985, in *Abdulaziz, Cabales and Balkandali v. UK* the Court held that:

> "[…] the advancement of the equality of the sexes is today a major goal in the member States of the Council of Europe. This means that very weighty reasons would have to be advanced before a difference of treatment on the ground of sex could be regarded as compatible with the Convention." (para. 78)

More recently, in *Konstantin Markin v. Russia* (Grand Chamber judgment of 22 March 2012), the Court reiterated that:

> "The advancement of gender equality is today a major goal of the member States of the Council of Europe and very weighty reasons would have to be put forward before such a difference of treatment could be regarded as compatible with the Convention." (para. 127)

In *Konstantin Markin v. Russia*, the Court extensively engaged with the issue of **gender stereotypes** and their harmful impact on women's careers and men's family life. The Court sought to counter such negative stereotypes.

European Court of Human Rights (GC), Konstantin Markin v. Russia (Appl. No. 30078/06), judgement of 22 March 2012, paras. 127, 142-3:[134]

[The applicant, a father of three children, who was serving in the Russian military, divorced from their mother on 30 September 2005. By mutual agreement of the parents, the children were to live with him. On 11 October 2005, he requested to take three years' parental leave. This was refused to him, because the three years' parental leave could be granted only to female military personnel. Though the applicant was allowed to take three months' leave, he was recalled to duty on 23 November 2005. In the legal proceedings that followed, the Russian Constitutional Court, in its judgement of 15 January 2009, justified the difference in treatment between servicewomen and servicemen as regards parental leave by the consideration that 'By granting, on an exceptional basis, the right to parental leave to servicewomen only, the legislature took into account, firstly, the limited participation of women in military service and, secondly, the special social role of women associated with motherhood.' In 2012, the Court, sitting in Grand Chamber, strongly rejected this argument and concluded that Russia is in breach of Article 14 ECHR in conjunction with Article 8 based, in part, on the following grounds:]

127. The Court further reiterates that the advancement of gender equality is today a major goal in the member States of the Council of Europe and very weighty reasons would have to be put forward before such a difference of treatment could be regarded as compatible with the Convention (see *Burghartz v. Switzerland*, 22 February 1994, § 27, Series A no. 280-B, and *Schuler-Zgraggen v. Switzerland*, 24 June 1993, § 67, Series A no. 263). In particular, references to traditions, general assumptions or prevailing social attitudes in a particular country are insufficient justification for a difference in treatment on grounds of sex. For example, States are prevented from imposing traditions that derive from the man's primordial role and the woman's secondary role in the family (see Ünal Tekeli, cited above, § 63).

142. […] [T]he difference in treatment cannot be justified by reference to traditions prevailing in a certain country. The Court has already found that States may not impose traditional gender roles and gender stereotypes (see the case-law cited in paragraph 127 above). Moreover, given that under Russian law civilian men and women are both entitled to parental leave and it is the family's choice to decide which parent should take parental leave to take care of the new-born child, the Court is not convinced by the assertion that Russian society is not ready to accept similar equality between men and women serving in the armed forces.

143. The Court concludes from the above that **the reference to the traditional distribution of gender roles in society cannot justify the exclusion of men, including servicemen, from the entitlement to parental leave. The Court agrees with the Chamber that gender stereotypes, such as the perception of women as primary child-carers and men as primary breadwinners, cannot, by themselves, be considered to amount to sufficient justification for a difference in treatment, any more than similar stereotypes based on race, origin, colour or sexual orientation.**

133. Ivanna Radačić. 2012. The European Court of Human Rights' Approach to Sex Discrimination in *European Gender Equality Law Review* 1. pp. 13-23.

134. The case summary here is based on: Olivier de Schutter. 2014. *International Human Rights Law. Cases, Materials, Commentary* (second edition). Cambridge: Cambridge University Press.

In addition to the general principles of non-discrimination and gender equality, the ECtHR has developed specific standards for equal access of women to justice in a number of cases concerning violence against women.[135]

*Positive measures*

Importantly, through its case-law on violence against women, in landmark cases such as *M.C v. Bulgaria* (2003), and *Opuz v. Turkey* (2009),[136] the European Court of Human Rights developed the principle that states must take action to prevent human rights violations. It established that, irrespective of whether those acts are perpetrated by the state or by private persons, the state was under an obligation to investigate, prosecute and punish them. This understanding has led to elaborating the **principle of due diligence**.[137]

This principle was first stated in the case of *X and Y*, where the Court held that positive obligations not only require states to refrain from violating rights, but may also impose a proactive duty to ensure that the rights of the individuals are not violated by other private individuals (para. 23). In *MC v Bulgaria*, the Court found that the obligations to protect rights under Article 3 and under Article 8 led to duties to conduct official investigations and effectively punish rape (paras. 149-53). In *Maslova v Russia* (2009), the Court held that "the manifestly debasing character of rape emphasises the state's procedural obligation in this context" (para. 91). The Court went on to hold that:

> The effective official investigation should be capable of leading to the identification and punishment of those responsible … The minimum standards as to effectiveness defined by the Court's case-law also include the requirements that the investigation must be independent, impartial and subject to public scrutiny, and that the competent authorities must act with exemplary diligence and promptness. (para. 91)

These factors pose a significant challenge to the activities of police and prosecutors charged with enforcing rape laws and through whom most of the complaints are filtered out of the criminal justice system (see, e.g., Kelly 2002; Kelly et al. 2005).[138] Recognition of these positive duties also suggests a need for redoubling of current efforts to bring perpetrators to justice.

The Court also held in numerous cases of domestic violence against women that national authorities have a positive obligation to take protective measures to prevent such violence, when the authorities "*knew or ought to have known*" at the time of the existence of a "*real and immediate risk*" to the life or health of an individual in *Kontrova v. Slovakia* (31 May 2007) and *Hajduova v. Slovakia* (30 November 2010). Authorities ought to intervene even when the threat from the potential aggressor has not yet materialised as physical violence (*Hajduova*). Authorities may act *ex officio*, sometimes even against the expressed wish of the victim (*Hajduova*). In some cases, temporary emergency protective measures may be taken (*Bevacqua and S. v. Bulgaria*, 12 June 2008).

European Court of Human Rights, *Opuz v. Turkey* (Appl. No. 33401/02), Judgement of 9 June 2009 (final 9 September 2009), paras. 134, 138, 139, 143-145, 147, 149, 161, 176.

[The applicant, Nahide Opuz, married H.O. in 1995, and the couple settled down in the southeastern Turkish city of Diyarbakır. The applicant and her mother suffered systematic and continuous physical violence, including death threats, which resulted in medically evidenced life-threatening injuries. They filed complaints and several criminal proceedings were instituted against H.O., which were all discontinued as victims withdrew their complaints or because of the lack of evidence. In one later incident, in March 1998, H.O. ran his car into the applicant and her mother, causing serious injuries. In another, in October 2001, he stabbed the applicant seven times with a knife. For the first attack he was convicted to three months imprisonment, which was later commuted to a fine. For the second he was fined, with payments to be made in eight instalments. During these proceedings H.O. made death threats, for which the applicant and her mother unsuccessfully asked the public prosecutor for protective measures. Following these rulings, in at least three separate accounts, the applicant filed criminal complaints due to H.O.'s death threats and harassment; he was only questioned by the authorities. The violence

135. This analysis is further developed in: Council of Europe. 2015. Equal Access to Justice in the Case-law on Violence against Women before the European Court of Human Rights, https://rm.coe.int/1680597b16
136. ECtHR, *Kontrova v. Slovakia*, Application No. 7510/04, final since 29 September 2007. It was the first case of domestic violence dealt with by the Court in substance; and *Branko Tomašić and others v. Croatia*, Application No. 46598/06, final since 15 April 2009.
137. Frederica Acar and Raluca Popa. 2016. From Feminist Legal Project to Groundbreaking Regional Treaty: The Making of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence. *European Journal of Human Rights*. 2016/3. pp. 287-319.
138. Patricia Londono. 2010. Chapter 7. Defining Rape under the European Convention on Human Rights. Torture, consent and equality in McGlynn, Clare, and Vanessa E. Munro, eds. *Rethinking rape law: International and comparative perspectives*. Routledge.

reached a peak in March 2002, when the applicant's mother attempted to move to another community. H.O. shot the applicant's mother with a gun killing her instantly. Six years after this incident, a domestic court convicted him for murder and sentenced him first to life imprisonment, but then mitigated the sentence and finally released him, taking into account his good behaviour in detention and the fact that the judgment was subjected to appeal proceedings. One month after his release the applicant filed another criminal complaint requesting protection from H.O. on account of his renewed threats against her. By this time, the case was already being considered by the ECtHR (following an application brought by Mrs. Opuz in July 2002), which requested explanation from the Turkish Government for why they were not taking protective measures, since the applicant's life was in danger. Following the ECtHR inquiry, the Turkish authorities investigated H.O., after which the threats stopped. Mrs Opuz alleged before the European Court of Human Rights that the Turkish government violated Article 2 (the right to life) and Article 3 (the prohibition of torture and inhuman treatment). These violations, the applicant contended, also amounted to a violation of Article 14 (the prohibition of discrimination). The Turkish government maintained that local authorities had provided an immediate and tangible response to Mrs Opuz and her mother, but that under the applicable domestic law, criminal prosecution depended on complaints lodged or pursued by the victim. Since Mrs Opuz and her mother consistently withdrew their complaints, Turkey asserted that authorities were unable to go forward with prosecuting H.O. The Court rejected these arguments and found that Turkey was in breach of Article 2 of the Convention in respect of the death of the applicant's mother. In a major turning point in ECtHR jurisprudence, the Court also found that there had been a violation of Article 3 of the Convention in respect of the authorities' failure to protect the applicant against domestic violence perpetrated by her former husband, thus finding for the first time that domestic violence can constitute inhuman treatment, and a violation of Article 14 of the Convention read in conjunction with Articles 2 and 3, because the State's failure to intervene in domestic violence amounted to discrimination against women. The Court reached its decision, in part, on the following grounds:]

134. […] The crimes committed by H.O. were sufficiently serious to warrant preventive measures and there was a continuing threat to the health and safety of the victims. When examining the history of the relationship, it was obvious that the perpetrator had a record of domestic violence and there was therefore a significant risk of further violence.

138. […] [T]here appears to be an acknowledgement [among States Parties] of the duty on the part of the authorities to strike a balance between a victim's Article 2, Article 3 or Article 8 rights in deciding on a course of action. In this connection, having examined the practices in the member States […], the Court observes that there are certain factors that can be taken into account in deciding to pursue the prosecution: the seriousness of the offence; whether the victim's injuries are physical or psychological; if the defendant used a weapon; if the defendant has made any threats since the attack; if the defendant planned the attack; the effect (including psychological) on any children living in the household; the chances of the defendant offending again; the continuing threat to the health and safety of the victim or anyone else who was, or could become, involved; the current state of the victim's relationship with the defendant and the effect on that relationship of continuing with the prosecution against the victim's wishes; the history of the relationship, particularly if there had been any other violence in the past; and the defendant's criminal history, particularly any previous violence.

139. It can be inferred from this practice that the more serious the offence or the greater the risk of further offences, the more likely that the prosecution should continue in the public interest, even if victims withdraw their complaints.

143. […] [I]t does not appear that the local authorities sufficiently considered the above factors when repeatedly deciding to discontinue the criminal proceedings against H.O. Instead, they seem to have given exclusive weight to the need to refrain from interfering with what they perceived to be a "family matter" […]. Moreover, there is no indication that the authorities considered the motives behind the withdrawal of the complaints. This is despite the applicant's mother's indication to the Diyarbakır Public Prosecutor that she and her daughter had withdrawn their complaints because of the death threats issued and pressure exerted on them by H.O. […] It is also striking that the victims withdrew their complaints when H.O. was at liberty or following his release from custody.

144. As regards the Government's argument that any further interference by the national authorities would have amounted to a breach of the victims' rights under Article 8 of the Convention, the Court notes its ruling in a similar case of domestic violence (see Bevacqua and S. v. Bulgaria, no. 71127/01, § 83, 12 June 2008), where it held that the authorities' view that no assistance was required as the dispute concerned a "private matter" was incompatible with their positive obligations to secure the enjoyment of the applicants' rights. Moreover, the Court reiterates that, in some instances, the national authorities' interference with the private or family life of the individuals might be necessary in order to protect the health and rights of others or to prevent commission of criminal acts

(see K.A. and A.D. v. Belgium, nos. 42758/98 and 45558/99, § 81, 17 February 2005). The seriousness of the risk to the applicant's mother rendered such intervention by the authorities necessary in the present case.

145. […] The Court thus considers that, bearing in mind the seriousness of the crimes committed by H.O. in the past, the prosecuting authorities should have been able to pursue the proceedings as a matter of public interest, regardless of the victims' withdrawal of complaints (see, in this respect, Recommendation Rec(2002)5 of the Committee of the Ministers, paragraphs 80-82 above).

147. [..] In any event, the Court would underline that in domestic violence cases perpetrators' rights cannot supersede victims' human rights to life and to physical and mental integrity (see the Fatma Yıldırım v. Austria and A.T. v. Hungary decisions of the CEDAW Committee, both cited above, §§ 12.1.5 and 9.3 respectively).

149. In these circumstances, the Court concludes that the national authorities cannot be considered to have displayed due diligence. They therefore failed in their positive obligation to protect the right to life of the applicant's mother within the meaning of Article 2 of the Convention.

161. The Court observes also that the violence suffered by the applicant, in the form of physical injuries and psychological pressure, were sufficiently serious to amount to ill-treatment within the meaning of Article 3 of the Convention.

176. The Court concludes that there has been a violation of Article 3 of the Convention as a result of the State authorities' failure to take protective measures in the form of effective deterrence against serious breaches of the applicant's personal integrity by her husband.

*Access to judicial remedies*

Judicial remedies shall be accessible and effective. The case of *Airey v. Ireland* (1979) demonstrated that the judicial remedies that can allow a victim of domestic violence to escape the violent situation through, inter alia, divorce or separation proceedings which shall be accessible and effective in order to guarantee practical – not just theoretical or illusory protection to the victim in a vulnerable position. **Such an effective access can, from time to time, require that the victim is afforded legal aid due to the complexity of the case, the victim's unfamiliarity with the court proceedings but also from the point of view of the victim's weakened capacity to represent her case due to her emotional involvement.**

*Thorough and effective investigation*

In *Aydin v. Turkey* (1996), a case that concerned the rape of a young Turkish woman of Kurdish origin by a state official, the Court found a violation due to the lack of a thorough and effective investigation, evident in the fact that the medical examination of the victim was performed by doctors who had no experience of dealing with rape victims, but also in the fact that the purpose of the investigation led by the public prosecutor was to establish whether the applicant had lost her virginity, when the focus should really have been on whether the applicant was a rape victim.

In *MC v. Bulgaria* (2004), the applicant, who was aged 14 at the time of the attack, complained that she had been raped by two men. The Bulgarian Criminal Code required that a complaint could only be established if "the victim was coerced into having sexual intercourse by the use of force or threats" (para. 80). The case had been discontinued because there was no evidence of threat or force. The Court found that both Article 3 and 8 had been breached. States were obligated "to protect the individual's physical integrity and private life and to provide effective remedies in this respect". The Court stated again that obligations under Article 3 did not apply only to State officials and concluded "States have a positive obligation inherent in Articles 3 and 8 of the Convention to enact criminal-law provisions effectively punishing rape and to apply them in practice through effective investigation and prosecution". (para. 153)

European Court of Human Rights, *M.C. v. Bulgaria* (Application no. 39272/98), judgement of 4 December 2003 (final 4 March 2004), paras. 153, 164-166, 181-185.

[On 31 July 1995, the applicant (M.C.), aged 14 (which was the age of consent for sexual intercourse in Bulgaria), was invited by a 20-year old male acquaintance (A.) to go with two of his friends, P. and V.A. to a disco bar 17 km away from her home. M.C. agreed on the condition that she was back home by 11 p.m. that night. The applicant

had met P. previously in a disco bar and had danced with him once. A. was the older brother of a classmate of hers. After going to the disco bar, A suggested that the group stop at a nearby reservoir to go swimming. Although M.C. objected, they drove to the reservoir. Once there, M.C. remained in the car, while the others went out. Shortly thereafter, P came back, sat in the front seat of the car next to M.C. and began kissing her. The applicant submitted later on to the investigating authorities that she had been scared and embarrassed and she had not had the strength to resist violently or scream. Her efforts to push P. back were unsuccessful, as he was far stronger. P. undressed her partially and forced her to have sexual intercourse with him. P later told the investigating authorities that the sex was consensual. Around 3:00 a.m. the same night, the group went to a nearby town where V.A.'s relatives had a house. While there, M.C. stayed close to A because he was the brother of a classmate and she believed he would protect her. Instead, A forced M.C. to have sexual intercourse with him on a bed. M.C. begged A to stop, but did not physically resist. A later told the investigating authorities the sex was consensual. Later that morning, M.C.'s mother found her at the house of V.A.'s relatives. The applicant and her mother went directly to the local hospital, where they were directed to see a forensic medical examiner. The applicant was examined at about 4 p.m. The examination found that her hymen had been freshly torn. The examiners also noted grazing on the applicant's neck, measuring 35 mm by 4 mm, and four small oval-shaped bruises. Ten days later, the family decided to file a complaint. On 11 August 1995 the applicant made a written statement about the events of 31 July and 1 August. On the same day P. and A. were arrested and made written statements. They claimed that the applicant had had sexual intercourse with them of her own free will. The two men were released. On 25 August 1995 a police officer drew up a report and forwarded the file to the competent prosecutor. On 14 November 1995, the district prosecutor began criminal proceedings and referred the case to an investigator who did not take any action on the case until November 1996. The investigator completed his work on the case on 18 December 1996. He drew up a report stating that there was no evidence that P. and A. had used threats or violence, and proposed that the prosecutor close the case. Having found the initial investigation had not been objective, thorough or complete, the district prosecutor ordered an additional one. The second investigator again proposed that the case should be closed. On 17 March 1997 the district prosecutor ordered the closure of the criminal investigation. He found, inter alia, that the use of force or threats had not been established beyond reasonable doubt. In particular, no resistance on the applicant's part or attempts to seek help from others had been established. M.C. unsuccessfully lodged consecutive appeals with other authorities. The appeals were dismissed in decisions of 13 May and 24 June 1997. The decision of 13 May 1997 stated: "It is true that, as can be seen from the report of the forensic psychiatric experts, the young age of the applicant and her lack of experience in life meant that she was unable to assert a stable set of convictions, namely to demonstrate firmly her unwillingness to engage in sexual contact. There can be no criminal act under […] the Criminal Code, however, unless the applicant was coerced into having sexual intercourse by means of physical force or threats. This presupposes resistance, but there is no evidence of resistance in this particular case. P. and A. could be held criminally responsible only if they understood that they were having sexual intercourse without the applicant's consent and if they used force or made threats precisely with the aim of having sexual intercourse against the applicant's will. There is insufficient evidence to establish that the applicant demonstrated unwillingness to have sexual intercourse and that P. and A. used threats or force." The decision of 24 June 1997 reiterated those findings. It also stated: "What is decisive in the present case is that it has not been established beyond reasonable doubt that physical or psychological force was used against the applicant and that sexual intercourse took place against her will and despite her resistance. There are no traces of physical force such as bruises, torn clothing, etc. ... It is true that it is unusual for a girl who is under age and a virgin to have sexual intercourse twice within a short space of time with two different people, but this fact alone is not sufficient to establish that a criminal act took place, in the absence of other evidence and in view of the impossibility of collecting further evidence." The Court rejected these arguments and found that Bulgaria had violated its positive obligations under both Articles 3 and 8 of the Convention, in part on the following grounds:]

153. […] States have a positive obligation inherent in Articles 3 and 8 of the Convention to enact criminal-law provisions effectively punishing rape and to apply them in practice through effective investigation and prosecution.

164. […] the evolving understanding of the manner in which rape is experienced by the victim has shown that victims of sexual abuse – in particular, girls below the age of majority – often provide no physical resistance because of a variety of psychological factors or because they fear violence on the part of the perpetrator.

165. Moreover, the development of law and practice in that area reflects the evolution of societies towards effective equality and respect for each individual's sexual autonomy.

166. […] [A]ny rigid approach to the prosecution of sexual offences, such as 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. In accordance with contemporary standards and trends in that area,

the member States' positive obligations under Articles 3 and 8 of the Convention must be seen as requiring the penalisation and effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim.

181. […] [W]hile in practice it may sometimes be difficult to prove lack of consent in the absence of "direct" proof of rape, such as traces of violence or direct witnesses, the authorities must nevertheless explore all the facts and decide on the basis of an assessment of all the surrounding circumstances. The investigation and its conclusions must be centred on the issue of non-consent.

182. […] [T]he failure of the authorities in the applicant's case to investigate sufficiently the surrounding circumstances was the result of their putting undue emphasis on "direct" proof of rape. Their approach in the particular case was restrictive, practically elevating "resistance" to the status of defining element of the offence.

183. The authorities may also be criticised for having attached little weight to the particular vulnerability of young persons and the special psychological factors involved in cases concerning the rape of minors […].

184. Furthermore, they handled the investigation with significant delays […].

185. […] [T]he investigation of the applicant's case and, in particular, the approach taken by the investigator and the prosecutors in the case fell short of the requirements inherent in the States' positive obligations – viewed in the light of the relevant modern standards in comparative and international law – to establish and apply effectively a criminal-law system punishing all forms of rape and sexual abuse.

*Respect for the applicant's personal integrity*

Throughout the entire investigation and judicial proceedings, respect has to be ensured for the applicant's personal integrity. It has to be recognised that women victims, especially in cases of sexual violence, often perceive criminal proceedings as an additional trauma. This is especially so, if the woman victim is forced into a direct confrontation with the aggressor, against her wish. (*Y. v. Slovenia*, 2015)

The standards developed through the case-law of the European Court of Human Rights in cases of violence against women have now been integrated in the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) and became legally binding. The Istanbul Convention includes numerous provisions aimed at facilitating access to justice for victims of gender-based violence, in particular by requiring states parties to:

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

Thus, the standards of the Istanbul Convention constitute a **core element** of ensuring equal access of women to justice.

The principle and standards enunciated above apply and should apply as well in cases that do not concern violence against women and in particular in employment matters and family matters.

***Summary list of case-law examples used in the manual***

**European Court of Human Rights**

- *Konstantin Markin v. Russia* (2012), Application no. 30078/06, Grand Chamber judgment of 22 March 2012
- *Halime Kiliç v. Turkey* (2016), Application no. 63034/11, judgment of 28 June 2016
- *M.C. v. Bulgaria* (2003), Application no. 39272/98, judgment of 4 March 2004
- *Y. v. Slovenia* (2015), Application no. 41107/10, judgment of 28 May 2015
- *Airey v. Ireland* (1979), Application no. 6289/73, judgment of 9 October 1979
- *A. v. Croatia* (2010), Application no. 55164/08, judgment of 14 October 2010
- *Branko Tomašić and others v. Croatia* (2009), Application no. 46598/06, judgment of 15 January 2009
- *Bevacqua and S v. Bulgaria* (2008), Application no. 71127/01, judgment of 12 June 2008
- *Stec and others v. the United Kingdom* (2006), Applications nos. 65731/01 and 65900/01, Grand Chamber judgment of 12 April 2006
- *Opuz v. Turkey* (2009), Application no. 33401/02, judgment of 9 June 2009
- *Durmaz v. Turkey* (2014), Application no. 3621/07, judgment of 13 February 2015
- *E.B. v. France* (2008), Application no. 43546/0, judgement of 22 January 2008

**European Committee of Social Rights**

- Collective complaints Nos. 124/2016 – 139/2016 filed by University Women of Europe against 15 state parties: Registered by the Secretariat of the European Committee of Social Rights on 24 August 2016, the complaints allege failure of states to observe the principle of equal pay for women and men for equal, similar or comparable work in breach of the European Social Charter's Articles 1, 4§3, and 20 and in conjunction with Article E.

**Committee on the Elimination of Discrimination against Women**

- *R.K.B. v. Turkey* (2012), CEDAW Communication no. 28/2010
- *Isatou Jallow v. Bulgaria* (2012), CEDAW Communication no. 32/2011
- *Ángela González Carreño v. Spain* (2014), CEDAW Communication no. 47/2012
- *Svetlana Medvedeva v. Russian* (2016), CEDAW Communication no. 60/2013
- *Anna Belousova v. Kazakhstan* (2015), CEDAW Communication no. 45/2012
- *V.K. v. Bulgaria* (2011), CEDAW Communication no. 20/2008
- *Inga Abramova v. Belarus* (2011), CEDAW Communication no. 23/2009,
- *X and Y v. Georgia (2015)*, CEDAW Communication no. 24/2009

**Court of Justice of the European Union**

- *Marschall v. Land Nordrhein- Westfalen* (1997)
- *Centrum v. Firma Feryn* (2008)
- *S. Coleman v. Attridge Law and Steve Law* (2008)

**Inter-American Court of Human Rights**

- *Atala Riffo and Daughters v. Chile* (2012)

**Country examples**

- *Lois E. Jenson v. Eveleth Taconite Co.* (1992) (United States)
- *R. v. Ewanchuk*, (1999) 1 S.C.R. 330 (Canada)

# MODULE III. WHAT EVERY PRACTITIONER SHOULD KNOW

Objectives: Module III is intended to encourage prosecutors and judges to consider how they can maximise the role they play in facilitating women's access to justice. This section also contains an overview of the legal issues that are considered most pressing for women in the five Eastern Partnership countries. While not all prosecutors or judges will encounter each of these topics in their work, it is important that legal professionals increase their general awareness of the most pressing women's rights issues in order to deliver justice more effectively. In addition to introducing the legal standards that apply to specific violations of women's rights, general information and commonly-held misconceptions and stereotypes are also included in Module III as essential information with which every legal practitioner should have a basic familiarity.

It should be noted that all of the topics discussed here are complex and require specific legal responses. As such, each topic should be the subject of a dedicated training. The objective here, however, is to sensitise prosecutors and judges to relevant legal standards and characteristics of these rights violations so that they will recognise when a gender sensitive approach is required.

## 3.1 The roles and duties of judges and prosecutors to ensure access to justice for women

Judges and prosecutors have different roles but both have a great deal of influence over the extent to which the rule of law is upheld in their particular jurisdiction. As State authorities, both professional groups can send powerful messages to society that violations of women's will not be tolerated and will be treated no less seriously under the law than any other human rights abuses. The acts of individual judges and prosecutors contribute to the overall identity of the justice system- whether it is perceived as impartial, fair and just. Judges and prosecutors also have important oversight authority and should provide leadership and expertise to other justice professionals, including the police, parole and probation staff, and attorneys.

In order to ensure that women have equal access to justice, judges and prosecutors should adopt a gender-sensitive approach to their work and ensure that they interpret the law in line with substantive notions of equality and international human rights. Practitioners should be aware of such issues as the disparate impact of laws on women; when it is legitimate to use differential treatment in law and policy in order to ensure an equitable outcome, and how inequitable distribution of resources leads to unequal distribution of power.[139]

Prosecutors and judges should take a pro-active approach to ensuring that barriers that women face in accessing justice are removed. For example, prosecutors dealing with cases of violence against women must build a strong case against the perpetrator that does not hinge entirely on the testimony of the victim herself. The prosecutor should actively pursue a range of other forms of evidence. Judges should consistently apply a gender perspective in their work, and being pro-active can involve ensuring that subordinate staff members (of prosecutor's offices or courts) receive training in gender-sensitive approaches or taking part in reform processes to develop gender-aware policies and guidance.

The justice system can play a crucial role in challenging patriarchal gender norms and upholding the value of gender equality in society. Judges and prosecutors have a responsibility to uphold the fairness and integrity of the justice system and to eliminate gender bias. Taking a gender sensitive approach to justice may at first glance appear to conflict with judges' duty of impartiality. In fact, impartiality does not require a *gender blind* approach.

139. Suprema Corta de Justicia de la Nación [National Supreme Court of Mexico]. 2014. *Judicial Decision-Making with a Gender Perspective: A Protocol*. English edition. Mexico City. p. 8

**Gender Sensitivity, Gender Blindness and Impartiality**

**Gender blindness** refers to ignoring and/or failing to address the gender dimension in a particular process, as opposed to **gender sensitivity** which is a process of taking the gender dimension into account.

For judges, the **duty of impartiality** is a central responsibility and an ethical obligation. The duty of impartiality does not, however, mean that judges must be gender blind. On the contrary, gender – as it intersects with other identity characteristics – should be taken into account and any disadvantages attached to it, challenged. Impartiality is not about closing ones eyes, but about keeping the mind open. "What makes it possible for [judges] to genuinely judge, to move beyond [their] private idiosyncrasies and preferences, is [their] capacity to achieve an "enlargement of mind" … by taking different perspectives into account."[140]

Furthermore, the right to equality before courts and tribunals and to fair trial requires impartiality in two contexts. First, "judges must not allow their judgement to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other. [and] Second, the tribunal must also appear to a reasonable observer to be impartial."[141]

Stereotypes are a form of bias and close legal practitioners' minds to the truth. As a justice of the Canadian Supreme Court stated:

> Myths and stereotypes are a form of bias because they impair the individual judge's ability to assess the facts in a particular case in an open-minded fashion. In fact, judging based on myths and stereotypes is entirely incompatible with keeping an open mind, because myths and stereotypes are based on irrational predisposition and generalization, rather than fact. They close one's mind to both truth and reality…[142]

Stereotyping permeates the various stages of the legal process: the investigation, trial and judgement phases. Accordingly, judges, magistrates and adjudicators are not the only actors in the justice system that apply, perpetuate and reinforce stereotypes. Prosecutors, law enforcement officials and other actors can allow stereotypes to influence investigations, trials and ultimately the judgement.[143] Prosecutors and judges should identify, challenge and dismantle stereotypes that occur in the justice system. This means not only that judges and prosecutors must not engage in discriminatory behaviour nor engage in gender stereotyping themselves, but they must also adopt gender sensitive approaches to the application of law and counter the myths and stereotypes present in laws or submitted by any of the parties.

> [E]ven the notoriously cautious courts are beginning to recognize that it is imperative that all jurists go beyond myths and stereotypes in order to ensure that justice is done… Debunking [myths] is more than simply being able to recognize myths and stereotypes. It is about exposing the ideological and cultural foundations of the myths and stereotypes prevalent in each culture and eradicating these fictions from the reasoning of all those who interpret our general culture, and, in particular, those in positions of power who contribute to their reinforcement'.[144]

## 3.2 Violence against women

*Violence against women* refers to some of the most commonly-occurring human rights violations suffered by women and girls around the world. Although the legal systems of the Eastern Partnership countries address violence against women in differing ways, experts agree that the problem is common for all the countries and it is one of the areas in which women experience considerable difficulties in protecting their rights. For this reason,

140. Honourable Madame Justice Claire L'Heureux-Dubé. 2001. 'Beyond the Myths: Equality, Impartiality, and Justice'. (2001) 10(1) *Journal of Social Distress and the Homeless.* paras. 87, 91.
141. Human Rights Committee, *General Comment No. 32*, para. 21 on Article 14 of the ICCPR.
142. Honourable Madame Justice Claire L'Heureux-Dubé. 2001. 'Beyond the Myths: Equality, Impartiality, and Justice'. (2001) 10(1) *Journal of Social Distress and the Homeless*. paras. 89, 92 [citations omitted].
143. CEDAW Committee. 2015. *General Recommendation No. 33 on women's access to justice*. paras. 26-27.
144. Honourable Madame Justice Claire L'Heureux-Dubé. 2001. 'Beyond the Myths: Equality, Impartiality, and Justice'. (2001) 10(1) *Journal of Social Distress and the Homeless*. paras. 87, 91.

the present manual devotes considerable attention to exploring the dynamics of violence against women and also the basic information that prosecutors and judges should know about the issue. More detailed guidance about good practices that prosecutors and judges should adopt to address violence against women is included in Module IV of the manual.

**Review**: You may have already encountered the phrases 'violence against women' and 'gender-based violence'. While the terms are often used interchangeably, including in some international conventions, they are not, in fact, synonymous.

**Gender-based violence** (GBV) is the more expansive terms and is usually used to mean "acts of physical, mental or social abuse (including sexual violence) that is attempted or threatened, with some type of force (such as violence, threats, coercion, manipulation, deception, cultural expectations, weapons or economic circumstances) and is directed against a person because of his or her gender roles and expectations in a society or culture."[145] While the most common forms of GBV are directed towards women and girls, men and boys can also be victims of GBV. And not all forms of violence that are directed towards females are gender-based.

**Violence against women** (VAW) is a form of gender-based violence- arguably the most common form.[146] VAW is defined as "a violation of human rights and a form of discrimination against women and shall mean all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life".[147]

This manual uses the term *violence against wo*men because it focuses on women's access to justice specifically. However, good practices that apply to GBV more broadly are also applicable.

Several important developments in international law have contributed to our understanding of violence against women. First, the most critical change was the shift from focusing only on direct State action (meaning, human rights violations perpetrated in the public sphere) to a recognition of States' obligation to take all necessary and reasonable measures to prevent human rights violations perpetrated by private individuals, and to investigate and punish such violations.[148] Second, this standard of customary law, the due diligence standard, was applied to private acts of violence against women.

Gender-based violence and violence against women were first defined in the **Declaration on the Elimination of Violence against Women** (1993), and **General Recommendation No. 12** (requiring State Parties to include information about measures to combat violence against women in periodic reports, 1989) to CEDAW.

While not a legally binding document, the Declaration on the Elimination of Violence against Women contains an important conceptualisation of this type of violence according to the context in which it is perpetrated: in the family or private sphere; in the general community or public sphere; and by the state (in custodial settings, for example).[149] The Declaration also characterises VAW not only as the violent acts themselves but as a deeply-rooted social problem – a "manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women."[150] **General Recommendation No. 19** later clarified that violence against women is a form of discrimination and a breach of the CEDAW, even though the Convention does not mention violence explicitly. General Recommendation No. 19 also draws a link between "traditional attitudes" that depict women as subordinate to men and violence against women. In particular such gender stereotypes contribute to some forms of violence, such as violence occurring in the family.[151] In July 2017, the CEDAW Committee also issued General Recommendation No. 35 on Violence against Women, updating the previous General Recommendation No. 19 on gender-based violence against women.

145. UN Women. Virtual Knowledge Centre to End Violence Against Women and Girls, available at: http://www.endvawnow.org/en/articles/347-glossary-of-terms-from-programmeming-essentials-and-monitoring-and-evaluation-sections.html.
146. Note that the Istanbul Convention includes a definition of "gender-based violence against women", under Article 3(d).
147. UN General Assembly. 1993. Declaration on the Elimination of Violence against Women. Article 1.
148. See *Velasquez Rodriguez v. Honduras,* Inter-American Court of Human Rights (1988) and ECtHR, *Opuz v. Turkey*, Application No. 33401/02, judgment of 9 June 2009.
149. Article 2, Declaration on the Elimination of Violence against Women.
150. Declaration on the Elimination of Violence against Women.
151. CEDAW Committee. 1992. General Recommendation No. 19 on Violence against Women, paras. 11, 21, 23.

Subsequent international human rights instruments have further articulated the obligations of the justice system to address VAW. For instance, the **Beijing Platform for Action** (a non-binding strategic framework) calls on national governments to:

> Promote an active and visible policy of mainstreaming a gender perspective in all policies and programmes related to violence against women; actively encourage, support and implement measures and programmes aimed at increasing the knowledge and understanding of the causes, consequences and mechanisms of violence against women among those responsible for implementing these policies, such as law enforcement officers, police personnel and judicial, medical and social workers, … and develop strategies to ensure that the revictimisation of women victims of violence does not occur because of gender-insensitive laws or judicial or enforcement practices.[152]

Expansive definitions of the forms that violence against women can take include domestic violence (physical, psychological, sexual violence), stalking, femicide, human trafficking, sexual violence, sexual harassment, harmful traditional practices, such as forced and child marriages, forced abortion and forced sterilization and so-called "honour crimes". UN conventions and Security Council resolutions address some forms of VAW explicitly, such as trafficking in persons, rape and sexual violence. Other international legal instruments articulate the need to protect women with particular vulnerabilities from violence, for example women with disabilities and women in conflict and post-conflict settings.

The **Istanbul Convention** is the first legally-binding instrument in Europe to include a definition of VAW. The definition reiterates principles from CEDAW and its supporting documents.

