TRAINING COURSE ON ENSURING GENDER EQUALITY THROUGH THE PRACTICE OF JUDGES, PROSECUTORS AND INVESTIGATORS

This training course is developed for use by the Justice Academy of Armenia for the training of investigators, prosecutors and judges on women's access to justice, gender stereotypes, the essence and forms of gender discrimination.

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TRAINING COURSE ON ENSURING GENDER EQUALITY THROUGH THE PRACTICE OF JUDGES, PROSECUTORS AND INVESTIGATORS

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List of acronyms

ADR	Alternative dispute resolution
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CC	Criminal Code
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
RA	Republic of Armenia
SDG	Sustainable Development Goals
UN	United Nations
VAW	Violence against women

SYNOPSIS OF THE TRAINING COURSE

NAME	Ensuring Gender Equality in Judicial Practice
BENEFICIARIES	The materials are developed for use by the Justice Academy for the training of investigators, prosecutors and judges.
THE GOAL OF THE COURSE	The course aims at providing the participants with in-depth knowledge about the particularities of women's access to justice, gender stereotypes, the essence and forms of gender discrimination, strengthening their skills of ensuring gender equality in Employment Law, Family Law, in the area of violence against women and criminal justice applying international and national standards.
COURSE CONTENT	The topics covered by the course are as follows: • the introduction to the concept of gender equality: women's access to justice, women's human rights, non-discrimination and gender stereotyping; • international and national legal framework on gender equality; • promotion of gender equality in the justice chain through strengthening the participants' skills in gender sensitive case and courtroom management, evidence gathering and assessment, application of remedies and ADRs, etc; • a particular focus will be put on application of international and national standards on ensuring gender equality in certain areas such as employment, family relations, investigating, prosecuting and sanctioning for violence against women and other forms of gender discrimination.
TRAINING METHODOLOGY	The training module is developed for approximately 15 participants. The methodology is based on an interactive approach that allows the participants to actively engage in the exchange of ideas and experiences, initiate discussions and ask questions. In the end of each session practical exercises will be provided in the form of case studies, group discussions, role plays, etc. Lecture notes and videos are included for the trainers and participants.
EVALUATION	While the participants will not be evaluated, the training content and presentation will be evaluated through pre- and post-course tests as well as by an evaluation form to be distributed to participants at the end of the course.
DURATION OF THE TRAINING	The course will compromise ten training hours.

COURSE OUTLINE

SESSION 1.
THE CONCEPTUAL FRAMEWORK

Goal: The goal of this session is to ensure that the participants have an in-depth understanding of the concepts that underpin international and national efforts to promote gender equality.
Learning objectives: At the end of this session the participants will:

- Identify the key concepts underpinning gender equality.
- Understand the meaning and context of the following key concepts: access to justice; women's human rights; discrimination and gender stereotyping within efforts to combat gender equality.
- Recognise the applicability and relevance of these key concepts to situations concerning gender equality.

Time: 2 hours
Methodology and Content: Lecture notes will be provided on the key concepts set out above and followed by practical exercises aimed at checking understanding of the material covered.

- Access to Justice - barriers to justice at the socio/cultural level and at the legal/institutional level; the six components of access to justice; the justice chain and attrition using the example of domestic violence.
- Women's Human Rights – explanation of the term.
- Non-discrimination – indirect and direct; dejure and defacto; intentional and unintentional; multiple and intersectional discrimination; positive discrimination, substantive versus formal equality.
- Gender Stereotypes – introduction; sex, gender, sexual, sex role and gender stereotypes; intersecting and compounding stereotypes; stereotypical beliefs and practice; state obligations to address gender stereotyping; judicial stereotyping; challenging stereotyping in the judicial system; Societal barriers; Intersectional & Multiple Discrimination.
- Contextual Framework in Armenia.
- Practical examples & exercises to check understanding throughout.

