

Conference “Towards guaranteeing equal access of women to justice”
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**Women’s access to justice:
Examples from the case-law of the European Court of Human Rights
on violence against women**

Slide 1: Introduction

I was glad and honoured to accept the invitation to talk at this Conference. As a judge, access to justice is naturally close to my heart. However, when it came to preparing my presentation concretely, I was hesitant about the appropriate niche from which to approach the issue. The Court’s jurisprudence on gender-based discrimination in access to justice is marginal – to say the least. In fact, I was unable to detect a single case under Article 6 arguing that access to court had been denied or hampered in a discriminatory manner based on *gender*. There is no specific case law on that issue.

When thinking more broadly about gender-based discrimination cases, the first thing that comes to mind is the impressive case-law that we have with regard to violence against women. And indeed, when immersing myself in these cases, I realised that many of them in fact raised important procedural issues which impede female victims’ effective access to justice.

Slide 2: Overview

I have chosen three such issues that seemed to me to be among the most essential:

- The putting in place of protective operative measures when ill-treatment is reported to the authorities.
- The adherence to the principle of non-discrimination in the meaning of maintaining an atmosphere in which, for example, reported instances of domestic violence against female victims are dealt with in a serious manner.

- And, lastly, that an investigation into alleged inferences of violence against women is conducted thoroughly and effectively.

I will illustrate each of these with an example.

Slide 3: Main Articles involved

Before embarking on the concrete cases, it is perhaps useful to clarify which Convention rights typically come into play in cases of violence against women.

As in all cases entailing killings or ill-treatment, it is not surprising that the bulk of the cases are brought to the Court under Articles 2 and 3 of the Convention – the right to life and the prohibition of torture or inhumane or degrading treatment or punishment.

In cases in which the treatment complained of is not inflicted by States agents but by private individuals – for example in cases of domestic violence – the complaints against the State can only relate to so-called positive obligations under the Convention.

Article 8 of the Convention, the right to private and family life and the State's positive obligation to protect this right is also often invoked before the Court in cases of violence against women.

The main provision on non-discrimination in Article 14 of the Convention includes the right to enjoy the rights and freedoms under the Convention free of discrimination based on sex. One could expect violence against women to be an area which can quite logically be looked at from the point of view of gender discrimination. However, Article 14 has played only a marginal role in those cases before the Court, for two reasons:

- It can partly be explained by the applicants' choice not to raise the issue of inequality or their inability to plead it in a substantiated manner.
- It is further quite typical for the Court to decide that no separate issue arises under Article 14 of the Convention after the claim has been dealt with extensively under other substantive Articles of the Convention.

Yet, aspects of gender equality can be drawn from the reasoning of the Court in almost any case on violence against women, regardless of the invoked Articles. At the same time, many of these aspects relate to issues around access to justice, as I will now aim to demonstrate through the cases I have chosen.

Slide 4: Protective operative measures, *Kontrova v. Slovakia* no. 7510/04, 31 May 2007

In the context of violence against women, access to justice is not limited to considerations of how the victim is to be compensated for the ill-treatment, from the *ex post* perspective. When incidents of domestic violence are reported to the domestic authorities, this knowledge triggers an obligation to implement protective measures with a view to preventing further harm.

Kontrová v. Slovakia – the first case on domestic violence dealt with in substance – provided the opportunity to deal with such a positive obligation to introduce protective measures *ex ante* in more detail.

The applicant lodged a criminal complaint against her husband with the local police accusing him of having assaulted and beaten her with an electric cable the previous day. She submitted a medical report by a trauma specialist indicating that her injuries would render her unfit for work for up to seven days. The applicant also stated that there was a long history of physical and psychological abuse by her husband. Some two weeks later, she and her husband jointly sought to withdraw her criminal complaint. A police officer advised them that to avoid a prosecution, they would have to produce a medical report showing that the applicant had not been unfit for work for more than six days. The applicant produced such a report and the officer in charge decided that, now that the matter was to be considered under the Minor Offences Act, no further action was to be taken. In the following weeks, the emergency service of the local police was alerted several times, by the applicant or a relative, that her husband had a shotgun and was threatening to kill himself and the children. The police arranged for a police patrol to visit the premises, but found that the husband had left the scene prior to their arrival. **The next day the applicant's husband shot dead their two children and himself.**

The applicant complained before the Court that the State had failed to protect the lives of her two children and alleged a violation of Article 2 of the Convention.