**A Closer Look at the Istanbul Convention**

Preventing violence, protecting victims, prosecuting perpetrators and the need for integrated polices at the national level, are the cornerstones of the Istanbul Convention. The measures required by the Convention are firmly based on the premise that violence against women cannot be eradicated without investing in greater equality between women and men and that in turn, only real equality between women and men and a change in power dynamics and attitudes can truly prevent this serious violation of human rights.

The Convention contains a number of ground-breaking features, including:

- Recognition of violence against women "as a violation of human rights and a form of discrimination against women." Under the Convention, VAW means "all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life" (Article 3(a)).
- The Convention requires parties to include a gender perspective in the implementation of its provisions.
- The most comprehensive non-discrimination clause among CoE treaties (21 specifically protected grounds and "any other status").
- **Criminalisation** of a comprehensive list of acts or behaviours defined as forms of violence against women (including **'new' offences**, such as forced marriage, sexual harassment and stalking, forced abortion and forced sterilisation).
- Specific provisions on **changing attitudes and eliminating stereotypes.**
- Reference to the **due diligence** standard, requiring state authorities to prevent, investigate, punish and provide reparation for acts of violence perpetrated by non-state actors.
- Inclusion of a chapter on the obligations of state parties to ensure that **investigations and judicial proceedings** concerning the forms of violence covered by the Convention are "carried out **without undue delay** while taking into consideration the **rights of the victim** during all stages of the criminal proceedings."
- Requiring parties to ensure that all measures form part of a **comprehensive and co-ordinated set of policies** that offer a holistic response to violence against women and domestic violence.
- Recognition of the role of non-governmental organisations (NGOs) and **the need to allocate appropriate resources** for the adequate implementation of all measures provided for in the Convention, including those carried out by civil society.

152. Beijing Platform for Action. Section D, para. 124(g).

**Note about the terms: *victim* and *survivor***

Increasingly, the term *survivor* is used to describe a woman who has been subjected to gender-based violence. This term is preferred, especially in the context of support and other social services, because it more empowering. However, in the legal context, the term *victim* is appropriate to refer to the injured party, whether or not they have survived the violence, and, therefore, it is the term used most often in this publication.

The Istanbul Convention, CEDAW, recommendations from the CEDAW Committee and guidance issued by the UN and at the European level set forth important standards for how the State, and in particular the criminal justice system, should address violence against women. Important principles that practitioners should be aware of include:

- **Human rights based interventions**. In order to provide effective support for victims, their rights, needs and safety must be at the forefront of all interventions. For prosecutors and judges, this standard requires a **victim-centred approach**, which may be a different approach from that used in other criminal proceedings. Through the investigation and adjudication, the special interests of female victims, including victims who serve as witnesses, should be given constant consideration. In order establish such an approach, special measures may be required, especially measures that remove barriers to justice. Note that Module IV of this manual is dedicated to practices that form the basis of a victim-centred approach.
- **Holding perpetrators accountable**. Some of the most insidious barriers to justice for victims of VAW are feelings of shame and guilt that they are somehow responsible for the violence and societal pressure to remain silent and tolerate abuse, without involving the formal legal system. Thus. one of the most important roles for the criminal justice system is to send a message to the wider community that violence is not acceptable, regardless of where it takes place, and that perpetrators will be held accountable under the law. Prosecutors and judges may face difficult situations in which the victim herself asks for leniency for the perpetrator, but legal professionals must remember their duty to apply the law uniformly. Furthermore, because perpetrators often attempt to manipulate or threaten victims once as case has entered the legal system, it can be empowering for the victim when a judge or prosecutor makes clear to the perpetrator that the State is managing the legal process and it is not in the victim's power to change the outcome.
- **Coordinated and multi-agency approach**. Violence against women is a complex problem and addressing it requires careful cooperation across a range of agencies, both within the justice system and outside. Information-sharing is especially critical in order to ensure the safety of the victim throughout legal proceedings. Taking a coordinated approach also means that individual agencies cannot shift responsibility for failings in the system as a whole. For example, prosecutors have oversight over the police and in this role can help to improve their capacity to carry out effective investigations. Additionally, coordination is required to ensure that risk assessments are carried out effectively and thoroughly. **Risk assessment** refers to a process in which possible risks of recidivism, escalation of violence and even lethal violence, are identified and evaluated on a continual basis. Typically, police officers conduct initial risk assessments, but prosecutors and judges also have responsibilities for managing risk.[153] In order for risk assessments to be carried out effectively, the assessment methodology must be unified across all responsible agencies; the whole system must use a single "language" and a core set of criteria for assessing the risk that a perpetrator will reoffend.
- **Training of professionals**. International law requires not only that States adopt laws and policies to address violence against women but also they must ensure that the relevant legal professionals have the capacity to enforce the law and uphold policy. Stand-alone trainings dedicated to specific topics of violence against women, which can be for mixed professionals, which can include social workers, health care providers, parole officers, etc., or a specific group, are the most effective. However, all prosecutors and judges should receive some basic training about this form of violence. Advanced and follow-on trainings may also be necessary, for example to update professionals about changes in the law such as the introduction of protective orders and the considerations to make when issuing them, or to talk about situations that require a particular response, for example, the increasing use of online and cyber stalking as a form of domestic violence.

In the domestic criminal justice context, violence against women is a latent crime, meaning that many forms of such violence take place away from public scrutiny (in the family or between people in a relationship) and most

153. Istanbul Convention, Article 51.

incidents are not ever reported to the authorities. A survey conducted by the European Union Agency for Fundamental Rights (FRA) (which included interviews with 42 000 women) asked women who had experienced physical and sexual violence, by partners and non-partners, why they did not contact the police following the most serious incident of violence, and some of the most prevalent answers included the following: I dealt with it myself; I thought it was not serious enough/never occurred to me; shame and embarrassment; I did not want anyone to know/kept it private; fear of offender or of reprisals.[154]

**Discussion point:** Practitioners should consider the findings from the FRA survey about the factors that dissuade female victims of violence from contacting the police and discuss whether the same factors may impact access to justice at other points along the justice chain and what other legal professionals, prosecutors and judges, could do to mitigate these factors.

The following sub-sections focus on three forms of violence against women considered most acute in the five Eastern Partnership countries: domestic violence, rape and sexual violence, and harmful practices.

### *3.2.1 Domestic violence*

*Review of legal standards*

Domestic violence, sometimes referred to as *intimate-partner violence* or *family violence* in different jurisdictions, is considered one of the most prevalent and "most insidious forms of violence against women."[155] According to the FRA survey, 31% of women in the European Union have experienced physical violence by either a partner or a non-partner since the age of 15.[156] Defining domestic violence as physical violence perpetrated by a partner is, in fact, a narrow understanding of what this form of violence entails. Domestic violence can affect women of all ages, and can include "battering, rape, other forms of sexual assault, mental and other forms of violence, which are perpetuated by traditional attitudes."[157]

The **Istanbul Convention** defines domestic violence as:

> [A]ll acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim. (Article 3)

*General considerations*

Domestic violence (DV) is not only the most commonly-occurring crime that women experience, it is one that many prosecutors and judges will encounter in their careers. Domestic violence cases can be very frustrating for legal practitioners as they require a specific approach. Unlike other crimes, acts of domestic violence are often concealed by both the perpetrator and the victim, they take place in the private sphere, and they are usually on-going violations.

Domestic violence includes physical, sexual and psychological violence (controlling behaviours), and, often, more than one type of violence at the same time. Often the act of domestic violence is understood through stereotypical assumptions about what constitutes violence, whereby psychological or emotional violence is excluded. Hence judges and prosecutors often minimise these types of violence or are reluctant to issue protective orders when there is no physical violence present. Furthermore, although many national legal systems do not recognise them as such, violence occurring between unmarried couples— **dating violence**, and between former partners— **stalking** (including cyber stalking)— are also forms of domestic violence.

The crimes of domestic violence and sexual violence often intersect. According to the FRA survey, incidents of sexual violence more often involve a partner, friend or an acquaintance than strangers. Furthermore, among women who have experienced violence from a partner, repeat incidents are typical, including both repeated forms of physical and sexual violence. For instance, over half of women who had been raped by a current

154. FRA, European Union Agency for Fundamental Rights. 2014. Violence against women: an EU-wide survey, Main Results. p. 64.
155. CEDAW Committee. 1992. General Recommendation 19 on Violence against Women. para. 23.
156. FRA- European Union Agency for Fundamental Rights, Violence against women: an EU-wide survey, Main Results, 2014, p. 39.
157. CEDAW Committee. 1992. General Recommendation 19 on Violence against Women. para. 23.

partner (or whose partner had attempted rape or to force the woman into sexual activity), had experienced more than one incident of sexual violence.[158] This manual addresses domestic violence and sexual violence as distinct topics (here, and in subsequent modules), but prosecutors and judges should be aware that domestic violence cases may not be limited to physical violence and that sexual violence occurring in a relationship (even in a marriage) should be treated no differently under the law from cases in which the perpetrator is a stranger.

Domestic violence involves people whose lives are intricately connected; the victim and perpetrator may share a home and/or have children together. The victim and perpetrator know each other intimately, and some continue to live together during legal proceedings.

Domestic violence follows a distinct pattern in which there are phases of extreme violence followed by periods in which the perpetrator is not violent and remorseful. This is known as the **cycle of violence**, in which there are periods of escalation, contrition and then continued violence. It is important that legal practitioners are aware of how the cycle of violence functions when they undertake risk assessments or evaluate a perpetrator's history of violent behaviour.

Of all forms of violence, domestic violence has the highest rate of repeat victimisation. According to the FRA study, the forms of violence most likely to recur are being pushed or shoved; slapped, grabbed or pulled by the hair; or beaten with a fist or a hard object. As many as 42% of the surveyed women reported that their former partners had beaten or kicked them six or more times. More than 20% of women reported that their current partners had grabbed them by the hair, beaten them with a fist or pushed their heads against something six or more times.[159]

When cases of domestic violence enter the legal system, it is usually after an especially severe episode which is rarely a first-time occurrence. A crime survey conducted in the United Kingdom found that on average a woman experiences 35 incidents of domestic violence before her first call to the police.[160] Prosecutors and judges should keep this finding in mind and be especially careful not to downplay the seriousness of the incident, suggest that the victim should exercise patience or that the victim and perpetrator should consider ways to 'reconcile.' Once a victim has decided to take steps to protect her rights through the legal system, she has most likely tired other options and found that they have been ineffective. Additionally, the majority of victims seeking help are motivated to end the violence but do not necessarily want their husbands or partners to be imprisoned.

The nature of DV cases requires prosecutors and judges to take an empathetic and understanding approach. They must be prepared to support victims in order to secure convictions for perpetrators. Legal professionals have an equally important role to play in conveying clear messages to society that domestic violence will not be tolerated.

*Understanding victims of domestic violence*

Due to their experiences, victims of domestic violence may be in shock and are generally under stress. Some will have experienced severe trauma. There are significant psychological consequences to victims of violence perpetrated by a partner (physical, sexual or psychological violence), such as high levels of depression, anxiety, feelings of vulnerability, loss of confidence and panic attacks.[161] Victims may well find it difficult to sleep and to concentrate. All of these emotional and psychological reactions can impact how a victim interacts with the justice system and her ability to make decisions about her case.

There is no 'typical' victim, and each person has different coping mechanisms. Some victims are very emotional (they may cry during interviews or in court) while others appear ambivalent or detached. Victims can seem to be uncooperative, but others may be active and engaged in legal proceedings. No assumptions should be based on how the victim behaves. Her apparent ambivalence should not be interpreted to mean that the incident did not take place or the case is not serious. Nor should a victim's engagement in legal proceedings be taken to mean she is 'too eager' and is trying to gain something for herself.

In some jurisdictions, the police are mandated to make arrests if there is sufficient probable cause that domestic violence has occurred. Even in countries without such provisions, cases of domestic violence may come to the attention of law enforcement without the victim having taken any action herself (for example, if police respond to an emergency call from a neighbour). In such cases, the victim may seem hostile towards the legal system

158. European Union Agency for Fundamental Rights (FRA). 2014. Violence against women: an EU-wide survey, Main Results. p. 43.
159. Ibid.
160. See Crown Prosecution Service. 2011. "Domestic Violence: the facts, the issues, the future - Speech by the Director of Public Prosecutions, Keir Starmer," 4 December 2011, available at: http://www.cps.gov.uk/news/articles/domestic_violence_-_the_facts_the_issues_the_future/.
161. FRA, European Union Agency for Fundamental Rights. 2014. Violence against women: an EU-wide survey, Main Results. p. 57.

that is attempting to hold the perpetrator responsible for his actions. It is imperative that justice sector actors do not become frustrated with the victim in this situation but that they explain the State's obligation to uphold the rule of law. It can be useful to clarify with the victim that her actions to assist and cooperate with the prosecution, such as testifying, are vitally important but that it is not her role to build a case against the perpetrator.

Keep in mind that a fair number domestic violence victims will have had previous negative experiences dealing with the law enforcement and justice systems. For example, it is not an uncommon situation for a victim to have reported incidents previously, but the police did not take action. Or a protective order could have been issued, but the perpetrator was not prosecuted for violating the terms of the orders. Prosecutors and judges should not be surprised if victims appear distrustful and sceptical of the legal system or have low expectations about the assistance they will receive from the state. It is the role of legal professionals to assure the victim that they State will provide an effective remedy.

Victims should not be viewed as passive. Most are resilient and have found ways to keep themselves and their children safe. Justice professionals must understand that when a victim stays with a perpetrator of violence, this is a coping mechanism.

Victims face a very high risk of repeated violence when they attempt to end the relationship and this, as well as other important factors (such as financial or other dependency on the perpetrator, pressure from family and the community, feelings of shame, stigmatisation etc.) are powerful motivators for women to remain in abusive relationships and not to report incidents of violence. In fact, victims tend to report violence when it is most severe and they feel most in danger. Victims are also the most likely to cooperate in criminal prosecutions when they feel that they are safe, their children and other family members are safe, and they are not at risk from further abuse from the perpetrator.

*Understanding perpetrators of domestic violence*

Perpetrators of domestic violence can be manipulative both in and out of court (for example, by delaying court dates, intimidating the victim/witness in court). In fact, this is the tactic they employ in order to manipulate the victim. Perpetrators use violence to exercise power and control over the victim and thus violence will often increase in severity and intensity once a case enters the legal system, in an effort to regain control.

When in court, the perpetrator may appear clam and reasonable. Neighbours who serve as witnesses often report that perpetrators "seem nice" or calm. Legal professionals must rely on accepted criteria to assess risk, such as evidence of prior abusive behaviour, evidence about the severity of the violence, abuse of drugs or alcohol, etc. As noted above, it is also very important that practitioners make clear to perpetrators that the State exercises control and makes decisions, and this may require removing the perpetrator from the court room if he appears to be intimidating the victim.

*Dispelling myths about domestic violence*

Gender stereotypes pertain to many aspects of women's lives, but some of the most harmful ones in the context of women's access to justice concern domestic violence. It is a very common, yet mistaken, belief that domestic violence is a private or family matter and should therefore be resolved within the family, without State intervention.

**Case-law example**: The case of *Opuz v. Turkey* involving ineffective state action in responding to domestic violence illustrates how this belief can deny women the equal protection of the law.[162] In order to avoid interfering in a "private or family matter," the authorities failed to take appropriate action against the applicant's husband, despite an established pattern of grave domestic violence.[163] He subsequently killed the applicant's mother while she was helping the applicant escape the family home. The ECtHR found that the applicant had demonstrated a *prima facie* case that domestic violence primarily affected women and that general and discriminatory judicial passivity in Turkey created a climate that was conducive to domestic violence.[164] This finding was

162. ECtHR, *Opuz v. Turkey*, Application No. 33401/02, judgment of 9 June 2009, paras. 185–191.
163. Ibid., para. 96
164. Ibid., paras. 198-201. This approach has been followed in domestic violence cases especially against the Republic of Moldova in which the domestic authorities took a similarly passive and discriminatory attitude towards women victims of domestic violence. See e.g. Eremia v. the *Republic of Moldova*, Application No. 3564/11, judgement of 28 May 2013; and *Mudric v. the Republic of Moldova*, Application No. 74839/10, judgment of 16 July 2013.

upheld in the case of *Durmaz v. Turkey* that involved ineffective investigations into the death of a victim of domestic violence.[165]

The misconception that domestic violence is a private family matter also involves assumptions about 'normal family relationships' and gender roles within families.

**Case-law example**: In an application, made to the CEDAW Committee *Isatou Jallow v. Bulgaria*, the Committee observed that "the authorities based their activities on a stereotyped notion that the husband was superior and that his opinions should be taken seriously, disregarding the fact that domestic violence proportionally affects women considerably more than men". It determined that the stereotype of men as heads of households and the related assumption of male superiority had influenced the decision of the State Party to investigate allegations of domestic violence made by Jallow's partner, but not to investigate the allegations of violence that Jallow made.

Such assumptions about gender roles within the family can have an influence on whether the legal system determines that an act or acts constitutes domestic violence and the level of severity that is required for sanctions or protective orders. This can result in rigid standards based on an overly narrow concept or stereotypical assumptions about what constitutes domestic violence that in turn, can impact women's right to a fair trial.[166]

**Case-law example**: In the case of *V.K. v. Bulgaria*, the Bulgarian courts found that there was no imminent threat to the life or health of V.K. and her children because they had not been subjected to domestic violence in the month prior to their application for protection. The CEDAW Committee determined that the refusal of the Bulgarian courts to issue V.K. a permanent protection order against her violent partner was based on 'stereotyped, preconceived and thus discriminatory notions of what constitutes domestic violence'.[167] It noted that gender-based violence does not require a direct and immediate threat to the victim, is not limited to physical harm, and includes "acts that inflict mental or sexual harm or suffering, threats of any such acts, coercion and other deprivations of liberty."[168]

In cases when one parent is alleged to be a domestic violence perpetrator, gender stereotyping can also affect the rights of women if issues of the care and custody of children are being determined in legal proceedings. The issue of the impact of gender stereotypes in family law cases (such as child custody and visitation) is discussed in detail in module 3.3.

The table below depicts the way in which a single stereotype may result in multiple inferences in cases of domestic violence:[169]

| **Stereotype** | **Men are/should be heads of households** |
|---|---|
| **(Group) assumption** | Men hold ultimate power in interpersonal and family relations and women are subordinate in those same relations |
| **Inferences (about an individual)** | Possible inferences include:<br>• a man is justified in using violence to discipline his wife if she does not obey him<br>• a man is justified in using violence or threats of violence to maintain power in marriage and family relations<br>• the wishes and desires of a (violent) man should be prioritised over those of his wife and their children, including in legal proceedings (e.g. child custody proceedings). |

165. *Durmaz v. Turkey,* Application No. 3621/07, judgment of 13 November 2014, para. 65. See also *Equal Access to justice in the case-law on violence against women before the European Court of Human Rights"* Council of Europe.
166. See *V.K. v. Bulgaria* (2011), Communication No. 20/2008, . . paras. 9.11-9.12
167. Ibid., para. 9.12
168. Ibid., para. 9.11-9.12
169. Simone Cusack. 2014. *Eliminating Judicial Stereotyping: Equal Access to Justice for Women in Gender-Based Violence Cases*. Prepared for the UN Office of the High Commissioner for Human Rights. p. 18.

**Discussion points:**

- Consider the following statement: "If the violence is serious enough, the victim will testify in court". Is this statement true or false? Explain your answer.
- Consider the myths and stereotypes below and identify points in the sample justice chain where these myths and stereotypes can impact women's access to justice.

| Myths and Stereotypes | Facts |
|---|---|
| Domestic violence is rare and happens only in "troubled" families. | • Research suggests that domestic violence is common and cuts across all socio-economic, educational, cultural, and ethnic groups. According to a survey carried out in 28 EU countries, 22% of women have experienced physical and/or sexual violence in a relationship with a man.[170] Globally, from 13% to 61% of women report having experienced physical violence from a partner.[171] |
| Violence between partners is a private matter. | • Violence between partners is a form of gender based violence. States have an obligation to prevent violence, protect victims and punish perpetrators. |
| If the violence and abuse were truly severe, the victim would have left if she had wanted to.<br>If the victim was battered that severely, she stayed because she derived masochistic enjoyment from it. | • Victims make decisions about when to leave a violent relationship based on complicated considerations including how best to protect themselves and their children.<br>• Cases that enter the legal system give only a partial picture of the victim's decision-making process and the steps she may have taken to escape a violent relationship.<br>• In fact, it is estimated that from 19%–51% of women who have ever been physically abused by their partner leave home for at least one night, and 8%–21% attempt to leave from two to five times.[172] |
| Even if violence takes place in a relationship, it is most likely an isolated incident. | • Of all forms of violence, domestic violence has the highest rate of repeat victimisation. In the United Kingdom, for example, it is estimated that nearly half of victims are victimised twice or more and almost one in four has been victimised three or more times.[173]<br>• When cases of domestic violence enter the legal system, it is usually after an especially severe episode and it is rarely a first-time incident. |
| Women perpetrate domestic violence against men as frequently as men do. | • In all countries where domestic violence has been studied, the overwhelming majority of victims are female (as high as 95%) and perpetrators are male.<br>• There are cases in which women use violence as self-defence or in response to abuse. Reports of female violence are "often exaggerated because abusers will accuse their partners of using violence, especially psychological violence, as a way to avoid or minimise their own responsibility."[174]<br>• It is possible that male victims underreport domestic violence due to feelings of embarrassment and shame.<br>• A justice system that uses a victim-centred approach will provide justice for victims of either sex. |
| Men who are violent cannot control their anger and frustration.<br>If a man was a "real abuser," he would be violent all of the time. | • This is not true. "Domestic violence is intentional conduct, and abusers are not out of control. Their violence is carefully targeted to certain people at certain times and places."[175]<br>• In court, perpetrators often appear very calm and reasonable. |

170. European Union Agency for Fundamental Rights (FRA). 2014. *Violence against women: an EU-wide survey. Results at a glance*. Luxembourg. p. 10.
171. World Health Organization. 2012. *Understanding and addressing violence against women*. p. 2, citing the WHO Multi-country study on women's health and domestic violence against women.
172. Ibid. p. 3.
173. Judicial College. 2013. *Equal Treatment Bench Book*. London. p. 11-17.
174. UNODC. 2011. *Preventing and Responding to Domestic Violence. Trainer's Manual For Law Enforcement and Justice Sectors in Viet Nam*. Hanoi. p. 49.
175. Ibid.

| | |
|---|---|
| Domestic violence is justified if the woman does not obey the man, which is her duty. | • Domestic violence is a form of gender-based violence and is never justified. |

### *3.2.2 Sexual violence*

*Review of legal standards*

Sexual violence is one the most common and most serious violations of human rights that women suffer. It is defined as any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or acts to traffic, or acts otherwise directed, against a person's sexuality.[176] It is committed against person's will— either the person has not given consent, or the person was unable to give consent (due to age or disability, for example). Sexual violence includes acts such as rape, sexual abuse of children, sexual abuse of people with disabilities, sexual harassment, enforced prostitution and trafficking for the purposes of sexual exploitation, forced abortion.

The **Istanbul Convention** includes a definition of sexual violence, obliging States to criminalise the following acts:

- engaging in non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object;
- engaging in other non-consensual acts of a sexual nature with a person;
- causing another person to engage in non-consensual acts of a sexual nature with a third person. (Article 36)

In addition to this Convention, a number of other hard and soft law instruments set the standards for the protection of victims from sexual offences. These include: CEDAW and General Recommendation No. 19, UN Declaration on Elimination of Violence against Women, Vienna Declaration and the Programme of Action (1993), Beijing Declaration and Platform for Action. Standards are detailed in the jurisprudence of CEDAW Committee[177] and the ECtHR.

States must ensure criminalisation of all acts of sexual violence, including those where no physical force and resistance is applied. The Istanbul Convention and the jurisprudence of the ECtHR define lack of consent as the central element of sexual offences,[178] while the CEDAW Committee jurisprudence gives an alternative of either defining offences by lack of consent or coercion, widely defined, though in its last case it opted for the consent based definitions.[179]

Further, there should be no legal gap with respect to protecting certain victims on account of procedural hurdles.[180] Regarding prosecution, the following standards are set in the relevant international documents and jurisprudence: prosecution must be prompt; it must be comprehensive – attention should not be focused on the question of force/resistance, but rather consent, which should be assessed in light of surrounding circumstances, and particular vulnerability of minors and women with disabilities should be taken into account; proceedings must be fair and impartial without prejudice to certain victims of account of their behaviour and character, and free from gender bias and gender stereotypes and no prejudice against victims on account of their behaviour or character.

The proceedings must be conducted in a respectful manner (which also applies to gynaecological examinations, which must be kept to minimum), questioning of the victim (which should be kept to minimum, especially if the victim is a minor) should not be intrusive, and questions about previous sexual experiences must not be asked. A victim's security and privacy must be protected.[181]

176. Etienne G. Krug, Linda L. Dahlberg, James A. Mercy, Anthony B. Zwi and Rafael Lozano (eds). 2002. *World report on violence and health*. Ch 6: Sexual violence. Geneva: WHO.
177. The CEDAW Committee has considered three cases on this subject: *Karen Vertido v. The Philippines* (2010), Communication No. 18/2008; *R.P.B. v. The Philippines* (2014), Communication No. 34/2011, and *V.P.P. v Bulgaria* (2012), Communication No. 31/2011.
178. ECtHR, *M.C. v. Bulgaria*, Application No. 39272/98, judgment of 3 December 2003.
179. CEDAW Committee. *R.P.B. v. The Philippines* (2014), Communication No. 34/2011,, para 9.
180. ECtHR, *X and Y v. the Netherlands*. Application No. 8978/90, judgment of 26 March 1985.
181. On victims rights see, e.g., 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.

*General considerations*

Sexual violence is a widespread phenomenon, both in peace and times of armed conflict. It is perpetrated by family members (parents, siblings, and relatives), intimate partners, acquaintances, strangers, State and quasi-State actors. While there might be cultural particularities with regard to forms of sexual violence, it is a worldwide problem rooted in gender inequality. Certain categories of women are particularly vulnerable, such as young women, poor women, women with disabilities, minority women, and women in custodial settings. Although the real dimensions of the problems are not known because statistics do not reflect the full picture due to underreporting, a World Health Organisation study found that around 10-27% women and girls experience sexual violence in their life times.[182] According to the European Union Agency for Fundamental Rights (FRA) survey, one in three women in the EU has been a victim of physical and sexual violence by a partner, a non-partner or both.[183]

Sexual violence has serious consequences for the physical, mental and social well-being of victims/survivors, who are often ostracised by their communities. Further, as a form of gender discrimination it has serious consequences for all women and society in general. It is hence important to combat sexual violence, and one of the ways is through the criminal justice system. Prosecution of sexual violence has many functions, including deterrence, justice for victims and affirming the principle of gender equality and women's human rights.

Sexual violence is vastly under-reported,[184] and some of the many reasons for underreporting include victims' feelings of shame and fear in the context of stigmatisation, as well as their reluctance to be subjected to legal processes that could themselves be intrusive, stressful or traumatic due to inadequate legislation, procedural issues or as a result of widely-held stereotypes.

*Understanding victims of sexual violence*

Prosecutors and judges should be aware that victims react to sexual violence in ways that are specific to this type of crime- violence against women. Legal practitioners should not assume that certain of the victim responses undermine their credibility.

As is the case with other forms of violence against women, victims of sexual violence may be in shock, experiencing trauma and require other forms of support alongside legal assistance, such as psychological support. Due to the prevalence of stereotypes about sexual violence (discussed in detail below) and stigmatisation of victims, many women never report sexual violence to the police. This is even more likely to be the case when the perpetrator is a person familiar to the victim, such as an acquaintance, co-worker, boyfriend or husband. Those who do report may not do so immediately, due to shame and fear. Note that the FRA study found that women who were victims of sexual violence perpetrated by a non-partner were the most likely to give the response that they did not contact law enforcement because: "I thought it was my fault," and victims of sexual violence in general were more likely to say that not wanting anyone to know about the violation kept them from contacting the police.[185]

Further, many victims do not resist violently and/or call for help because they are afraid or ashamed.[186] Many react with disassociation. The so-called frozen fright syndrome is particularly prevalent among young victims. The passive response is also common when perpetrators are known to the victims. Moreover, many victims will not show obvious signs of trauma after the event; emotional numbness is one of the characteristics of post-traumatic stress disorder (PTSD) from which many victims suffer.[187] Further, they may continue seeing the perpetrator, particularly if he is a member of family or the person with whom they have children.

Legal practitioners should also understand the serous risk of secondary victimisation in the course of the proceedings, in particular when testifying, when the victim is required to confront the perpetrator, answer questions repeatedly about incidents of rape, and various questions about her private and sexual life. Hence criminal justice agents should take steps to minimise overly intrusive questioning. At the same time, for some victims providing detailed testimony and confronting the alleged perpetrator in court can be empowering acts.

182. Claudia Garcia-Moreno, Henrika Jansen, Mary Ellsberg, Lori Heise and Charlotte Watts (eds.). 2005. *WHO Multi-Country Study on Women's Health and Domestic Violence against Women-Initial Results on Prevalence, Health Outcomes and Women's Responses*. Geneva: WHO.
183. European Union Agency for Fundamental Rights (FRA). 2014. *Violence against women: an EU-wide survey. Results at a glance*. Luxembourg. p. 27.
184. Denise Lievore. 2003. *Non-Reporting and Hidden Recording of Sexual Assault: An International Literature Review*. Canberra: Commonwealth Office on the Status of Women.
185. European Union Agency for Fundamental Rights (FRA). 2014. Violence against women: an EU-wide survey, Main Results. p. 64.
186. Sue Lees. 2002. *Carnal Knowledge: Rape on Trial*. Women's Press, Limited, Temkin and Krahe.
187. Edna B. Foa and Barbara O. Rothbaum. 1998. Treating the Trauma of Rape: Cognitive-Behavioral Therapy for PTSD. New York: Guilford

Following a victim-centred approach, prosecutors in particular should consult with victims to determine the most appropriate approach to testifying. Justice actors should generally ensure that confidentiality is protected and this may require protection of the victim's identity, from the press but also in court records.

*Understanding perpetrators of sexual violence*

In cases of sexual violence, the perpetrator is usually someone known to the victim and the victim's trust or dependency is often exploited by the perpetrator.[188] From research, we know that perpetrators are not atypical men, violent and/or psychologically disturbed.[189] It is not individual pathology, but misogyny, and the failure of the legal system to challenge it, that is most often the cause of offence.[190] It is hence extremely important that the social environment is challenged by securing accountably for the crime of rape. It is thus wrong to mitigate the sentence on account of professional respectability of the perpetrator, his family status etc. or to consider the so-called 'contribution of the victim'.

*Dispelling myths about sexual violence*

Stereotyping in varied forms can affect women's right to a fair trial in cases of sexual violence. The CEDAW Committee urges State Parties to "[e]nsure that all criminal proceedings involving rape and other sexual offences are conducted in an impartial and fair manner and free from prejudices or stereotypical notions regarding the victim's gender, age and disability".[191]

Three stereotypical assumptions about women's sexual behaviour are widespread: women want to be sexually possessed, women lie about being raped, and women are responsible for being raped.[192]

The first assumption is seen in the force-based definition of rape or in prosecutorial and judicial practices whereby cases in which there is no direct force/resistance are dismissed. However, even consent based definitions are often interpreted in practice in a way that equalises consent with submission, which is particularly the case with intimate partner rape.

The second assumption is seen in the collection and assessment of evidence, particularly questioning of the victim. Historically, corroboration of victim testimony was required and victims who reported late were considered suspect. While this is no longer a legal requirement in most CoE countries, prosecutors are often unwilling to charge perpetrators in situations where there is no corroborating evidence, and judges are often reluctant to convict in such cases. Victims are treated with suspicion, questioned about all aspects of their private lives to test their credibility and character. They are assessed against the myth of the 'real' victim as a chaste woman who takes all precautions to avoid rape, and when it happens is visibly disturbed and calls for help.[193] Certain categories of women who defy norms of proper womanhood are particularly suspect, such as sexually active women, single mothers, sex workers, those who drink alcohol or use drugs. Hence, prosecution is often abandoned in such cases.

The third assumption is also visible in the phase of assessment of evidence where victims are questioned about different aspects of their private lives, as well as in the sentencing phase, where a victim's 'contribution' is examined, as a circumstance that can mitigate the sentence. The following circumstances are often taken as relevant: where the victim was at the time of offence (did she take risks, such as hitchhiking or walking in a dark street, was she having fun?), how she behaved (particularly whether she 'flirted' or drank), what she wore (particularly whether she wore 'provocative' clothes), how she behaved afterwards (particularly if she was sexually active). Due to this focus on the victim, victims often feel that they have been charged with a crime. Many describe criminal proceedings as a second rape.[194]

The three assumptions reflect and perpetuate the 'real rape' mythology, according to which 'real rape' is a violent attack by a stranger on an unsuspecting victim who resist to her utmost.[195]

188. Sue Lees. 2002. *Carnal Knowledge: Rape on Trial*. Women's Press, Limited, Temkin and Krahe.
189. Ibid.
190. Ibid.
191. *R.P.B. v. The Philippines* (2014), Communication No. 34/2011, , paras. 9(b)(iii) and 9(b)(iv).
192. Ivanna Radačić.2014. Seksualno nasilje: mitovi, stereotipi i pravni sustav. Zagreb: TimPress.
193. Jennifer Temkin. and Barbara Krahé. 2008. Sexual Assault and the Justice Gap: A Question of Attitude. Oxford: Hart Publishing.
194. Susan Estrich. 1987. Real Rape. Cambridge: Harvard University Press.
195. Jennifer Temkin, J. and Barbara Krahé. 2008. Sexual Assault and the Justice Gap: A Question of Attitude. Oxford: Hart Publishing.

**The myth of the 'ideal rape victim' means that offenders are not held legally accountable**

The woman who comes to the attention of the authorities has her victimization measured against the current rape mythologies, i.e., who she should be in order to be recognized as having been, in the eyes of the law, raped; who her attacker must be in order to be recognized, in the eyes of the law, as a potential rapist; and how injured she must be in order to be believed.