SESSION 2.
THE INTERNATIONAL, REGIONAL AND NATIONAL LEGAL FRAMEWORK ON ENSURING GENDER EQUALITY

Goal: The goal of this session is to ensure that the participants have an in-depth understanding of international and national legislation on gender equality, strategic documents in the sphere of ensuring gender equality, forms of gender discrimination and challenges in ensuring de-facto gender equality.
Learning Objectives: At the end of this session the participants will:

- Identify gender discrimination and its forms
- Apply international law on gender discrimination together with the national legislation in their practice
- Understand barriers to ensuring gender equality in practice

Time: 2 hours
Methodology and Content: Lecture notes will be provided on international and national legislation on gender equality, description and forms of gender discrimination followed by a practical exercise (a problem question) aimed at identification of gender discrimination in practice and application of international and national legislation.

2.1. THE INTERNATIONAL AND REGIONAL LEGAL FRAMEWORK ON ENSURING GENDER EQUALITY

- The United Nations (UN) – The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and examples from cases from the CEDAW Committee
- Council of Europe – the European Convention on Human Rights (ECHR); the European Social Charter (ESC); the Convention against Trafficking; the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence

2.2. NATIONAL LEGAL FRAMEWORK ON ENSURING GENDER EQUALITY IN ARMENIA

- Constitutional and general legislative framework
- Law on Ensuring Equality between men and women
- Draft Law on Ensuring Equality Before the Law
- Gender strategies and gender mainstreaming
- Exercise

SESSION 3.
PROMOTING GENDER EQUALITY IN JUDICIAL PRACTICE

Goal: The goal of this session is to provide the participants with enhanced skills for promoting gender equality in their practice through removing obstacles for effective litigation, gender sensitive case and courtroom management, personal data protection, promotion of gender equality in the justice system.
Learning objectives: In the end of this session the participants shall:

- Strengthen their skills of gender sensitive approach to the cases they are responsible for, in interpretation and application of legal norms
- Enhance their knowledge of ensuring proportionality in sharing personal data
- Improve their skills of encouraging and supporting gender equality in the justice system.

Time: 2 hours
Methodology and Content: Lecture notes will be provided on gender sensitive vs. neutral approach to judicial proceedings, in terms of collecting and assessing the evidence, case and courtroom management, interpretation and application of law, sharing of personal data, and supporting gender equality in the justice system. In the end a group exercise will be provided in order to facilitate a discussion of the application of the material covered in the lecture.

- Barriers to effective litigation in the context of gender equality in practice
- Evidence gathering and assessment
- Remedies

- Alternative Dispute Resolution
- Gender Sensitive Case and Courtroom Management
- Collecting and Sharing Data
- Supporting Gender Equality in the Justice Sector
- Exercise

SESSION 4.
ENSURING GENDER EQUALITY IN PARTICULAR AREAS

Goal: The goal of this session is to ensure that the participants have a solid understanding of international and national legislation and practice in the areas of Employment Law, Family Law and Criminal Justice, identify the gaps of the relevant legislation and barriers in practice, improve the interpretation and application of law in their respective areas and by including an intersectional analysis.
Learning objectives: At the end of this session the participants shall:

- Be able to identify the gaps of Employment Law, Family Law and Criminal Law with regard to ensuring gender equality
- Understand the challenges of effective application of law in practice
- Be able to apply the international standards and best practices in their respective areas

Time: 4 hours
Methodology and Content: Lecture notes will be provided on legislative and practical aspects of ensuring gender equality in employment, family relations, investigating, prosecuting and sanctioning for violence against women and other forms of gender discrimination. In the end a case study and a role play will follow to practice the application of the material covered in the lecture and which will illustrate how multiple discrimination can disadvantage women.

