

WOMEN'S ACCESS TO JUSTICE: A GUIDE FOR LEGAL PRACTITIONERS



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WOMEN'S ACCESS TO JUSTICE: A GUIDE FOR LEGAL PRACTITIONERS

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October 2018

The content of this factsheet is drawn from the 'Training Manual for Judges and Prosecutors on Ensuring Women's Access to Justice,' Council of Europe, September 2017 (Authored by E. Duban and I Radačić).

This document has been produced as part of a project co-funded by the European Union and the Council of Europe. The views expressed herein can in no way be taken to reflect the official opinion of either party.

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Cover design and layout: KIS Kyiv, Ukraine

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1 General Principles: What Does “Access to Justice” Mean in Relation to Violence Against Women?

Effective access to justice is an essential right enshrined in numerous instruments within the universal human rights protection system. The obligation not to discriminate against women and to achieve de facto equality between women and men is an essential part of these rights. The UN Committee on the Elimination of Discrimination against Women, has articulated six interrelated elements of access to justice that are considered key for a justice system that is responsive to gender.¹ These are: justiciability; availability; accessibility; good quality; accountability and the provision of remedies for victims.

In terms of violence against women (VAW), access to justice means States must implement a range of measures including:

- amending domestic law to ensure that acts of violence against women are properly defined as crimes;
- ensuring appropriate procedures for investigations and prosecutions;
- ensuring access to effective remedies and reparation.

Women also encounter a number of obstacles with respect to access to justice within and outside the legal system, which must be overcome in order for them to effectively access justice² and can be divided into two categories:

The Legal/Institutional Level

- Discriminatory or insensitive legal frameworks such as: explicitly discriminatory legal provisions; gender blind provisions that do not take

1 See General Recommendation No. 33 of the UN Committee on the Elimination of Discrimination Against Women issued on the 23rd July 2015, CEDAW/C/GC/33.

2 See Council of Europe Gender Equality Strategy 2014-2017, Strategic Objective 3: Guaranteeing Equal Access of Women to Justice.

into account women's social position and gaps in legislation concerning issues that disproportionately affect women.

- Problematic interpretation and implementation of the law which discriminates against women.
- Ineffective or problematic legal procedure such as the lack of gender-sensitive procedures in the legal system.
- Poor accountability mechanisms (including corruption)
- Under-representation of women among legal professionals.
- Gender stereotyping and bias by justice actors

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.

2 The Legal Framework

Equality is an underlying value of international law, and all major human rights treaties contain a prohibition on discrimination on the basis of sex or gender, whether in the enjoyment of the rights enumerated in the document, or as a free-standing norm. Guaranteeing women's equal access to justice is also one of the six priority themes of the Council of Europe's Gender Equality Strategy 2018-2023. 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:

1. *The European Convention of Human Rights (ECHR) and Protocol No. 12 to the ECHR* Although the ECHR is a gender neutral instrument, the European Court of Human Rights has established jurisprudence on women's rights, including on violence against women (see section C) and also established several important principles of women's equal access to justice. The Protocol 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.
2. *The European Social Charter (ESC)* is the counterpart to the ECHR in the field of economic and social rights. Revised in 1996, 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 European Committee of Social Rights (ECSR) monitors the extent to which member states comply with the Charter through a reporting system and a procedure of collective complaints.
3. *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.

4. *The Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention)* 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 (VAW) and domestic violence (DV). The Istanbul Convention has a two-pillar monitoring mechanism to assess 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.

3 ECHR Case Law on Access to Justice and Violence against Women

Recent European Court of Human Rights case law has demonstrated the barriers women experience in accessing justice and has enabled the Court to formulate standards, particularly in VAW cases.

The Recognition of liability for VAW against private individuals

The Court has significantly increased women's access to justice by recognising that forms of VAW perpetrated by private individuals constitute violations of particular rights protected under the Convention (the right to life e.g. *Kontrova v. Slovakia* (2007); *Talpis v. Italy* (2017) and the prohibition of torture and inhuman and degrading treatment e.g. *E. and S. and Others v. Slovakia* (2009) and *Balsan v. Romania* (2017)).