Slide 5: Positive obligation to protect under Article 2

When examining the applicant's claim under Article 2, the Court showed understanding for the difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources. The scope of the positive obligations under Article 2 to prevent loss of life through acts of private individuals was to

be interpreted in a way which did not impose an impossible or disproportionate burden on the authorities.

For a positive obligation to arise, it must rather be established:

- That there existed a “real and immediate risk” to the life of an identified individual from the criminal acts of a third party.
- That the authorities “knew or ought to have known” about the risk at the time.
- But that despite this knowledge they failed to take measures.

The Court noted that the situation in the applicant's family had been known to the local police force. In response to her situation, the police had an array of specific obligations, none of which was taken.

In my opinion, the case of *Kontrová* provides a good illustration of the vulnerability of the female victim of domestic violence. When the reporting of serious instances of domestic violence fails to prompt an adequate response, help very often comes dramatically late.

Slide 6: The principle of non-discrimination, *Opuz v. Turkey no. 33401/02* 9 June 2009

Effective access to justice for female victims of violence also entails the prerequisite that the access is provided free of any discriminatory treatment based on sex or any other ground. Although, as mentioned above, not many such cases have been successfully pleaded under Article 14, in cases of extreme inactivity on the part of the authorities the Court has been willing to accept as gender-based discrimination both the dimension of domestic violence and the implications of such an inactive approach. This brings me to my second example. The case of *Opuz* represents the leading case in this respect.

The applicant’s mother was shot and killed by the applicant’s husband as she attempted to help the applicant flee the matrimonial home. In the years preceding the shooting, the husband had subjected both the applicant and her mother to a series of violent assaults, some of which had resulted in injuries which doctors had certified as life-threatening. The incidents and the women’s fear for their lives had been repeatedly brought to the authorities’ attention. Although criminal proceedings had been brought against the husband for a range of offences, including death threats, serious assault and attempted murder, they were discontinued in at least two instances after the women withdrew their

complaints, allegedly under pressure from the applicant's husband. Despite the seriousness of the injuries, the husband was convicted in respect of only two of the incidents, for which he received light sentences. For the fatal shooting of the applicant's mother – an act the husband said he had carried out to protect his honour – he was convicted of murder and sentenced to life imprisonment. He was, however, released pending appeal and renewed his threats against the applicant, who sought the authorities' protection. It was not until seven months later, following a request from the Court for information, that measures were taken to protect her.

The Court considered the different aspects of the case under Articles 2 and 3 separately and in conjunction with Article 14 of the Convention.

Slide 7: Prosecuting acts of domestic violence out of public interest against the victim's wishes?

Various factors were to be taken into account in deciding whether to pursue a prosecution:

- These related to the offence: its seriousness, the nature of the victim's injuries, the use of a weapon, planning.
- The offender: his record, the risk of his reoffending, any past history of violence.
- The victim and potential victims: any risk to their health and safety, any effects on the children, the existence of further threats after the attack.
- The relationship between the offender and the victim: the history and current position, and the effects of pursuing a prosecution against the victim's wishes.

In *Opuz*, despite the pattern of violence and use of lethal weapons, the authorities had repeatedly dropped proceedings against the husband in order to avoid interfering in what they perceived to be a "*family matter*", and did not appear to have considered the motives behind the withdrawal of the complaints, despite being informed of the death threats. The Court observed that the authorities had failed to assess the imminent threat posed by the husband to the mother's life. In domestic violence cases perpetrators' rights could not supersede the victims' rights to life and physical and mental integrity. The authorities could have ordered protective measures under the relevant legislation or issued an injunction restraining the husband from contacting, communicating with or approaching the applicant's mother or entering defined areas. The

criminal justice system, as applied in the applicant's case, had not acted as an adequate deterrent.