4.1. ENSURING GENDER EQUALITY IN EMPLOYMENT LAW

- International standards and practices
- Armenian law and practice

- Conclusions and Recommendations
- Exercise

4.2. ENSURING GENDER EQUALITY IN FAMILY LAW

- International standards and practices
- Armenian law and practice
- Examples of interpretation and application of law with suggestions for improvement
- Exercise

4.3. ENSURING GENDER EQUALITY IN THE AREA OF VIOLENCE AGAINST WOMEN AND IN CRIMINAL JUSTICE

- International standards and practices
- Protection of gender equality in Criminal Law, introduction to the amendments to the Criminal Code and their interpretation
- Investigating, prosecuting and sentencing for sexual violence
- Case-law on domestic violence: identification of gaps and suggestions for improvement
- Exercise

EXECUTIVE SUMMARY

This training manual is a comprehensive educational tool containing all the relevant international and national legal framework on gender equality, necessary analytical and practical tools to support judges, prosecutors and investigators in promotion of gender equality and combating gender discrimination in the justice system. The manual aims at providing the participants with in-depth knowledge about the peculiarities of women's access to justice, sex and gender stereotypes, the essence and forms of gender and sex discrimination, strengthening their skills of ensuring gender equality in employment and family relations, in the area of violence against women and criminal justice applying international and national standards.

It is envisaged for 10 academic hours and consists of the following 4 sessions:

1. The Conceptual Framework covers areas on women's access to justice, women's human rights, sex and gender discrimination, sex and gender stereotyping and elaborates on the particular challenges for gender equality in Armenia, multiple discrimination of women belonging to national minorities, women with disabilities and women of non-traditional gender identity and sexual orientation.

2. The International, Regional and National Legal Framework on Ensuring Gender Equality which introduces The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the European Court of Human Rights (ECtHR), the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence and other relevant standards and case-law on gender equality, criteria for identification of discrimination, national legislation on gender equality including the draft anti-discrimination legislation.

3. Promoting Gender Equality in Judicial Practice which specifically addresses the challenges that victims of gender discrimination and their lawyers face in practice, namely judicial stereotyping, evidence gathering and assessment, including interrogation of the victims of gender-based violence, remedies for the victims of gender discrimination, use of alternative dispute resolution mechanisms, gender insensitive case and courtroom management, collecting and sharing data, supporting gender equality in the justice sector. Examples of improper, gender insensitive practices inconsistent with international standards are discussed and relevant recommendations for improvement are introduced.

4. The last session concerns gender equality in particular areas, such as Employment Law (the state of gender equality in the local labour market based on official statistics, recruitment and promotion practices, maternity leave, sexual harassment), Family Law (child custody, visiting rights, distribution of property) and Violence Against Women (current and new Criminal Code's regulations on gender discrimi-

nation and sanctions for violence against women, sexual violence, domestic violence). In all areas international standards and case-law are provided based on which the national legislation and application of law is introduced with the gaps identified in practice. Relevant recommendations are offered to improve women's access to justice in the mentioned spheres.

All sessions include practical exercises to strengthen the knowledge and check understanding. Exercises include group discussions of actual cases, case scenarios, role play and discussion of specific questions.

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, during the lifetime of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), adopted in 1979, 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 against women 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]

[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).

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 (ECHR), the European Social Charter (ESC), the Convention on Action against Trafficking in Human Beings, and the Convention on Preventing and Combating Violence against Women and Domestic Violence. 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 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. The project produced the "Training Manual for Judges and Prosecutors on Ensuring Women's Access to Justice" authored by Elisabeth Duban, Ivana Radačić, Priya Gopalan and Raluca Popa, as a 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.

This Training Course on Gender Equality is developed in the framework of the Council of Europe project "Path towards Armenia's Ratification of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence" and builds upon the contents of the previous training manual. The course has been designed with two central aims: to provide guidance for judges, prosecutors and investigators on steps that can be taken in their daily practice to improve gender equality and to provide a tool for Academy of Justice of Armenia 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.

Trainers that organise training on ensuring women's access to justice should also be mindful of the resistance they may encounter to such training. 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. 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.

Sex and Gender: a note on terminology

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."[4]

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.[5]

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 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.[6]

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.

[4] Council of Europe. 2015. Gender Equality Glossary.

[5] 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'.