The Development of the Doctrine of Positive Obligations

The doctrine applies to the actions of a private individual or a state official and to several forms of VAW. The Court 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)).

Due Diligence

The due diligence principle implies that States are under an obligation to investigate, prosecute and punish human rights violations and, irrespective of whether those acts are perpetrated by the State or by private persons. In *X and Y v. the Netherlands* (1985), 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 *M.C. v. Bulgaria* (2003), the Court found that the obligations to protect rights entail a duty 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 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).

The Court has also held that national authorities have a positive obligation to take protective measures to prevent domestic violence, when the authorities “knew or ought to have known” at the time of a ‘real and immediate risk’ to the life or health of an individual (see *Kontrova v. Slovakia* (2007), *Opuz v Turkey* (2009) and *Hajduova v. Slovakia* (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* (2008)).

Access to judicial remedies

Judicial remedies shall be **accessible** and **effective**. The case of *Airey v. Ireland* (1979) demonstrated that judicial remedies that allow a victim of domestic violence to escape the violent situation through, inter alia, divorce or separation proceedings must be accessible and effective in order to guarantee **practical** (not just theoretical or illusory) protection to a victim in a vulnerable position. Such effective access can 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 victim’s weakened capacity to represent her case due to her emotional involvement.

Thorough and effective investigation

In *Aydin v. Turkey* (1996) the Court held that medical examinations of rape victims must be performed by doctors who had experience with such victims.

The purpose of an investigation by a public prosecutor is to establish whether the applicant was a rape victim rather than whether she had lost her virginity.

The Court has also stated that obligations under Article 3 did not apply only to State officials as '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.' The requirement of evidence of the use of force or threats with regard to the prosecution of rape therefore constitutes a breach of both Article 3 and 8 (*M.C. v. Bulgaria* (2004), para. 153).

Respect for the applicant's personal integrity

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

The principle of non-discrimination

This is a key principle of the Convention, which encompasses non-discrimination in access to justice and access to judicial remedies. In *Opuz v. Turkey* (2009), the Court found that the domestic violence suffered by the applicant, "may be regarded as gender-based violence which is a form of discrimination against women."³ 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

3 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.

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 was upheld as well in *Eremia and Others v. the Republic of Moldova* (2013):

'[...] 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 [...] 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).

However, the articulation of sexual violence as an issue of sex-based discrimination is absent from the ECHR jurisprudence. It may develop in this direction as the Court increasingly takes into account the Istanbul Convention, which recognises that VAW is a form of discrimination against women (Article 3).

4 The Istanbul Convention and Access to Justice

The standards developed through the case-law of the European Court of Human Rights in cases of VAW have now been integrated in the 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:

- Ensure measures to protect the rights of victims of violence are secured without discrimination (Article 4)
- Ensure that State Parties exercise due diligence to prevent, investigate, punish and provide reparation for acts of violence (Article 5)
- Take measures to promote changes in social and cultural patterns to eradicate gender stereotypes (Article 12)
- Provide adequate training of professionals working with victims of violence on their needs and rights and on equality (Article 15)
- 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 should also apply in cases that do not concern VAW and in particular in employment and family matters.

5 Guidance for Practitioners on Ensuring Access to Justice for Victims of Violence

In order to ensure that women have equal access to justice, legal practitioners 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. Prosecutors and judges should take a pro-active approach to ensuring that barriers that women face in accessing justice are removed in cases concerning VAW. The following good practices and principles constitute the essential components of a gender-sensitive justice system and should be applied by justice professionals when handling cases.

Legal standing (*locus standi*)

In criminal cases and specifically cases concerning VAW, victims are involved in trials in their capacity as witnesses for the prosecution. 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.

Good practice: The EU Directive 2012/29/EU (2012) established minimum standards on the rights, support and protection of victims of crime and outlines several rights that are granted to victims with formal roles in criminal proceedings in every EU country. The following rights 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 makes 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.

Furthermore, 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, including accompanying them to pre-trial meetings and court. This is also recommended by the Istanbul Convention in Article 55(2).