Under Article 3 of the Convention, the Court deemed the authorities' response to the husband's acts as manifestly inadequate in the light of the gravity of his offences. The judicial decisions had had no noticeable preventive or deterrent effect, and had even disclosed a degree of tolerance taking into account the mildness of the sentences imposed on the husband. He received a short prison sentence, commuted to a fine, for trying to run down the two women with his car, and a small fine, payable in instalments, for stabbing the applicant seven times. Furthermore, it was not until 1998 that Turkish law had provided specific administrative and policing measures to protect against domestic violence, and even then the available measures and sanctions were not effectively applied in the applicant's case. Lastly, it was a matter of grave concern that the violence against the applicant had not ended and that the authorities had still not taken any action. Despite the applicant's request for help, nothing was done until the Court requested the Government to provide information about the protective measures it had taken. Therefore, Article 3 of the Convention had been violated.

Lastly, the Court examined the complaint of the applicant that she and her mother had been discriminated against on the basis of their gender under Article 14 read in conjunction with Articles 2 and 3 of the Convention.

The Court considered that the State's failure to protect women against domestic violence breached their right to equal protection by the law, and that this failure did not need to be intentional. It made reference to more specialised legal instruments in the field of gender-based violence and discrimination, such as:

- The 1979 United Nations Convention Eliminating All Forms of Discrimination Against Women (CEDAW Convention).
- The Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Belém do Pará Convention).

Turning then to the specific circumstances prevailing in Turkey at the time, the Court observed that although the Turkish law then in force did not make an explicit distinction between men and women in the enjoyment of rights and freedoms, it needed to be brought into line with international standards in respect of the status of women in a democratic and pluralistic society. It thus appeared to the Court that the alleged discrimination was not based on the legislation per se, but rather resulted from the general attitude of the local authorities.

The research produced by the applicant of two leading NGOs in the field indicated that when victims reported domestic violence to police stations, police officers did not investigate their complaints but sought to assume the role of mediator by trying to convince the victims to return home and drop their complaint. Police officers considered the problem as a “*family matter with which they could not interfere*”. Moreover, it transpired from these reports that there were unreasonable delays in issuing injunctions by the courts against perpetrators of domestic violence, because the courts treated that as a form of divorce action and not as a matter of urgency. Delays were also frequent when it came to serving injunctions on the aggressors, given the negative attitude of the police officers.

As a result of these problems, the above-mentioned reports suggested that domestic violence was tolerated by the authorities and that the remedies indicated by the Government did not function effectively. The Court concluded that there had been a violation of Article 14 of the Convention, read in conjunction with Articles 2 and 3 of the Convention.

The approach initiated by the Court in *Opuz* has since been followed in domestic violence cases, especially against the Republic of Moldova (*Eremia v. the Republic of Moldova*, no. 3564/11, 28 May 2013; *Mudric v. the Republic of Moldova*, no. 74839/10, 16 July 2013; *T.M. and C.M. v. the Republic of Moldova*, no. 26608/11, 28 January 2014.).

Slide 8: Thorough and effective investigation, *Y. v. Slovenia* no. 41107/10 28 May 2015

At the core of the procedural obligations under Articles 2 and 3 of the Convention lies the duty of the domestic authorities to conduct a thorough and effective investigation. The principles underlying this obligation as to cases of sexual abuse formed an issue once more in the very recent case of *Y. v. Slovenia*, my third example.

Slide 9: Effective investigation of cases of ill-treatment committed by private individuals?

In the Court’s view an effective investigation should in principle be capable of leading to the establishment of the facts of the case and to the identification and punishment of those responsible.

This is not an obligation of result, but one of means:

- The authorities must take reasonable steps to secure evidence concerning the incident, such as witness testimony and forensic evidence.
- A requirement of promptness and reasonable expedition is implicit in this context.
- Notwithstanding its subsidiary role in assessing evidence, the Court recalled that where allegations were made under Article 3 of the Convention, the Court must apply a particularly thorough scrutiny even if certain domestic proceedings and investigations have already taken place.

In the case of *Y. v. Slovenia* the applicant's mother had brought criminal proceedings against a family friend, an older man, whom the applicant accused of having repeatedly sexually assaulted her at the age of 14. The proceedings had been marked by several longer periods of complete inactivity. While it was impossible for the Court to speculate as to whether the fact that more than seven years had elapsed between the applicant lodging her complaint and delivery of the first-instance judgment had prejudiced the outcome of the proceedings, such a delay could not be reconciled with the requirements of promptness. There had accordingly been a violation of the State's procedural obligations under Article 3.