[6] Note that Article 1 of CEDAW defines "discrimination against women."

MODULE 1.
THE CONCEPTUAL FRAMEWORK

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."[7]

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"[8] and which is accessible to all. 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. Ensuring access to justice requires co-operation between judicial entities and law enforcement bodies, and extends to administrative and civil society institutions.[9]

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.[10]

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

Gender Sensitive v Gender Blind Approaches

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.

[7] UN Women. 2015. *Progress of the World's Women 2015-2016: Transforming Economies, Realising Rights.* New York. p. 11.

[8] Ibid.

[9] Parliamentary Assembly of the Council of Europe. 2015. Resolution 2054 on Equality and non-discrimination in the access to justice.

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

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".[11]

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."[12]

Because women do not hold the same power and privilege as men, they do not have the same protection of the law. As a result, women will disproportionately experience certain barriers to justice.

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 or institutional nature and those of a socio-economic and cultural nature.[13]

TYPES OF OBSTACLES TO WOMEN'S ACCESS TO JUSTICE

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

[11] Parliamentary Assembly of the Council of Europe. 2015. Resolution 2054 on Equality and non-discrimination in the access to justice.

[12] UN Women. 2015. *Progress of the World's Women 2015-2016: Transforming Economies, Realizing Rights.* New York. p. 11.

[13] Council of Europe Gender Equality Commission. 2013. *Feasibility Study: Equal Access to Justice for Women*.

Exercise

Based on your own experiences as a practitioner, can you think of any examples of legal/institutional barriers that women face in accessing justice?

Examples: Legally excluding women from certain jobs; no laws on sexual harassment within the workplace; 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; not ensuring that evidentiary rules, investigation and other legal procedures are impartial and not influenced by gender stereotypes or prejudice.

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, childcare, etc.)
Unequal distribution of tasks within the family
Gender stereotypes and cultural attitudes

Exercise

Based on your own experiences as a practitioner, can you think of any examples of socio-economic and cultural barriers that women face in accessing justice?

Examples: lack of knowledge on how to access legal aid; inability to afford transportation to court because of childcare; the 'time poverty' of women to access justice because of a disproportionate burden of work in the home, cultural pressure not to make claims for inheritance or property division.

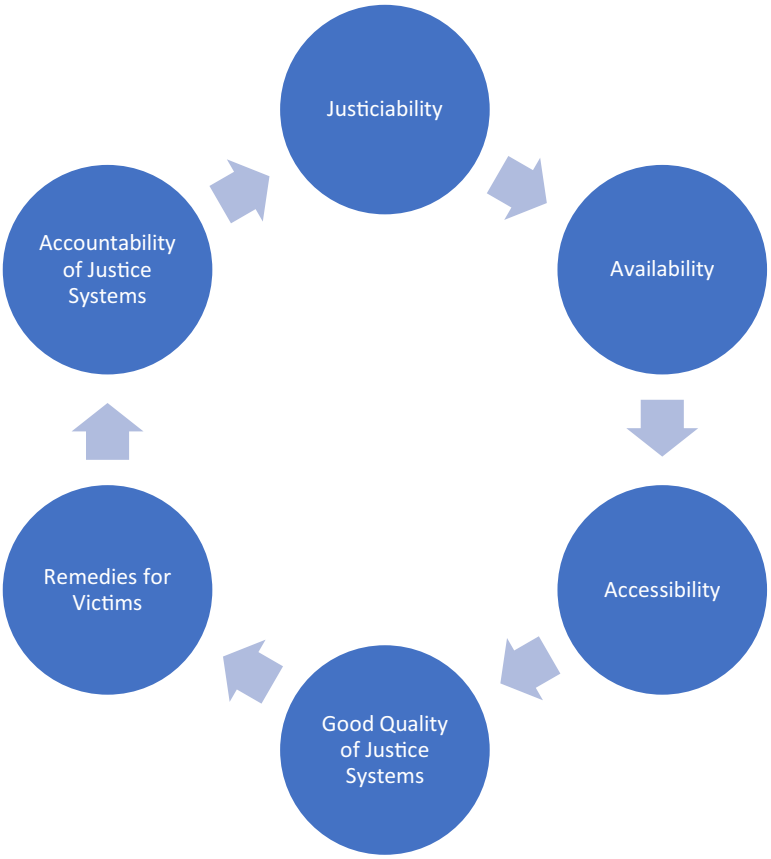
Exercise

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?