Under an Additional Protocol to the European Social Charter, State Parties can recognise the right of specific organisations to file collective complaints.

Initial Procedural Issues and Investigation

Prosecutors - Key considerations that prosecutors should keep in mind during the investigation period include the following:

- Learn to **recognise signs of distress** during meetings; avoid any secondary victimisation; inquire whether the victim has a preference about the sex of the prosecutor assigned to her case and/or to have a female officer, family member, friend or NGO advocate present.
- **Oversee the lawfulness of the investigation and evidence-gathering process** and monitor whether investigators are thorough and observe human rights standards in order to reduce the reliance on the testimony of the victim/witness as the only form of evidence at trial. Prosecutors should engage constructively with police and provide guidance on how to use proper investigative techniques to prove the elements of the crime. Police must prevent gender stereotypes from influencing the investigation and compromising evidence collection.

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

- Base the **decision on all the available evidence**, the likelihood of conviction and the seriousness of the crime. 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 or private matters,’ or they do not present a risk to the larger society, or on stereotyped notions of who is a ‘real victim’ or what is the ‘appropriate behaviour’ of a victim of violence.

Good practice: 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 policies help to eliminate the problematic application of prosecutorial discretion. Policies 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. 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.

Judges – can take a number of steps to ensure a gender sensitive approach:

- **Granting protective orders** - Protective order hearings are also 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.
- **Exercise discretion** during the preliminary stages of a criminal process to protect victims’/witnesses’ rights and dignity and to ensure they do not experience secondary victimisation, for example, by excluding the public from hearings if the case concerns sexual violence and requires confidentiality. The Istanbul Convention makes clear that the rights, interests and special needs of victims/witnesses shall be protected at all stages of the investigation (Article 56); this includes taking measures to inform victims about potential danger from the perpetrator, about their rights and the services available, to protect the victim’s privacy, and to avoid contact between the victim and the perpetrator.
- **Vigilance in civil cases** - Judges should consider whether it is appropriate to promote settlement and should be attentive to the possibility that a woman is being pressured to reach a settlement.

- 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 VAW. A good practice found in a number of countries is to grant investigative power to specialised equality and quasi-judicial bodies.
- If a female victim/witness appears to contradict her testimony in court, the judge should question her sensitively in order to establish the reasons for the change so that they can be addressed (e.g. she may be receiving pressures/threats from the defendant; the judge could remove the defendant from the courtroom, if necessary).

Evidentiary Issues

- *Establishing discrimination* - 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. 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. In discrimination claims establishing the burden of proof and the evidence required to make a prima facie case are important considerations. The role of victims in presenting evidence, the weight of evidence required and the burden of proof all differ between criminal, administrative and civil cases. In criminal cases, the victim has a more limited role. It is the responsibility of the 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. 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

Good practice: The Swiss Federal Act on Equality between Women and Men (Loi federale sur l'égalité entre femmes et hommes, 24 March 1995) 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', whereby 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.

Common forms of evidence, such as witness statements, documents, or common knowledge will be relevant to discrimination claims. However, 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. Too often, the absence of evidence of direct discrimination is used as justification for not charging a case or dismissing a claim. 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).

- *Prosecute Using a Victim Centred Approach* - This requires prosecutors to **avoid making assumptions** about victims and to recognise that providing evidence about violent incidents can impact victims differently. Whereas some may find the process cathartic or empowering others may experience secondary traumatisation.
- *Use Non-Victim or Corroborating Evidence* - Non-victim evidence is evidence from other sources that supports the victim's claim. Corroborating

evidence could be used if a victim's statement to the police or prosecutor is submitted as evidence in court but the victim does not testify. Using other forms of evidence does not mean that the victim lacks credibility. Some common types of non-victim/corroborating evidence used in cases of VAW are: statements of police officers; statements of neighbours or other witness accounts; recordings of emergency calls/ police dispatch calls; CCTV recordings; photographs of the injury and scene; medical history/reports; history of previous incidents (e.g. criminal record of the perpetrator; past exclusion/protective orders; administrative penalties); communication from the perpetrator to the victim; bad character evidence about the perpetrator and expert testimony, especially to explain the impact of violence on the victim, common behaviours and reactions of victims.