Apart from the issue of length of proceedings, the case of *Y. v. Slovenia* was also significant given the Court's findings under Article 8 regarding the way in which the criminal proceedings against the applicant's assailant were conducted. The applicant complained before the Court, *inter alia*, of breaches of her personal integrity during the criminal proceedings, and, in particular, that she had been traumatised by being cross-examined by the defendant himself during two of the hearings. Thus, what was at stake was the alleged lack or inadequacy of measures aimed at protecting the victim's rights in the criminal proceedings.

The Court had to determine whether a fair balance had been struck between the applicant's personal integrity and the rights of the defence. Criminal proceedings concerning sexual offences are often perceived as an ordeal by the victim, in particular when the latter is unwillingly confronted with the defendant. These features are even more prominent in a case involving a minor. Therefore, in such proceedings certain measures must be taken for the purpose of protecting the victim, provided that they are reconciled with an adequate and effective exercise of the rights of the defence. The Court reiterated that, as a rule, the defendant's rights under Article 6 of the Convention required that he be given an adequate and proper opportunity to challenge and question a witness against him, either when he was making his statements or at a later stage. However, in the opinion of the Court, a person's right to defend himself does not provide for an unlimited right to use any defence arguments. Thus, since a direct

confrontation between defendants charged with criminal offences of sexual violence and their alleged victims involves a risk of further traumatising for the latter, in the Court's opinion personal cross-examination by the defendant should be subject to a very careful assessment by the national courts, particularly regarding the more intimate questions.

The fact that the applicant's questioning had stretched **over four hearings**, held **over seven months**, without an apparent reason for the long intervals between hearings, in itself raised concerns. With regard to the nature of the cross-examination by the defendant himself, the Court noted that, while the defence had to be allowed a certain leeway to challenge the applicant's credibility, cross-examination should not be used as a means of intimidating or humiliating witnesses. It was first and foremost the responsibility of the presiding judge to ensure that respect for the applicant's integrity was adequately protected from those remarks, an intervention which could have mitigated what must have been a distressing experience for her. The Court acknowledged that the authorities had taken a number of measures to prevent the applicant from being traumatised further, such as excluding the public from the trial and having the defendant removed from the courtroom when she gave her testimony. However, given the sensitivity of the matter and her young age at the time when the alleged sexual assaults had taken place, a particularly sensitive approach was required. The Court found that – taking into account the cumulative effect of the shortcomings of the investigation and the trial – the authorities had failed to take such an approach and to provide the applicant with the necessary protection, in breach of Article 8 of the Convention.

Slide 10: Conclusion

The Court has explicitly found that the overall unresponsiveness of the judicial system to cases of violence against women can amount to condoning such violence, reflecting a discriminatory attitude towards the victim as a woman.

Yet overall there is little examination under Article 14 of the question of equality between the sexes in the context of access to justice. However, as the short snap shots into the Court's case-law on violence against women show, the Court has already identified several parts of the puzzle that – if completed – would holistically secure effective protection and access to justice for female victims of violence.

Important principles in this respect can be adduced from the specific case-law of the Court on violence against women dealing with positive and procedural aspects of Articles 2, 3 and 8 of the Convention:

- The national authorities have a duty to take reasonable protective operational measures in order to react in a timely manner to cases of violence against women where they know or ought to know of the existence of a real and immediate risk.
- The measures need to be adequate to effectively deter and avert the violent acts from materialising.
- When necessary the authorities need to take action *ex officio* even against the express wish of the victim.
- Allegations of ill-treatment must be scrutinised in thorough and effective investigations that are completed in a timely manner.
- Due respect is to be had for the personal integrity of female victims, especially in the case of sexual offences or with regard to minors.

Nevertheless, it appears that not all the pieces of the puzzle have been detected yet, but remain to be discovered in future cases. I would assume that in many cases a more stringent argumentation under Article 14 of the Convention would lead the Court in the right direction towards empowering the female victims of violence to seek protection and to allow them a non-discriminatory and effective access to justice.

I thank you for your attention.