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.[14]

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 of access to justice that are considered the basic elements of a justice system that is 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

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.

[14] 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.

Accessibility requires that all justice systems are secure, affordable and physically 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.

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.

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.

Case Study 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.[15]

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

[15] 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)

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.[16]

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.

Exercise

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.

[16] 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."[17]

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 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 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 com prehensive 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.

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*.[18]

This strategy proposed gender main- streaming as the "global strategy for promoting gender equality".[19]

[17] Hilary Charlesworth, 2014, 'Two steps forward, one step back? The field of women's human rights' European Human Rights Law Review.

[18] 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.

[19] 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.

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[20] 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 ECHR), or as a free-standing norm (e.g. Protocol 12 to the ECHR). The ESC contains a non-discrimination clause that pertains to all rights of the Charter and discrimination on the grounds of sex.[21]

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 Armenia 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*[22] 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.[23]

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).[24]

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".[25]

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.

[20] There are nine core human rights treaties, which are discussed in Module II of this manual.

[21] European Social Charter, ETS No.163, Part V, Article E.

[22] For example, ICCPR, ICESCR and CEDAW.

[23] 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).

[24] 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).

[25] Council of Europe. *Gender Equality Glossary*. p. 5.

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.[26]

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.[27]

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 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.[28]

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.

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.[29] However, according to the practice of the European Court of Human Rights, very weighty reasons

[26] 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.

[27] Council of Europe. *Gender Equality Glossary*. p. 5.

[28] UN Working Group on discrimination against women in law and in practice, see http://www.ohchr.org/EN/Issues/Women/WGWomen/Pages/SubmissionInformation.aspx.

[29] 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.*

need to be adduced for the difference in treatment: traditional assumptions about men and women's working lives and family roles do not suffice.[30]

> **Case-law example**: In *Konstantin Markin v. Russia*, ECtHR, *Konstantin Markin v. Russia (Grand Chamber)*, Application no. 30078/06, judgement of 22 March 2012, para. 143the 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".

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,[31] 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.[32]

This second formulation has not yet been applied in the 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.[33]

> **Case Law Example** - In a number of cases, the ECtHR has implied that affirmative measures could be justified where "factual inequalities are at issue". For instance, in *Stec and others v. the United Kingdom*, *Stec and others v. the United Kingdom*, judgement of 12 April 2006 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".

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.[34]

[30] See Ivana Radačić. 2012. The European Court of Human Rights' Approach to Sex Discrimination in *European Gender Equality Law Review* 1. pp. 13-23.

[31] ECtHR *Adulaziz, Cabales and Balkandali v. The United Kingdom*, Applications nos.9214/80, 9473/81, 9474/81, judgement of 28 May 1995.

[32] ECtHR, *Thlimmenos v. Greece* [GC], Application no 38365/97, judgment of 6 April 2000.

[33] 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).

[34] 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.

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[35]
- 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)[36]
- disability[37]
- 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".[38]

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".[39]

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.[40]

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[41] illustrates how gender discrimination overlaps with aspects of racial discrimination.

[35] See Committee on Racial Discrimination. 2000. General Recommendation No. 25, Gender related dimensions of racial discrimination.

[36] 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.

[37] See Article 6, Convention on the Rights of Persons with Disabilities.

[38] UN Working Group on discrimination against women in law and in practice, see http://www.ohchr.org/EN/Issues/Women/WGWomen/Pages/SubmissionInformation.aspx.

[39] Committee of Ministers of the Council of Europe. 2007. Recommendation CM/Rec(2007)17 on Gender equality standards and mechanisms. para. 59.