- *Work Sensitively with the Victim* - 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; 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. 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, using pre-recorded video testimony as evidence; request/order that testimony be given from another room via video link or closed circuit television. You should also anticipate and plan for the possible introduction of prejudicial, embarrassing or harmful evidence by the defence. The Istanbul Convention expressly requires States to take measures to ensure that evidence related to the sexual history and conduct of victims of violence is permitted only when it is "relevant and necessary" to civil or criminal proceedings (Article 54).
- *Avoid Gender Stereotypes* - Rules of evidence and procedure play a critical role, as they can entrench gender stereotypes which undermine the credibility of victims. Below are three evidentiary rules that rely on gender stereotypes and should be avoided:
 - (1) The prompt complaint requirement: 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.

- (2) 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. This imposes a higher burden of proof on victims of sexual violence in comparison with other violent crimes.
- (3) 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. This puts the victim and not the aggressor on trial by focusing on their behaviour instead of the alleged conduct of the defendant.

Good practice: Rape shield laws are designed to prohibit or limit the use of the victim's sexual history, behavior or reputation that is unrelated to the subject of the legal proceeding and 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. Rape shield laws exist in Canada, the United Kingdom and the United States.

Other problematic forms of evidence specific to cases of sexual violence include evidence of the use of force or a physical struggle and reflect the erroneous belief that if sexual violence is truly non-consensual, the woman will fight back.

Theory of the Case and Legal Reasoning

In preparing for a case of VAW, prosecutors should prepare a theory of the case that presents the issue as both a crime and as a form of discrimination. They should develop and demonstrate an understanding of the nature of VAW, such as the cycle of violence, and its impact on women. Prosecutors should also explain victims' seemingly contradictory actions when prosecuting the case and use facts, evidence and statistics to refute myths and not perpetuate stereotypes themselves.

Remedies

Judicial remedies should be tailored to meet the specific human rights violation, to address the wrong and also to compensate for the harm suffered. In civil cases, this may include restitution (reinstatement if appropriate), compensation/compensatory damages, and measures to ensure non-repetition. Courts should also consider ordering rehabilitation (medical and psychological care and other social services) for victims. Victims may also be unaware of their entitlement to civil damages or how to seek remedies, and practitioners should provide basic information about these options along with referrals to legal aid services. 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.

Determining the appropriate remedies in criminal cases concerning VAW requires an understanding of the dynamics of violence and the harm that the victim has suffered. 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).

- *Protective orders* - are civil, administrative or even criminal remedies or injunctions that address the desire of many victims to end the violence and have protection from further acts of violence. 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 or other legal sanctions.
- *Perpetrator Programmes* - The creation of such programmes is a good practice and a requirement of the Istanbul Convention (Article 16). Prosecutors can request and courts can order perpetrators to attend such programs as a condition of their sentence but they should not be mandated as an alternative to sentencing or other legal sanctions. If attendance is mandated, legal professionals are responsible for determining that they meet certain criteria and that they include risk assessments and measures to ensure victim safety.

- *Remedies that go beyond “restitution”* – these can be transformative in that they seek to eliminate gender bias and stereotyping at a structural level. This may include orders to require certain public actors (e.g. law enforcement officers or health service providers) to take specific action such as in the case of *González et al. v. Mexico*, (Inter-American Court of Human Rights, 2009). Here, the Court ordered the standardisation of all protocols, manuals, investigation criteria, and services that are used to investigate all the crimes relating to the disappearance, sexual violence and murders of women in accordance with international standards; to implement permanent education and training programs and courses on human rights and gender for civil servants in order to overcome stereotypes regarding the social role of women; and to conduct an educational program targeted at the general population of the state of Chihuahua, in order to overcome the current situation of violence. The State was also required to submit to the Court an annual report, for three years, on the fulfilment of all these measures. 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.⁴ and the enforcement/execution of judgments

Sentencing

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

Some points that prosecutors and judges may consider in the context of criminal sentencing include:

- *Are there aggravating circumstances that justify an increased sentence?* (e.g. the relationship to the victim; repeat offences/any prior convictions; children present; the extremity of the violence and/or whether a weapon was used.)