If her victimisation does not fit the myths, it is unlikely that an arrest will be made or a conviction obtained.[196]

The fact that gender stereotypes are entrenched in the area of rape laws and practices, leads to the inferences below, which may impact individual cases.[197]

| **Stereotypes** | **Women should be chaste** | **Women should dress and behave modestly** |
|---|---|---|
| **(Group) assumption** | Women should abstain from extramarital sex | Women should dress and behave to avoid impropriety and indecency, especially to avoid sexual attention |
| **Inferences (about an individual)** | Possible inferences include:<br>• an unchaste woman has a propensity to consent to sex and must have consented<br>• a woman who has had prior sexual relations is a less credible witness<br>• an unchaste woman 'deserved' raped and is not 'worthy' of criminal justice system intervention<br>• violence is justified to curtail sexual promiscuity or regain sexual control | Possible inferences include:<br>• an immodest woman 'provoked' sexual assault and must accept blame<br>• an immodest woman is a less credible witness |

Widespread myths and stereotypes concerning sexual violence are explored in more detail in the table below.

| **Myths and Stereotypes** | **Facts** |
|---|---|
| "Real" rape victims would have put up a fight and shown signs of a physical struggle. | • Women often do not physically resist rape for a variety of reasons: fear, shock, the power dynamics between the victim and perpetrator, duress or intimidation. They may choose not to resist out of fear for greater injury.<br>• They may dissociate from the event or cannot resist due to their physical or mental state. Young women in particular are reported to "freeze" in response.<br>• Not only do perpetrators tend to be physically stronger, but they can produce a situation of fear or abuse of trust where no direct force is needed. |
| It can be assumed that women are always sexually available. | • The belief that women have the burden of actively showing non-consent rather than that men have the responsibility to ascertain consent denies women's sexual autonomy and implies that they are in a state of constant consent to sexual activity.[198] |
| When women are silent, it can be inferred that they are consenting to sex even if forced, threatened or coerced. Their silence can be understood as consent. | • No. Consent to sexual intercourse must be clear and freely given. There is a difference between consent and submission, which gives rise to criminal liability. |

196. *R. v. Seaboyer, [1991] 2* S.C.R. (L'Heureux-Dubé & Gonthier JJ, dissenting in part) (Canada, Supreme Court), 577, 650.
197. Simone Cusack. 2014. Eliminating Judicial Stereotyping: Equal Access to Justice for Women in Gender-Based Violence Cases, Research Report, Prepared for the UN Office of the High Commissioner for Human Rights. p. 19.
198. Canada, Supreme Court. *R. v. Ewanchuk*. 1999. 1 S.C.R. 330. L'Heureux-Dubé J, concurring. para. 95

| | |
|---|---|
| Women provoke or invite sexual attacks through their behaviour: by being out late, being in isolated places or by dressing in a particular manner. | • The only indication of a woman's willingness to have sex should be her clear and free consent. Nothing that women do can be taken as provocation to rape.<br>• In the UK, juries can be told that if a man flashed his wallet in a public area and then had it stolen, no one would say that the person who stole the wallet was not really a thief.[199] Neither would it be acceptable to say that the man/victim was "asking for it" because he was showing his wallet. |
| A sex worker cannot be raped. | • The law should be applied impartially. Just because a woman performs sex acts in exchange for money, it does not follow that she should accept any form of violence. The relevant consideration is whether the sex worker consented to sex during the incident in question. |
| Raped women have not been victimised – they have been dishonoured or shamed and are guilty. | • Sexual violence is an infringement of dignity, autonomy, and physical and mental integrity. |
| Women are likely to fabricate allegations about being raped or sexually assaulted. | • There is no indication that there are more false reports of rape in comparison to any other crime. Data demonstrate that the number of women who fabricate sexual assault complaints is very low (based on Australian research indicating that less than 2% of rape complainants were charged with making a false report).[200]<br>• By contrast, while sexual violence against women is extremely high, the extent to which it is reported, and effectively prosecuted is extremely low. A reason for this is the prevalence of gender stereotypes relating to sexual violence that have permeated all aspects of the criminal justice process.[201] |
| Men cannot control their sexual urges and therefore cannot be held responsible for committing sexual violence | • Rape is about power and domination. Delinking the sexual component from rape allows it to be seen as the violent act of domination that it is. |
| The "real" victim immediately reports her rape. | • There is no evidence that delayed reports are false. By contrast, statistics indicate that most cases of sexual violence are not reported. This may be due to stigma, shame, shock or fear.<br>• The Court of Appeal in the UK confirmed that juries can be told that a delay in reporting can be due to trauma after the rape.[202]<br>• If the perpetrator is personally known to the victim, it can be even more difficult to report the rape. |
| Most rapes are committed by strangers. | • In 90% of cases rapists are known to the victim: a partner or former partner, friend, colleague, acquaintance or professional (e.g. a doctor, therapist).[203] |
| Rape by a stranger is more traumatic than rape by a known person.[204] | • Sexual assault is a traumatic experience regardless of whom the perpetrator is. Rape by a known person can be more traumatic sometimes due to the grave breach of trust.[205] |

199. Judicial College. 2013. *Equal Treatment Bench Book*. London. p. 222.
200. See e.g. Victoria Law Reform Commission Sexual Violence Discussion Paper. 2001. p. 156 cited in International Commission of Jurists. 2015. Sexual Violence Against Women: Eradicating Harmful Gender Stereotypes and Assumptions in Law and Practice. p.11.
201. For data and further discussion see International Commission of Jurists. 2015. Sexual Violence Against Women: Eradicating Harmful Gender Stereotypes and Assumptions in Law and Practice. p. 3.
202. Judicial College. 2013. *Equal Treatment Bench Book*. London. p. 222.
203. Ibid.
204. Ibid.
205. Ibid.

### *3.2.3 Harmful practices*

Harmful practices (sometimes referred to as *harmful traditional practices*) are specific forms of violence that are most often directed toward women and girls and are rationalised as having cultural or religious roots or stemming from morality. The UN Special Rapporteur on Violence against Women has noted:

> Certain customary practices and some aspects of tradition are often the cause of violence against women. […] Blind adherence to these practices and State inaction with regard to these customs and traditions have made possible large-scale violence against women. States are enacting new laws and regulations with regard to the development of a modern economy and modern technology and to developing practices which suit a modern democracy, yet it seems that in the area of women's rights change is slow to be accepted.[206]

Harmful practices include a range of human rights violations that can be perpetrated against females throughout their life cycles, as illustrated in the table below.[207] Note that the table does not present an exhaustive list, but it focuses on specific harmful practices that are more common in the European and Caucasus regions. Several specific harmful practices— prenatal sex selection[208] and early and forced marriage— have been identified by some of the beneficiary countries under this project as especially problematic.

| Phase of the Life Cycle | Type of Harmful Practice |
|---|---|
| Prenatal | Prenatal sex selection and abortion of female foetuses (linked to a preference for sons) |
| Infancy | Female infanticide |
| Childhood and Adolescence | Early and forced marriage; crimes committed in the name of 'honour' |
| Adulthood | Crimes committed in the name of 'honour''honour'; forced marriage |
| Old Age | Maltreatment of widows; elder abuse |

*Review of legal standards*

CEDAW and the Convention on the Rights of the Child (CRC) require State parties to address harmful practices. The former convention calls on States to "modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women," (Article 5) while the latter requires the abolition of "traditional practices prejudicial to the health of children." (Article 24(3)).

The CEDAW Committee and the Committee on the Rights of the Child have defined harmful practices as persistent practices or forms of behaviour that are "grounded in discrimination" on the basis of sex, gender and age in additional to "multiple and/or intersecting forms of discrimination" and that often involve violence and cause physical and/or psychological harm or suffering.[209] The criteria for determining if a practice is harmful within the scope of CEDAW and the CRC are as follows:

- The practice is a denial of the dignity and/or integrity of the individual and a violation of the human rights and fundamental freedoms of the two conventions;
- The practice constitutes discrimination against women or children and is harmful (meaning, it results in negative consequences that include physical, psychological, economic and social harm and/or violence and limitations on the victim's capacity to participate fully in society or develop and reach their full potential;

206. Commission on Human Rights. 1994. Preliminary report submitted by the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy. para. 67.
207. Chart developed from United Nations Office of the High Commissioner for Human Rights (OHCHR) Fact Sheet: Harmful Traditional Practices Affecting the Health of Women and Children Population Fund. Accessible from http://www.ohchr.org/Documents/Publications/FactSheet23en.pdf;
208. PACE. 2011. Resolution 1829 (2011) on Prenatal sex selection, accessible at: http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=18020&lang=en.
209. CEDAW Committee and Committee on the Rights of the Child. 2014. *Joint General Recommendation No. 31 on Harmful Practices,* CEDAW/C/GC/31-CRC/C/GC/18. para. 15.

- The practice is "traditional, re-emerging or emerging" and is prescribed and/or kept in place by social norms that perpetuate male dominance and inequality of women and children, on the basis of sex, gender, age and other intersecting factors;
- The practice is imposed on women and children by family members, community members or society at large, regardless of whether the victim provides, or is able to provide, full, free and informed consent.[210]

Joint General Recommendation No. 31 on harmful practices calls on States to ensure that "women and children subjected to harmful practices have equal access to justice, including by addressing legal and practical barriers to initiating legal proceedings, such as the limitation period, and that the perpetrators and those who aid or condone such practices are held accountable".[211] To this end, it is recommended that States, *inter alia,* draft legislation on harmful practices, implement protective mechanisms for victims and provide victims with legal remedies and reparations. Capacity development for a broad range of professionals is also envisioned. Law enforcement personnel, including the judiciary, should receive training on the implementation of "new or existing legislation criminalising harmful practices to ensure that they are aware of the rights of women and children and are sensitive to the vulnerable status of victims".[212]

For State parties, the Istanbul Convention requires that the necessary legislative and other measures be taken to "promote changes in the social and cultural patterns of behaviour of women and men with a view to eradicating prejudices, customs, traditions and all other practices which are based on the idea of the inferiority of women or on stereotyped roles for women and men" (Article 12). The Convention explicitly prohibits several harmful practices as forms of violence against women and girls: forced marriage, female genital mutilation, and crimes committed in the name of 'honour' (Articles 37, 38, 42).

Note that the Istanbul Convention uses the term "**forced marriage**" to describe intentional conduct of forcing an adult or a child to enter into a marriage (Article 37). The CoE Committee of Ministers (CM) recommends that all member states "prohibit forced marriages, concluded without the consent of the persons concerned," without distinguishing between child or adult spouses.[213]

Other international legal instruments and standards draw particular attention to the issues of **child marriage**, sometimes referred to as ***early marriage***.[214] Child marriage violates a multitude of rights including girls' rights to education and health s well as sexual and reproductive rights. The CEDAW Committee has emphasised that States must establish "independent, safe, effective, accessible and child-sensitive complaint and reporting mechanisms which are accessible to girls, and which have the girls' best interests as a primary consideration".[215] It highlighted that special consideration is to be given to girls because they face specific barriers in accessing justice due to their limited social and legal capacity to make significant decisions about their lives.[216]

*General considerations*

Legal proceedings concerning harmful practices can be especially problematic because they often involve minor girls (especially in cases of forced marriage), and the most common perpetrators are family or community members. The investigation process, in particular, can be complicated, and must be approached differently from other criminal investigations. For example, as noted about so-called honour-based crimes, but relevant to all harmful practices, "rather than being viewed as criminal acts against women, [these crimes] … are often sanctioned by the community. […] In addition, prosecution of cases may be impeded by unwillingness on the part of individuals with knowledge of the case to provide corroborating evidence."[217] Judges and prosecutors must be acutely aware of the potential negative impact on victims, such as threats and retaliation, if they are seen to have transgressed a traditional or cultural practice in the community.

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210. Ibid. para. 16.
211. Ibid. para. 55(o).
212. Ibid. para. 71.
213. Committee of Ministers. 2002. Recommendation CM/Rec(2002)5, para. 84.
214. See, e.g., ESCR Committee, *Concluding Observations: Sri Lanka*, UN Doc. E/C.12/LKA/CO/2-4 (2010), para. 15; ESCR Committee, *Concluding Observations: Chad*, UN Doc. E/C.12/TCD/CO/3 (2009), para. 19; ESCR Committee, *Concluding Observations: Colombia,* UN Doc. E/C.12/COL/CO/5 (2010), para. 18; ESCR Committee, *Concluding Observations: India*: UN Doc. E/C.12/IND/CO/5 (2008), paras. 13, 33; Juan Méndez, *Report of the UN Special Rapporteur on torture and other cruel, inhuman and degrading treatment,* UN Doc. A/HRC/31/57 (2016), para. 58; article 21(2) of the African Charter on the Rights and Welfare of the Child requires states to prohibit child marriage. *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, 2nd Ordinary Sess., Assembly of the Union, *adopted* 11 July 2003, CAB/LEG/66-6 (*entered into force* 25 November 2005).
215. CEDAW Committee. 2015. *General Recommendation No. 33 on Women's access to justice*, UN Doc. CEDAW/C/GC/33. para. 25(b).
216. Ibid., para. 24.
217. CEDAW Committee. *General Recommendation No. 31 on Harmful practices,* CEDAW/C/GC/31-CRC/C/GC/18, para 30.

Prosecutors and judges must take special care to balance the rights of the victim with the best interest of the child, which may at times conflict. For example, if a girl aged 13 is forced into marriage by her mother and father, what form will access to justice take if her parents are prosecuted and potentially imprisoned?

Legal practitioners should apply the law impartially, keeping in mind and addressing the specific potential risks to victims. Harmful practices should be treated under the law with the same degree of seriousness as other crimes or infractions. National law and policy should make clear that "where there are conflicts between customary and/or religious law and the formal justice system, the matter should be resolved with respect for the human rights of the survivor and in accordance with gender equality standards; and the processing of a case under customary and/or religious law does not preclude it from being brought before the formal justice system".[218]

Legal practitioners must also take care to not rely on stereotypes about the practices of minority community members to justify inaction. Certain harmful practices are seen as "cultural" or specific to certain communities or groups. This can be problematic as these practices could be seen as part of their culture and therefore to be accepted or at the very least, tolerated. Alternatively, such violence may be relied upon to criticise certain immigrant and minority communities.[219]

*Dispelling myths about harmful practices*

Various gender stereotypes dominate the area of harmful practices. Sexual stereotypes that women should be chaste, that their sexuality needs to be controlled and that virginity is a prerequisite to marriage, underlie harmful practices such as early, child and forced marriages. The practice of forced marriage is often justified by stereotyped views that women need to be protected to ensure their financial and physical security, and are incapable of making decisions for themselves. Early and child marriages have also been defended on the grounds of the stereotyped notion that girls mature faster and are therefore more likely to handle family life at an earlier age than boys.[220]

**Discussion points:**

- What are the gender stereotypes that relate to harmful practices?
- As a judge or prosecutor, what particular considerations might inform your response to cases of harmful practices?
- Whose rights are you seeking to protect and what are these rights?
- What are your duties in applying the law in circumstances when the victim's rights may conflict with the wishes of her parents and community?
- What steps can you take to protect the rights of the victim where the wishes of the family and community contravene her rights?
- What role can community leaders and other social actors play in supporting justice actors in addressing harmful cultural practices? How can these various actors work together?
- What types of redress may provide an effective remedy to victims of harmful practices, and their communities at large. Consider how these remedies may have a preventative or awareness raising function.

218. UN Women. 2012. *Handbook for Legislation on Violence against Women*, p. 13.
219. International Commission of Jurists. 2016. Women's Access to Justice for Gender-Based Violence, Practitioner's Guide No. 12. p. 156.
220. For example, in a case challenging Zimbabwe's Marriage Act, the Constitutional Court recognised and debunked the stereotypical notions on which the law permitted distinct ages of marriage for men and women, namely that a girl matures earlier than a boy. The Court held that any law, custom or practice which authorises child marriage is unconstitutional. Mudzuru v. Minister of Justice, Const. Application No. 79/14, Judgment No. CCZ 12/2015 (2016) (Zimbabwe, Constitutional Court), 51. For more discussion on this case and harmful practices generally, see the OHCHR's forthcoming research paper on Judicial Gender Stereotyping and Sexual and Reproductive Health and Rights.

## 3.3 Family law

Family law is an area of law that is particularly important to women. Consider, for example, the results of a household survey conducted in Jordan about the demand for legal aid services. Of all of the respondents who identified family law as the area of their main concern, 94% were women.[221] In fact, as compared to administrative, civil and criminal law, the area of family law showed the most divergence in terms of how males and females responded. This finding suggests that women still bear the main responsibilities for unpaid domestic work and childcare, and so their legal interests tend to reflect this role.

Family law may overlap with harmful practices, in the case of forced marriage for example, but it is generally distinct from violence against women and concerns civil, rather than criminal, matters. National laws of the beneficiary countries to this project do not directly discriminate against women within the family. However, there are examples when women do not have the full protection of the law in cases concerning marriage and divorce, child custody, alimony/maintenance or the division of property.

Specifically, domestic violence underpins many divorce cases and yet often remains hidden in civil proceedings. Or, even if the fact of domestic violence is known, the court may not apply a gender-sensitive approach that takes into consideration issues of coercion, harassment or manipulation that are characteristic of domestic violence situations. Studies of the interactions between family court advisors and parents during mediation sessions in the United Kingdom, for example, indicate that when women raised the issue of domestic violence, it would generally "disappear by being ignored, reframed or rejected by family court advisers."[222]

*Review of legal standards*

In several of its provisions, CEDAW recalls that discrimination in the family remains an impediment to full equality between women and men. The Convention recognises the common responsibility of men and women in the upbringing of children and also that the interest of the children is a fundamental consideration (Article 5). CEDAW also requires States to take measures to eliminate discrimination against women in "all matters relating to marriage and family relations" (Article 16).

General recommendation No. 21 of the CEDAW Committee on equality in marriage and family relations elaborates on the previsions of the Convention and clarifies some important principles, such as: women's entitlement to decide on the number and spacing of children, which shall not be limited by practices such as forced sterilisation or forced abortions; the need to ensure that women are not discriminated against in divorce proceedings, concerning the division of property, for example; and recalling States' obligation to ensure that women are free from gender-based violence in both public and family life.

**The Best Interests of the Child**

As part of a larger victim-centred approach, the Istanbul Convention makes an important link between domestic violence and family issues, in the context of child custody, visitation rights and safety. State parties are required to take "necessary legislative or other measures to ensure that, in the determination of custody and visitation rights of children, incidents of violence covered by the scope of [the] Convention are taken into account" and "ensure that the exercise of any visitation or custody rights does not jeopardise the rights and safety of the victim or children". (Article 31).

In the context of sanctions for perpetrators of domestic violence, the Istanbul Convention recommends that States withdraw parental rights "if the best interests of the child, which may include the safety of the victim, cannot be guaranteed in any other way". (Article 45(2)).

Domestic violence and the vulnerable position of an abused partner should be taken into account when deciding which parent should have care and custody of a child.[223] Such determinations must be informed by an assessment of individual parental capabilities and behaviour as well as the benefits and risks of placing a child in the care and custody of either or both parents.

221. Jordan's Justice Center for Legal Aid and the Department of Statistics of the Ministry of Planning and International Cooperation. 2011. *Statistical Survey on the Volume of Demand of Legal Aid Services*.
222. Council of Europe Gender Equality Commission. 2013. *Feasibility Study: Equal Access to Justice for Women*. p. 17.
223. CEDAW Committee. 2010. Concluding Observations: Czech Republic, UN Doc. CEDAW/C/CZE/CO/5 (2010), para. 23; CEDAW Committee,. 2009. Concluding Observations: Germany, UN Doc. CEDAW/C/DEU/CO/6. para. 42.

*General considerations*

Focusing on the issue of how the legal system should address the issue of domestic violence in the context of family law cases, practitioners should be aware that a significant number of contentious divorce cases actually have a history of domestic violence, although this fact may not necessarily be known by the parties' attorneys or even the court. When they are not aware of a history of violence, or of the dynamics of domestic violence, it is also not uncommon for legal professionals (especially judges) to encourage the divorcing couple to reconcile or 'work out their differences' – often in order to 'keep the family together.' This practice can inadvertently increase the danger to the victim and/or her children of repeated or escalated violence.

Discouraging divorce cases from going forward also undermines the victim's decision-making process. As noted in module 3.2.1, divorce is the primary remedy that women seek to escape abusive relationships, usually after many years of experiencing abuse. Note that the FRA study included women who had experienced physical and/or sexual violence by a partner and were able to overcome the violence. Of these women, 30% identified "divorce, separation or moving away" as the primary factor that helped them to leave a violent relationship as compared to two percent who identified "charges brought against the perpetrator/conviction in court".[224]

There are several specific intervention points that practitioners should consider when family law and domestic violence intersect.

- Coordination in criminal and civil matters when domestic violence is concerned is critical. It is very important that legal professionals working on criminal cases, particularly prosecutors and judges, do not assume that information about the proceedings will have been made available in any civil actions. For example, the judge in a divorce hearing may not have received any information about the former husband violating a protective order.
- If there is a history of abuse, it is not appropriate in cases concerning family disputes to encourage reconciliation or assign the case to mediation or alternative forms of dispute resolution. The specific issue of alternative dispute resolution is described in more detail in module 4.7 of this manual. Legal practitioners should be aware that mediation is premised on a notion that the parties to the dispute have equal bargaining power and can negotiate to resolve issues.
- When domestic violence is concerned, there is an unequal balance of power between the parties, and this means that courts should exercise caution and review agreements concerning, children, alimony, finances or property before they are approved.
- Special care must be taken in determinations of child custody and visitation, and practitioners who deal with cases concerning these issues should receive specialised training in the dynamics of domestic violence, how to assess parental fitness, how to determine child safety and make assessments that are in the best interest of the child.
- Practitioners should be aware that perpetrators of domestic violence often manipulate child custody and visitation arrangements in order to exercise power and control over the victim and to harass them. Therefore, it is appropriate for courts to order perpetrators to demonstrate that they are no longer abusive and do not represent a threat to the victim or the children (for example, by completing a programme for violent offenders), before awarding visitation rights.

**Case-law example**: *González Carreño v. Spain*, a communication submitted to the CEDAW Committee provides instruction on how courts should consider information about domestic violence in decisions on child custody. The author of the communication had been subjected to physical and psychological violence by her husband, eventually initiating a separation from him. The Spanish court granted custody of the couple's child to the mother (the petitioner) and established a visitation schedule with the father. During the separation, the petitioner was subjected to harassment and threats by her husband. The child, a daughter, witnessed the continued violence against her mother and became frightened of the father. The petitioner repeatedly sought protection orders, barring the husband's contact from her and the child, requesting supervised child visitation and for child support payments.

The court issued several protective orders but only included the child in one of them. When the court eventually issued an order of marital separation, it did not consider the facts of domestic violence or identify it as the cause of the separation. A later court decision authorised unsupervised visits between the child and her father despite evidence of continued violence. Ultimately, the husband murdered his daughter and committed suicide.

224. European Union Agency for Fundamental Rights (FRA). 2014. Violence against women: an EU-wide survey, Main Results. p. 46.

The CEDAW Committee determined that the State had violated the Convention and General Recommendation No. 19. Specifically, the authorities did not exercise due diligence to protect the petitioner or her child and failed to take the best interest of the child into consideration by not giving consideration to the patterns of domestic violence. The Committee recommended that "in […] matters of child custody and visiting rights, the best interests of the child must be a central concern and when national authorities adopt decisions in that regard they must take into account the existence of a context of domestic violence."[225] Furthermore, the Committee focused on the actions of the court, noting "the judiciary should not apply inflexible standards based on preconceived notions about what constitutes domestic violence."[226]

*Dispelling myths related to family law*

In light of the centrality of marriage in relation to the family, a number of gender stereotypes operate within this institution. These stereotypes perpetuate the belief that women's role is in the family home where they serve as mothers, homemakers and caregivers, whereas men are heads of households and breadwinners.[227]

In child custody matters where there is a history of domestic violence, these stereotypes about the characteristics of women and men and their role within the family unit and marriage may result in the prioritisation of the rights of perpetrators (usually male) over the rights of the victims (usually women) and children.[228] Stereotypes concerning the roles of women and men within marriage, according to which men are perceived to be superior to women may result in the courts prioritising the perpetrator's claim while failing to give due consideration to the complainant's allegations of her own domestic violence and that of the child.[229] Such prioritisation also violates the best interest of the child.

**Case-law example**: In the communication concerning *González Carreño v. Spain*, above, the CEDAW Committee found that the actions of the authorities reflected "a pattern of action which responds to a stereotyped conception of visiting rights based on formal equality which, in the present case, gave clear advantages to the father despite his abusive conduct and minimised the situation of mother and daughter as victims of violence, placing them in a vulnerable position."[230]

The Committee stated: "Based on stereotypes, the right of visitation was seen merely as a right of the father and not as a right of the child as well. The best interests of the child would have required if not eliminating the visits, at least limiting them to supervised visits of short duration… The authorities' assessment of the risk to the author and her daughter seems to have been obscured by prejudice and stereotypes that lead to questioning the credibility of women victims of domestic violence."[231]

In this case, having a relationship with the father was mistakenly considered to be in the best interests of a child even when the father had been violent to the mother.

Another stereotype relating to marriage and family life affects groups that do not conform to the heteronormative gender and biological roles, such as LGBT persons and sex workers. They may be denied custodial rights based on the argument that they are unsuitable parents because of their "deviant" behaviour. Although the "child's best interest" is a legitimate goal, international law states that it cannot be simply referred to in abstract terms without specific proof of how the child's best interest is jeopardised by parents' sexual orientation or by growing up in a "non-traditional" family. Without such proof, the concept of "the child's best interest" cannot be relied upon to restrict a protected right, such as the right to not be discriminated based on sexual orientation.[232]

225. CEDAW Committee. 2014. *González Carreño v. Spain*, Communication No. 47/2012, decision of 15 August 2014. para. 9.4.
226. Ibid., para. 9.7.
227. Simone Cusack. 2013. *Gender Stereotyping as a Human Rights Violation: Research Report*. p. 55
228. *See Ángela González Carreño v Spain*, CEDAW Communication No 47/2012, Amicus Curiae Brief prepared by Simone Cusack, 2 February 2014. para.35
229. *Isatou Jallow v. Bulgaria*, Communication No. 32/2011, UN Doc. CEDAW/C/52/D/32/2011 (2012), para. 8.6.
230. *Ángela González Carreño*, CEDAW Communication No. 47/2012, UN Doc CEDAW/C/58D/47/2012(2014)15 August 2014, para. 9.4.
231. Ibid, paras. 3.9, 3.10.
232. *Case of Atala Riffo and Daughters v. Chile*, Judgment of 24 February 2012 (Merits, Reparations and Costs) (Inter-American Court of Human Rights), paras. 109-111.

**Case-law example**: In the case of *EB v. France*, the ECtHR implicitly recognised that compounded stereotypes influenced the refusal of French authorities to grant the applicant's request to adopt a child as a single parent. The applicant was a lesbian. In finding violations of the applicant's rights to respect for private and family life and freedom from discrimination, the Court found that in denying her application to adopt, domestic authorities made a distinction based on the applicant's sexual orientation.[233] Stereotypes about the applicant's sexual orientation and marital status, namely that lesbian women cannot be good mothers contributed to the denial of her custody application.[234]

There are many different ways in which gender stereotypes harm an individual in the context of family law proceedings.

**Discussion points:**

Using the checklist[235], identify and discuss the harms caused by the stereotypes and myths set out in the table below.[236]

- ✓ Does the gender stereotype deny the individual a right or a benefit?
- ✓ Does the gender stereotype impose a burden on the individual?
- ✓ Does the gender stereotype degrade the individual, diminish their dignity or otherwise marginalise them?

| Myths and Stereotypes | Inference/consequence | Good practice |
|---|---|---|
| Men are the heads of households and the bearers of authority and knowledge within the family. | In relation to child custody matters, the wishes of the man and his interests as a father should be prioritised above those of the child. | The best interests of the child is the central concern in cases of child custody. When a parent has been abusive, there must be effective supervision between the abusive parent and child. |
| Men are the primary breadwinners in the family. | Women do not often equally enjoy their family's economic wealth and gains.<br>Family structures, gendered labour division within the family and family laws affect women's economic well-being.<br>Women are usually more disadvantaged then men when the family breaks down and may be left destitute upon widowhood. | Economic advantages and disadvantages related to the marriage and its dissolution should be borne equally by both parties.<br><br>The division of roles and functions during the spouses' marriage should not result in detrimental economic consequences for either party. |
| Men are better decision-makers in family property matters. | Men should administer the family property.<br><br>When marriages end, post-dissolution property distribution and maintenance regimes often favour husbands due to insufficient recognition of non-financial contributions, women's lack of legal capacity to manage property, and gendered family roles.<br><br>Women's rights to use the family home impact their post-dissolution economic status. | Spouses should have equal access to the marital property and equal legal capacity to manage it.<br><br>Post-dissolution, the state should maintain equality between the parties in the division of all property accumulated during the marriage, recognising the value of indirect and non-financial contributions. |

233. ECtHR. *E.B v France*. Application No. 43546/02, decision of 22 January 2008, para. 96
234. Rebecca J. Cook and Simone Cusack. 2010. *Gender Stereotyping: Transnational Legal Perspectives*. Philadelphia: University of Pennsylvania Press. p. 31.
235. This checklist slightly modifies that developed by Rebecca J. Cook and Simone Cusack. See Rebecca J. Cook and Simone Cusack. 2010. *Gender Stereotyping: Transnational Legal Perspectives* (Philadelphia: University of Pennsylvania Press. p. 60.
236. See CEDAW Committee. 2013. General Recommendation No. 29 on Article 16 of CEDAW on Economic consequences of marriage, family relations and their dissolution. CEDAW C/GC/29 (2013).

| Myths and Stereotypes | Inference/consequence | Good practice |
|---|---|---|
| Customary/religious unregistered marriages:<br><br>Only when a marriage is registered should the property rights of the spouses be protected.<br><br>Property should be registered in the name of the husband or his (male) relatives (e.g. his father) | When an unregistered marriage dissolves, women are more likely to be penalized due to the fact that the unregistered marriage conveys no legal rights to them. The failure to register may have been caused by a lack of education or knowledge of her rights. | Regardless of their registration status, the rights of women in marriages must be protected. If the circumstances warrant, the State should allow and enable the parties to prove the marriage by means other than registration. |
| The "normal" family comprises of heterosexual parents.<br><br>Lesbian women or gay men cannot be good parents. | Lesbians and gay men should not be allowed to become parents or to adopt children due to their "deviant" behaviour.<br><br>When a parent is not heterosexual, it can be assumed that the child's best interests would be impacted in child custody or adoption cases. | The child's best interests should be determined in an objective manner without discriminating against parents based on their sexual orientation. Extensive psychological research demonstrates that children raised by lesbian and gay parents do equally well as those brought up by heterosexual parents in terms of emotional well-being, sexual responsibility, academic achievement and avoidance of crime.[237] |

## 3.4 Employment law

In this manual, the term *employment law* refers to issues of discrimination that women face in the workplace and not to labour rights in the context of collective bargaining. The beneficiary countries to this project all inherited labour codes from the Soviet period. As noted in module 1.1.1 of this manual on barriers to justice, there are a small number of discriminatory provisions in the labour law that are a legacy of the Soviet past. Specifically, it has been assessed that in Azerbaijan, women are prohibited from 38 categories of jobs, "including about 70 professions and tasks in the metal industry alone. […] women in Moldova are barred from 29 categories of jobs. The category for the food industry alone lists around 60 professions and tasks. […] And in Ukraine, women cannot work with lead, manufacture pipes or be excavator operators".[238]

For the most part, however, the labour codes of the beneficiary countries uphold principles of gender equality. Yet in practice, women face employment discrimination in varied forms, including in recruitment, hiring, remuneration, advancement and promotion. Such patterns of discrimination are common in most of the world. For instance, around the world, there is a persistent gender-based gap in wages for paid work. Women's average earnings are almost half those of men, even though they tend to work longer hours when both paid and unpaid work are taken into consideration. The "average global earned income for women and men [is] estimated at $10 778 and $19 873, respectively".[239] Women hold less than a third of leadership positions in employment even though their educational achievements are on par with men, or in many countries, higher than their male counterparts.[240]

Some of these differences in employment can be explained by the fact that women are far more likely than men to take time out of the labour force due to childcare and other non-paid household responsibilities. Decisions

237. Judicial College. 2013. *Equal Treatment Bench Book*. p. 230.
238. Alena Sakhonchik. 2016. Remnants of the Soviet past: Restrictions on women's employment in the Commonwealth of Independent States. World Bank. 28 April 2016, accessible from: http://blogs.worldbank.org/voices/remnants-soviet-past-restrictions-womens-employment-commonwealth-independent-states.
239. World Economic Forum. 2016. The Global Gender Gap Report 2016. Geneva. p. 30.
240. Ibid.

about if and when a woman will return to employment after having children have many personal motivations, but they may also be influenced by discriminatory laws— for example, provisions that only provide paid childcare leave to mothers and not fathers or other family members. Such laws also reinforce gender stereotypes that childcare is foremost a female responsibility.

Sexual harassment is a form of violence that disproportionately impacts women. Sexual harassment is not limited to the labour sphere (it can take place in educational institutions, for example), but because it is often regulated under the law as a criminal offense and/or as a violation of employment law (a form of sex/gender-based discrimination), it is discussed in this manual in the context of employment.

**Sexual harassment** consists of unwelcome and offensive conduct or behaviour that can take two forms: (1) ***quid pro quo***- when a job benefit (e.g. a pay raise, promotion or continued employment) is made contingent on the victim "acceding to demands to engage in some form of sexual behaviour;" and (2) **hostile working environment**- when the conduct creates condition that are "intimidating or humiliating for the victim."[241] Sexual harassment includes physical, verbal and non-verbal conduct.

*Review of legal standards*

CEDAW requires all State parties to eliminate discrimination against women in the field of employment and to ensure equality in, *inter alia*, selection for jobs, the right to promotion, job security and "all benefits and conditions of service and the right to receive vocational training and retraining," and the right to equal remuneration.[242] The Convention also prohibits discrimination in dismissals based on marital status, pregnancy or maternity leave and encourages States to provide supporting social services that would enable both parents to "combine family obligations with work responsibilities and participation in public life." (Article 11). On the subject of special protections in the workplace for pregnant women, CEDAW states "[p]rotective legislation relating to matters covered in this article shall be reviewed periodically in the light of scientific and technological knowledge and shall be revised, repealed or extended as necessary." (Article 11(d)).

The **International Labour Organisation** (ILO) is the UN agency that defines international labour standards. The following ILO conventions set out the basic principles and States' obligations in terms of protecting women's labour and employment rights:

- Equal Remuneration Convention (No. 100)
- Discrimination (Employment and Occupation) Convention (No. 111)
- Workers with Family Responsibilities Convention (No. 156)
- Maternity Protection Convention (No. 183)

Note that ILO conventions are tools for drafting or amending national labour law, but courts can also rely on the conventions to decide cases when "national law is inadequate or silent, or to draw on definitions set out in the standards, such as 'forced labour' or 'discrimination'».[243]

The **European Social Charter** prohibits discrimination on the grounds of sex in the context of employment and occupation. Likewise, European Union law on discrimination in the field of labour and employment is extensive and while not covered extensively in this publication, due to the fact that the Eastern Partnership countries are not EU members, they may serve as useful examples.

**Sexual harassment** is addressed through various treaties and international documents, including those that prohibit violence against women, such as CEDAW and the earlier Declaration on the Elimination of Violence Against Women. The Beijing Platform for Action (a non-binding set of recommendations for government action) calls on States to:

> Enact and enforce laws and develop workplace policies against gender discrimination in the labour market, especially considering older women workers, in hiring and promotion, and in the extension of employment benefits and social security, as well as regarding discriminatory working conditions and sexual harassment; mechanisms should be developed for the regular review and monitoring of such laws. (para. 178(c)).

241. International Labour Organisation. *Sexual Harassment at Work Fact Sheet.* Available from: http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_decl_fs_96_en.pdf.
242. CEDAW Committee. 1989. General Recommendation No. 13 on Equal remuneration for work of equal value recommends specific actions for state parties to overcome gender segregation in the labour market.
243. ILO. How International Labour Standards are used. Available at http://www.ilo.org/global/standards/introduction-to-international-labour-standards/international-labour-standards-use/lang--en/index.htm.

The ILO Committee of Experts on the Application of Conventions and Recommendations has clarified that the **Discrimination (Employment and Occupation) Convention** applies to sexual harassment even though not mentioned explicitly in the text. In a Special Survey on equality in employment and occupation, the ILO provided several examples of discrimination on the basis of sex, including the category of sexual harassment, which is defined expansively to include: "insults, inappropriate remarks, jokes, insinuations and comments on a person's dress, physique, age or family situation; a condescending or paternalistic attitude with sexual implications undermining dignity; unwelcome invitations or requests that are implicit or explicit, whether or not accompanied by threats; lascivious looks or other gestures associated with sexuality; and unnecessary physical contact, such as touching, caresses, pinching or assault".[244]

The **European Social Charter** requires parties to, *inter alia*, to prevent sexual harassment in the workplace or in relation to work and to take all appropriate measures to protect workers from such conduct as a means to ensure the right of all workers to protection of their dignity at work. (Article 26). The **Istanbul Convention**, in contrast, addresses sexual harassment as a form of violence against women and requires State parties to "ensure that any form of unwanted verbal, non-verbal or physical conduct of a sexual nature with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment, is subject to criminal or other legal sanction. (Article 40).

*General considerations*

There is limited national jurisprudence on employment-based discrimination claims, but the lack of cases entering the justice system should not suggest that women's rights are not violated. Women are often unaware that certain actions in the employment sphere constitute discrimination; they may not know how to protect their rights, and without legal assistance they may find it impossible to gather evidence of direct discrimination. Even when patterns of discrimination seem apparent, such as enterprises that consistently fail to hire or promote women, there may be no individual victims willing to come forward to make a claim in court. Many women prefer to make complaints of employment discrimination to national human rights institutions, such as ombudsperson offices, rather than initiate litigation. The Former Yugoslav Republic of Macedonia, for instance, adopted an anti-discrimination law in 2006 (later amended in 2008 to reflect EU directives on gender equality, and fully re-drafted in 2011)[245], and the first case to claim a violation of this law was decided in 2016 (claiming unfair dismissal due to pregnancy).[246]

**Case-law example**: *Svetlana Medvedeva v. Russian Federation* is a communication considered by the CEDAW Committee on the issue of whether prohibiting women from taking certain jobs violates the Convention. Ms. Medvedeva was a qualified navigational officer but was rejected from a job as a helmsperson-motorist based on the fact that Russian legislation prohibits women from working as machinery crew on all types of vessels. The author of the communication challenged the decision in Russian court, seeking a judicial order to compel the company to establish safe working conditions for her employment. Her argument was based on equality provisions in the Russian Constitution and Labour Code. The district court dismissed the case, holding that the author's rights had not been violated because the prohibition was intended to protect women from harm to their health. On appeal, the case was dismissed. In addressing the CEDAW Committee, the author argued that the Labour Code provisions are discriminatory as they exclude women from work and "remove the onus from employers to create safe working environments and improve workplace conditions."[247] Furthermore, Russian law does not prohibit men from undertaking harmful employment, demonstrating gender bias.