⁴ See Judgement T-760 (Constitutional Court of Colombia, Sentencia T-760/08, July 31, 2008) (Colombia).

- *Does the risk assessment indicate a possibility that the perpetrator will reoffend?*
- *Is the perpetrator a ‘first-time’ offender?* This should not necessarily lessen the sentence. Many first time offenders have used violence in the past but may never have been charged. Prosecutors and judges should consult other sources of information to determine a perpetrator’s history of abuse.
- *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, such as a victim impact statement?*

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, such guidelines list the factors that a judge should consider and which may affect the sentence and are based on research and evidence, taking into account the overall approach to the problem and expert opinion. 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.⁵

Risk Assessment

Decisions about suspending a sentence, the conditions of imprisonment, and conditional 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 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 and the participation of victims. Judges rely on expert reports about the dangerousness of an offender when deciding on the conditions of release. Threats from prison to harm the victim should be considered in reviewing a custodial sentence. In cases where there is danger to the victims and the family, judges should ensure that victims are informed when the perpetrator escapes or is released temporarily or definitively.

⁵ Sentencing guidelines can be accessed from: <http://www.sentencing-guidelines.gov.uk>.

Gender Sensitive Case and Courtroom Management

There are a number of practical considerations for both prosecutors and judges to ensure safety and reduce risks for women involved in legal processes, especially in criminal cases.

Safety concerns and managing risk

- Offices of prosecutors and courts should have adequate **security features** e.g. screening for weapons and training for security personnel on VAW dynamics.
- In domestic violence proceedings, judges should be aware that the alleged perpetrator may use tactics to **intimidate the victim** or manipulate the legal process (such as glaring, staring, making emotional appeals etc.). Judges should act decisively, by issuing warnings, rearranging the seating of parties to a proceeding or removing the perpetrator from the courtroom, if needed.
- At the end of VAW processes where the perpetrator is not in custody, parties should be dismissed 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.
- Prosecutors should explain the stages of the legal process, enquire if the victim/witness has considered applying for a **protection order** and review the steps she can take to ensure her safety throughout the legal process- This includes the possibility that the offender will not be in custody and to provide information about personal safety plans in open court.
- Legal practitioners should be aware of **social services** and support organisations for victims of violence that are available in order to make the appropriate referrals.
- Prosecutors and judges have a duty to undertake **risk assessments** to determine the level of risk of escalated violence, to manage the risk during legal proceedings and the level of monitoring and intervention that is required by the justice system.

- In protection order hearings, judges should make use of risk assessments to determine the content of the order, such as restrictions on **child visitation**.
- Risk assessments should be performed **periodically** as levels of risk are dynamic and change during the legal process and in co-operation with victims themselves. It is also vital that all professionals who work with victims of domestic violence use a **common set of criteria** to assess risk (multi-agency approach).

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 domestic violence.⁶ 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.⁷

- Incidents of VAW require special management and handling techniques in the legal system. Some countries have created specialised courts or dedicated dockets that deal specifically with such cases 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 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 VAW and specialised courts were also created. The courts have combined criminal and civil jurisdiction; they 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 they issue a decision within 72 hours. Judges who work in the specialised courts are required to receive training

6 The joint circular is accessible in French and Flemish from: <http://www.evaw-global-database.unwomen.org/>

7 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).

on gender-based violence. The Act created a holistic and multidisciplinary approach to gender-based violence both within and outside the legal system, including victim support offices, with which the courts cooperate.

- Legal practitioners can take steps to clearly identify VAW cases for **priority attention** e.g. distinctively marking the relevant case files to ensure that the case is managed correctly, and as quickly and sensitively as possible.

Planning for meetings and the court setting

- A safe, private and comfortable location should be chosen for the victim.
- Courthouses should have **separate waiting areas** for parties to legal proceedings.
- Arrangements should be made for **on-site childcare**.
- Permitting women to be accompanied by an **advocate** or support person.

Informing victims of their rights and about support services

- The Istanbul Convention requires that prosecutors and judges provide victims with specific **information** about their legal rights and available support services (Article 56).
- Prosecutors should inform victims of violence about the role that the State plays in a criminal proceeding and how they can be assisted in that process.
- 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 legal systems, citizens have a right to legal and other types of **assistance**, provided they meet specific criteria. Such information should be made available to women when they first encounter the legal system. 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 resources the victim might wish to access.

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. 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 or other impairments (for instance, in Braille).

- In cases of VAW, 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 of the perpetrator) in case the victims or their families could be in danger.

Interactions with Witnesses and Litigants

Women as victims of violence

- VAW most often takes place in the private sphere and the consequences for the victim are significant. Practitioners should develop an understanding of how these cases differ from other cases of violence, the nature of VAW and the impact it has on victims, their children and their families.
- Do not be afraid to express **empathy** to the victim and explain to her that efforts will be made to minimise her trauma, to avoid delays in the proceedings and to ensure her safety.
- Refrain from assessing the **credibility** of a victim on the basis of how emotionally expressive she appears to be when testifying, remembering that victims may have different reactions to the investigative and judicial process.

Children witnesses of violence

- Do 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. There is a heightened level of danger when such cases come before the legal system, and perpetrators may **intensify the violence** or direct the abuse towards the children.
- Carefully weigh the risks of violence against the **best interest of the child** and also the parental rights of both parties.

Women and multiple discrimination

- Give special consideration to the ways in which judges and prosecutors interact with women who belong to groups subjected to multiple/intersectional 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.
- Be aware that women who have **minority status** can often face additional hurdles in accessing justice, 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, or transgender women, it could mean fear of being 'outed' and possible discrimination and reprisals).
- Avoid relying on or perpetuating **stereotypes** about specific and minority groups of women (e.g. "domestic violence is part of Roma culture"), especially if those myths justify gender-based violence. This is particularly important when considering incidents of harmful practices such as female genital mutilation (FGM).
- Understanding the particular circumstances of minority women, including their cultural backgrounds, should not excuse human rights violations based on culture or tradition.

Gender bias in legal proceedings

It is 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. Gender bias can occur when the experiences of women are not adequately understood or given consideration. 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 (e.g. referring to females as 'girls' and males as 'men,' or referring to a woman as 'dear', 'darling', 'young lady', etc. and 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 gender-based violence, such as the cycle of violence in the context of domestic 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.

The Role of Experts and Amici Curiae

- Experts with specialist knowledge can assist the court in understanding the complex phenomenon of rape trauma syndrome, post-traumatic stress disorder, the cycle of violence experienced by victims of abuse or determining the best interest of the child.
- Expert testimony can also be effective in dispelling common gender stereotypes, such as the myth of how a ‘typical’ victim of rape behaves.
- Judges should be attentive to the scope of the testimony and be sure to limit the expert only to the areas of her/his competency. Judges should also ensure that the expert 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 to ensure this.
- Information submitted by amicus curiae (friend of the court) differs from expert testimony and 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). 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. Amicus curiae briefs should not, however, comment on the merits a case.

Alternative Dispute Resolution (ADR)

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. While ADR may be beneficial in some settings, gender experts urge caution in applying ADR in the context of women's access to justice. 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).

ADR when applied to cases of domestic violence is based on the misconception that 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 and, more broadly, it is contrary to the rule of law and women's equality before the law because it removes serious crimes such as VAW from the ambit of the mainstream justice system.⁸

Mediation is often applied to family law and divorce cases, such as disputes over property division, child custody and child visitation. Courts must develop screening procedures to determine whether there is a history of domestic violence before referring any family disputes to mediation. Court personnel, and mediators, should be trained in how to conduct such screening tests and to ensure confidentiality.

8 Women's Access to Justice for Gender-Based Violence, Practitioner's Guide No. 12, International Commission of Jurists, p. 138.

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