The CEDAW Committee found that the labour regulations violate the Convention because they treat men and women differently; they do not in any way promote the employment of women and are based on discriminatory stereotypes.[248] The Committee stated that "the introduction of such legislation reflects persistent stereotypes concerning the roles and responsibilities of women and men in the family and in society that have the effect of perpetuating traditional roles for women as mothers and wives and undermining women's social status and

244. Report of the Committee of Experts on the Application of Conventions and Recommendations, Special Survey on Equality in Employment and Occupation in respect of Convention No. Ill. 1996. p. 15.
245. The Law on Equal Opportunities for Women and Men of 2012.
246. Karolina Ristova-Asterud. 2016. Gender Equality and Women's Rights in Training for Lawyers in South East Europe, presentation at the regional conference Strengthening Judicial Capacity to Improve Women's Access to Justice, 24-25 October, Chisinau, Republic of Moldova.
247. CEDAW Committee, *Svetlana Medvedeva v. Russian Federation*, Communication No. 60/2013, decision of 25 February 2016, para. 3.3.
248. Ibid. para 11.7

their educational and career prospects."[249] In not assessing the claims of the author of discrimination, the Russian courts "condoned the discriminatory actions of the private company" and further denied the author the effective protection of the law for an act of gender-based discrimination.

**Case-law example**: In 2016, the University Women of Europe filled collective complaints for violations of the European Social Charter against 15 countries (Belgium, Bulgaria, Czech Republic, Croatia, Cyprus, Finland, France, Greece, Ireland, Italy, Netherlands, Portugal, Norway, Slovenia and Sweden) stating women are not treated equally as they earn structurally less than men for equal work.[250]

The complaints allege violations of Articles 1 (right to work), 4(3) (right to fair remuneration - non-discrimination between women and men in remuneration), and 20 (right to equal opportunities and equal treatment in employment and occupation without discrimination on the grounds of sex).

Very few sexual harassment cases have been reviewed in international courts as compared to domestic violence cases (the ECtHR has not heard a case of sexual harassment in the workplace, for example). Likewise, sexual harassment claims are rare in domestic courts, in large part because victims are dissuaded from making complaints out of fear of losing their jobs, because the law does not define sexual harassment and there is no clear complaint mechanism in the workplace or, often, because they are not aware of their rights or even accept such behaviour as a 'normal' part of working life. Women's advocacy NGOs note that victims approach them about sexual harassment cases, but they are generally seeking advice and support and not interested in making claims through the legal system.

When cases of sexual harassment come before courts it is often after the victim has lost her job, or left the employment voluntarily, and is no longer dependent on the employer.

**Case-law example**: The CEDAW Committee has reviewed one communication on sexual harassment, *Anna Belousova v. Kazakhstan*. The author of the communication worked in a primary school under a yearly contract. When her contract came up for renewal, the school director indicated that her employment depended on the author engaging in a sexual relationship with him or paying him a large sum of money. The author refused and her contract was not renewed. At this point, the author made a formal complaint to the city Department on Education and, later, the Ministry of Education. The claims were determined to be unfounded, but the author maintained that she was not given the opportunity to provide her account. She then attempted to pursue legal action through a criminal complaint for rape and extortion, but the investigators and prosecutors did not initiate criminal proceedings.

In considering the admissibility of the complaint, the CEDAW Committee noted that Kazakhstan had no legal provisions prohibiting sexual harassment in the workplace. When considering the merits of the case, the Committee recalled that under General Recommendation No. 19 equality in employment is impaired when women are subjected to gender-based violence, which can include sexual harassment, in the workplace. The Committee found a violation of CEDAW reasoning that the institutions and courts "failed to give due consideration to the author's complaint of […] sexual harassment in the workplace, and to the evidence in support of that complaint, and that they thus failed in their duty to apply gender sensitivity to the examination of the complaint. Moreover, [they] failed to give due consideration to the clear *prima facie* indication of an infringement of the equal treatment obligation in the field of employment."[251] In other words, the State failed to act with due diligence to investigate or prosecute the case.

The Committee addressed the reasoning of the city court that the author's allegations were not credible because she only complained of sexual harassment after she had been dismissed and the court's lack of sensitivity to the position of the author. The "author was in a vulnerable position as a subordinate to [the director] and the renewal of her labour contract was wholly dependent on [his] discretion."[252] Furthermore, the nature of the harassment stemmed from the author "being a woman in a subordinate and powerless position and constituted a violation of the principle of equal treatment."[253]

249. Ibid. para. 11.3
250. For more information, see the website of the European Committee of Social Rights, https://www.coe.int/en/web/turin-european-social-charter/collective-complaints-procedure; University Women of Europe: https://uweboard.wordpress.com/tag/european-social-charter/.
251. CEDAW Committee, *Anna Belousova v. Kazakhstan*, Communication No. 45/2012, decision of 13 July 2015, para. 10.8
252. Ibid.
253. Ibid. para. 10.13.

*Dispelling myths related to employment law*

Frances Raday, former CEDAW Committee member and former Chair of the Working Group on discrimination against women in law and practice has noted:

> [t]he most universally prevalent gender stereotype still attached to women in all cultures, religious and secular, is that they are primarily homemakers and that their role in the public sphere in general and in the labour market in particular is subordinate to that of men.[254]

A consequence of these stereotypes is that women have limited employment opportunities when compared to men, leading to positive action measures in employment. The 1984 Council Recommendation on the promotion of positive action for women, effectively obligates member states to address gender stereotyping.[255]

**Case-law example**: In the case of *Marschall* concerning positive action in favour of women in employment, the European Court of Justice found that: "It appears that even when male and female candidates are equally qualified, male candidates tend to be promoted in preference to female candidates particularly because of prejudices and stereotypes concerning the role and capacities of women in working life and the fear, for example, that women will interrupt their careers more frequently, that owing to household and family duties they will be less flexible in their working hours, or that they will be absent from work more frequently because of pregnancy, childbirth and breastfeeding."[256]

This stereotype about the traditional working and family roles of women and men, may result in the dismissal of women from jobs based on their private life.

**Case-law example**: In *R.K.B v. Turkey*, the CEDAW Committee referred to the different standard of morality applied to women with respect to extra-marital affairs. In this case, R.K.B, a married women was dismissed from employment for allegedly having an extramarital relationship with a married male manager, who continued to be employed. R.K.B claimed unlawful termination of employment and gender-based discrimination. The Turkish court found that R.K.B's employment was unlawfully terminated but did not find gender-based discrimination. The CEDAW Committee noted that the court proceedings were based on the stereotyped perception of the gravity of extramarital affairs by women, that extramarital relationships were acceptable for men and not for women and that only women were held to a higher standard of morality.[257]

The type of work available to women is also impacted by assumptions about women's and men's working capabilities, in light of differences in their physical characteristics and reproductive functions. Women are subjected to discrimination in employment on account of stereotypes that result from these differences. The case of *Sirdar* concerned the termination of employment from the UK Royal Marines, on the basis that the claimant, a woman did not meet the criterion of "combat effectiveness" that requires marines to be male. The European Court of Justice did not challenge or question this criterion but took it at face value.[258] There are a number of explanations as to why justice actors perpetuate stereotypes in this way. First, as gender stereotypes are deep-rooted in society, they may have been unaware that they were reinforcing stereotypes. A second reason is the way in which norms are often implicitly gendered in that they devalue the feminine. For instance, full-time work is the dominant standard and part-time work (which is often performed by women), is considered a deviation from the norm.[259]

Research on sexual harassment demonstrates that it is linked to a lack of clarity about gender roles and work roles. At its worst, sexual harassment arises from a need for power or dominance, and a desire to assert control

254. Frances Raday. 2012. "Article 11," in Marsha A Freeman, Christine Chinkin and Beate Rudolf (eds), *The UN* Convention on the Elimination of All Forms of Discrimination against Women*: A Commentary*. Oxford University Press, 2012. p. 304.
255. See 1984 Council Recommendation on the promotion of positive action for women (84/635/EEC). Recommendation 1a) calls on member states, 'to eliminate or counteract the prejudicial effects on women in employment or seeking employment which arise from existing attitudes, behaviour and structures based on the idea of a traditional division of roles in society between men and women".
256. *Marschall v Land Nordrhein- Westfalen*, Case C-409/95 [1997] ECR I-6363 paras. 3 and 5. For further discussion on this case see, Alexandra Timmer. 2016. "Gender Stereotyping in the case-law of the EU Court of Justice, European Equality Law Review 2016/1. pp. 40-42.
257. CEDAW Committee, *R.K.B. v. Turkey*, Communication No. 28/2010, decision of 13 April 2012, para. 8.7.
258. *Sirdar v. The Army Board and Secretary of State for Defence*, Case C-273/97 [1999] ECR I-7403, 26 October 1999, para. 30
259. For further discussion, see Alexandra Timmer. 2016. "Gender Stereotyping in the case-law of the EU Court of Justice". European Equality Law Review, 2016/1. p. 44.

over others.[260] It is related to the sex stereotypes that men want to dominate women sexually and women want to be sexually possessed. It is reported that women in traditionally female or male occupations experience more sexual harassment than women in gender-neutral occupations.[261]

A common stereotype is that sexual harassment is harmless office banter and not a serious issue. This is related to the belief that women enjoy receiving compliments, even in the work place. However, sexual harassment demeans a woman's contributions in the work place, and denigrates her qualifications and professional skills by reducing her to the object of her employer's sexual attention. This approach of trivialising sexual harassment discounts the varied but nonetheless distressing and humiliating conduct that constitutes sexual harassment. Consequently, only when the harassment reaches the level of serious sexual assault or rape is it considered to merit legal attention and fall within the ambit of legislation.

Aside from misconceptions about what sexual harassment is, there is another set of mistaken beliefs relating to what constitutes appropriate behaviour from the victim in reacting to such harassment in order to qualify as a 'real' case of sexual harassment. A delay in the employee's response or reporting of the harassment should not undermine her claim. Similarly, if a victim sues her employer for sexual harassment after her employment was terminated, this again is not an indication of a false claim. There is no appropriate time period within which an employee is expected to complain through proper channels. The time to do so may vary, depending upon the needs, circumstances, and more importantly, the emotional threshold of the employee.[262]

There are many reasons that an employee might endure sexual harassment without making a report. First, making the harassment public may impact future employment prospects, bearing in mind the entrenched stereotype that women are likely to fabricate allegations of sexual assault. The employee may be afraid of repercussions and recriminations, such as being labelled a "trouble-maker". Thus, there is a heavy professional and personal cost in making the allegations public, which in some cases may involve a public scandal. This fear is exacerbated by the power dynamics between the employer and employee. The employee may have no choice but to endure the harassment due to her financial dependence on the job, and she may not have many alternative employment opportunities open to her. Indeed, such circumstances may even encourage an employer to persist with the harassment, and to do so with impunity.

**Discussion points:**

- Consider the myths and stereotypes in the table below and discuss whether these myths and stereotypes may have resulted in discriminatory legislation impacting the employment of women in your country?
- As a judge or prosecutor, what can you do to challenge such discriminatory legislation in your country?
- What steps can you take as a judge or prosecutor to challenge the stereotypes and inferences set out below?

| Myths and Stereotypes | Improper Inferences |
|---|---|
| A woman's place is at home | • Women should be prohibited from doing night work based on safety considerations of being out of the house at night.<br>• Women's domestic and childcare responsibilities will interfere with her work obligations. |
| The man is/should be the main breadwinner. | Women's incomes are supplementary to that of the main breadwinner (e.g. her husband) so it is reasonable that her wages are lower. |

260. See Joan H Joshi & Jodie Nachison. 1996. *Sexual harassment in the workplace: how to recognize it; how to deal with it - a guidelines paper*. CGIAR Gender Program working paper series no. 13. Washington, D.C.: The World Bank.
261. Ibid.
262. The "context-emotional threshold" standard in appreciating the time element in reporting violations is set out in Philippine Aeolus Automotive United Corporation v. National Labour Relations Commission and Rosalinda Cortez, G,R, No. 124617, 28 April 2000 (Philippines) which is cited in UN Women and International Commission of Jurists. 2016. Gender Stereotypes in Laws and Court Decisions in Southeast Asia: a Reference for Justice Actors. p.93

| Myths and Stereotypes | Improper Inferences |
|---|---|
| Women are the weaker sex in need of protection, particularly during pregnancy and thereafter.<br><br>Mothers and children have a special relationship and therefore mothers should be the children's primary care givers. | The special relationship between a woman and her child should be preserved by preventing its disruption by the burdens which result from full time employment.<br><br>• If a mother has to work, this will be an additional burden alongside her main role as the primary caregiver. She should be protected from this burden.<br><br>• It is risky to hire recently married and pregnant women because they will prioritise childcare over work responsibilities. |
| Women are the physically the weaker sex. | • Women are incapable of performing certain work because they have less strength (e.g. construction work, some forms of agricultural work, security sector work, etc.).<br>• Certain jobs present a risk for women's physical and reproductive health. |
| Certain jobs require attractive women. | Younger women are more attractive, and therefore the employment of women in certain industries or professions should be limited to those under age of 40. |
| Sexual harassment occurs when a women is raped or sexually assaulted in the workplace | • Any unwelcome acts of a sexual nature that do not meet the definitions of rape or sexual assault are just part of the workplace environment and there is nothing an employer can do to prevent the occurrence. |
| If the harassment were serious, the victim would have complained immediately. | • If there is a delay in reporting, the victim's allegation is presumed to be lacking credibility. The reality is that the time period within which a victim complains depends on her needs, circumstances and emotional threshold.[68] |

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263. Philippine Aeolus Automotive United Corporation v. National Labour Relations Commission and Rosalinda Cortez, G,R, No. 124617, 28 April 2000 (Philippines) setting out the "context-emotional threshold" standard in appreciating the time element in reporting violations.

# MODULE IV. PROMOTING WOMEN'S ACCESS TO JUSTICE THROUGH THE PRACTICE OF JUDGES AND PROSECUTORS

Objectives: Module IV of this manual outlines practices that promote greater gender-sensitivity in the administration of justice. The aim of this part of the manual is to build the capacity of prosecutors and judges to apply a 'gender lens' in their day-to-day practice and to improve their understanding of how neutral law and policy are often applied in a manner that creates barriers to women who are seeking redress in the legal system.

While there are areas where the professional roles of prosecutors and judges overlap, there are also many points of divergence. Therefore, Module IV presents general information and, where relevant, aims to also provide separate guidance for judges and prosecutors respectively. Likewise, there are critical differences between public and private law (namely, criminal law and civil law) in terms of procedure, standards of proof and possible sanctions. Women's access to justice is relevant in both areas of law, but it is not possible within the scope of this manual to comprehensively address all possible legal scenarios.

Care was given to include examples and case studies that cover a range of the kinds of rights violations that women experience. It is also recommended that this manual be supplemented at the national level with dedicated training programmes on topics such as domestic violence and family law, sexual violence or sexual harassment in the workplace, for example.

The good practices and principles outlined in this section reflect the essential components of a gender-sensitive justice system and which should be applied by justice system professionals when handling cases. For a review of these standards, see Part 1.3 of this manual (Access to Justice).

The following sub-sections roughly follow the stages of a legal proceeding, from the preliminary and pre-trial period to sentencing, but note that there would be critical differences in process depending on whether the case is criminal or civil.

## 4.1 Legal standing

Legal standing (*locus standi*) refers to the determination of who can make legal claims or the capacity of a person or persons to bring a suit in court. Legal standing is based on a requirement that the claimant has or will sustain a violation (of their rights or a legally-protected interest) and that the harm is redressable.

The concept of legal standing intersects with women's access to justice in several important areas: the rights of victims in criminal proceedings; the ability of civil society organisations with an interest in a case to take part in legal proceedings; and the development of class actions or public interest actions in cases of discrimination on the grounds of sex or gender.

In **criminal cases** and specifically cases concerning violence against women, victims are involved in trials in the capacity of witnesses for the prosecution. It is important to bear in mind that the specific dynamics of gender-based violence, and in particular domestic violence, mean that the victim not only knows the offender but has had an intimate relationship with him. Because of this relationship, there is a high risk of repeated and escalated abuse, retaliation and threats against the victim. Thus, it is critical that victims receive protection from the justice system throughout the entire legal process. However, one of the failings observed in many justice systems is the lack of support for victims of gender-based violence because they are not formal parties to the criminal proceedings.

☑ **Good practice**: In the EU, efforts have been made to strengthen victims' rights and to improve the support and protection of victims in criminal proceedings. **EU Directive 2012/29/EU** (2012) establishing minimum standards on the rights, support and protection of victims of crime outlines several rights that are granted to victims with formal roles in criminal proceedings in every EU country. The EU Directive includes, *inter alia*, the following rights that are especially relevant to female victims of violence: to be heard and provide evidence; to review a decision not to prosecute (especially prosecutors' decisions to withdraw charges or discontinue proceedings); to receive information about progress in the case (information about the final judgment, issues of remand in custody, and about release or escape from custody is especially critical in cases of domestic violence). Guidance for the implementation of the directive make clear that prosecutors and judges are obliged to inform victims of their rights. In non-EU countries, national laws grant rights to crime victims, and therefore justice professionals must ensure that these rights are protected.

In order to improve women's access to justice, it is recommended that the rules on legal standing be broadened to "allow **groups and civil society organisations** with an interest in a given case to lodge petitions and participate in the proceedings".[264] A number of countries permit women's support organisations to participate in domestic violence and sexual violence proceedings as non-legal representatives that provide support for victims- a practice that is recommended by the Istanbul Convention.[265] Typically, such NGOs act as informal advocates for survivors of violence who typically do not have their own counsel. NGO advocates explain legal processes, liaise with various agencies of the criminal justice system on behalf of their client and also accompany the survivor of violence to pre-trial meetings and in court. In these cases, NGOs do not have formal standing, but they can be instrumental in acting as a bridge between the legal system and the victim.

In the EU, the issue of whether NGOs have *locus standi* in **discrimination cases** has been addressed in two different contexts: (1) whether the organisation has the right to participate in legal proceedings either on behalf or in support of a victim and (2) whether the organisation can make claims "in the public interest without a specific victim to support or represent, challenging institutional forms of discrimination and reducing the risk of further victimisation of potential individual plaintiffs" (*actio popularis*).[266] In EU countries, NGOs and trade unions are permitted "to engage in judicial or administrative proceedings on behalf of or in support of claimants,"[267] but most countries do not allow such organisations to make compensation claims if there is no identified victim of discrimination that they are representing. Only two countries permit NGOs to seek remedies in civil discrimination cases (in the form of punitive damages or awards for themselves- *in nome proprio*) when cases are in the public interest.[268] But, even here, it is not clear that such provisions could be used in cases of sex/gender discrimination.

**Case-law example**: Cases before the ECtHR have explored the issue of whether NGOs can bring claims on behalf of individuals even though the organisations themselves are not victims of any alleged violations of the European Convention. In two cases, the court determined that the organisations did have legal standing,[269] but the circumstances of the cases were exceptional and involved the deaths of individuals with mental disabilities in State care. The court's decision was based on several criteria used for determining *locus standi* in such cases, including: the vulnerability of the victim; the obstacles that prevented the victim from making a complaint or exhausting domestic remedies; the serious nature of the violation and importance of the legal claim; the lack of alternatives to ensure effective representation of the victim; the link between the victim and the NGOs claiming standing; and domestic procedure which permitted *locus standi* in such a case.[270]

**Discussion poin**t: Whether a case concerning an issue of women's access to justice, involving gender-based violence for instance, would meet these criteria could be discussed or debated.

Although few countries allow civil society organisations to initiate legal proceedings, broadening concepts of legal standing to allow for **collective redress, public interest actions, and strategic litigation** is seen as an

264. Ibid. para 16(c).
265. Article 55(2) of the Istanbul Convention requires states parties to ensure that NGOs and domestic violence counsellors have the possibility to assist and/or support victims during investigations and judicial proceedings.
266. European Commission. 2014. *European Anti-Discrimination Law Review*, Issue 19, November 2014. p. 15.
267. European Union Agency for Fundamental Rights (FRA). 2012. *Access to Justice in Cases of Discrimination in the EU: Steps to Further Equality*. Luxembourg. p. 12.
268. The countries are Luxembourg and Liechtenstein. *European Anti-Discrimination Law Review*, Issue 19, November 2014, 15.
269. ECtHR, *Centre for Legal Resources on behalf of Vincent Campeanu v. Romania,* Application No. 47848/08, judgment of 14 July 2014; *Helsinki Committee on behalf of Ionel Garcea v. Romania*, Application No. 2959/11, judgment of 24 March 2015.
270. ECtHR, *Centre for Legal Resources on behalf of Vincent Campeanu v. Romania*, Application No. 47848/08, judgment of 14 July 2014.

important step in improving access to justice in cases of discrimination.[271] Permitting NGOs and equality bodies to initiate cases of discrimination when there are no victims willing to make a claim or identified (for example, in the case of sexist or discriminatory advertising) is a means of addressing persistent patterns of discrimination. Patterns of gender-based discrimination may be apparent, such as in the case of companies that have a history of not hiring or promoting female employees, but they are difficult to litigate without a complainant willing to come forward. The case below relates to discrimination on the grounds of ethnicity, but the situation is analogous to cases in which a company discriminates against women in recruitment. Within the procedure of their jurisdiction, courts can consider whether certain lawsuits can be brought by organisations with legitimate interests.

**Case-law example**: In *Centrum v. Firma Feryn* (2008), the CJEU held that the fact an employer made it clear that it would not recruit employees of a certain ethnic or racial origin was likely to strongly dissuade candidates from applying for jobs, which would limit their access to employment and thus constituted direct discrimination. The court found that "the existence of such direct discrimination is not dependant on the identification of a complainant who claims to have been the victim" and national courts should determine the right of organisations with a legitimate interest to bring legal or administrative proceedings "without acting in the name of a specific complainant or in the absence of an identifiable complainant".[272]

Broadening legal standing to permit **collective claims** or **class actions** is a means to achieve collective redress, and it allows several persons who have been victims of discrimination to join forces.[273] Under an Additional Protocol to the **European Social Charter**, State Parties can recognize the right of specific organisations to file collective complaints. To date, of the CoE member states, 15 accept collective complaints, and only seven such claims have been filed alleging violations of the Charter. One such collective complaint, discussed in the preceding module 3.4 on employment law concerns unequal pay between women and men.

As noted, very few women who have experienced violations of their rights turn to the legal system for redress, due to a number of factors including their lack of knowledge of the law, as well as socio-economic and cultural barriers. No less significant are the feelings of shame or fear of retaliation when initiating a legal case, especially if the woman's actions are viewed as 'going against the norm.' For example, women who have experienced sexual harassment in the workplace often remain silent because they are concerned with losing their jobs or stigmatisation. Class action suits have been used successfully to challenge entrenched patterns of discrimination and disparate impact in hiring practices and have led to important legal change. Collective claims are more limited in the European context, but several countries recognise the legal standing of organisations in collective actions and on behalf of an individual victim.

**Case-law example**: *Lois E. Jenson v. Eveleth Taconite Co.* (1992) was the first class action lawsuit in the United States on sexual harassment in the workplace. The petitioner alleged that she and other female employees experienced regular hostile behaviour from male employees, including sexual harassment, abusive language, threats and intimidation. Because the company had a history of inaction concerning reports made by female employees of unwelcome touching, offensive language, and sexually explicit materials in the workplace, a class action was initiated. The class was defined as all women who had applied for or been employed in specific positions in the company. Among the outcomes of the trials, the company was ordered to implement training for all employees on sexual harassment. The case is important precedent in the US legal system for defining the burden of proof in cases of a hostile work environment, but it is also viewed as ground-breaking for addressing an entire workplace culture and providing women with a forum to demand redress for violations of their rights and improvements for future female employees.

Finally, even when not parties to a legal proceeding, NGOs and other organisations can also play an important role in providing courts with expert opinions, especially concerning discrimination or gender-based violence claims. Further information about third-party interventions is provided in module 4.10 on the role of experts and *amici curiae*.

271. Ibid. p. 47.
272. CJEU, *Centrum v. Firma Feryn*, Case C-54/07, judgement of 10 July 2008. Accessible at: http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A62007CJ0054.
273. European Union Agency for Fundamental Rights (FRA). 2012. p. 41

## 4.2 Initial procedural issues and investigation

This section concerns decision-making at the initial stage of a legal proceeding, before any determinations based on facts or evidence are made. It is useful to consider the role of prosecutors and judges separately in terms of good practices that will ensure women's access to justice. For prosecutors, this period corresponds to the investigation phase during which decisions are made about how a criminal case is charged and preliminary procedural issues are resolved before adjudication. For judges, the pre-trial period may not always entail an in-depth investigation, but it does involve decision-making on such topics as whether to admit a complaint or claim, interim measures (such as issuing a protective order in a case of domestic violence or determinations of child custody in divorce cases). Judges and prosecutors alike should approach all initial procedural issues with sensitivities to gender.

Looking more closely at the **role of the prosecutor** in cases of gender-based violence, sexual harassment, or even discrimination (if criminalised under national legislation), the investigation process is a critical turning point in terms of whether the case enters the criminal justice system. Key considerations that prosecutors should keep in mind during the investigation period include the following:

- Be aware that individual victims, especially young victims and victims of sexual crimes, may find it very difficult and even traumatising to speak about their experiences with male law enforcement professionals, including prosecutors. While part of a gender-sensitive approach requires all prosecutors to learn to recognise signs of distress during meetings and avoid any secondary victimisation, it can also be a good practice to inquire whether the victim has a preference about the sex of the prosecutor assigned to her case. Some victims may prefer to speak with a female prosecutor, or to have a female officer, family member, friend or NGO advocate present, and so efforts should be made to accommodate such preferences.
- Cases on violence against women, especially domestic violence, sexual violence, and rape, require close **cooperation between the police and prosecutors** during investigation. The prosecutor oversees the lawfulness of the investigation and evidence-gathering process and monitors whether investigators are observing human rights standards. Equally important, the prosecutor must also "ensure that all available evidence has been collected, whether this is by the police, investigating body or by the prosecutors themselves."[274] A thorough investigation at this stage reduces the reliance on the testimony of the victim/witness as the only form of evidence at trial, and it increases the likelihood of a successful prosecution.

Prosecutors should be especially vigilant about the possibility that police attitudes, myths or gender stereotypes[275] have influenced the investigation and compromised evidence collection. Prosecutors must review arrest trends and verify that the police are properly identified and responding to acts of VAW.

It is not uncommon in jurisdictions in which police carry out domestic violence investigations for prosecutors to find procedural errors or other weaknesses in the police work, for example, when evidence collection is not thorough or when police fail to observe due process requirements. The result is usually to drop the charges or send the case back for further investigation, which not only causes delays by may also mean that the case never enters the justice system at all. In their capacity to oversee police-led investigation, it is important that prosecutors engage constructively with police and provide guidance on how to use proper investigative techniques to prove the elements of the crime and avoid reliance on gender stereotypes. "Prosecutors should not use evidential difficulties to dismiss cases if they find that these difficulties are due to lack of care and commitment in the investigative process."[276]

When a woman's rights have been violated (for example under Article 3 of the European Convention on Human Rights), the lack of effective investigation into the violation is itself a breach of international law guaranteeing the right to a remedy (for example, under Article 13 of ECHR) and grounds for a claim against the State to be brought before an international court, such as the ECtHR.

☑ **Good practice**: In Belgium, a joint circular developed by the Minister of Justice and the Board of Prosecutors General on criminal policy with respect to violence in couples sets forth guidelines for criminal policy on domestic violence addressed to police and prosecutors. The circular standardises a common system for identifying and registering domestic violence cases and for evidence collection. The circular is part of a multi-disciplinary

274. UNODC. 2014. p. 43.
275. For examples of how stereotypes have improperly influenced law enforcement officials' investigations into violence against women see, e.g., *Isatou Jallow v. Bulgaria*, Communication No. 32/2011, UN Doc. CEDAW/C/52/D/32/2011 (2012), para. 8.6 (CEDAW); *Case of González et al. ('Cotton Field') v. Mexico*, Judgment of 16 November 2009 (Preliminary Objection, Merits, Reparations, and Costs), paras. 400-401 (Inter-American Court of Human Rights).
276. Ibid. p. 71.

approach that incorporates a victim-centred perspective throughout that also includes procedures for informing victims of their rights and making referrals to support services.[277]

- The level of **discretion** that prosecutors exercise over whether a criminal case will move forward to adjudication or not and how a case will be charged varies according to the different jurisdictions. In every legal system, however, the prosecutor should base the decision on all the available evidence, the likelihood of conviction and the seriousness of the crime. Gender stereotyping can improperly influence prosecutors' charging decisions and thus the convictions that follow. Decision-making should not be influenced by attitudes indicating that some forms of gender-based violence, such as domestic violence or stalking are of lesser importance than other crimes, that they are 'family matters,' or they do not present a risk to the larger society. Likewise, prosecutors should not base a charging decision on stereotyped notions of who is a 'real victim' or what is the 'appropriate behaviour' of a victim of violence.

☑ **Good practice**: UN Women recommends that countries adopt **pro-prosecution and absent-survivor/victim prosecution polices** in cases concerning violence against women. The Istanbul Convention requires State parties to allow for the investigation and prosecution of cases of violence against women to proceed *ex parte* or *ex officio* (meaning that they shall not depend on a complaint or report from the victim) (Article 55). Such polices help to eliminate the problem of prosecutorial discretion being applied when there is a perception that violence against women is not a serious problem, that victims cannot be trusted, or there are difficulties collecting evidence.[278] Polices can also be introduced that require prosecutors to provide explanations about why a case has been dropped, which can then be subjected to judicial review. Such policies send strong messages to the perpetrator and the larger community that the State takes cases of violence against women seriously and does not consider them to be 'private issues.' At the same time, when prosecution is pursued without the consent of the victim, it is critical that the victim has access to other legal remedies, such as protective orders.[279] Considerations of victim/survivor safety are discussed in detail in modules 4.8 and 4.9.

**Judges** also have an important role in ensuring that women are not prevented from accessing justice due to procedural barriers at this early stage. For example, in jurisdictions in which courts have the power to issue **protection orders** against perpetrators of domestic violence, the judge presides over a hearing at which time the victim and offender present evidence. Protective order hearings are not necessarily held in the context of criminal proceedings with a full investigation (although judges will rely on police investigative reports). Therefore, the judge's determination on whether a victim requires protective measures is critical not only for the safety of the victim and other family members, but also in creating the best possible conditions for the case going forward and resulting in a conviction. Victims/survivors who do not fear for their personal safety and are reassured that the justice system also focuses on reducing risk of further violence are much more likely to cooperate as witnesses in a subsequent criminal trial. In addition, protective order hearings are an important first opportunity for the judge to set an appropriate tone and demonstrate that the State exercises due diligence in cases of domestic violence.

Likewise, judges can exercise discretion during the preliminary stages of a criminal process to take steps to protect victims'/witnesses' rights and dignity and to ensure they do experience secondary victimisation, for example by excluding the public from hearings if the case concerns sexual violence and requires confidentiality (preliminary investigatory phase, protective order hearings, bail hearings, etc.). The Istanbul Convention, for example, makes clear that the rights, interests and special needs of victims/witnesses shall be protected at all stages of the investigation (Article 56) including taking measures to inform victims about potential danger from the perpetrator, about their rights and available services, to protect the victim's privacy, and to avoid contact between the victim and perpetrator.

Many of these considerations can be relevant to civil cases as well. For instance, courts often seek to encourage litigants to negotiate and settle cases to avoid burdening the legal system with hearings and/or trials. Judges should keep in mind, however, that the decision to settle a case should be made by the parties, and there may also be cases that should not be settled given their legal importance, for instance cases of particularly egregious sexual harassment. Judges should consider in each case whether it is appropriate to promote settlement, giving consideration to women's access to justice issues. They can be attentive to the possibility that a female applicant is being pressured to reach a settlement and make the appropriate rulings in the pre-trial period.

277. Council of Europe Gender Equality Commission. 2015. *Compilation of good practices to reduce existing obstacles and facilitate women's access to justice*. Strasbourg. pp. 24-26.
278. UN Women. 2012. *Handbook for Legislation on Violence Against Women*. p. 35.
279. Cheryl Thomas, "Legal Reform on Domestic Violence in Central and Eastern Europe and the Former Soviet Union", paper presented at the Expert Group Meeting on good practices in legislation on violence against women, Vienna, Austria, 26- 28 May 2008.

Both prosecutors and judges should take steps from the initiation of a criminal complaint concerning gender-based violence to ensure that there are **no delays in the investigation and evidence-collection** stages (especially concerning the collection and testing of forensic evidence) that would jeopardise the prosecution and adjudication. It is a general good practice to use expedited proceedings (such as fast-tracking and specialised courts) in cases of violence against women. Further information about case management, including good practice examples, can be found in module 4.8, below.

A good practice found in a number of countries is to grant **investigative power to specialised equality and quasi-judicial bodies**. How courts and extra-judicial bodies interact is discussed in section 4.11, below.

**Case-law example**: The 2016 case of *Halime Kiliç v. Turkey* illustrates several failings that occurred during an investigation/pre-trial period that the ECtHR determined amounted to a violation of Article 2 (the right to life) in conjunction with Article 14 (prohibition on discrimination) of the ECHR. In this case, a victim of domestic violence lodged four complaints with the authorities and obtained three protection orders against her husband. In 2008, the victim made the first complaint and requested a protection order, which was granted by the Family Court. The prosecutor brought charges against the perpetrator. When the victim later lodged a second complaint, the court issued two more protection orders, and the prosecutor committed the perpetrator to trial, requesting pre-trial detention, which the court denied. The victim requested further assistance from the prosecutor, alleging that her husband had made death treats. After making a fourth complaint, the victim was killed by her husband. The ECtHR found that the time it took to issue the protective orders was protracted (19 days in one case and 8 weeks in the second), that there were delays in the prosecutor ordering the perpetrator to be placed in custody, the court did not properly assess the risks to the victim and order pre-trial detention, the perpetrator was never prosecuted for violations of the protective orders, and neither the police nor prosecutor had informed the victim about available shelter facilities.[280]

## 4.3 Evidentiary issues

The CEDAW Committee identifies several problem areas related to the evidentiary base in cases brought by women, such as: inadequate evidence collection (failures during the investigation period); evidentiary rules that are "restrictive, inflexible or influenced by gender stereotypes" (especially relevant to violence against women cases); and difficulties collecting evidence "relating to emerging violations of women's rights occurring on line and with the use of ICT's [information and communication technologies] and new social media."[281] An additional challenge for legal practitioners is determining the types of evidence that can be used in cases alleging sex- or gender-based discrimination. This section explores good practices for collecting evidence, both related to discrimination cases and GBV and draws attention to examples of good practices in modifying rules of evidence in order to increase protection for victims of GBV and reduce secondary victimisation.

One of the challenges in prosecuting and adjudicating cases of gender or sex-based discrimination is the absence of evidence to prove that specific actions or decisions were discriminatory. Not only is evidence of direct discrimination usually non-existent (for example, rules, policies and practices appear neutral; they do not explicitly establish different treatment for women and men), but discrimination claims usually require specific types of evidence as well as procedural rules that make it easier for claimants to establish discrimination.[282] In the majority of discrimination cases, the prosecutor (if discrimination is defined in the national criminal code) and the judge (in civil and criminal cases) will collect and review evidence of **indirect discrimination**. Therefore, when reviewing evidence, the focus should be on the *effects* of the rules, policies or practices that are being challenged in order "to show that they are disproportionately unfavourable to specific groups of persons by comparison to others in a similar situation."[283]

In discrimination claims establishing the burden of proof and the evidence required to make a *prima facia* case are both important considerations. Note that the role of victims in presenting evidence, the weight of evidence required and the burden of proof all differ in significant ways between criminal, administrative and civil cases

280. *Halime Kılıç v. Turkey* (application no. 63034/11), Judgement of 28 June 2016.
281. General Recommendation No. 33 on women's access to justice. paras 25(a) and 51.
282. Farkas. L. & Petrovski, S. 2012. *Handbook for Training Judges on Anti-Discrimination Law*. OSCE Mission to Skopje. p. 9.
283. European Union Agency for Fundamental Rights/ Council of Europe. 2010. *Handbook on European Non-discrimination Law*. Luxembourg. p. 129.

(for example, in employment cases). In criminal cases, the victim has a more limited role. It is the responsibility of the complainant/authorities to investigate and establish discrimination, beyond a reasonable doubt, and that the accused had discriminatory intent. The standard of proof is higher in criminal cases due to the presumption of innocence and severity of the possible sanctions. The burden of proof does not shift.

In contrast, in civil cases and administrative proceedings on sex/gender discrimination, victims have a more active role, and each party presents evidence supporting his or her claim. Most importantly, under European law, established by EU directives and the case-law of the CJEU, the **burden of proof shifts** from the plaintiff to the defendant. Put simply, the shift in the burden of proof does not alleviate the obligation of the plaintiff to establish a causal link between the conduct and the harm suffered- to present evidence of discrimination. Instead, they must first "convince the court of the probability that they suffered discrimination"[284]- establishing a ***prima facia* case** (meaning, 'on first impression', it is accepted that discrimination occurred until proven otherwise). The burden of proof then moves to the respondent/defendant to prove that discrimination was *not* the motivation for the specific treatment. "If the respondent is unable to give objective reasons for the treatment that are unrelated to discrimination, [s/he] will be liable for a breach of non-discrimination law."[285] The EU notes that in many countries there is still an "imperfect understanding" among judges, legal professions and even some equality bodies about the requirements for establishing a *prima facie* case and shifting the burden of proof and that both training for legal practitioners and written guidance are needed.[286]

☑ **Good practice**: The Swiss Federal Act on Equality between Women and Men[287] was adopted, in part, to facilitate implementation of anti-discrimination provisions contained in the Swiss Constitution, particularly establishing a procedure for litigation of such cases. The Act includes a provision on 'facilitated proof," - the existence of discrimination is presumed as long as the plaintiff is able to demonstrate that discrimination is plausible. In the context of labour relations, Swiss case-law has established that it is sufficient for a woman to show that a male employee in a similar position who performs similar work earns more than the female employee (for example, a demonstration that the female worker earned from 15% to 25% less than a male worker) in order to shift the burden of proof. To overcome the presumption of discrimination, the employer must provide proof of an objective reason to justify the differential treatment; the justification must be proportionate to the degree of discrimination. These evidentiary rules take some of the burden of proof from the plaintiff and also facilitate the work of the judge- who may make a finding of discrimination without rigorous proof. This approach was adopted in order to promote the recognition of discrimination in the employment context.[288]

Common **forms of evidence** in cases of sex or gender-based discrimination do not differ from those submitted in cases of discrimination on other grounds, such as: witness statements, documents, or common knowledge.[289] In addition, it is important that practitioners are also familiar with other types of evidence, such as statistics, situation testing, questionnaires, audio or video recordings, forensic expert opinions and inferences drawn from circumstantial evidence, that can be used to prove discrimination claims. These types of evidence are summarised in the table below.[290]

| Type of evidence | How it is used |
|---|---|
| Situation testing | Can be used to uncover discriminatory practices and differential treatment in employment, for example. The process involves putting a person (here, a man) in an identical situation to the person alleging discrimination and assessing the action of the alleged discriminator. Note that this type of evidence is particularly useful in cases where the discriminator's action would be immediate, such as being given access to restaurants or rental property or in the case of hiring for a job. It would be more difficult to apply in cases alleging discrimination in promotions, for example. |

284. Lilla Farkas. 2011. *How to Present a Discrimination Claim: Handbook on seeking remedies under the EU Non-discrimination Directives*, (European Commission), p. 52.
285. Ibid.
286. Lilla Farkas and Orlagh O'Farrell, 2014, *Reversing the burden of proof: Practical dilemmas at the European and national level,* (European Commission), p. 8.
287. Loi fédérale sur l'égalité entre femmes et hommes, 24 March 1995.
288. See Florence Aubry Girardin, 2016, Moyens à disposition des juges en vue d'améliorer l'accès des femmes à la justice Situation de la Suisse, presentation at the regional conference Strengthening judicial Capacity to Improve Women's Access to Justice, 24-25 October, Chisinau, Republic of Moldova.
289. Farkas. L. & Petrovski, S. 2012. *Handbook for Training Judges on Anti-Discrimination Law*. p. 44.
290. Information summarised from *Handbook for Training Judges on Anti-Discrimination Law*.

| Type of evidence | How it is used |
|---|---|
| Questionnaires | In some jurisdictions, national law gives victims the opportunity or obligation to contact the alleged discriminator and to ask for clarification of his/her conduct in a questionnaire. The questionnaire answers, or a non-response, are evidence from which the court can draw inferences. Note that in countries without this specific legal process, victims (or prosecutors) can still use a response from an alleged discriminator as evidence. |
| Statistical data | Statistical evidence is an important means of establishing indirect discrimination, and patterns of discrimination, on the grounds of sex or gender, especially in the employment context (unequal pay or non-hiring and promotion, for example). "Using statistics helps to shift the focus away from the individual victim towards broader underlying structural inequalities. This is helpful if a victim knows that there are many others who share [this] fate but are unwilling to bring an action against the discriminator."[291] |
| Audio or video recordings | Evidentiary rules around the use of audio or video recordings differ by jurisdiction, but some countries do allow this form of evidence to be used by equality bodies and in court. |
| Opinions of expert witnesses | Expert opinions can be especially useful in establishing that there are patterns of discrimination in specific institutions or to assess and explain how evidence of discrimination in technically complex cases (for example, in determining what is "equal work" in cases alleging that a woman/women were paid less for the same work performed by men). |

In cases with prosecutorial involvement, it is important that prosecutors act with due diligence to explore various options for proving the existence of discrimination by considering various types of evidence. One of the most common barriers to justice that women who have experienced discrimination encounter is the lack of familiarity and practice of judicial officers with the evidence needed in cases of indirect discrimination. Too often, the absence of evidence of direct discrimination is used as justification for not charging a case or dismissing a claim.

A careful approach to evidence collection is also a critical part of prosecuting criminal cases, especially of violence against women. Both prosecutors and judges should always keep in mind the responsibility of the State to gather sufficient evidence to convict a perpetrator of violence which means that a victim's testimony remains crucial but is by no means the only type of evidence that should be considered. This point is articulated in the Istanbul Convention which states that parties to the convention "shall ensure that investigations into or prosecution of offenses […] shall not be wholly dependent upon a report or complaint filed by a victim […] [and the] proceedings may continue even if the victim withdraws her or his statement or complaint" (Article 55).

**Case-law example**: In case of *M.C. v. Bulgaria*[292], the applicant alleged that she was raped by two men, a charge that both men denied. When the case was investigated, insufficient evidence was found of M.C. being forced to have sexual intercourse. The prosecutor terminated the proceedings based on a determination that the use of force or threats had not been established beyond a reasonable doubt and "no resistance on the applicant's part or attempts to seek help from others had been established." In her communication to the ECtHR, the applicant alleged that the action of the prosecutor reflected a practice of prosecuting rape perpetrators only when there was evidence of "significant physical resistance" even though this was not an element of the crime, nor clearly supported by case-law. The ECtHR determined that both the investigator and prosecutor considered that date rape had occurred, but given the absence of "direct evidence" (traces of violence or proof of resistance), they adopted the view that lack of consent could not be inferred. The Court pointed out that the authorities had not considered other evidence (e.g. that M.C. had been mislead and coerced) or explored other possibilities (e.g. that M.C. experienced 'frozen fright' and therefore submitted to the act of rape or dissociated). The ECtHR held that there had been ineffective investigation in this case, in violation of the ECHR.

It is a good practice for prosecutors dealing with violence against women cases to take specific steps to reduce the likelihood that victims will refuse to co-operate in criminal cases by adopting a victim-centred approach that minimises the risk of repeated violence for the victim. A victim-centred approach can enhance the willingness of

291. Ibid. p. 47.
292. Case of M.C. v. Bulgaria, Judgement of 4 December 2003.

victims to testify and their ability to do so effectively. Key to a victim-centred approach is the creation of an enabling environment that allows victims to provide the best possible evidence. This requires prosecutors to avoid making assumptions about victims and to keep an open mind when listening to their experience. It is important to recognise that providing evidence about violent incidents can impact victims differently. Some may find the process cathartic, or empowering and a part of their recovery process. Others victims may experience secondary traumatisation. With these different outcomes in mind, prosecutors bear the responsibility of assessing the individual circumstances of each victim and tailoring their responses to meet the specific situations. The roles played by prosecutors in eliciting evidence and by judges in steering the trial process are particularly important.[293] Such approaches are described in module 4.8 on case management.

In terms of evidence collection, prosecutors must have the knowledge and skills needed to vigorously prosecute a case without the victim's testimony, and this requires constructing the case using **non-victim or corroborating evidence**. Prosecutors must be pro-active both in instructing police to collect specific types of evidence and in exploring the range of potential pieces of evidence.[294]

Note that, here, *non-victim evidence* refers to sources of evidence that support the victim's claim, other than that provided by the victim/survivor herself. The term *corroborating evidence* can also be used, for example, if a victim's statement to the police or prosecutor is submitted as evidence in court but the victim does not testify and other forms of evidence are offered. *Corroborating evidence* does not apply to the problematic practice in cases of domestic or sexual violence of requiring multiple forms of evidence for each charge based on a presumption that the victim is not credible. Many national legal systems once required such corroboration (e.g. two forms of evidence that penetration took place, two forms of evidence of lack of consent, etc. in rape cases), but have since removed this requirement.

The following checklist presents some of the most common types of non-victim/corroborating evidence used in cases of domestic violence, which could also be relevant to some other cases of violence against women.

- ✓ Statements of police officers, from the scene or regarding other interactions with the victim or accused.
- ✓ Statements of neighbours or other witness accounts (for example, friends, children[295], teachers, co-workers, staff of women's crisis centres and shelters, etc.).
- ✓ Recordings of emergency calls/ police dispatch calls.
- ✓ CCTV recordings (note that such recordings are especially useful in cases of stalking on harassment).
- ✓ Photographs of the injury and scene (including photographs of property damage).
- ✓ Medical history/reports (including history of emergency treatment as well as reports that show a history of abuse, such as dental records; examinations by specialists).
- ✓ Forensic medical certificate from the incident.
- ✓ History of previous incidents (e.g. criminal record of the perpetrator; past exclusion/protective orders; administrative penalties).
- ✓ Previous reports on domestic violence that were not pursued.
- ✓ Communication from the perpetrator to the victim, especially those that can be used as evidence of threats (notes, letters, emails, SMS messages, facebook/whatsapp posts, etc.).
- ✓ Bad character evidence about the perpetrator
- ✓ Expert testimony or witnesses, especially to explain the impact of violence on the victim, common behaviours and reactions of rape victim, concepts such as the cycle of violence or battered women's syndrome, etc.

It is a common myth that "if the violence is serious enough, the victim will testify in court." In fact, the victim's willingness to testify depends on a number of factors, including whether she feels threatened by the perpetrator, has been pressured not to cooperate in the prosecution and her dependent status on the perpetrator (especially in cases of domestic violence). It is not unusual in cases of domestic violence for a victim to request that

293. For a fuller discussion on the victim or witness-centred approach, see Gopalan, Kravetz and Menon, "Proving Crimes of Sexual Violence" in Serge Brammertz and Michelle Jarvis (eds), *Prosecuting Conflict-Related Sexual Violence at the ICTY* (OUP, 2016), 111-130.
294. Further guidance about prosecutor and police cooperation can be found in Council of Europe, Anna Constanza Baldry and Elisabeth Duban. 2016. *Improving the Effectiveness of Law Enforcement and Justice Officers in Combating Violence against Women and Domestic Violence: Training of Trainers Manual.* Available at https://rm.coe.int/16806acdfd
295. Note that special techniques and processes should be in place when interviewing children about GBV.

the prosecutor drop the case or otherwise indicate before trial that she will be an unreliable witness (she may fail to attend meetings or to appear in court, contradict her earlier statement when on the stand, minimise the violence, testify that the perpetrator did not cause the injuries, etc.).

In addition to careful preparation of alternative forms of evidence, prosecutors should thus take steps to ensure that the victim understands her role in the trial, what will take place and how the prosecutor will act to minimise her risk. It is also a good practice for prosecutors to ensure that there is a clear and comprehensive **victim statement** in the case file that can be used as evidence if the witness does not testify in court and to protect the victim from unnecessary and repetitive questioning about the incident. Such a report can be in written form but consideration should be given to using video statements. This practice is especially helpful for victims of sexual violence as it minimises the need for them to repeatedly speak about the incident.

Prosecutors and judges should also give careful consideration to the **methods for introducing evidence** in court, especially those that can minimise trauma and stress for the victim and avoid overly intrusive or repetitive questioning. For example, when victims who are traumatised and fearful of facing the abuser in court, pre-recorded video testimony can be introduced as evidence. Even if the jurisdiction requires cross-examination or confrontation by the defence, the prosecutor can request and/or the court can order that testimony be given from another room via video link or closed circuit television. If a female victim/witness appears to contradict her testimony in court, the judge should be prepared to question her sensitively in order to establish the reasons for the change so that they can be addressed (for example, by removing the defendant from the courtroom if intimidating tactics are being used).

Another important aspect of case preparation is to anticipate and plan for the possible introduction of prejudicial, embarrassing or harmful evidence by the defence, in particular evidence that may be damaging to the witness but which is not relevant or has no value in the case (for example, evidence of past sexual conduct or reputation, of substance abuse, etc.). Note that the Istanbul Convention expressly requires states to take measures to ensure that evidence related to the sexual history and conduct of victim's of violence is permitted only when it is "relevant and necessary" to civil or criminal proceedings (Article 54).

Very often intrusive questioning in cases of violence against women is used in order to present evidence based on stereotypes and assumptions about, for example, women's private behaviour, dress and private life. Prosecutors must be ready to object to and shield victims/witnesses from any evidence related to a victim's 'bad' character that is prejudicial and unrelated to the incident being prosecuted. Likewise, judges should also monitor the proceedings and intervene if the attention shifts toward questioning the victim's credibility, rather than establishing the guilt or innocence of the accused.

**Case-law example**: The case of *Y v. Slovenia* before the ECtHR concerns procedural obligations and role of the judge during criminal proceedings in a case of sexual assault. The underlying case concerns a claim made by Y against X, alleging that he had forced the applicant (a 14-year old girl at the time) to engage in sexual intercourse. During the criminal proceedings, gynaecological evidence was found to be inclusive, and X cross-examined Y, asking her over 100 questions during a four-month period. The ECtHR examined whether in the criminal proceedings against X, the State afforded sufficient protection to Y's right to respect for her private life, and especially for her personal integrity. The Court found that many of X's questions during cross-examination were aimed at attacking Y's credibility and intended to denigrate her character. While acknowledging the right of the defendant to cross-examination, the Court held that the State failed to maintain an appropriate balance between the rights of the defendant and the applicant's right to privacy. While noting that the defence has some leeway to challenge the reliability and credibility of the witness/victim and to point out possible inconsistencies in her testimony, the Court also stated clearly that "cross-examination should not be used as a means of intimidating or humiliating witnesses".[296]

Rules of evidence and procedure play a critical role, as they can entrench gender stereotypes which undermine the credibility of victims.[297] "Procedures and rules of evidence in the criminal justice system are often infiltrated by strong gender stereotypes which can result in engagement in gender-biased behaviour by court officials and

296. ECtHR, Judgement in *Y v. Slovenia*, 28 May 2015.
297. For a detailed discussion on this point, see Sexual Violence against Women: Eradicating Harmful Gender Stereotypes and Assumptions in Law and Practice, International Commission of Jurists, 2015.

discrimination against women by the criminal system in general. Gender stereotypes particularly affect procedures in rape and violence against women cases."[298]

Victims of sexual violence have been viewed with suspicion and distrust by the legal system, based on the false belief that women fabricate allegations of rape and sexual assault. Although false, this notion is deeply embedded in certain legal systems. As a result, unique evidentiary rules were developed for cases of sexual violence. These rules reflect some of the stereotypes about victims of sexual violence and facilitated intrusive and unwarranted inquiry and speculation about her "morality" and "character" thus, making it very difficult for a victim to establish her credibility.[299] Three evidentiary rules that rely on gender stereotypes and should be avoided include the following:

**The prompt complaint requirement**: procedural and evidentiary rules and practices that relate to the timeframe within which a complaint of sexual violence is made. In some jurisdictions, a delay in reporting may be used to question the truthfulness of a victim's allegation. Requiring this form of evidence gives legal form to stereotypical assumptions that a 'real' or 'ideal' victim of sexual violence will report the violence quickly.[300]

**The corroboration requirement** prohibits convictions based solely on the testimony of the victims and imposes a legal requirement that the victim's testimony must be corroborated by other evidence – whether physical, forensic, medical or the testimony of other witnesses. This requirement imposes a higher burden of proof on victims of sexual violence in comparison with other violent crimes, where a conviction may be secured solely on the victim's testimony.[301] The corroboration requirement embodies the assumption that women lie about being sexually assaulted and is premised on the mistaken notion of how sexual violence occurs and what it involves.

**Credibility challenges** based on the **victim's prior sexual conduct** reflect the stereotype that women are more likely to be believed if seen as, chaste, moral or respectable. It reflects "the assumption too often made in the past that a woman who has had sex with one man is more likely to consent to sex with other men",[302] even though there is no "logical or practical link between a woman's sexual reputation and whether she is a truthful witness".[303] Aside from being irrelevant, the admission of evidence relating to a victim's sexual history is prejudicial and potentially traumatising to the victim. Such evidence effectively puts the victim on trial by focussing on their behaviour outside the court room instead of the alleged conduct of the defendant.[304]

☑ **Good practice**: **Rape shield laws** are designed to prohibit or limit the use of the victim's sexual history, behaviour or reputation that is unrelated to the subject of the legal proceeding. Rape shield laws are based on an understanding that these forms of evidence are often used to undermine a victim's credibility and can also violate her privacy. Among other jurisdictions, rape shield laws exist in Canada, the United Kingdom and the United States (at both the state and federal levels).

Other problematic forms of evidence specific to cases of sexual violence include: evidence of the use of force or a physical struggle (as an element of the crime or relied upon as corroborative evidence to bolster a victim's credibility); lack of evidence of the victim fighting back (to imply that the sexual intercourse was consensual). These evidentiary requirements reflect the erroneous belief that if sexual violence is truly non-consensual, the woman will fight back and the perpetrator will have to use physical force or the threat of it to overcome her.

**Case-law example**: Case-law example: In the case of *M.C. v Bulgaria*, the ECtHR noted that: "[T]he evolving understanding of the manner in which rape is experienced by the victim has shown that victims of sexual abuse – in particular, girls below the age of majority – often provide no physical resistance because of a variety of psychological factors or because they fear violence on the part of the perpetrator. "[Any] rigid approach to the prosecution of sexual offences, such as 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.[305]

298. Gabriella Knaul, Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/66/289 (10 August 2011), para. 46.
299. R. v. Seaboyer, [1991] 2 S.C.R. 577, 708-709 (L'Heureux-Dubé & Gonthier JJ, dissenting in part) (Canada, Supreme Court).
300. CEDAW Committee, *Karen Vertido v. The Philippines* (2010), Communication No. 18/2008, paras. 8.4-8.5. See also International Commission of Jurists. 2015. Sexual Violence Against Women: Eradicating Harmful Gender Stereotypes and Assumptions in Law and Practice., p.12.
301. See CEDAW Committee. 2015. *General Recommendation No. 33 on Women's access to justice*. para. 25(a)(iii).`
302. R v A (no.2) [2001] UKHL 25 (United Kingdom).
303. *R. v. Seaboyer* [1991] 83 DLR (4th) 193 (Canada Supreme Court)
304. For a fuller discussion on the importance of a gender sensitive evidentiary framework. see Gopalan, Kravetz and Menon, "Proving Crimes of Sexual Violence" in Serge Brammertz and Michelle Jarvis (eds), *Prosecuting Conflict-Related Sexual Violence at the ICTY* (OUP, 2016), p.130-145. The discussion on ICTY rules of evidence and procedure on sexual violence evidence provides good practice examples applicable in national jurisdictions.
305. M.C. v Bulgaria (2003) ECHR 651, paras. 164-166.

## 4.4 Theory of the case and legal reasoning

Improving women's access to justice requires the application of a gender perspective throughout legal proceedings. At the stage when practitioners are developing the theory of the case or undertaking legal analysis using a gender perspective, taking a **gender sensitive approach** refers to a process of questioning "the facial neutrality of laws and norms; [determining] the legal framework that will best effectuate the right to equality; [deciding] whether differentiated treatment is legitimate; and [articulating] why we are applying the chosen framework to the facts."[306] Here, developing the theory of the case refers to first determining the applicable law and then applying legal reasoning to interpret the law and apply it to the given set of facts.

One of the barriers to justice that women face is the absence of specific legislation that addresses the rights violations that they have experienced. Recall the *Anna Belousova v. Kazakhstan* communication to the CEDAW Committee described in module 3.4 of this manual. The Committee noted that there was no national law in Kazakhstan on sexual harassment. In such circumstances, legal practitioners will be required to look beyond domestic law at international human rights standards. National law on date rape, stalking and harassment are also underdeveloped, especially emerging areas of cyber staking and online harassment, but studies suggest that women are increasingly being targeted through these media.

In preparing for a case of violence against women, prosecutors should prepare a theory of the case that presents the issue as both a crime and as a form of discrimination. In particular, prosecutors need to develop and demonstrate an understanding of the nature of this form of violence, such as the cycle of violence, and its impact on women.

The prosecutor should counteract any prevalent stereotypes such as "if she did not leave a violent relationship, it was not very serious" or "it could not be rape if the victim did not fight back." Prosecutors should be aware of the dynamics of crimes that disproportionately affect women and explain victims' seemingly contradictory actions when prosecuting the case. They should use facts, evidence and statistics to refute myths and not perpetuate stereotypes themselves.

## 4.5 Remedies

In order to improve women's access to justice, the CEDAW Committee recommends that States ensure the provision of remedies that are "adequate, effective, promptly attributed, holistic and proportional to the gravity of the harm suffered".[307] Judicial remedies should be tailored to meet the specific human rights violation, to address the wrong and also to compensate for the harm suffered. Gender-sensitivity requires consideration of what is the most appropriate remedy in a given situation.

It can be useful for judges (as well as prosecutors who may recommend specific remedies) to use the following short list of considerations when determine whether the remedy will "contribute to the elimination of the patterns and discrimination and marginalisation that may have been behind the facts in the particular case".[308]

- ✓ Did the party suffer disproportionate harm based on her sex/gender?
- ✓ What types of remedies could provide the best redress for this kind of differential impact?
- ✓ What remedy would be the most appropriate way to make the victim whole, given the type of harm suffered?
- ✓ When determining an appropriate remedy, have the victim's desires been taken into account?
- ✓ Will the remedy provide redress for all the different types of harms that the victim has experienced and have been identified? (Keep in mind, for example, the psychological harm that victims of gender-based violence may suffer in addition to physical, sexual or other forms of harm, or lost income in cases of employment discrimination).

306. Suprema Corta de Justicia de la Nación [National Supreme Court of Mexico]. 2014. *Judicial Decision-Making with a Gender Perspective: A Protocol*. English edition. Mexico City. p. 106.
307. CEDAW General Recommendation No. 33, para 19(b).
308. Note that this provision is cited from the General Law of Victims of Mexico. See Suprema Corta de Justicia de la Nación. *Judicial Decision-Making with a Gender Perspective: A Protocol*, p. 131, from which the checklist is summarised.

In civil cases, for example employment discrimination, appropriate remedies may include restitution (reinstatement), compensation/compensatory damages, and measures to ensure non-repetition. Note that for victims of sexual harassment or other forms of employment discrimination, reinstatement may not necessarily be the remedy that women are seeking. Compensating the victim is important not only for restitution but because it sends a clear message to the person/organisation using discriminatory practices. Courts should also consider ordering rehabilitation (medical and psychological care and other social services) for victims.[309]

Determining the appropriate remedies in criminal cases, those concerning violence against women, requires an understanding of the dynamics of violence and the harm that the victim has suffered. "The wishes and needs of victims are often diametrically opposed to the requirements of legal proceedings," and victims/survivors are often more willing to participate in formal legal proceedings if they believe "that the system offers remedies that could potentially make the ordeal worthwhile."[310] The Istanbul Convention provides guidance on several important considerations in determining appropriate remedies. Remedies for **civil damages and criminal sanctions should not be mutually exclusive**, which means that victims of VAW are entitled to civil remedies (against the perpetrator of the state) in parallel with criminal sanctions (Article 29). Victims have the right to claim **compensation** for the harm they have suffered(Article 30). Victims may be unaware of their entitlement to civil damages or how to seek remedies, and so practitioners should provide basic information about these options along with referrals to legal aid services. Note, however, that in cases of domestic violence, monetary sanctions against the perpetrator are often ineffective and can potentially negatively impact a woman if she is financially dependent on the husband or partner.

**Case-law example**: The case of *Airey v. Ireland* (1979*)* before the ECtHR demonstrated that the judicial remedies that can allow a victim of domestic violence to escape the violent situation through, *inter alia*, divorce or separation proceedings shall be accessible and effective in order to guarantee practical – not just theoretical or illusory– protection to the victim in a vulnerable position. Effective access may require that the victim is afforded legal aid due to the complexity of the case, the victim's unfamiliarity with the court proceedings but also from the point of view of the victim's lessened capacity to represent her interests due to her emotional involvement in the case.[311]

**Protective orders** are an example of a gender-sensitive remedy that has been used effectively in domestic violence cases. Protective orders are civil remedies that address the desire of many victims to end a violent relationship, without the perpetrator necessarily being criminally prosecuted or jailed. Protective orders alone are not adequate remedies for domestic violence, and they are usually used in conjunction with separation/divorce proceedings or criminal processes. As noted in the Istanbul Convention, protective orders shall be available "irrespective of, or in addition to, other legal proceedings" and they may also be introduced in subsequent legal proceedings (Article 53). Additionally, violators of protective orders shall be subject to criminal sanctions

The creation of **programmes for perpetrators of violence** (for example, for perpetrators of domestic violence or for sex offenders) is a good practice and a requirement of the Istanbul Convention (Article 16). In many jurisdictions, prosecutors can request and courts can order perpetrators to attend such programs as a condition of their sentence. Note that such programs should not be mandated as an alternative to sentencing or other legal sanctions. Such programmes have a goal of treating offenders and teaching them how to adopt non-violent practices, with an eye toward the prevention of future violence. They may be offered in parallel with other programmes, such as anger management, relationship counselling or treatment for substance abuse and addiction, but they are distinct forms of treatment and should not be substituted.

When used properly, perpetrator programmes can be an effective form of alternative relief for victims of violence. However, if attendance in such programmes is mandated, legal professionals have the responsibility of determining that the programmes meet certain criteria, most crucially that they include risk assessments and measures to ensure victim safety.[312] When a perpetrator participates in such a programme, "it may influence a victim's decision to stay with or leave the abuser, or provide the victim with a false sense of security."[313]

309. CEDAW General Recommendation No. 33, para 19(b).
310. Judith Lewis Herman. 2005. Justice from the Woman's Perspective. Violence Against Women 2005 11: 571-602, 574-575.
311. *Airey .v Ireland*, Judgement of 9 October 1979.
312. See generally, Marianne Hester and Sarah-Jane Lilley, 2014, *Domestic and Sexual Violence Perpetrator Programmes: Article 16 of the Istanbul Convention*, Council of Europe. Additional guidance on judicial considerations when mandating attendance in a perpetrator programme can also be found in *Improving the Effectiveness of Law Enforcement and Justice Officers in Combating Violence against Women and Domestic Violence: Training of Trainers Manual.*
313. *Domestic and Sexual Violence Perpetrator Programmes: Article 16 of the Istanbul Convention*,, p. 7.

Particularly in the context of VAW, remedies that go beyond "restitution" (which would involve returning a victim to the situation prior to the violation which may very well be the situation which gave rise to gender-based violence) are recommended. The Special Rapporteur on violence against women, its causes and consequences advocates for the use of reparations for women that strive to have a **transformative** potential, and that aspire to subvert instead of reinforce gender hierarchies, systemic marginalization and structural inequalities that may be at the root cause of violence against women.[314] When they award transformative remedies that seek to eliminate gender bias ands stereotyping at a structural level, justice actors are protecting and advancing women's rights.

Thus, depending on the jurisdiction, judges may be able to order remedies that extend beyond those requested by litigants, and have a broader impact across society. This may include orders to require certain public actors (e.g. law enforcement officers or health service providers) to take specific action.[315] Additionally, instead of dictating a remedy, courts may engage in a dialogue about remedies with the executive branch and require it to propose solutions and explain its action on the matters before the court.[316] By considering formal and substantive equality across the system, rather than focussing on a narrow assessment of individual cases in isolation of the social context in which they occur, the judiciary can play a transformative role in furthering society wide equality.[317]

## 4.6 Sentencing and the enforcement/execution of judgments

In cases of violence against women, prosecutors and judges should ensure that the requested sentence reflects the serious nature of the crime.[318] Sentencing in such cases should be fair, non-discriminatory, proportionate, uniform and consistent. Note that the primary goals of sentencing must be to prevent the reoccurrence of the violence, to protect the victim, and to hold the perpetrator accountable. The rehabilitation of the perpetrator shout not be the primary aim of a criminal sentence.

There is variation in the procedures for judicial decision-making about sentencing (in some European countries, the court first establishes guilt and then judges may refer to pre-sentencing reports for guidance, while in others the two phases are combined). Nevertheless, some points that prosecutors and judges may consider in the context of criminal sentencing include the following:[319]

- ✓ Are there **aggravating circumstances** that justify an increased sentence? (These can include the relationship of the perpetrator to the victim; whether the offense was repeated/does the perpetrator has a prior conviction; whether children were present when the violence was committed; the extreme nature of the violence and/or whether a weapon was used.)[320]
- ✓ Does any **risk assessment** that was conducted during the proceedings indicate that there is a possibility that the perpetrator will reoffend?
- ✓ Is the perpetrator a '**first-time**' **offender**? Practitioners should be aware that many offenders who appear in court for the first time have used violence in the past but may never have been charged. Caution should be exercised when making decisions about suspended sentences or conditional released based on the fact that the perpetrator does not have a criminal record. Prosecutors and judges should consult other sources of information to determine a perpetrator's history of abuse.

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314. OHCHR, *Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, Rashida Manjoo*(A/HRC/14/22, 19 April 2010), paras.31, 85. See also paragraph 32 in General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of CEDAW, noting that "remedies should include different forms of reparation, such as monetary compensation, restitution, rehabilitation, and reinstatement; measures of satisfaction, such as public apologies, public memorials and guarantees of non-repetition; changes in relevant laws and practices; and bringing to justice the perpetrators of violations of human rights of women."
315. See example of *González et al. ("Cotton Field") v Mexico*, Inter-American Court of Human Rights, Judgment of 16 November 2009 (Preliminary Objection, Merits, Reparations, and Costs), para. 450.
316. See Judgement T-760 (Constitutional Court of Colombia, Sentencia T-760/08, July 31, 2008) (Colombia) cited in the Guide for the Judiciary on Applying a Human Rights-Based Approach to Health Application to sexual and reproductive health, maternal health and under-5 child health, OHCHR, Harvard FXB, UNFPA, WHO and PMNCH (Advance version) p. 40.
317. See Guide for the Judiciary on Applying a Human Rights-Based Approach to Health Application to sexual and reproductive health, maternal health and under-5 child health, OHCHR, Harvard FXB, UNFPA, WHO and
PMNCH (Advance version) p. 43.
318. Istanbul Convention, Article 45.
319. *Improving the Effectiveness of Law Enforcement and Justice Officers in Combating Violence against Women and Domestic Violence: Training of Trainers Manual*, pp. 90-92.
320. Istanbul Convention, Article 46.

- ✓ Can a perpetrator of sexual violence be required to **register as a sexual offender** as part of the sentence in the particular jurisdiction?
- ✓ Has the victim been given the opportunity to provide information about the impact of the violence that is relevant to sentencing? For example, judges can allow victims to address the court or provide a written statement that presents her opinion about the sentencing of the perpetrator, the effect of the crime on herself and other family member, especially children and any concerns she may have. Prosecutors should prepare the victim for sentencing hearings and present her with such options. Judges are not required to follow the opinion of the victim, but her statements can be useful to remind the court of the harm that the perpetrator has caused.

☑ **Good practice**: Some courts have developed **sentencing guidelines** to help judges decide on the appropriate sentence in domestic and sexual violence cases. In the United Kingdom, for instance, such guidelines list the factors that a judge should consider and which may affect the sentence. The guidelines are based on research and evidence and take into account the overall approach to the problem and the options of experts. Notably, the implementation of the guidelines is periodically reviewed. The Sentencing Council for England and Wales has produced guidelines for cases involving sexual offenses, domestic violence and breach of a protective order.[321]

Judges and prosecutors play a role in overseeing the enforcement of judgments, especially when they involve criminal proceedings (but also in civil cases, for example, violations of a protective order). Particularly in cases involving violence, decisions about suspending a sentence, the conditions of imprisonment, and decisions release should not be made without considering the results of an assessment of the risk of future violence, to the victim or to others.

In many domestic violence cases, a **risk assessment** will have been conducted by police at an early stage in the proceedings, but it is vital that the findings be updated- a process that requires coordination among justice sector actors.[322] Judges rely on expert reports about the dangerousness of an offender, especially when deciding on the conditions of release. If an offender continues to make threats to harm the victim from prison, for example, this would be vital information to consider in reviewing a custodial sentence. In the context of managing the risk of dangerous offenders, the Council of Europe notes that "[e]fforts should be made to diminish missing information, misunderstandings and/or the absence of appropriate reactions to the level of risk that can arise when different agencies and types of staff have to co-operate. It is a common experience that reoffending takes place particularly when relevant information has not been shared or when relevant parties have failed to act properly."[323] Further information about risk assessment is provided in module 4.8.1.

**Case-law example**: In *A. v. Croatia*, the ECtHR found a violation of the ECHR in a case involving domestic violence. After experiencing domestic violence by her husband, A initiated a number of legal proceedings (three criminal proceedings and four for minor offenses). The outcome of such proceedings was the issuing of several protective orders, pre-trial detention, psychiatric and psycho-social treatment, and a prison term. Although some of the sanctions were implemented, the perpetrator did not serve prison sentences for two offenses (one of which included making death threats to the applicant). The ECtHR noted that the State failed to adequately protect the applicant's rights when the authorities did not take into consideration the different criminal and minor offenses proceedings concerning a number of violent acts committed by the same person against the same victim, and failed to view the case history as a whole. This case highlights the importance of coordination within the legal system and giving due consideration to the entire history of abuse and criminal history when making determinations of the appropriate sanction. It also draws attention to the role of judicial oversight in ensuring that judgements are executed and sentences are served.

321. Sentencing guidelines can be accessed from: http://www.sentencing-guidelines.gov.uk (under the "publications page').
322. Further guidance about risk assessment can be found in *Improving the Effectiveness of Law Enforcement and Justice Officers in Combating Violence against Women and Domestic Violence: Training of Trainers Manual* (Anna Costanza Baldry and Elisabeth Duban, Council of Europe, 2016).
323. Committee of Ministers, Recommendation CM/Rec(2014)3 on Dangerous offenders, Explanatory Memorandum, para. 149.

## 4.7 Alternative dispute resolution

Many jurisdictions around the world have been exploring the use of alternative forms of justice as a means to alleviate some of the burden on formal justice institutions and to increase access to justice for marginalised groups. Alternative dispute resolution (ADR) is one such method, and the term *ADR* can refer to a wide variety of mechanisms that replace a full-scale court process, such as arbitration, mediation and negotiation processes. ADR processes can be voluntary or mandatory and may result in either binding or non-binding decisions. Among Council of Europe member states, many have law that "provides for alternative dispute resolution processes and sentencing – in criminal and in civil law. In particular in family law, methods of resolving disputes alternative to judicial decisions are considered to better serve family relations and to result in more durable dispute resolution."[324]

While ADR may be beneficial in some settings, gender experts urge caution in applying such alternative process in the context of women's access to justice. The CEDAW Committee recommends that ADR be prohibited in cases of violence against women and called on States Parties to "ensure that cases of violence against women, including domestic violence, are under no circumstances referred to any alternative dispute resolution procedures".[325] The Istanbul Convention also contains a clear **prohibition on mandatory alternative dispute resolution processes**, including mediation and conciliation, in adjudication and sentencing concerning the kinds of violence against women outlined in the convention itself (Article 48). The drafters of the Convention have taken a clear stance that the serious risk that ADR will have negative effects if made mandatory and replaces adversarial court proceedings outweighs any potential benefit.

> "Victims of such violence can never enter the alternative dispute resolution processes on a level equal to that of the perpetrator. It is in the nature of such offences that such victims are invariably left with a feeling of shame, helplessness and vulnerability, while the perpetrator exudes a sense of power and dominance. To avoid the re-privatisation of domestic violence and violence against women and to enable the victim to seek justice, it is the responsibility of the State to provide access to adversarial court proceedings presided over by a neutral judge and which are carried out on the basis of the national laws in force."[326]

ADR is not appropriate when there are extreme power imbalances between the parties, and there is also a risk that such an alternative process might "prioritise family unity over women's access to justice".[327] Furthermore, ADR when applied to cases of domestic violence is based on the misconception that both the perpetrator and the victim are equally at fault for the violence, and that both need to moderate their behaviour in order to resolve the issue. This approach trivialises the seriousness of the crime. More broadly, it is also contrary to the rule of law and women's equality before the law because it removes serious crimes such as those involving acts of violence against women from the ambit of the mainstream justice system.[328]

Mediation is often applied to **family law** and **divorce cases**, such as disputes over property division, child custody and child visitation. Legal practitioners should exercise caution in recommending ADR in such cases, due to the inherent power imbalances mentioned above and the fact that research indicates that a large number of contentious divorce cases have a history of domestic violence that may never have been addressed. It is imperative that courts develop screening procedures to determine whether there is a history of domestic violence before referring any family disputes to mediation. Court personnel, and others who serve as mediators, should be trained in how to conduct such screening tests and to ensure confidentiality.

ADR may be applicable to the resolution of incidents related to **employment** or **labour law**, but again due to power imbalances, it is not advisable to apply ADR in cases related to sexual harassment or disputes concerning sex/gender discrimination.[329]

There is, however, some evidence that when ADR processes are properly designed to "enhance the power or status of the weaker party" and overseen by the formal legal system, they can be "effective in conditions of discrimination or power imbalance".[330] In a small number of countries where victim-led ADR and restorative justice practices have been tested in domestic violence cases (Bangladesh, India, South Africa), evaluation suggests that

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324. Council of Europe. 2011. *Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence*. para. 251.
325. CEDAW General Recommendation No 33, paragraph 58(c). 363 UN Women.
326. *Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence*. para. 252.
327. Heise, L. 2011. *What Works to Prevent Partner Violence: An Evidence Overview*. Strive Research Consortium: London. p. 80.
328. Women's Access to Justice for Gender-Based Violence, Practitioner's Guide No. 12, International Commission of Jurists, p. 138
329. Ibid.
330. Center for Democracy and Governance, USAID. 1998. *Alternative Dispute Resolution Practitioners' Guide*. p. 20.

women feel positive about having the opportunity to "make their voices heard, to tell their story, and to insist on changes in their partners' behavior".[331] In Roma communities in Southeast Europe, some community justice projects have provided women with opportunities to assert their rights in way that has been more effective than in the formal justice system.[332] Research in the U.S. also suggests that mediation can possibly provide a victim of domestic violence with an opportunity to "stand up to the perpetrator" and resolve the situation more quickly than a judicial processes.[333] However, U.S. experts also stress that mediation should only be used in domestic violence cases when certain criteria are met, namely "when there has been a break in the coercive control," which could be the result of "the batterer completing a batterer's intervention program or accepting responsibility for and changing his behaviour".[334] Even in these cases, mediators must be skilled in conducting pre-mediation screening to determine its appropriateness, in assessing the risk for any further abusive or manipulative behaviour, and in ensuring that issues of child custody and property division are negotiated separately from other issues to minimise coercive control.

It should be noted that ADR is not effective and should not be used in cases of particularly violent crimes, such as sexual violence, or repeat offenses, which require public sanctions and punishment.

The above examples all illustrate that ADR can offer women a means to overcome barriers to formal justice, but only when programmes are voluntary, context specific and very carefully developed to reflect the specific needs of women in that community. Judges and other legal system actors can take important lessons from the examples of successful use of alternative processes. Legal practitioners should consider other means to ensure that the elements of ADR that benefit women, such as having their opinions and needs acknowledged in legal proceedings, are incorporated into standard and formal legal processes.

## 4.8 Gender-sensitive case and courtroom management

Some of the barriers to justice that women encounter are related to the fact that legal procedures are often inadequate to address the specific needs of women as victims or as litigants. In contrast, when legal practitioners are aware of and understand the perspectives of women encountering the justice system, they can act in a way to improve those processes.

The following sections of the manual present practical considerations that both prosecutors and judges can take to ensure safety and reduce risks for women involved in legal processes, especially in criminal cases. Many of these practices form part of a victim-centred approach that is required under the Istanbul Convention - in which the rights, needs and safety of victims of violence against women are placed at the forefront during investigation and prosecution, without discrimination. In fact, many of these practices could effectively be applied to other legal proceedings, such as family law cases or even cases of discrimination.

### *4.8.1 Safety concerns and managing risk*

Prosecutors and judges should take specific steps to ensure the safety of victims in legal proceedings, both to avoid re-victimisation by the perpetrator and secondary victimisation during the legal process itself. Victim safety is an utmost concern in cases of VAW, but safety measures should also be given consideration in civil cases that are especially contentious, such as family disputes or employment discrimination claims. In civil cases, safety refers not only to the risk of physical violence but also to protection of the plaintiff from harassment, threats, hostile reactions and even potential secondary victimization during investigation and trial processes (for example, subjecting women to repeated and intrusive questioning, pressuring women to drop cases or reconcile with violent partners, etc.). Safety precautions can be categorised as immediate measures and on-going processes that improve the overall management of cases in which women are in high risk situations.

At the institutional level, steps should be taken to ensure that the offices of prosecutors as well as courthouses have **adequate security features**, such as screening for weapons and security personnel who have received training in

331. The example is from South Africa. See Lori Heise. 2011. *What Works to Prevent Partner Violence: An Evidence Overview*. p. 81.
332. Council of Europe Gender Equality Commission. 2013. *Feasibility Study: Equal Access to Justice for Women*. p. 17.
333. Ashley E. Lowe and Nina Dodge Abrams. 2011. Should We Mediate in Cases Involving Domestic Violence? Oakland County Bar Association, November 2011. p. 9.
334. Ibid, p. 10.

topics such as the dynamics of domestic violence and the possible dangers that such cases present. During proceedings that concern domestic violence, which could include protection order hearings, criminal trials or divorce and child custody hearings, judges should be especially aware of the possibility that the alleged perpetrator will use tactics to intimidate the victim or manipulate the legal process (such as glaring, staring, making emotional appeals, etc.). Judges should act decisively to stop such behaviours, by issuing warnings, reseating parties to a proceeding or removing the perpetrator from the courtroom if needed. At the end of processes that concern violence against women in which the perpetrator is not in custody, it is good practice to dismiss the parties with a time lag, allowing the victim to leave the court first and offering a security escort out of the building if needed.

Prosecutors and judges should speak with female litigants, especially victims of violence, about plans for their safety and that of any family members. During preliminary interviews, prosecutors should explain the stages of the legal process and inquire about whether the victim/witness has given consideration to applying for a protection order. The discussion should include reviewing the steps she can take to ensure her safety throughout the legal process, taking into consideration the possibility that the offender will not be in custody or will be released on bail, provide information about personal safety plans in open court. Such information is best conveyed through legal council or an advocate, or *in camera* hearings.

It is a good practice for legal practitioners to be aware of the social services and support organisations for victims of violence that are available in the community, such as crisis centres and shelters, in order to make the appropriate referrals. These types of organisations can work more closely with the victim and assist her to develop a personal safety plan.

☑ **Good practice**: A model used in Germany for court-based assistance to domestic violence victims is used to coordinate and facilitate how the criminal justice system manages domestic violence cases. After an act of violence has been committed, the police pass an investigative report to a court assistance office. The office then co-ordinates separate meetings with the victim and perpetrator, at which time the victims' individual needs and support are discussed, and referrals are given to specialist advice centres ("women help women" centres) that can help with safety planning and other services. The court assistance office reports on the interviews to the public prosecutor with recommendations for judicial intervention.[335]

Apart from victim's safety planning conducted by the victim herself, prosecutors and judges also have a duty to undertake **risk assessments**.[336] Risk assessment is a process to determine the level of risk of escalated violence and to manage the risk during legal proceedings. In most countries, police who respond to incidents of domestic violence also conduct preliminary risk assessments. Prosecutors should use such assessments to make determinations about the level of monitoring and intervention that is required by the justice system as well as the appropriate **criminal charge, bail and release conditions and in sentencing and parole hearings**.

In **protection order hearings**, judges should also make use of risk assessments to determine the content of the order, such as restrictions on child visitation, for example. Risk assessments should be performed periodically as levels of risk are dynamic and change during the legal process. It is also vital that all professionals who work with victims of domestic violence, including not only police, prosecutors and judges, but also social workers, service providers, parole officers, prison authorities etc. use a common set of criteria to assess risk. Usually such criteria are developed through multi-agency meetings of the relevant stakeholders.

**Case-law example**: In *Tomasic and Others v. Croatia*, the ECtHR held that there was a violation of Article 2 of the ECHR when the Croatian authorities failed to take the appropriate steps to prevent the deaths of two people in a case involving domestic violence. In this case, the Court examined whether the relevant authorities should have known that M.M. presented a risk to the lives of his former wife and his child. The Court noted that the State Attorney's Office instituted criminal charges against M.M. and the domestic courts established that M.M. had made threats against his former wife for a long period of time— evidence of awareness of the risk. The Court also found that the authorities failed to assess M.M.'s condition or the likelihood that he would act on the threats, and they did not take "adequate measures […] to diminish the likelihood of M.M. to carry out his threats upon his release from prison".[337]

☑ **Good practice**: In Belgium, the Minister of Justice and the Board of Prosecutors General on criminal policy with respect to violence in couples adopted a joint circular that sets forth guidelines for criminal policy on

335. Ibid. pp. 77-78.
336. Istanbul Convention, Article 51.
337. ECtHR, *Branko Tomasic and Others v. Croatia*, Application No. 46598/06, judgment of 15 January 2009.

domestic violence.[338] The circular standardises a system for identifying and registering domestic violence cases that both police and prosecutors use. The circular also outlines the responsibilities of law enforcement and the judiciary and serves as a reference tool for both institutions.[339]

Incidents of violence against women require special management and handling techniques in the legal system. For example, investigation must proceed quickly in cases of rape or sexual violence, as critical evidence could otherwise be lost. Practice has shown that victims of domestic violence face a very high risk of further violence, and often more intensive violence, once a legal process has been initiated. For these reasons, many jurisdictions have fast-track and simplified processes for gender-based violence cases (in both criminal and family law cases). Some countries have created specialised courts or dedicated dockets that deal specifically with such cases (criminal, civil or a combination) or to manage hearings on protection orders related to domestic violence.

☑ **Good practice**: In 2004, Spain enacted a law on integrated protection measures in cases of gender-based violence (the Organic Act 1/2004). Subsequent law reform introduced important new measures to facilitate implementation of the act, such as **fast trials** for specific and minor domestic violence offences that are adjudicated within two weeks of the incident. A **specialised Prosecutor of Violence against Women** and **specialised courts** were also created. The courts have combined criminal and civil jurisdiction. These courts examine all applications for protection orders (which a victim may file with the police, magistrate's court, public prosecutor's office or State women's support centres) and grant a decision within 72 hours. Judges who work in the specialised courts are required to receive training on gender-based violence. The Act created a holistic and multidisciplinary approach for dealing with gender-based violence both within and outside of the legal system, including victim support offices, with which the courts cooperate.[340]

Even in the absence of such expedited processes, legal practitioners can take steps to clearly identify and flag violence against women cases for priority attention. Even a step as simple as distinctively marking the relevant case files can help to ensure that the case is managed correctly, as quickly and sensitively as possible. Such a labelling process also greatly assists in record-keeping and monitoring.

### *4.8.2 Planning for meetings and the court setting*

At a practical level, prosecutors and judges should consider in advance how to manage the format and setting for any interviews as well as the court room itself.[341] For example, for meetings with female victims of violence, a safe, private and comfortable location should be chosen where there is no risk that the victim will be confronted by the alleged perpetrator (for this reason, it is advised that prosecutors do not meet victims of violence at a police station). Courthouses should be organised in a way to have separate waiting areas for parties to legal proceedings, especially in cases of domestic violence, but also in divorce cases or other family matters. Arrangements should be made for on-site childcare to make it easier for women to attend meetings or hearings in court. Similarly, legal practitioners should consider whether it is possible to permit women to be accompanied by an advocate or support person (who could be a member of a woman's organisation, crisis centre, a family member or a friend).

### *4.8.3 Informing victims of their rights and about support services*

It is a good practice to provide detailed information to women in legal proceedings about their legal rights, procedural issues and to give referrals to local support organisations, especially those that provide legal aid.[342] Women very often do not have legal counsel, and so it should not be presumed that they have received ade-

338. The joint circular is accessible in French and Flemish from: http://www.evaw-global-database.unwomen.org/en/countries/europe/belgium/2006/circulaire-n-col-3-2006-du-1er-mars-2006-du-college-des-procureurs-generaux and http://www.evaw-global-database.unwomen.org/-/media/files/un%20women/vaw/full%20text/europe/belgium%20-%20col_3-2006/belgium%20-%20col_3-2006.pdf.
339. Council of Europe Gender Equality Commission. 2015. *Compilation of good practices to reduce existing obstacles and facilitate women's access to justice*. pp. 24-26.
340. Carmen de la Fuente Méndez. 2016. Special Courts and Special Prosecutor's Offices Examining Cases of Violence Against Women in Spain: Ten Years´ Experience: Barriers, Remedies and Good Practices for Women's Access to Justice, presentation at the regional conference Strengthening judicial Capacity to Improve Women's Access to Justice, 24-25 October, Chisinau, Republic of Moldova.
341. Further guidance about preparing for interviews and other interactions with victims/witnesses can be found in *Improving the Effectiveness of Law-Enforcement and Justice Officers in Combating Violence against Women and Domestic Violence: Training of Trainers Manual*. 2016. Anna Costanza Baldry and Elisabeth Duban, Council of Europe. accessible at http://www.coe.int/en/web/istanbul-convention/publications
342. See Ibid for guidance about informing victims of their rights and referrals to support services.

quate information about what the legal process will entail. As a measure of protection for victims of violence against women, the Istanbul Convention requires that prosecutors and judges provide victims with specific information about their legal rights and available support services.[343]

The CEDAW Committee emphasizes the importance of developing targeted outreach activities and distributing information about justice mechanisms, procedures and remedies as a way to combat harmful practices. Such outreach and informational materials should be "appropriate for all ethnic and minority groups in the population and designed in close cooperation with women from these groups and, especially, women's and other relevant organisations."[344]

Prosecutors should take special care to inform victims of violence about the role that the State plays in a criminal proceeding and how they can be assisted in that process as witnesses. Victims of gender-based crimes should be told explicitly about their rights to claim compensation for damages, to apply for civil protection orders, to be heard in hearings, both preliminary and at trial, as well as the right not to testify. Under some domestic legal systems, citizens have a right to legal assistance, provided they meet specific criteria (such as economic thresholds and the type of legal matter). It is important that such information be made available to women when they first encounter the legal system by providing clear referral information to local services. Prosecutors should not assume that women will have received this information from the police but should take time during initial interviews to speak about the kinds of resources the victim might wish to access. Judges can also ensure that courthouse staff that come into contact with women victims of violence, such as clerks, are trained to make appropriate referrals to services.

☑ **Good practice**: In many countries, NGOs that specialise in women's rights and legal aid providers cooperate with local offices of the prosecutor and courts to make informational brochures about their services available to women. Note that such information should be provided in the local language and other languages that are spoken by women in the country, as well as made accessible to people with visual impairments (for instance, in Braille).

In cases of violence against women, judges should inform victims about the outcome of sentencing, custodial arrangements and any changes in those arrangements (such as early or temporary release or escape) in case the victims or their families could be in danger[345].

## 4.9 Interactions with female witnesses and litigants

A gender-sensitive legal system is one that takes into consideration the fact that women face disadvantages and inequality in public and private life. The kind of legal matters that bring women into contact with the formal justice system tend to be those that disproportionately concern females. When prosecutors and judges have a basic understanding of how the experiences of women in the legal system, as victims, witnesses, or offenders, differ from men's experiences, they can have an impact on "ensuring that women have confidence in the justice process and that their interests are properly and appropriately protected".[346] The following sections provide basic information that can assist legal practitioners to understand the experiences of women they may encounter in court. It is recommended that the following modules be used in conjunction with Module III of this manual, which presents key points about the areas of law that concern women most often.

### *4.9.1 Women as victims of violence*

Module 3.2 explains the fact that violence against women most often takes place in the private sphere and it perpetrated by someone that the victim knows, including close family members. The consequences for the victim are significant, and legal practitioners must develop an understanding of how these cases differ from other cases of violence, the nature of violence against women and impact it has on victims, their children and their families.

343. Article 56.
344. CEDAW General Recommendation No 33, above note 383, paragraph 17(c).
345. See Article 56(1), Istanbul Convention.
346. Judicial College. 2013. *Equal Treatment Bench Book*. London. p. 11.

In dealing with cases of violence against women, prosecutors and judges should always keep in mind the difficulties that victims face in presenting evidence or even being involved in criminal proceedings. This means that practitioners should not only exercise patience but should strive, wherever possible, to ensure the efficiency and effectiveness of the process and ensure that the victim has the support she requires.

Prosecutor and judges should not be afraid to express empathy to the victim and to demonstrate an understanding of the trauma she has endured. It is possible to express such empathy without violating obligations to remain impartial by not commenting on the merits of a case. Instead prosecutors and judges demonstrate empathy by explaining that efforts will be made to minimise trauma and delays in the proceedings and to ensure her safety.

Justice actors should refrain from assessing the credibility of a victim on the basis of how emotionally expressive she appears to be when testifying. The assessment of a victim's evidence should not be guided by stereotypical expectations of victim behaviour. Judges and prosecutors should remember that victims may have a range of reactions to the investigative and judicial process, and so the victim's demeanour in the courtroom needs to be assessed with this consideration in mind.

Understanding of the dynamics of gender-based violence is imperative when children are involved, as is very often the case with incidents of domestic violence. Prosecutors and judges should not assume that because children were not directly physically harmed by the abuser that they were not also victimised or that they are not at risk for violence in the future. As noted, there is a heightened level of danger when domestic violence cases come before the legal system, and perpetrators may intensify the violence or direct the abuse towards the children. Legal practitioners must be skilled in carefully weighing the risks of violence against the best interest of the child and also the parental rights of both parties.

**Case-law example**: In *Bevacqua and S v. Bulgaria*, the applicant and her husband separated due to domestic violence; the applicant filed for custody of their child- a son- and agreed that the father would have contact with the child. After one visit, the father refused to return the child to his mother and stopped all contact with the applicant. The applicant later collected the child from kindergarten and they both went to stay in a hostel for victims of domestic violence. After a complaint from the husband, the authorities threatened to prosecute the petition for child abduction. Although the applicant had communicated information about the domestic violence and requested an interim order on child custody, the court did not issue such an order. The applicant eventually agreed to shared care of the child, but she was also subjected to further violence by her husband during this time. The applicant was eventually granted custody of the child, but the father was not prosecuted for domestic violence. The ECtHR found violations of both the applicant's and child's rights under Article 8 of the ECHR (right to respect for private and family life). The Court noted that the State's failure to adopt interim custody measures without delay had adversely affected the wellbeing of the child and that insufficient measures had been taken in respond to the domestic violence perpetrated by the former husband.[347]

**Discussion point:** Note that the ECtHR decided the *Bevacqua and S v. Bulgaria* case before the Istanbul Convention had entered into force. How might the Court's reasoning differ for a case with the same facts occurring in a country that has ratified the Istanbul Convention, yet still reach the same judgment?

### *4.9.2 Women as offenders*

Just as women who are victims of crimes have distinct experiences, based on the gender dimension of the crime, females offenders differ from male offenders. "The circumstances in which women commit criminal offences are different from men. A considerable proportion of women offenders are in prison as a direct or indirect result of the multiple layers of discrimination and deprivation, often experienced at the hands of their husbands or partners, their family and the community".[348] In considering women offenders as a particular group, it is useful to keep in mind that there are specific characteristics of 'women's crimes' and of women's background and societal roles.

347. Case of *Bevacqua and S. v. Bulgaria*, Application No. 71127/01, judgment of 12 June 2008.
348. Penal Reform International. 2012. *Briefing: Access to Justice. Discrimination of Women in Criminal Justice Systems.* London. p. 1.

Women's offenses are "closely linked to poverty and often a means of survival to support their family and children".[349] Women are less likely to be convicted of violent crimes; they are less likely to use weapons during the commission of a crime, usually they have not played a major role in planning, are less likely to recidivate for a violent crime, and do not present the same degree of danger to the community as male offenders.[350] If arrested jointly with a male criminal they assisted in the crime, women are usually in a subordinate position and a coercive relationship with the other offender. Female offenders are much more likely to be the principle caretaker of young children at the time of arrest.[351] Although women mainly commit petty crimes, theft and fraud, "[d]ue to their economic status, they are particularly vulnerable to being detained because of their inability to pay fines for petty offences and/or to pay bail".[352]

A high proportion of female offenders have been victims of emotional, sexual and/or physical abuse in their childhoods or as adults. Studies conducted in various countries indicate that female offenders are more likely to have experienced gender-based violence in their lifetimes than either male offenders or women in the general population. For instance, in a study conducted in England and Wales, 53% of female prisoners reported they had experienced some form of emotional, physical or sexual abuse in the past.[353] Research conducted in other countries found that in their lifetimes, as many as 30.7% (Finland[354]) and 57% (Germany[355]) of women have experienced sexual abuse, and 58% (Hungary[356]) have experienced physical abuse before being in prison.

Practitioners should be aware of the connections between women's experiences of violence and their commission of crimes. It has been observed that, statistically, most homicides of current or former female partners are committed by men who are usually convicted of manslaughter (having acted without premeditation).[357] In contrast, a small number of women killed male partners, and the majority of them are, in fact, victims of domestic violence. Such women are more often charged with premeditated murder as they "simply do not dare to directly confront their abuser without a weapon".[358] As a result, the minority of women who kill their partners tend to serve longer prison sentences than men who perpetuate an extreme and lethal form of domestic violence.

The phenomenon of women who have experienced long-term or repeated domestic violence and responded by assaulting or killing their partner is rare among survivors of violence but not among women who are imprisoned. The fact that such a history of domestic violence may contribute to a woman's crime has been termed the **battered woman syndrome**. Information about the battered woman syndrome is usually presented to support the defences of provocation, self-defence or acting under duress. The syndrome is not a defence but is information provided to the court to "assist decision-makers better to understand the circumstances preceding a woman's eruption into lethal violence, it may remove sources of misunderstanding that might make decision-makers inappropriately suspicious of a woman's account of her relationship and it may give some insight into what was happening in the woman's thought processes when she had resort to lethal force".[359] It may be appropriate to consider evidence of the battered woman syndrome in the following contexts:

- as a mitigating factor during sentencing
- a factor to consider in the exercise of prosecutorial discretion
- to assess a woman's state of mind "in custody disputes, civil actions and where a battered woman is charged as a criminal accomplice."[360]

Because there is some controversy over the use of evidence of the battered women syndrome, it is generally recommended that judges not use the term in court unless it has been raised by the defence. Usually experts present evidence to explain the situation of women who have been subjected to repeated violent acts, their psychological state (such as the inability to "to take any independent action that would allow them to escape the

349. Ibid.
350. Elaine DeCostanzo, National Association of Women Judges. 2000. *Sentencing Women Offenders: A Training Curriculum for Judges*. Washington. DC. pp. 1-4.
351. Ibid.
352. Penal Reform International. 2012. *Briefing: Access to Justice. Discrimination of Women in Criminal Justice Systems.* London. p. 1.
353. Cathy Robinson, Women's Custodial Estate Review, (National Offender Management Service, 2013), p 26.
354. Anniina Jokinen and Natalia Ollus, STRONG: Presentation of the results from WS2-WS4; Finland and Scandinavia, (European Institute for Crime Prevention and Control, affiliated with the United Nations (HEUNI), 2012).
355. Mariona Bosch, Daniela Heim, Mar Camarasa, Noelia Igareda, Réka Sáfrány, Katalin Bálint, Kay Wegnerand, Klaus-Peter David, Comparative Report: Hungary Germany, Spain, (ALTRA Project: In-Prison Support and Therapy for Victims and Perpetrators of Domestic Violence, 2007). p. 23
356. Ibid, p. 22.
357. Council of Europe Gender Equality Commission. 2013. *Feasibility Study: Equal Access to Justice for Women*. para. 33
358. Ibid.
359. Judicial Commission of New South Wales. 2016. *Equality Before the Law Benchbook*. Section 7- Women, p. 7308.
360. Ibid. p. 7308

abuse, including refusing to press charges or accept offers of support"[361]) and the measures they use to protect themselves. It is appropriate for both judges and prosecutors to demonstrate an understanding of how systematic abuse can impact a female offender and they make take account of the characteristics of the battered women syndrome during investigation, prosecution and sentencing.[362]

Globally, women are a minority of prisoners, representing from two to nine percent of national prison populations, and because they are a minority, the special needs of females in the criminal justice system have "tended to remain unacknowledged and unaddressed".[363] In fact, women's needs and vulnerabilities differ considerably from those of male offenders due to gender identities and biological differences- their roles as mothers or caretakers, for example- and discrimination, such as past victimisation.[364]

Prosecutors and judges should give special consideration to the following points when dealing with female offenders:

- ✓ avoid criminal sanctions that disproportionately penalise women, such as sex work offenses
- ✓ avoid detaining women for petty offenses/ inability to pay bail
- ✓ avoid pre-trial custody for female offenders and prioritise non-custodial measures
- ✓ during sentencing, consider the impact of imprisonment on women's caregiving roles and mental health and strive to impose non-custodial measures for women who do not present a risk.

☑ **Good practices**: The United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders with their Commentary (known as the Bangkok Rules) states "[w]hen sentencing women offenders, courts shall have the power to consider mitigating factors such as lack of criminal history and relative non-severity and nature of the criminal conduct, in the light of women's caretaking responsibilities and typical backgrounds." (Rule 61). This rule allows judges to take into account the circumstances of the offense and encourages the use of judicial discretion in sentencing.

### *4.9.3 Women and multiple discrimination*

Prosecutors and judges should give special consideration to the ways in which they interact with women who belong to groups subjected to multiple discrimination, as not all women's experiences are the same. For instance, factors such as ethnicity, socio-economic status (including single mother status), being from a remote or rural location, sexual orientation, disability status, status as a refugee, asylum-seeker or internally-displaced person, and age all affect women's experiences and may put them in a particularly disadvantaged position. The concept of multiple discrimination is described in module 1.3.

Women who have minority status often face additional hurdles in accessing justice, for example due to such factors as physical or geographical isolation from support services, legal assistance, law enforcement and courts, cultural and linguistic barriers, fears of 'exposure' and legal ramifications (for women with immigrant status this may mean fear of deportation; for lesbians, bisexual women, and transgender (LBT) women, it could mean fear of being 'outed' and possible discrimination and reprisals).

Practitioners must, on one hand, recognise that women are not a homogenous group and should take into consideration other statuses. On the other hand, prosecutors and judges should avoid relying on or perpetuating stereotypes about specific and minority groups of women (for example, "domestic violence is part of Roma culture" or "domestic violence does not occur between same-sex couples"), especially if those myths justify gender-based violence. This balance is particularly important when considering incidents of harmful practices. While judges are encouraged to understand the particular circumstances of minority women, including their cultural backgrounds, they should not excuse human rights violations based on culture.

361. The Updated Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice, adopted by the General Assembly under its resolution 65/228 (2010), footnote 23 to paragraph 15(k) cited in Women's Access to Justice for Gender-Based Violence, Practitioner's Guide No. 12, International Commission of Jurists, p. 214.
362. See The Updated Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice, adopted by the General Assembly under its resolution 65/228 (2010), footnote 23 to paragraph 15 (k) cited in Women's Access to Justice for Gender-Based Violence, Practitioner's Guide No. 12, International Commission of Jurists, p. 214.
363. Penal Reform International. 2012. *Briefing: Access to Justice. Discrimination of Women in Criminal Justice Systems.* London. p. 2.
364. Jo Baker and Therese Rytter. 2014. *Conditions for Women in Detention, Needs, Vulnerabilities and Good Practices*. Dignity Danish Institute Against Torture, Copenhagen. p. 23.

### *4.9.4 Tips for gender-sensitive interactions*

Prosecutors and judges should strive to engage with women victims of violence and female litigants in a respectful and sensitive manner during interviews, hearings and at trial. It is, however, not uncommon for women to experience gender bias and inequalities in legal proceedings. Such biases are the result of commonly-held stereotypes that are usually unconscious. In a legal setting however, it is essential that prosecutors and judges do not allow any preconceptions to shape their decisions. It is equally important that they do not inadvertently reinforce stereotypes through their language or demeanour. If judicial officers are not aware of how to interact with women in legal proceedings in a gender-sensitive manner, "it is relatively easy to act unconsciously in a way that causes offence to women generally, or to a particular woman, or that is (or is perceived as) discriminatory or gender biased".[365] The following points are relevant to both prosecutors and judges.

Gender bias can occurs when the experiences of women are not adequately understood or given consideration. For example, very often, "insufficient account is taken of the realities of the female experience of sexual assault and family and domestic violence, and women are assessed from the male standpoint of what a 'reasonable man' would have done rather than what a 'reasonable woman' would have done in the circumstances".[366] Gender-sensitive interactions require an awareness of when gender bias can occur or be perceived, which can include the following situations where gender bias could occur:[367] Keep in mind that 'language' does not refer only to spoken language but can also include the wording used on signs, in brochures, or other materials. It can also extend to the language used by legal staff and personnel who interact with parties to proceedings, such as court clerks, bailiffs, and others. The following are examples of potential areas of bias, related to how parties to a legal proceeding are addressed as well as judicial conduct and reasoning.

- Careless and/or inappropriate use of language (this could include, for example, referring to females as 'girls' and males as 'men,' or referring to a woman as 'dear', 'darling', 'young lady', etc. It could also mean using exclusive and gender-specific language, such as 'chairman.')
- Assessing a woman against how a man would have acted or felt in a situation.
- Assessing a woman against how a 'normal' woman ought to behave.
- Exhibiting a lack of understanding of GBV, such as domestic violence (the cycle of violence) or sexual assault and the impact on the victim.
- Exhibiting a lack of understanding of the value of household work and childcare activities.
- Not taking appropriate account of the statistical differences between men and women in relation to such matters as income level, household work and childcare activities.

Consider the following examples of problematic interactions with female witnesses, litigants or defendants and how they could be corrected.

| **Possible gender bias or perceptions of gender bias** | **Gender-sensitive interaction** |
|---|---|
| During a hearing for a protection order, the judge addresses the victim of domestic violence as "Tatiana" and the perpetrator as "Mr. Ivanov." | Modes of address for women and men should be of an equivalent level (Mrs/Ms and Mr, rather than a first name). |
| When interviewing a victim of sexual violence, the prosecutor begins the conversation with: "Tell me what happened on 9th of July" and later interrupts the witness/victim by stating: "Just explain the facts of the alleged incident." | The prosecutor should strive to make the victim/witness comfortable, explain the proceedings, express understanding that the processes of describing a violent assault is difficult, and ask the victim/witness to explain in her own words the events. Note that in cases of sexual violence, some jurisdictions recommend a flexible approach to allowing hearsay evidence as long as it does not infringe the rights of the accused. It is important that the interviewer, whether a prosecutor or judge, allow the victim to speak without expressing frustration or impatience if there are gaps in the account or she finds if difficult to speak. Interruptions should be kept to a minimum and only used when necessary (if the witness is breaking procedural rules in court or for clarification). |

365. Department of the Attorney General Western Australia. 2009. *Equality Before the Law Bench Book. Section 7-Women*. First edition. Perth. Section 10.2.1.
366. Ibid. Section 10.2.1.
367. Summarized from *Equality Before the Law Bench Book*.

| Possible gender bias or perceptions of gender bias | Gender-sensitive interaction |
|---|---|
| During a protracted divorce proceeding with disputes over the division of property, a judge says "You women are all the same. You are never satisfied." | The judge should not express frustration, imply that all women are the same or act in the same manner, or suggest that the litigant does not have a just cause. |
| When called as a witness in a domestic violence case, the victim contradicts a statement made to the police and says she injured herself. The prosecutor asks: "Were you lying to the police or are you lying now?" | The prosecutor should recognise that when a victim/witness changes her account of the facts, it is usually due to such factors as having been threatened by the perpetrator, reconciliation with the perpetrator or due to her dependency status.<br>The prosecutor should request a recess and speak to the victim in a sensitive manner about her concerns. The prosecutor should also prepare to submit corroborating evidence and to explain why the victim is behaving in this manner. |

## 4.10 The role of experts and amici curiae

As noted in module 4.3, expert witnesses and expert testimony can serve as important forms of evidence, both in civil proceedings on discrimination and in criminal cases of violence against women. Experts with specialist knowledge can assist the court in determining the best interest of the child, or to understand complex phenomenon concerning the rape trauma syndrome, post-traumatic stress disorder, the cycle of violence experienced by victims of abuse or the battered women syndrome concerning female offenders, for example. Expert testimony can also be effective in dispelling common gender stereotypes, such as the myth of how a 'typical' victim of rape behaves.

A prosecutor (or attorney) may decide that expert witness testimony will assist the court to understand a particular point of law. The process of approving the expert, however, falls to the judge who makes a determination of whether the person has the requisite qualifications and competencies in the subject matter. Judges should also be attentive to the scope of the testimony and be sure to limit the expert only to the areas of her/his competency. Particular attention should be paid to ensuring that the expert witness does not reflect bias or reinforce gender stereotypes but that the testimony reflects women's interests or concerns. In some jurisdictions, the judge can decide to appoint an expert.

Information submitted by *amicus curiae* (friend of the court) differs from expert testimony. *Amicus curiae* briefs are generally used in order to elucidate points of law or explain the jurisprudence on a particular topic (although they can also present factual or scientific information). An important characteristic of *amicus curiae* briefs is their use to "inform the court of the broader consequences of the cases, by showing the potential implications of a decision or to point out unintended consequences for people or groups not party to the suit".[368]

As in the case of expert testimony, *amicus curiae* briefs are submitted by individuals or organisations that are not party to the proceedings but which offer comments relevant to the case. The value of *amicus curiae* briefs is to assist the court. As noted about the ECtHR, but also applicable to other international and also domestic courts, "[e]ven an expert tribunal like the Strasbourg Court cannot know all of the law or other materials that may have a bearing on the outcome of a case".[369] *Amicus curiae* briefs should not, however, comment on the merits of a case. The ECtHR has discretionary power to allow *amicus* briefs to be filed and also determines the scope of the brief based on the issues that the applicant outlines in its submission to the court.

*Amicus curiae* briefs are especially useful in presenting information or statistics to show that a practice or policy is a form of indirect discrimination or for summarising international law on issues relevant to women (in domestic courts).

368. Laura Van den Eynde. 2013. An Empirical Look at the Amicus Curiae Process of Human Rights NGOs before the European Court of Human Rights. *Netherlands Quarterly of Human Rights*. Vol. 31/3. p. 274.
369. Paul Harvey. 2015. Third Party Interventions before the ECtHR: A Rough Guide. Strasbourg Observers. 24 February 2015. Available from: https://strasbourgobservers.com/2015/02/24/third-party-interventions-before-the-ecthr-a-rough-guide/.

## 4.11 Collecting and sharing data

Any initiatives to increase the gender sensitivity of the justice system should be based on clear evidence. Therefore, it is necessary to "build a knowledge base on the demand side of justice; that is, on the needs and the challenges encountered by the intended beneficiaries and end users of justice services".[370] This knowledge base is founded on data collection and analysis of the challenges that women and men face in accessing justice and on identifying the primary "justiciable issues (or issues that can be solved through legal means)"[371] that bring women and men into contact with the formal justice system.

In order to identify the needs and challenges of justice users, specific measurement tools should be used that "capture the composite nature of the demand side of justice, and account for the different ways in which women and men experience justice, and the different barriers they face".[372] The measurement process usually involves the development of indicators that rely on a combination of data sources, including administrative data but also sources that are outside of the legal system (such as household and expert surveys). However, even the administrative data that is collected by justice institutions, supplemented by case/court file reviews, can reveal a great deal of important information about how cases are handled by the legal system.

While all national justice systems produce data through their statistical offices (which is often published by national statistics agencies), not all produce comprehensive sex-disaggregated data. Even fewer also cross-tabulate and analyse the data to build a picture of the barriers that women face in accessing justice. The development of gender-sensitive indicators to measure access to justice is a broad topic that merits special study. Here, a few recommended indicators are suggested that could be adopted by justice sector institutions in their administrative record-keeping. The following sample indicators rely on administrative data.[373]

- Number of cases disaggregated by sex (of plaintiffs, defendants, offenders and victims) and by type of case.
- Types and number of complaints lodged with alternative dispute resolution mechanisms, disaggregated by sex.
- Number of parties to a legal proceeding who had legal representation, disaggregated by sex.
- Number of cases brought to court for which legal aid was granted, disaggregated by sex.
- Yearly attrition rate in rape/ sexual violence/ domestic violence cases, by procedural stage and reason of attrition, disaggregated by whether or not the victim is underage.

☑ **Good practice**: The CoE Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO) has devised a questionnaire for State parties to the Istanbul Convention to use in reporting on compliance with the treaty. The questionnaire covers the full scope of the Convention, but it also specifies the possible data-collecting agencies (law enforcement agencies/criminal and civil justice services include the police, prosecution services, courts, and prison and probation services) and useful ways to disaggregate the data (by sex, age, type of violence as well as the relationship of the perpetrator to the victim, geographical location, and any other factors deemed relevant, for example disability).[374]

Collecting data about cases by type and sex of the litigants is a crucial part of case tracking that can help to illuminate where attrition occurs in the justice chain. In order to be effective, however, common definitions must be developed for all relevant law enforcement and justice agencies (for example, what constitutes a 'domestic violence case' or a 'case of sexual harassment') especially where legislation is not in line with international human rights standards. Additionally, case management systems should be in place so that cases can be tracked through the legal system and do not become 'lost', for example, if a criminal case is re-charged.

In addition to indicators about justice users, detailed record-keeping by justice institutions can also shed light on the 'supply side' of access to justice. For example, data on the number of judges/magistrates per a specific

370. Teresa Marchiori. 2016. *Framework for Measuring Access to Justice Including Specific Challenges Facing Women*. UN Women/Council of Europe. p. 77.
371. Ibid.
372. Ibid. p. 79.
373. Some of the sample indicators are summarised from Teresa Marchiori. 2016. *Framework for Measuring Access to Justice Including Specific Challenges Facing Women*. This publication includes a much richer discussion of proposed indicators for measuring access to justice for women.
374. GREVIO. 2016. Questionnaire on legislative and other measures giving effect to the provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention), available from: http://www.coe.int/en/web/istanbul-convention/grevio.

population size, disaggregated by level of court (e.g. first instance, second instance, supreme court), and sex would give an indication of accessibility. Likewise, data about the number of women and men among justice personnel, e.g. court staff, in offices of the prosecutor and in law enforcement, disaggregated by sex and position would also shed light on the capacity of the justice system to meet the specific needs of women and men.

Sharing of data related to justice users and types of cases between agencies is essential in cases of violence against women to ensure that attrition does not occur or victims/survivors are not subjected to secondary victimisation.[375] In addition to data-sharing and joint case management by police, prosecutors and courts, other key actors, such as parole and probation officers, social workers, women's support organisations, crisis centres and shelters, and organisations that work with perpetrators of violence should have access to information about how a case is progressing in the legal system.

Courts and prosecutors can also consider making some information about specific cases available to the public in order to promote confidence in the justice system and to send messages that violations of women's rights have serious repercussions. Such publicity, if managed in a sensitive manner, can work against wide-spread perceptions that domestic violence is a private and 'family' matter, and can help to end impunity for perpetrators. Of course, precautions should be taken, for example, removing all names or identifiers from court records, making use of initials or letters in place of the victim's name to preserve confidentiality, and controlling the content that is released to the public.

## 4.12 The court in a broader context

This section explores ways in which formal justice system mechanisms interact with other institutions that review complaints of human rights violations and also considerations for public outreach.

### *4.12.1 Co-operation with national human rights institutions*

The CEDAW Committee highlights the role of national human rights institutions (NHRIs) and ombudsperson offices as means to create wider "possibilities for women to gain access to justice".[376] In many countries these quasi-judicial bodies have the power to receive complaints of human rights violations, including on sex/gender discrimination, to conduct investigations and to issue recommendations, advisory opinions or sanctions based on their findings. Women seeking justice for rights violations often find equality bodies, ombudsperson institutions or human rights commissions to be more accessible than courts. Procedural differences, simplified filing requirements, the fact that many such NHRIs offer advice about filing complaints, and the non-adversarial approach are all characteristics of equality bodies that can make them more approachable than litigation in court.

National human rights institutions, and other non-judicial bodies[377], intersect with the formal justice system in several ways, and therefore it is important that prosecutors and judges are not only familiar with the procedures and decisions of such bodies but that they also form cooperative working relationships with them. Several key entry points include the following:

- **Remedial powers**. The powers of NHRIs to recommend or provide remedies vary by institution. Some NHRIs have the competence to receive individual complaints but do not have the power or standing to issue orders or appear before administrative or judicial bodies to enforce such orders.[378] However, even when they lack enforcement powers, some institutions can exert influence by monitoring proceedings of sex or gender-based discrimination cases before courts or administrative bodies, or they can

375. The Council of Europe has prepared guidance on how states can meet the requirements of Article 11 of the Istanbul Convention, with recommendations and a checklist: Sylvia Walby. 2016. *Ensuring Data Collection and Research on Violence Against Women and Domestic Violence: Article 11 of the Istanbul Convention*.
376. CEDAW Committee. 2015. General Recommendation No. 33 on Women's access to justice. para 59.
377. The *Handbook on European law relating to access to justice*. 2016. European Union Agency for Fundamental Rights and Council of Europe. It includes section 2.4.1. on non-judicial bodies.
378. OSCE Office for Democratic Institutions and Human Rights (ODIHR). 2012. *Handbook for National Human Rights Institutions on Women's Rights and Gender Equality*. Warsaw. p. 34.

investigate complaints concerning excessive delays in such proceedings. "Some NHRIs even have the power to file appeals on the constitutionality of legislation before the competent courts".[379]

☑ **Good practices**: In Finland, cases of employment discrimination, including discrimination on the basis of sex or gender, can be referred to regional Occupational Safety and Health Authorities. If a preliminary investigation indicates that there has been workplace discrimination (which is prohibited under the criminal code), the case is forwarded to the public prosecutor for consideration of whether to bring charge or to forward it to the police for further investigation.[380] The Moldovan Council on the Prevention and Elimination of Discrimination and Ensuring Equality has the authority to investigate any complaint alleging discrimination and to consider *ex-officio* cases. Decisions of the Council can be challenged in administrative court.

- **Training and capacity-building**. NHRIs commit to undertake education activities, which include facilitating the training of key actors in the legal and justice systems (lawyers, prosecutors, judges, law enforcement officers, parliamentarians, and government officials) on topics of women's economic, social and cultural rights, responding to violence against women and gender equality.[381] It can be especially effective for judicial training institutions and NHRIs to collaborate on the development and implementation of training programmes on women's rights and/or access to justice.
- **Analysis and research**. Through their investigative functions, NHRIs can contribute to the legal reasoning and evidence base concerning specific violations of women's rights and to the jurisprudence on *de jure* and *de facto* sex/gender-based discrimination. Under the Paris Principles (the UN Principles relating to the Status of National Institutions), NHRIs have the responsibility to submit opinions, recommendations, proposals and reports on any human rights matter to the government. In addition to annual reports, NHRIs frequently produce thematic reports on topics relevant to women's rights or gender equality. Such reports can be instrumental in improving the understating of cross-cutting and emerging legal issues that impact women (for example, labour legislation, sexual and reproductive rights, housing and pension laws, etc.).

☑ **Good practices**: The Gender Equality Ombudsperson of Croatia has conducted studies of how the courts treat discrimination cases (including cases of sexual harassment) in 2010 and 2012.[382] By conducting such analysis, NHRIs can "advocate for change, improve judicial training and develop robust data on how litigants have been dealt with by the courts."[383] The Public Defender (Ombudsperson) of Georgia has a Department of Gender Equality (established in 2013) which monitors implementation of international and national law on gender equality, examines complaints and issues conclusions and recommendations. The Department publishes an annual report on women's rights and gender equality and has also issued several relevant special reports on: discrimination against women in the workplace (2014); violence against women (2015); monitoring of the women's penitentiary (2015); early marriage (2016); and on combating and preventing discrimination and the situation of equality (2016).[384] Most of the reports contain recommendations to law enforcement and the judiciary, and many include reviews of national legislative developments and of ECtHR decisions concerning Georgia.

### *4.12.2 Communication and public outreach*

Women's access to justice may be hindered by their lack of knowledge of the remedies that are available through the legal system or also by their mistrust of the system itself. In order to improve the availability of justice systems, and to increase public confidence, the key institutions should conduct "targeted outreach activities and distribute information about available justice mechanisms, procedures and remedies in various formats."[385] Outreach and activities should be in a form that is accessible and appropriate for all women, including those who experience multiple forms of discrimination. Ideally, the appropriate bodies of the legal system will cooperate closely with women's NGOs and other organisations, such as NHRIs, to develop campaigns and printed materials.

379. Ibid.
380. European Union Agency for Fundamental Rights (FRA). 2012. p. 32.
381. See the *Amman Declaration and Programme of Action*. 2012. paras. 9, 18.
382. Information about and a report of the 2010 study is available in Croatian at: http://www.prs.hr/index.php/analize-i-istrazivanja/analiza-sudske-prakse/181-istrazivanje-sudske-prakse-u-podrucju-antidiskriminacijske-zastite-2010
383. *Handbook for National Human Rights Institutions on Women's Rights and Gender Equality*. p. 44.
384. Special reports can be accessed in Georgian and English languages from: http://www.ombudsman.ge/en/reports/specialuri-angarishebi.
385. CEDAW Committee. 2015. General Recommendation No. 33 on Women's access to justice. para 17(c).

Communication can take a number of forms depending on the purpose. For example, in some jurisdictions, courts and prosecutors produce or make available printed brochures with information for women about their legal rights and the basic steps of specific legal proceedings. Others may offer basic legal information through consultations.

☑ **Good practices**: The Crown Prosecution Service of the United Kingdom has developed a leaflet for victims/witnesses in domestic violence cases that describes what they can expect from their meeting with a prosecutor, specifically outlining the protection measures that can be offered if the victim gives evidence, who will attend the meeting and the purpose of the meeting. Contact information is provided for other support resources.[386] In Poland, representatives of the judicial system (probation officers, trainee judges and judges) provide free information and legal advice to women about the rights of victims/survivors of violence during an annual event- the Week of Free Aid to Victims of Violence: Open Courts. The campaign addresses diverse crimes but includes crimes that affect women disproportionately such as rape, threatening behaviour, domestic violence and "physical, sexual, economic and psychological violence (humiliation, debasement, isolation from family and friends)".[387]

Publicising carefully-selected information about cases can help to improve the public's awareness of the court's functions and is also an important aspect of reducing impunity. In cases of violence against women, in particular, both the office of the prosecutor and courts can send strong messages on how seriously the State takes the obligation of due diligence and that violent acts, regardless of whether they are perpetrated in the private or public sphere, will be punished.

Conducting internal reviews of any possible breakdowns in the justice system from the perspective of female justice users is another means of improving its responsiveness to the public.

## 4.13 Supporting women in the justice sector

In the Eastern Partnership countries participating in this project, women are generally well-represented in the legal profession, but there are nevertheless imbalances depending on their speciality and hierarchical position. The countries are also not homogenous in terms of female representation among judges or prosecutors. Compare the following data[388]:

**Distribution of Female Professional Judges, by Instance (% of total, 2014)**

| Country | Female professional judges | Female 1st instance professional judges | Female 2nd instance professional judges | Female supreme court professional judges |
|---|---|---|---|---|
| Armenia | 23% | 22% | 31% | 18% |
| Azerbaijan | 11% | n/a | n/a | n/a |
| Georgia | 49% | 50% | 51% | 21% |
| Republic of Moldova | 45% | 43% | 52% | 47% |
| Ukraine | n/a | n/a | n/a | n/a |

Note that n/a indicates data not available.

386. The text of the leaflet can be accessed from http://www.cps.gov.uk/publications/prosecution/witnesseng.html.
387. International Human Rights Initiative, Inc. (IHRI)/ Due Diligence Project. 2014. *Due Diligence and State Responsibility to Eliminate Violence against Women. Regional Report: Europe*. p. 26.
388. All data is from 2014. European Commission for the Efficiency of Justice (CEPEJ). 2016. European judicial systems. Efficiency and quality of justice. CEPEJ STUDIES No. 23 pp. 101, 103, 136, 104.

**Distribution of Female Court Presidents, by Instance (% of total, 2014)**

| Country | Total female court presidents | 1st instance female court presidents | 2nd instance female court presidents | Supreme court female court presidents |
|---|---|---|---|---|
| Armenia | 0% | 0% | 0% | 0% |
| Azerbaijan | 4% | 3% | 17% | 0% |
| Georgia | 4% | 5% | 0% | 0% |
| Republic of Moldova | 22% | 25% | 0% | 0% |
| Ukraine | n/a | n/a | n/a | n/a |

Note that n/a indicates data not available.

**Distribution of Female Public Prosecutors, by Instance (% of total, 2014)**

| Country | Female public prosecutors | Female 1st instance public prosecutors | Female 2nd instance public prosecutors | Highest instance public prosecutors |
|---|---|---|---|---|
| Armenia | 10% | NAP | NAP | NAP |
| Azerbaijan | 4% | n/a | n/a | n/a |
| Georgia | 26% | NAP | NAP | NAP |
| Republic of Moldova | 30% | 30% | 24% | 30% |
| Ukraine | 31% | 34% | 28% | 27% |

Note that n/a indicates data not available; NAP indicates that the question was not applicable.

**Distribution of Female Heads of Public Prosecution Offices, by Instance (% of total, 2014)**

| Country | Female heads of public prosecution offices | 1st instance female heads | 2nd instance female heads | Highest instance female heads |
|---|---|---|---|---|
| Armenia | 0% | NAP | NAP | NAP |
| Azerbaijan | n/a | n/a | n/a | n/a |
| Georgia | 4% | NAP | NAP | NAP |
| Republic of Moldova | 5% | 5% | 0% | 0% |
| Ukraine | 4% | 4% | 0% | 0% |

Note that n/a indicates data not available; NAP indicates that the question was not applicable.

The data indicate that women are better represented as judges than among prosecutors. However, there is a clear "downward trend" similar that that observed among other CoE countries, in which the proportion of female judges compared to male judges decreases as they move up the hierarchy. Women's judicial representation is lowest at the supreme court level and as court presidents. The representation of women among prosecutors follows a trend similar to that observed among judges, with fewer female prosecutors in leadership positions than among the general staff.

Data about the number of women and men in the judiciary provide us with only a limited picture of the gender-based patterns of employment. In fact, "women tend to be overrepresented in traditionally female areas such as civil and family law, while men are overrepresented in areas that are perceived as more male, such as tax or commercial law. Consequently, such male dominated fields may be less receptive to women's needs."[389]

389. Council of Europe Gender Equality Commission. 2013. *Feasibility Study: Equal Access to Justice for Women*. p. 20.

Male-dominance in law enforcement has been identified as a factor that often dissuades women from reporting gender-based violence or cooperating in prosecutions, and for this reasons a number of countries have initiated police units that include female officers to deal with such crimes.

Supporting women in the justice sector has several facets. It can refer to increasing women's access to legal professions. Promoting gender balance in the judiciary is central element of strengthening the judicial sector as a whole, and States should strive towards a gender balance "at each level, including at the most senior levels", mirroring the representation of women in society as a whole.[390] Thus, steps should be taken to ensure that women are recruited on an equal basis with men to specific positions in the judiciary as well as removing barriers to women's career advancement that are themselves discriminatory. For example, in the Republic of Moldova, in order to qualify for certain leadership positions in the legal profession, a lawyer must have five years of continual work experience in the field of law. Female lawyers who take maternity leave (or, in fact, other forms of family-based leave) may not be able to meet this requirement if the leave period is construed as an interruption to their careers. In fact, several lawyers submitted a complaint to the Moldovan Equality Commission on the practice of requiring lawyers to suspend their license in order to benefit from free medical insurance (during pregnancy or for a child's first three years).[391] Although the provision is gender neutral, it has a discriminatory impact on women, given that they are more likely than men to take time out of work to care for children. Effectively, women must have more than five years of work experience, and, as a result, they are underrepresented in decision-making roles.[392]

Secondly, supporting women in the justice sector extends beyond gender parity on the bench and also requires gender competence. Judges and their staff must receive gender sensitivity training on the types of topics included in this manual.

Lastly, supporting women may also refer to founding professional groups to advance women's common interests. There are many examples of women in the legal profession forming associations, not only for the purposes of networking, to support each other and to discuss any difficulties they face as women in their professions, but also to serve as leaders in promoting women's rights and access to justice more broadly. For instance, associations of women judges and women lawyers have lobbied for reforms that will improve the legal system response to violence against women. Organisations, such as the national branches of the International Association of Women Judges (IAWJ) also undertake advocacy, conduct training and educational programmes to enhance the capacity of legal practitioners (including other judges), develop guidance materials and conduct analysis.

390. Council of Europe Plan of Action on Strengthening Judicial Independence and Impartiality. 2016. CM(2016)36. Action 1.2.
391. Council of Europe. 2016. *Barriers, Remedies and Good Practices for Women's Access to Justice in Five Eastern Partnership Countries*..
392. Ibid.

# CONCLUSION

Access to justice for women is a multi-dimensional concept that requires an approach that tackles barriers to justice at the legal and institutional levels as well as the socio-economic and cultural levels. Justice sector actors must be aware of the intersecting components of access to justice and the implications for their professional roles at each step. Despite the apparent complexity of improving women's access to justice, many of the interventions required of prosecutors and judges can be reduced to the simple formula of approaching their day-to-day work using a gender-sensitive approach—one that explicitly acknowledges the differences in the experiences of women and men, including experiences of rights violations but also interactions with the justice system, how women's and men's needs differ, in terms of recourse and remedies, and the pervasive nature of gender stereotypes, even if those of which we are all unconscious.

The Council of Europe, European Union, and United Nations experts (such as the CEDAW Committee and the Special Rapporteur on violence against women, its causes and consequences) all recognize that legal systems continue to present barriers to women which, in turn, stall progress towards gender equality. In fact, it can be argued that gender inequality worsens or perhaps becomes more entrenched when women experience human rights violations (the initial experience of gender inequality) and are then denied effective legal remedies for those very violations (the second experience of gender inequality and discrimination).

The dual need to address persisting gender inequality and access to justice only becomes more relevant with the close of the first decade of the new millennium. The Sustainable Development Goals (SDGs), the follow-on from the Millennium Development Goals, is a global plan of action to 2030. The SDGs include targets for achieving gender equality and women's empowerment (Goal 5) by requiring countries to have legal frameworks that address discrimination. The SDGs also require providing access to justice for all and the creation of effective, accountable and inclusive institutions at all levels (Goal 16). The intersections of these two goals is a platform for targeted and cooperative efforts to ensure that women, as well as men, are able to receive equal measures of justice when they require it.

# ANNEXES

## Annex 1: Practical Considerations for Conducting Training on Women's Access to Justice[393]

A number of steps are necessary in order to plan a training event on women's access to justice and, in addition to the larger considerations to be observed in the planning of quality judicial and prosecutorial training, there are some specificities related to the topic. This section provides a brief overview and guidance on general aspects related to planning a training event for judges and/or prosecutors, but focuses on the specific ones that may arise when preparing a training on women's access to justice. It is divided into four main sub-sections: a. design; b. implementation; c. evaluation; and d. follow-up. A sample agenda and a suggested checklist is also provided in this Annex.

### *a. Design*

Ideally, any training event will be planned as part of the approved curricula of the national training institutions for either judges or prosecutors. This will ensure that the training is certified and, therefore, recognised at the national level. This will increase interest and participation from judges and prosecutors, but it will also increase the likelihood that the trainees will be able to integrate new information or new skills in their daily practice. Carrying out such trainings through the national training institution, will also promote the sustainability of training results. The institutional context well help ensure that the training expertise and material directed at the training, as well as the institutional memory of such trainings, will be reused in future trainings.

From the onset, key decisions need to be made about the type of training to be delivered:

- Is the training going to be delivered as part of a continuous training of judges and/ or prosecutors or as part of an initial training?
- Is the women's access to justice training to be dedicated or integrated? More specifically, is the content of the training is to be related exclusively to the topic of women's access to justice or the topic would be only one aspect of a larger training, for example, on access to justice guarantees under the European Convention on Human Rights.
- Is there a particular category of judges and prosecutors that should be targeted as participants? Which ones will be best positioned to apply new knowledge and skills in their regular practice?

### *i. Selecting trainers and experts*

Training on women's access to justice on the basis of this *Training Manual* would best be delivered by a team of trainers comprised of national trainer(s) and an international trainer (optional), and ensuring the participation of legal trainers, as well as gender experts.

If the training event is organised by the national training institutions, it is advised, as much as possible, to rely on the national experts working with these institutions and to select trainers from the same profession as the trainees. If training is delivered to judges, then other peer judges would be a good choice for trainers. If the trainer is seen as a fellow professional, his or her standing among the audience is likely to be much higher, and the corresponding impact upon trainees' attitudes and values the greater. Nonetheless, even if international trainers are invited, they should only conduct selected parts of the training along with the national trainers. When selecting international trainers, if they do not speak a common language with the trainees, care has to be taken that the agenda is designed in such a way as to allow enough time for interpretation. The room set-up may also

393. Considerations have been included that refer specifically to training on women's access to justice as a gender equality topic. With respect to the general guidance on human rights training, this section takes as its basis the Council of Europe Training Manual on the European Convention of Human Rights: Council of Europe. 2007. Training Manual on the European Convention of Human Rights.

be affected by the need to make interpretation equipment available. These are important considerations and should be integrated in the design of the training.

Given the specificity of the topic, it is important to ensure the participation of trainers with an expertise in gender issues. This may require selecting some of the trainers from outside the regular rosters of the national judicial or prosecutorial training institutions. These could be lawyers or representatives of civil society working directly with women. Representatives of national authorities with the relevant expertise or who participate in the development of relevant legislation can be invited from the Ministry of Justice, the Ministry of the Interior, and the Prosecutor's Office, among others. From civil society, aside from lawyers who represent women, it also may be useful to invite a psychologist to a portion of the training, especially if violence against women is being addressed by the trainings.

An approach often used in judicial training is to invite persons belonging to groups that are affected by judicial decisions, in this case women who suffered violence against women or those who have been discriminated against in employment for example. Another powerful way of communicating the perspective of women directly impacted by judicial decisions is to organise a visit to a women's organisation that assists women victims of gender-based violence or that offers legal assistance to women more broadly. It may be possible to organise such visits, provided the training lasts more than one day.

### *ii. Assessment of training needs with respect to women's access to justice*

Knowledge of the group of trainees and their existing needs is crucial for the good planning of a training event, but this can prove challenging to acquire particularly under time pressure. However, every opportunity should be taken and the training institutions, as well as the trainers themselves, should remain mindful of the importance of identifying and analysing existing training needs.

The assessment of training needs can be done in a number of ways. At the level of the training institutions, regular meetings with representatives of the courts and prosecutors' offices would keep the institutes informed about the existing needs, based for example on appraisals or other personal interviews with judges and prosecutors and from information on output of cases or quality standards. Training institutions can use results of previous training evaluations to identify future training needs. In addition to these on-going modalities, training institutions can conduct or commission specific needs assessments. Surveys and/or focus groups with judges and prosecutors may be carried out with the purpose of identifying specific needs. These more extensive needs assessments would not be feasible in view of one training event alone, therefore the planning of a training event on women's access to justice should refer to the existing needs assessments at the level of the judicial or prosecutorial training institutions. If no specific information can be acquired on the existing needs in this field, the trainer may consider communicating with the representatives of the relevant training instructions and sending out a simple questionnaire to the participants sufficiently in advance of the training.

It should be borne in mind that needs may not be only self-identified. One of the common obstacles when introducing gender topics in any area of training is the assertion of the irrelevance of gender. Training institutions and/or trainers should be prepared to explain the need for training on women's access to justice. This need may be established by the judicial or prosecutorial training institutions on the basis of international, regional, and national standards. For the example, the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) is currently being ratified by an increasing number of member states. The Istanbul Convention contains extensive provisions aimed at ensuring access to justice for women victims of gender-based violence. The recent or pending ratification of the Istanbul Convention may indicate a need for judicial and prosecutorial training in this area, especially as the convention itself asks states parties to deliver training to all relevant professionals (Article 15). Additionally, public opinion polls or specific polls regarding public perceptions of the judiciary may provide another source of needs identification. Gender equality may be identified as an increasingly important value among the population, while at the same time there may be a perception among women that the justice system is failing them. This type of information about public attitudes is important to substantiate the need for trainings on women's access to justice.

After the needs are identified, the objectives of the training should be defined taking into account this assessment. In a training session four different aspects of the learning process can be distinguished, as represented in the below table:[394] The objective of any training session is likely to involve all four of these categories. When identifying the objectives of a particular training on the basis of this *Training Manual*, these should be kept in mind:

394. Council of Europe Training Manual on the European Convention on Human Rights. p. 12.

the development of judges' and prosecutors' knowledge and skills on the particular topic of women's access to justice, as well as the promotion of attitudes and values that support gender equality.

| Knowledge | Skills | Attitudes | Values |
|---|---|---|---|
| E.g. Knowledge of human rights instruments / relevant case-law of the European Court of Human Rights and of domestic courts. | E.g. Skills in identifying a human rights issue, and researching relevant legal rules to apply the law to a given situation. | E.g. Appropriate attitudes to reinforce the professional responsibility to respect and promote the human rights of women. | E.g. Values committing relevant professionals to gender equality and related principles. |

### *iii. Adaptation to the target audience (judges, prosecutors or mixed)*

The primary intended audience for the *Training Manual* are judges and prosecutors. The composition of the group of participants will be decided in cooperation with or directly by the national training institutions, given their mandate and common practice. In some countries, training institutions at national level are mandated to train judges, prosecutors, as well as legal professionals more broadly. In other countries, the mandates may be more limited and each profession may have a specific training institute.

In choosing the participants, more diverse groups are preferable to homogenous groups. Even with a single-profession group, there are differences in the level of experience of the participants (beginners/advanced), their hierarchic level (first instance courts, appeal courts, supreme or constitutional courts for judges) and geographical distribution (participants from the same or different courts or regions). These differences influence the dynamic in the group. While it may be easier to achieve a high level of trust in more homogenous groups, there are many advantages to having mixed groups, including mixed groups of judges and prosecutors and possibly even with the participation of other legal professionals. Given that women's access to justice is an issue that involves all stages of the justice chain, important insights may be gained by having a broadly mixed group. Diversity in the group may also enable broader co-operation among the different legal professionals with the aim of improving women's access to justice.

### *iv. Developing the training programme, materials and practical exercises*

The *Training Manual* can be used as the main source for designing a training event on women's access to justice**.**

The substantive parts of the manual provide ample content to develop presentations on the topics chosen for the training. Training institutions and trainers may consider sending the manual in advance to the trainees so that they become familiar with the topics and its content, as the training event will not be the place to go through the manual at length. The general part of the manual is complemented by national parts, which contain relevant information about the national legislation and the situation of women in the respective country.

The manual does not provide examples of exercises for each module, but trainers can develop exercises starting from the examples given in each module and the discussion points included therein. For example, in the module on Family law (Module III: What Every Practitioner Should Know, section 3.3), a table of stereotypes and myths related to gender roles in the family is included, and their impact on family law issues, such as child custody, distribution of property after divorce, registration of marriage. This table is accompanied by a checklist of discussion points. Using the table and the discussion points, trainers could conduct a group exercise to discuss gender stereotypes prevalent in family matters and their impact on judicial decisions in family law.

Similarly, the manual does not provide full-fledged case studies, but it makes ample references to case-law examples, which are relevant to the issue discussed. Trainers can modify the case-law examples given in the *Training Manual* to develop case studies, which can be used for group work. For example, in module 4.9 (Interactions with female witnesses and litigants), the case of Bevacqua and S v. Bulgaria is presented and a question for discussion is suggested. Trainers could use both the description of the case and the suggested discussion point to develop a case study for a group work session on interactions with women victims of domestic violence in the context of child custody decisions.

Practical considerations on the status of international and regional instruments for the national courts should also be addressed in the presentations or discussion, as well as practical examples of cases in which a conflict between international and national law may arise. A useful discussion of these issues and concrete examples are provided in the country chapters of this Training Manual.

In addition to these types of materials, which can be directly developed based on the content of the Training Manual, other resources and materials can also be included.

- Trainers can use hypothetical cases. An example of a hypothetical case on sexual violence is offered in the Annex 3. Additionally, facts from the judgments of the European Court of Human Rights or the Committee on the Elimination of Discrimination against Women, can be used and participants can be asked to determine whether there has been a violation and under which articles of relevant standards. The name of the case and the country in question should not be revealed until the end of the discussion to prevent participants looking them up online. Participants can brainstorm the cases in small groups, presenting their findings to the entire group at the end. Trainers should discuss group findings and provide analysis of the actual decisions.
- News articles on human rights violations can often be used to create a case study also.
- Use of moot courts scenarios can increase the participation of the trainees and it may be a useful way of encouraging the trainees to practice the new perspective and skills acquired in an engaging way. Role play is considered one of the training methods with one of the highest retention rates for knowledge and skills acquisition.
- Either before or after a presentation on relevant international and Council of Europe standards, participants can be asked to list the relevant international human rights provisions relevant to ensuring the equal access of women to justice. This can be done in groups or individually.
- Note that Annex 1 to the Training Manual lists a number of additional resources, including video and multimedia resources.

Trainers on women's access to justice will need to facilitate a discussion in the group of participants on gender stereotypes. Some exercises are suggested below to help the trainers address gender bias and challenge gender stereotypes.

Exercise 1: **Reflect on gender stereotypes prevalent in the culture(s) you are familiar with.**

Consider the following proverbs and the gender stereotypes they perpetuate.[395] Can you think of similar / other proverbs in the culture you are familiar with? What gender stereotypes do they reflect?

Virtuous is the girl who suffers and dies without a sound. (India)

A wise woman is twice a fool. (USA)

A good wife, an injured leg and a pair of torn trousers stay at home. (Netherlands)

Only a shameful woman takes her husband to Court. (Uganda)

Women ask questions, men give the answers. (Arabic, multiple languages)

The glory of man is knowledge, but the glory of a woman is to renounce knowledge. (Brazil)

If your petticoat fits well, do not try to put on your husband's pants. (Creole, Martinique)

Exercise 2: **Reflect on the following question: In what ways are women/ men treated differently in your community?**

The Council of Europe Factsheet on Equality between Women and Men[396] gives the following facts about gender inequality in Council of Europe member states:

In Council of Europe member states, women are still vastly under-represented in decision-making. In 2015, women represented 26% of national parliaments, while men constituted the vast majority (76%). Furthermore, men's

395. Examples are from I Know Gender, an online training course provided by the UN Women Training Center, available at https://trainingcentre.unwomen.org/course/description.php?id=2
396. Council of Europe. 2015. Factsheet on Equality between Women and Men available at https://rm.coe.int/168064f51b

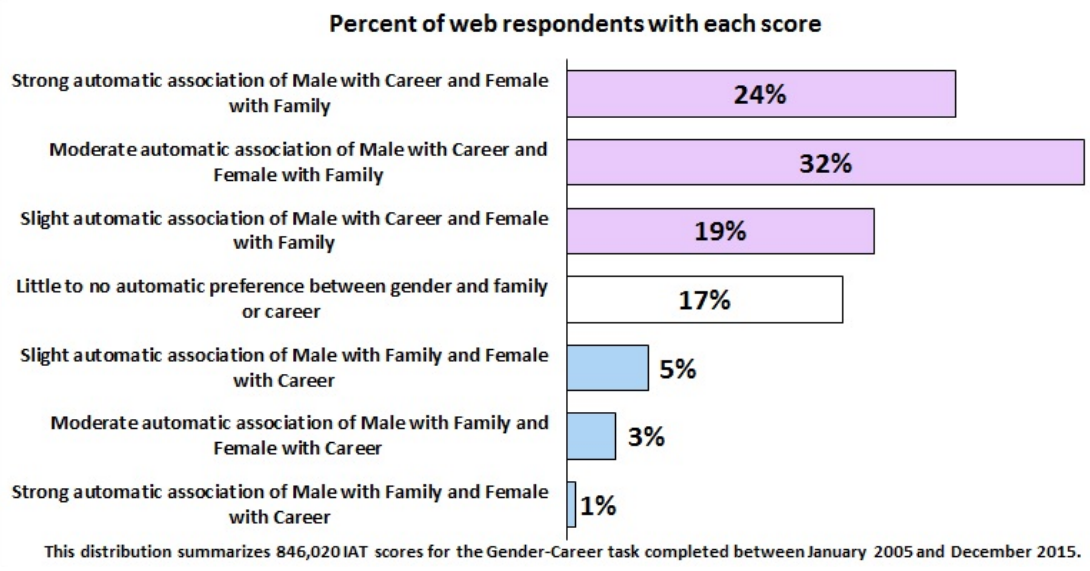
share of the governments of Council of Europe member states was 77%, while women's was 23%. There are inequalities in labour force participation also, as women participate at a rate of 52% (of active women) and men at a rate of 66%. Moreover, in most countries, women earn on average only 60 to 75% of men's wages, and the average gender pension gap in the 28 European Union (EU) member states is as high as 39%. These inequalities translate in barriers for women's access to justice also, as they mean women have less resources than men and decision-making institutions are male-dominated.

The trainers should also have readily available statistics about gender inequalities in the country where the training is held (please see the national parts of the manual).

Exercise 3: **Assessing bias and discussing stereotypes: gender and career**

Ask the participants to take the **Gender and Career IAT test**.[397] The trainer should also take the test and disclose her/ his score, as a way of building trust in the group. This test takes about 10 min to complete. Access to computer and Internet connection are required. Explain that many people may be surprised with the results of the test. The test does not say anything about one's professionalism. It is just a way of understanding better how deeply ingrained certain associations are. This is important as implicit preferences can predict behaviour. Implicit preferences are related to discrimination in hiring and promotion, medical treatment, and decisions related to criminal justice.

This Implicit Associations Test (IAT) often reveals a relative link between family and females and career and males. The summary of other people's results shows that most people implicitly associate male with career.




Now let's look at our scores and discuss the results. The trainer can collect the scores anonymously and present the aggregated result to the group. The trainer can then facilitate a discussion about the consequences of this implicit bias and ways to minimise its impact in judicial decisions.

Trainers should also plan for an assessment at the end of the training to test retention of knowledge. This can be made in the form of a quiz to be completed by the whole group collectively, rather than each individual participant.

Additional assignments may include the development of a personal action plan by each participant for the next six months. The participants in the training are asked to reflect on how they may apply the newly acquired knowledge and skills in the next six months. This is a very useful follow-up tool as well, as the trainer can go back to the participants six months after the training and see how they were able to use the knowledge and skills and what obstacles they encountered.

397. The IAT is one of the tools that can be used to diagnose bias. Harvard University, Project Implicit. Available at https://implicit.harvard.edu/implicit/

The final part of the design of the training consists of selecting training resources and techniques, coordinating the trainers, moderators and other experts and the elements of the training, and carefully considering timing limitations. This final step results in the development of an agenda. A sample agenda is offered below, as well as a suggested checklist for the organisation of the training, included at the end of this annex.

| ***Sample Training Agenda – Two days*** | | |
|---|---|---|
| This is an example of training included in the curricula for continuous learning. Participants are judges from first instance courts and appeal courts (30 participants). The training takes place on the premises of the judicial training institute.<br><br>The training is delivered by a team composed of a national trainer (judge), an international trainer and a gender expert. A representative of a women's organisation is also invited to provide a guest presentation. | | Relevant elements of the *Training Manual* and other suggested tools and resources |
| **FIRST DAY** | | |
| 8:45-9:00 | Registration of participants | |
| 9:00-9:15 | Welcome by Representative of the Judicial Training Institute<br><br>Introduction of trainers, and overview of programme | |
| 9:15-10:15 | Introductory session<br>(*National trainer*) | Icebreaker exercise and brief introduction of participants<br><br>Discussion of the purpose and learning objectives of the training; if any questionnaire was administered in advance, summary of the expectations from the participants<br><br>Exercise: Reflect on the following question: In what ways are women/ men treated differently in your community? (The trainer may use information from the national part of the manual to prepare background material for this exercise.) |
| 10:15-10:30 | Q&A | |
| 10:30-10:45 | *Coffee break* | |
| 10:45-12:15 | **Module 1** (corresponding to the Training Manual)<br><br>Access to justice. Women's human rights. International standards and examples from judicial practice<br>(*International and/or national trainer*) | Presentations based on Sections 1.1 and 1.2. of the general part of the manual<br>Video: CEDAW Quick & Concise: The principle of substantive equality (See Annex to the Training Manual) |
| 12:15 – 13:00 | **Module 1** (exercises)<br>Group work in small groups followed by plenary discussion | Exercise: Women's rights are human rights. |
| 13:00 – 14:15 | Lunch | |

| | | |
|---|---|---|
| 14:15-15:15 | **Module 2** (corresponding to the Training Manual)<br><br>Standards on women's access to justice introduced by the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) and overview of the relevant ECtHR case-law | Presentation based on Module II of the general part of the *Training Manual* |
| 15:15-15:30 | *Coffee break* | |
| 15:30-16:30 | **Module 2** (continued)<br>Practical work in small groups followed by plenary discussion | Exercise on myths and stereotypes based on table included at the end of the general part of the *Training Manual's* Section 3.2.1 on domestic violence.<br>Discussion point: Consider the myths and stereotypes and identify the points in the sample justice chain where these myths and stereotypes can impact women's access to justice. |
| **SECOND DAY** | | |
| 8:45-9:00 | Registration of participants | |
| 9:00-10:00 | **Module 3** (corresponding to the Training Manual)<br><br>Thematic presentation: Violence against women | Presentation based on Section 3.3 of the general part of the manual<br>*Guest presentation by a representative of a women's organisation providing support services to women victims of domestic violence* |
| 10:00-10:30 | **Module 4** (corresponding to the Training Manual)<br><br>Workshop on Evidentiary issues | Section 4.3 of the general part of the *Training Manual* |
| 10:30-10:45 | *Coffee break* | |
| 10:45-11:30 | **Module 4**<br>Workshop on Gender-sensitive case and courtroom management | Section 4.8 of the general part of the *Training Manual* |
| 11:30-13:00 | **Module 4**<br>Workshop on Interactions with female witnesses and litigants | Section 4.9 of the general part of the *Training Manual* |
| 13:00-14:15 | *Lunch* | |
| 14:15-15:30 | **Module 4**<br>Women's Representation and career in the judiciary<br><br>*Q&A* | Section 4.13 of the general part of the *Training Manual* |
| 15:30-15:45 | Final assignment (collective quiz) | Quiz |
| 15:45-16:00 | *Coffee break* | |
| 16:00-16:30 | Evaluation of the seminar. Presentation of certificates (optional) | Training evaluation forms; Action Plan – asking participants to list three points that they will implement in their daily work following this training. Possible follow-up: in six months request participants to return to these three points, and indicate whether they are implementing them and if not, why? What challenges do they face? |

## *b. Implementation*

Trainers who deliver training on women's access to justice for judges and prosecutors should avoid a classroom approach. This is a significant prerequisite for the success of the training, for the following reasons: (1) the participants are adults; (2) the participants are legal professionals; and (3) the participants are peers or perhaps hierarchically superior to the trainer.

Trainers should avoid the temptation to deliver as much information as possible in the allocated time and instead focus on providing as much (or as little) information is necessary to ensure that the group is motivated, but not bored. In line with the "learning pyramid", it has been demonstrate that people retain least from passive learning methods such as lecture (5%); reading (10%); audio-visual (20%) and demonstration (30%) and most from participatory teaching methods, such as group discussion (50%); practice by doing (75%); and teaching others (90%). Participation and building trust in the group are key to a successful training particularly on a topic that touches on trainees' personal domain, with topics such as violence against women, care provision, inequalities in the profession and so on.

Openness, honesty and humour are important to ensure participation of trainees and to build trust. Consider starting with a fun icebreaker, like the one below:

Example of an icebreaker exercise:[398]

1. Welcome participants to the training and introduce yourself to the group. This should be kept very brief.

2. Ask each participant to introduce his/her name by simply adding an adjective before their name that begins with the same letter, before they state the name of their organization and title. You can begin by introducing yourself in the manner that you want to participants to follow.

For example:

"I am talkative Tatiana. I work as a family law judge."

"I am reliable Ramona. I work in the 'X' Court of Appeal."

"I am ingenious Ivan. I work as a criminal court judge."

This can be done when seated, but becomes more fun and active if the participants are standing in a circle. Each participant moves into the circle while introducing her or himself. The participants will remember each other's amusing adjectives. Most importantly, an atmosphere of informality is established.

One of the main roles of the trainer is to ensure that all participants actively engage with the topics and remain connected to the group. From the onset, it should be stated as a ground rule that active participation is expected and is critical to the success of the training.

The participation of trainees will be influenced not only by the approach and style of the trainer, but also by the learning environment, for example its location, facilities, and room set-up. The room set-up is important to increase participation of the trainees. The room size should be adapted to the group, i.e., big enough to ensure comfort, but not too big so that participants can hide away somewhere. Flexible seating in a U-shape is preferable as it allows participants to face each other and the trainer can move and walk in the middle. Auditorium and classroom styles of seating with fixed chairs are to be avoided. Banquet-style seating, in groups of 4-6 per table, would be useful for discussion in small groups.

In order to build trust in the group, the participants may be encouraged to speak from (their own) experiences. The trainer can demonstrate such openness by volunteering her/ his own experience, for example of a situation in which one has experienced discrimination. Such an experiential approach may be used to debunk the myth of neutrality and make it clear that every professional is a human being and, rather than discarding the influence of personal experience, values and beliefs, one should make them explicit and reflect on how these may influence decisions and in particular judicial decisions.

398. This example appears in Cooperative for Assistance and Relief Everywhere. 2014. Gender, Equity and Diversity Training Materials.

To ensure active contribution, participants should be allowed to speak, ask questions, discuss, DO something rather than primarily listen (to the trainer or other presenters). Participation, rather than passive reception, enhances the value of training for learners, as well as the satisfaction gained by trainers. There is no definitive rule about how much group work and how many exercises should be included in a training event. Indeed, some trainers prefer to make the entire training into a group exercise with little to almost no presentations. This type of seminar approach may prove very effective, as it allows for going through the topics only through discussion and feedback from the trainer. It may require, however, more extensive advance preparation, such as sending the Training Manual and asking trainees to read the relevant parts in advance.

Group work may take the form of *brainstorming* (when participants are asked to reflect on a particular statement or question and their ideas are recorded by the trainer on a flipchart); *buzz groups* (small groups of three to four people that quickly discuss one point or answer one question before reporting back to the plenary); or *snowballing / pyramiding* (the audience is asked to discuss a topic for a brief period of time, say 3-4 minutes, in pairs or threes, then the pairs/threes discuss their conclusions for another brief period with another pair/three to identify whether there was disagreement / the means at arriving at the conclusion were similar and this is followed by general discussion).[399]

Group work may also take the form of role play. Especially for the topic of gender-sensitive interaction with female witnesses, litigants or defendants (see Module 4.9 of the *Training Manual*), it may be effective to design a role play exercise around a domestic violence or sexual violence court hearing. Members of the group will be allocated different roles (victim; prosecutor; police officer; judge). The 'actor' participants would then act the role play in front of the whole group. Be careful, as the trainer needs to prepare the role play scenario in advance.

Another type of group work that would be suitable for the topics of the Training Manual, as often they related to attitudes and values among judges and prosecutors, is an exercise around empathic perspective taking. For example, after a presentation from a victim or from a women's organisation or after a visit to a shelter (if access is permitted), ask the group to try to take the perspective of the victim and discuss what may be the obstacles for her to report the incident to the police or testify in court.

### *c. Evaluation*

Evaluation of the training should ideally include both the trainers assessing the retention of knowledge by the participants and the trainees providing feedback on the quality of the training. It is important to use an evaluation form at the end of the training for the trainees to give their feedback. Results of these evaluation may be presented at a future training, will help identify future training needs and will provide lessons learned.

### *d. Follow-up*

Follow-up would be taken at least at two levels: individual and institutional. As suggested earlier, participants in the training may be asked to develop a personal action plan over the next six months following the training, which the trainer can then follow-up on to see how the participants were able to use the knowledge and what obstacles they encountered. Furthermore, if the training is part of a series of trainings, follow-up is important in order to ensure that participants build their knowledge progressively.

At the institutional level, it is important to ensure that relevant training be on-going and sustained with appropriate follow-up to ensure that newly acquired skills are adequately applied.

399. This classification of group work is presented in the Training Manual on the European Convention on Human Rights, pp. 54-55: Council of Europe. 2007. Training Manual on the European Convention on Human Rights.

**Checklist for developing and conducting training based on the *Training Manual for Judges and Prosecutors on Ensuring Women's Access to Justice***

| Task | Who is responsible | Timeframe |
|---|---|---|
| | | |
| Decide on the length of the training (ideally 2-3 days or integrated in a semester-long curricula for initial training) | Training institution | At least three months before the training event |
| Decide on the level of the training (beginners/ advanced) | Training institution | At least three months before the training event |
| Select trainers: national and international, gender experts, guest presenters and representatives of civil society | Training institution | At least three months before the training event |
| Assessment of training needs | Ideally these should be based on existing needs assessments at the level of the training institutions | At least two months before the training event |
| Setting up learning objectives | Trainers and training institution | At least two months before the training event |
| Adaptation to the target audience | Trainers | At least two months before the training event |
| Adaptation to national training requirements | Training institution and trainers | At least two months before the training event |
| Send the invitations or the confirmations of participation to the trainees | Training institution | At least a month in advance |
| Developing training materials and practical exercises | Trainers | At least three weeks before the training event |
| Make sure case studies are included | Trainers | At least three weeks before the training event |
| Send the materials in advance to trainees | Training institutions and trainers | At least two weeks before the training |
| Prepare a final assessment for participants and evaluation tools (such as an evaluation form) | Trainers | At least two weeks before the training event |
| Prepare additional assignments (such a personal action plan) | Trainers | At least two weeks before the training event |
| Distribute the definitive programme (including intended learning outcomes) | Trainers and training institution | At least one week before the training |
| Evaluation of training | Trainers and trainees | On the day of the training event |
| Certification | Training institution | Certificates prepared in advance; certification on the last day of the training |
| Discuss the evaluation outcome and future training needs | Training institution and trainers | Shortly after the training event |
| Follow-up | Training institutions, trainers, trainees | Six months after the training |

**Note:** In addition to the steps above, practical organisation matters also need to be adequately addressed when preparing a training event, such as: decide on budget; prepare the name plates for participants and trainers; venue; room set-up; interpretation; coffee breaks and lunch; preparation of the documents to be distributed at the venue; equipment: computer with appropriate presentation software, overhead projector, flipcharts and pens etc.

## Annex 2: Sample Exercises and Practical Tools for Trainers

### I. Sample presentation outline: Women's Access to Justice and the Istanbul Convention

*Standards on women's access to justice introduced by the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) and overview of the relevant ECtHR case-law*

1. General information about the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention)
2. Ground-breaking features of the Istanbul Convention
3. Scope of the Convention: who does the Convention cover?
4. Main pillars of the IC:
   - **a. P**revention
   - **b. P**rotection
   - **c. P**rosecution and punishment
   - d. Integrated **P**olicies
5. Forms of violence criminalised by the Istanbul Convention
6. Standards on access to justice for women victims of gender-based violence introduced by the IC
   - a. Adequate provision of legal information (Article 19)
   - b. Encourage reporting (Article 27)
   - c. Provide victims with adequate civil remedies (Article 29), and compensation (Article 30)
   - d. Ensure that investigations and judicial proceedings are carried out without undue delay (Article 49) and that prosecutors can initiate and continue proceedings, even if the victim withdraws the complaint (Article 55 para 1)
   - e. Ensure the possibility for governmental and non-governmental organisations and domestic violence counsellors to assist and/ or support victims, at their request, during investigations and judicial proceedings (Article 55 para 2)
   - f. Ensure that evidence relating to the sexual history and conduct of the victim is permitted only when relevant and necessary (Article 54)
   - g. Ensure that mandatory alternative dispute resolution processes or sentencing, including mediation and conciliation, are prohibited (Article 48)
   - h. Ensure the protection of victims at all stages of investigations and judicial proceedings (Article 56)
   - i. Provide victims with access to legal assistance and to free legal aid (Article 57).
7. Examples from the case-law of the European Court of Human Rights
   - a. *Opuz v. Turkey*
   - b. *Y. v. Slovenia*
   - c. *M.C. v. Bulgaria*
8. Conclusions : using the Istanbul Convention to improve women's access to justice

### II. Sample exercise adapted from a case of the European Court of Human Rights

Overview: In section 4.9 of the Training Manual, on interactions with female witnesses and litigants, the case of *Bevacqua and S v. Bulgaria* is presented and a question for discussion is suggested. Trainers could use both the description of the case and the suggested discussion point to develop a case study for a group work session on interactions with women victims of domestic violence in the context of child custody decisions.

Case-law example: In Bevacqua and S v. Bulgaria, the applicant and her husband separated due to domestic violence; the applicant filed for custody of their child- a son- and agreed that the father would have contact with the child. After one visit, the father refused to return the child to his mother and stopped all contact with the applicant. The applicant later collected the child from kindergarten and they both went to stay in a hostel for

victims of domestic violence. After a complaint from the husband, the authorities threatened to prosecute the petition for child abduction. Although the applicant had communicated information about the domestic violence and requested an interim order on child custody, the court did not issue such an order. The applicant eventually agreed to shared care of the child, but she was also subjected to further violence by her husband during this time. The applicant was eventually granted custody of the child, but the father was not prosecuted for domestic violence. The ECtHR found violations of both the applicant's and child's rights under Article 8 of the ECHR (right to respect for private and family life). The Court noted that the State's failure to adopt interim custody measures without delay had adversely affected the wellbeing of the child and that insufficient measures had been taken in response to the domestic violence perpetrated by the former husband.

Discussion point: Note that the ECtHR decided the Bevacqua and S v. Bulgaria case before the Istanbul Convention had entered into force. How might the Court's reasoning differ for a case with the same facts occurring in a country that has ratified the Istanbul Convention, yet still reach the same judgment?

### III. Sample hypothetical case on sexual violence: proceedings and investigation[400]

**The Case:** the victim, a 40-year old woman, is walking back from work; she is commuting daily between the little town where she works in a factory and the village where she lives. The total distance between the two is 4 km or one-hour walking. She often gets a ride from fellow villagers or drivers from neighbouring villages. In November 2014, after dark, she was hitchhiking to cars driving in the direction of her village, when one of them stopped. She recognised the driver as a cousin of one of her fellow villagers and she decided to get in the car with him.

Right before entering the village, the driver veered away from the road into a little forest. The driver told the woman he had wanted to get to know her for some time now and make her 'his woman'. The victim replied that she was a married woman and she was certainly a few years his senior, that she was also very tired and she'd like to get home. The man went on to say he had an erection and he wanted to have sex right there and then, as he had never done it in the car. He didn't mind that she was married, he also said. All the better, in fact, as she should not be bothered by having sex one more time.

The victim tried to open the door, but it was locked by the driver, who told her to relax and stay calm, as he did not want to slay her, but he would if she kept resisting like a 'stupid hen'. He got out of the car, pulled the victim's hair and pushed her on the back seat and, against her resistance, he penetrated her. While she was resisting, the victim lost one earring and her skirt become a little torn. Furthermore, she acquired specific bruises on her hips and chest, which are signs of violence. The aggressor's pants were also torn in the struggle in the pocket area.

After the rape, the aggressor tells her that he would take her home and, if she was smart, she would not let herself become the laughing stock of the whole village and risk her husband leaving her alone with two children. On the other hand, he was interested in staying friends and one day she might even learn to like him. Humiliated, tired and fearing she might be left alone in the forest, quite far from the village, the victim stayed in the car and the driver took her close to home. She was thinking of getting home as soon as possible to wash herself immediately, lest (God forbid!) she would become pregnant from the rape. She couldn't decide whether or not she would tell her husband what happened. He was anyway always angry since he had lost his job.

How would she make sure that her children didn't find out (so that other children wouldn't mock them) or her parents (since her mother had a weak heart that might collapse at the news)? And what would people say?

There is no police station in their village.

**Exercises:**

A. Please list the relevant arguments :

*The argum*gainst the victim's filing a complaint:

B. Fill in and discuss the questionnaire below:

400. This case was prepared by Judge Corina Voicu, Director of the Department for Legislation and Documentation of the Superior Council of Magistracy of Romania, for the purpose of a training seminar on women's access to justice implemented by the Council of Europe.

| ***Stage/ step*** | ***How important is this step for an eventual resolution to this case?***<br><br>***Note:***<br>***VI = very important***<br>***U = useful***<br>***N = not important*** | ***In your experience, how long does it take for this step to be initiated after the time when the alleged crime was committed? (in days)*** | ***In your experience, when do the facts available at this stage become known to the judicial authorities? (number of days counted from the time of the alleged crime)*** | ***When would it be <u>desirable</u> for this step to be taken?*** | ***Where should the victim go to complete this step (in case her presence is necessary)?*** | ***Are the legal framework/ technical means/ financial resources etc adequate for completing this step?*** |
|---|---|---|---|---|---|---|
| Making the complaint | | | | | | |
| Investigation of the crime scene | | | | | | |
| Recording the evidence left on the victim's clothes | | | | | | |
| Forensic examination of the victim's body | | | | | | |
| Sampling biological evidence from the victim | | | | | | |
| Examination of the car and home of the accused | | | | | | |
| Sampling biological evidence from the suspect | | | | | | |
| Analysis of the bio samples | | | | | | |
| Psychological exam of the victim | | | | | | |
| Psychological exam of the suspect | | | | | | |
| Interviewing the victim | | | | | | |
| Interviewing the suspect | | | | | | |
| Interviewing the witnesses | | | | | | |
| Confrontation between the victim and the suspect | | | | | | |
| Informing the victim about her procedural rights | | | | | | |
| Legal aid to the victim | | | | | | |
| Psychological support to the victim | | | | | | |
| Social inquiry | | | | | | |

| *Stage/ step* | *How important is this step for an eventual resolution to this case?*<br><br>*Note:*<br>*VI = very important*<br>*U = useful*<br>*N = not important* | *In your experience, how long does it take for this step to be initiated after the time when the alleged crime was committed? (in days)* | *In your experience, when do the facts available at this stage become known to the judicial authorities? (number of days counted from the time of the alleged crime)* | *When would it be <u>desirable</u> for this step to be taken?* | *Where should the victim go to complete this step (in case her presence is necessary)?* | *Are the legal framework/ technical means/ financial resources etc adequate for completing this step?* |
|---|---|---|---|---|---|---|
| Cross-checking the national register of perpetrators | | | | | | |
| Preventive measures against the aggressor | | | | | | |
| Protection measures for the victim | | | | | | |
| Acquiring the status of civil party | | | | | | |
| Trial | | | | | | |
| Judicial decision | | | | | | |
| The victim receiving damages from the perpetrator | | | | | | |
| The victim receiving compensation from the state | | | | | | |

### IV. Sample needs assessment questionnaire

In as much as possible, the planning of a training event on women's access to justice should refer to the existing needs assessments at the level of the judicial or prosecutorial training institutions that are delivering the training. However, if a specific rapid needs assessment becomes necessary, trainers may send a simple questionnaire a few weeks in advance of the training in order to gauge the expectations and level of knowledge of the participants in the training.

Dear participant,

Thank you for taking the time to complete this pre-training questionnaire. Questionnaire responses are anonymous and your responses will provide very useful information which will be used to determine future training activities. The information gathered through this survey will only be used for this purpose. We ask you to respond honestly and in the most complete way possible.

1. General information
   a. Work affiliation (organisation/ department/ court):
   b. Title:
   c. Level:
   d. Sex:
2. Educational background and previous experiences in training on women's access to justice or women's rights/ gender equality issues
   a. What is the highest level of education completed?

b. Have you received an introductory training on women's rights/ gender equality? *Yes/ No*
c. Have you taken any training related to women's rights/ gender equality in the past two years? *Yes/ No*

3. Knowledge on gender equality and particular issues related to women's access to justice
   a. How familiar are you with international norms on women's rights? On a scale of 1 to 5 (1 poor familiarity; 5 excellent familiarity)
   b. To what extent do concerns related to women's access to justice influence your everyday work? (Not at all/ To a limited extent/ To a significant extent)
4. Learning needs
   a. Which of the following topics for training you would be most interested in? (choose the top three)
      - Concepts related to women's rights, gender equality and women's access to justice
      - International standards
      - Case-law of the regional courts, in particular the European Court of Human Rights
      - Practical guidance for improving women's access to justice in the practice of judges and/ or prosecutors
      - Thematic presentations and discussions on the following (choose two themes)
        - Sex/ gender based discrimination
        - Violence against women
        - Improving access to justice for victims of domestic violence
        - Women's access to justice in divorce proceedings, custody determination and other family matters
        - Women's access to justice in the context of labour rights
   b. In which tools and sources of information would you be most interested to support your work?
5. Please share any thoughts or comments that you think might be useful.

**V. Sample evaluation questionnaire**[401]

Questions can involve a range of different types of responses. Below are several examples:

*Linear scale:* trainees indicate their response to a series of statements: e.g.

**On a scale of 1 – 5 (1= poor; 5= excellent), please rate:**

The way in which the training was presented

The content of the information presented

The usefulness of the readers and/or handout

Your knowledge of the subject before the training

Your knowledge of the subject now

*Choice of most appropriate response:* one (or possibly more) responses are elicited: e.g.

**What was / were the most important factor(s) in your attendance at training?**

[Tick all responses which were relevant in your situation]

- I felt I would learn something useful

- The content of the training is relevant to my job

-My superior officer instructed me to attend

401. Adapted from the *Training Manual on the European Convention on Human Rights*, Council of Europe. 2007. Training Manual on the European Convention on Human Rights.

- My colleagues had indicated they were attending
- I wanted to attend to meet other colleagues

Choice of one response from several alternatives: *one response is elicited, e.g.*

**What relevance do you think the training has for you? Select the most appropriate:**

- I will be able to put into practice my new knowledge immediately
- I think my new knowledge will be of some use to me in the near future
- I cannot see my new knowledge being of much practical use in the near future
- The knowledge gained was of no direct relevance to me

*Seeking a limited number of open responses:* the trainee is asked for key impressions: e.g.

**List the three most important things that you have learnt / now will do in your job?**

It is also crucial – at the end of each set of questions – to allow space for any further comments the trainee may wish to make: these may be elicited by means of a formula such as 'any further comments?' or 'do you have any suggestions for improving future training'?

Ask the trainees also about their appreciation of the place of venue: was the place of venue easy to find, how they did appreciate the meeting room, the seating, acoustics, meals etc.

### VI. Sample personal action plan

At the end of the training, participants should be asked to list three-six actions that they could take in their daily work to improve women's access to justice. The trainers can explain that they will contact the participants again in six months to see how these actions progressed, whether or not it was easy to implement them, and whether the participant needed additional support, including possibly additional training.

## Annex 3: Selected Resources on Gender Equality and Women's Access to Justice

1. UN bodies and material
2. Council of Europe bodies and material
3. Guidance and training material
4. General reference material
5. Case-law databases
6. Video resources

### 1. UN bodies and material

Committee on the Elimination of Discrimination Against Women
http://www.ohchr.org/en/hrbodies/cedaw/pages/cedawindex.aspx

General Recommendations
http://www.ohchr.org/EN/HRBodies/CEDAW/Pages/Recommendations.aspx

General Recommendation No. 33 on women's access to justice (2015)
http://www.ohchr.org/EN/HRBodies/CEDAW/Pages/Recommendations.aspx

Special Rapporteur on violence against women, its causes and consequences
http://www.ohchr.org/EN/Issues/Women/SRWomen/Pages/SRWomenIndex.aspx

### 2. Council of Europe bodies, standards and material

Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention), and the Group of Experts against Violence against Women and Domestic Violence
http://www.coe.int/en/web/istanbul-convention/home.

European Committee of Social Rights
http://www.coe.int/en/web/turin-european-social-charter/european-committee-of-social-rights

European Court of Human Rights, Press Service, Thematic Factsheets on the Case-law of the Court, including on gender equality, domestic violence, violence against women, reproductive rights, trafficking in human beings, work-related rights, among others.
http://www.echr.coe.int/Pages/home.aspx?p=press/factsheets

Council of Europe Convention on Action against Trafficking in Human Beings, and the Group of Experts on Action against Trafficking in Human Beings
http://www.coe.int/en/web/anti-human-trafficking/home

Gender Mainstreaming conceptual framework, methodology and presentation of good practices - Final Report of Activities of the Group of Specialists on Mainstreaming (2004) and Rec (84)
https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680b0f41

*Gender equality and women's rights - Council of Europe standards* (2016)
https://edoc.coe.int/en/gender-equality/6930-gender-equality-and-women-s-rights-council-of-europe-standards.html

Publications on Gender Equality:
http://www.coe.int/en/web/genderequality/publications

*Gender Equality Glossary* [English, French]
https://edoc.coe.int/en/gender-equality/6947-gender-equality-glossary.html

Publications on Guaranteeing Equal Access of Women to Justice:
http://www.coe.int/en/web/genderequality/equal-access-of-women-to-justice

*A feasibility study on Equal Access to Women to Justice* (2013)
https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680597b1e

*Compilation of good practices from member states to reduce existing obstacles and facilitate women's access to justice* (2015)
https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680597b12

Publications on Improving Women's Access to Justice in Five Eastern Partnership Countries:
http://www.coe.int/fr/web/genderequality/women-s-access-to-justice

*National studies on barriers, remedies and good practices for women's access to justice in five Eastern Partnership countries* (2016)
https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806b0f41

### 3. Guidance and training material

#### Equality / Gender equality

*Access to Justice in Cases of Discrimination in the EU: Steps to Further Equality*
(European Union Agency for Fundamental Rights –FRA, 2012) [German, English, French]
http://fra.europa.eu/en/publication/2012/access-justice-cases-discrimination-eu-steps-further-equality

*Access to Justice: discrimination against women in criminal justice systems* (Penal Reform International, 2012)
https://www.penalreform.org/resource/access-justice-discrimination-women-criminal-justice-systems/

*Equality Before the Law Benchbook*
(Judicial Commission of New South Wales/ Australia, 2016)
https://www.judcom.nsw.gov.au/wp-content/uploads/2016/07/Equality_before_the_Law_Bench_Book.pdf

*Equality Before the Law Benchbook*
(Department of the Attorney General/ Western Australia, 2009)
http://www.supremecourt.wa.gov.au/_files/equality_before_the_law_benchbook.pdf

*Equal Treatment Bench Book*
(Judicial College/ United Kingdom, 2013)
https://www.judiciary.gov.uk/publications/equal-treatment-bench-book/

*Gender Equality Law in Practice: a manual for judges and legal practitioners*
(Office for Gender Equality of Croatia and Institute for Health and Welfare of Finland, 2017)
http://pak.hr/cke/ostalo%206/Manual_Gender%20Equality%20Law%20in%20Practice_ENG.pdf

*Gender in Justice*
(European Institute for Gender Equality, 2017)
http://eige.europa.eu/rdc/eige-publications/gender-justice

*Handbook on European Law Relating to Access to Justice*
(European Union Agency for Fundamental Rights and Council of Europe, 2016) [Multiple languages]
http://fra.europa.eu/en/publication/2016/handbook-european-law-relating-access-justice

*Handbook on European Non-Discrimination Law*
(European Union Agency for Fundamental Rights, European Court of Human Rights, 2011) [Multiple languages]
http://fra.europa.eu/en/publication/2011/handbook-european-non-discrimination-law

*Handbook For Training Judges on Anti-Discrimination Law*
(Organisation for Security and Co-Operation in Europe, 2012) [English, Macedonian]
http://www.osce.org/skopje/116787

*Human Rights Education for Legal Professionals* (HELP)- self-learning and distance learning
(Council of Europe) [Multiple languages]
http://help.elearning.ext.coe.int

*Judicial Decision-Making with a Gender Perspective: A Protocol*
(National Supreme Court of Mexico, 2014) [English, Spanish]
http://www.sitios.scjn.gob.mx/codhap/ProtocolGenderPerspective
http://www.sitios.scjn.gob.mx/codhap/node/1153/

*Training Manual on Gender Sensitivity and CEDAW*
(Ateneo Human Rights Centre/Philippines, UNIFEM, 2007)
http://unwomen-asiapacific.org/docs/cedaw/archive/Philippines/P9_CEDAWTrainingManual_PhilJA.pdf

**Violence against women / Gender-based violence**

*Essential Services Package for Women and Girls Subject to Violence/ Module 3: Justice and Policing Essential Services*
(UN Women, UNFPA, WHO, UNDP and UNODC, 2015) [Arabic, English, Spanish, French][402]
http://www.unwomen.org/en/digital-library/publications/2015/12/essential-services-package-for-women-and-girls-subject-to-violence

Guidance on the Istanbul Convention, Council of Europe
http://www.coe.int/en/web/istanbul-convention/publications

*Improving the Effectiveness of Law Enforcement and Justice Officers in Combating Violence against Women and Domestic Violence: Training of Trainers Manual*
(Council of Europe, 2016)
https://rm.coe.int/16806acdfd

*Preventing and Combating Domestic Violence against Women: A learning resource for training law enforcement and justice officers*
(Council of Europe, 2016)
https://rm.coe.int/16805970c1

*Handbook on Effective Prosecution Responses to Violence against Women and Girls* (UNODC, UN Women, 2014)
http://www.unodc.org/documents/justice-and-prison-reform/14-02565_Ebook_new.pdf

*Handbook for Legislation on Violence against Women*
(UN Women, 2012) [Multiple languages]
http://www.un.org/womenwatch/daw/vaw/v-handbook.htm

*Sexual Violence against Women: Eradicating Harmful Gender Stereotypes and Assumptions in Laws and Practice*
(International Commission of Jurists, 2015)
https://www.icj.org/icj-addresses-harmful-gender-stereotypes-and-assumptions/

*Women's Access to Justice for Gender-Based Violence: A Practitioners' Guide*
(International Commission of Jurists, 2016)
https://www.icj.org/womens-access-to-justice-for-gender-based-violence-icj-practitioners-guide-n-12-launched/

**4. General reference material**

Material on the European Union Agency for Fundamental Rights Violence against women EU-wide survey:
http://fra.europa.eu/en/publications-and-resources/data-and-maps/survey-data-explorer-violence-against-women-survey

Material on gender stereotypes/stereotyping (OHCHR):
http://www.ohchr.org/EN/Issues/Women/WRGS/Pages/GenderStereotypes.aspx

402. Currently being translated into Russian.

*Eliminating Judicial Stereotyping: Equal Access to Justice for Women in Gender-Based Violence Cases* (OHCHR (2014)
www.ohchr.org/Documents/.../Women/.../StudyGenderStereotyping.doc

*Progress of the World's Women: In Pursuit of Justice 2011–2012*
(UN Women, 2011) [Multiple languages]
http://www.unwomen.org/en/digital-library/publications/2011/7/progress-of-the-world-s-women-in-pursuit-of-justice

**5. Case-law databases**

UN Jurisprudence database (for communications under the CEDAW Optional Protocol)
http://juris.ohchr.org/search/Documents

European Court of Human Rights HUDOC database
http://www.echr.coe.int/Pages/home.aspx?p=caselaw&c=#n14597620384884950241259_pointer

Factsheets on European Court of Human Rights decisions on gender equality, violence against women, domestic violence and reproductive rights
http://www.echr.coe.int/Pages/home.aspx?p=press/factsheets&c=

*Compilation of case-law of the European Court of Human Rights on Gender Equality Issues* (2016)
http://www.coe.int/en/web/genderequality/equal-access-of-women-to-justice

*Equal access to justice in the case-law on violence against women before the European Court of Human Rights* (2015)
https://edoc.coe.int/en/gender-equality/6690-equal-access-to-justice-in-the-case-law-on-violence-against-women-before-the-european-court-of-human-rights.html

European Union Agency for Fundamental Rights Case-law Database
(A compilation of Court of Justice of the European Union (CJEU) and European Court of Human Rights (ECtHR) case-law with references to the Charter of Fundamental Rights of the European Union)
http://fra.europa.eu/en/case-law-database

**6. Video Resources**

CEDAW Quick & Concise: The principle of substantive equality
(International Women's Rights Action Watch Asia Pacific, UN Women) [3.38 mins.]
http://cedaw-in-action.org/en/2008/03/01/training-manual-on-gender-sensitivity-and-cedaw/
https://www.youtube.com/watch?v=rI8lNB-XMIk

Women's Access to Justice
(International Development Law Organisation-IDLO) [4.40 mins.]
http://www.idlo.int/news/multimedia/videos/womens-access-justice

UN Women Digital Library
http://www.unwomen.org/en/digital-library/videos

UN Women/Georgia Digital Library
http://georgia.unwomen.org/en/digital-library/videos

## Annex 4: Treaties on Women's Human Rights and Status of Ratification

| | Armenia | Azerbaijan | Belarus | Georgia | Moldova | Ukraine |
|---|---|---|---|---|---|---|
| **UN TREATIES AND CONVENTIONS** | | | | | | |
| International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ |
| International Covenant on Civil and Political Rights (ICCPR) | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ |
| International Covenant on Economic, Social and Cultural Rights (ICESCR) | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ |
| Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ |
| Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ |
| Convention on the Rights of the Child (CRC) | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ |
| International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW) | S | ✓ | | ✓ | ✓ | |
| Convention on the Rights of Persons with Disabilities (CRPD) | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ |
| ILO Equal Remuneration Convention (No. 100) | ✓ | ✓ | | ✓ | ✓ | ✓ |
| ILO Discrimination (Employment and Occupation) Convention (No. 111) | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ |
| ILO Workers with Family Responsibilities Convention (No. 156) | | ✓ | | | | ✓ |
| ILO Maternity Protection Convention (No. 183) | | ✓ | ✓ | | | |
| **COUNCIL OF EUROPE CONVENTIONS** | | | | | | |
| European Convention on Human Rights | ✓ | ✓ | | ✓ | ✓ | ✓ |
| European Social Charter | ✓ | ✓ | | ✓ | ✓ | ✓ |
| Convention on Action against Trafficking in Human Beings | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ |
| Convention on Preventing and Combating Violence against Women and Domestic Violence | | | | R | S | S |

Notes: ✓= ratification; S= signature

ENG

The Council of Europe is the continent's leading human rights organisation. It comprises 47 member states, 28 of which are members of the European Union. All Council of Europe member states have signed up to the European Convention on Human Rights, a treaty designed to protect human rights, democracy and the rule of law. The European Court of Human Rights oversees the implementation of the Convention in the member states.

**www.coe.int**

The European Union is a unique economic and political partnership between 28 democratic European countries. Its aims are peace, prosperity and freedom for its 500 million citizens – in a fairer, safer world. To make things happen, EU countries set up bodies to run the EU and adopt its legislation. The main ones are the European Parliament (representing the people of Europe), the Council of the European Union (representing national governments) and the European Commission (representing the common EU interest).

**http://europa.eu**

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