[40] 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.

[41] 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.

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".[42]

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".[43]

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" (CEDAW Committee. 2004. General Recommendation No. 25 on Temporary Special Measures.)

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"(para 18-19).

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.[44]

[42] 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.

[43] CEDAW Committee. 1988. General Recommendation No. 5 on Temporary Special Measures.

[44] 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.

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.[45]

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.[46]

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. Some laws are outright discriminatory, explicitly recognizing that women have fewer rights than men. For example, some countries deny women the right to pass their nationality to their children on an equal basis with men and maintain some form of gender discrimination in their nationality laws, such as denying women the equal right to confer nationality to spouses or linking women's nationality to their marital status.[47]

Women also often have fewer rights than men in marriage, divorce and inheritance and may even be held to different legal standards than men. Gender-neutral language in laws can be detrimental to women when the definition of crimes and the design of punishment regimes and remedies are tailored towards men. In many ways, these laws are less favourable because they appear gender-neutral, but in practice deny women the rights and protections that they supposedly provide. Such laws fail to take into consideration the different conditions and obstacles that women face as rights-holders in comparison to men.

There are also areas of law where rights and protections are largely absent or implemented poorly. For instance, women who work in the domestic domain (e.g., family, home-based and domestic workers) are often not legally protected. The absence of laws prohibiting discrimination in the workplace can also affect the ability of women to engage in activities which are vital for empowering them in such settings. These may include policies and regulations against sexual harassment, equal representation in labour unions and maternity protection.

The concept of substantive equality therefore 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 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.[48]

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.

[45] UN Women. 2015. *Progress of the World's Women 2015-2016: Transforming Economies, Reing Rights.* New York. p. 35.

[46] Council of Europe Committee of Ministers. 2007. Recommendation CM/Rec(2007)17 on Gender equality standards and mechanisms.

[47] Global Campaign for Equal Nationality Rights, "The Problem", available from http://equalnationalityrights.org/the-issue/the-problem and See Equality Now, *The State We're In: Ending Sexism in Nationality Laws,* p. 14, (New York, 2016)

[48] Catherine A. MacKinnon. 1987. 'Difference and Dominance: On Sex Discrimination' in *Feminism Unmodified: Discourses on Life and Law*. Harvard University Press, Cambridge.

Exercise

1. *What is the difference between direct and indirect discrimination?*
2. *Provide an example of a policy that could implement substantive equality.*

   Examples: providing information on access to justice in a range of languages rather than the majority language of a country, providing help with child care costs for women with children to enable them to attend court or to attend training courses in the workplace.
3. *Provide an example of a policy that could implement positive discrimination?*

   For example, setting gender quotas in areas where women are under represented e.g. in commerce, in political parties, in government
4. *Think about one way in which you could incorporate an intersectional approach towards your own working practice.*

   For example, consider more than just one axis of discrimination in your policies e.g ask questions regarding disability, ethnicity, language when implementing any policies regarding promotion and consider how these factors might intersect on any one individual and what you could do mitigate against them.

1.4. GENDER STEREOTYPES AND BIAS

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.[49]

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. 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, at- tributes 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.[50]

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. 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".[51]

[49] Rebecca J. Cook and Simone Cusack. 2010. *Gender Stereotyping: Transnational Legal Perspectives*. Philadelphia: University of Pennsylvania Press. p. 9

[50] 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.

[51] Rashida Manjoo. 2012. *Report of the Special Rapporteur on violence against women, its causes and consequences*, UN Doc. A/67/227. para. 41.

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.[52]

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.[53]

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[54] 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 superiority of either of the sexes or on stereotyped roles for men and women. (CEDAW, Article 5(a))
>
> States parties have an obligation to expose and remove the underlying social and cultural barriers, including gender stereotyping that prevent women from exercising and claiming their rights and impeded their access to effective remedies. (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"[55] and "eliminate *wrongful* gender stereotyping."[56]

These concepts can be summarised as follows: [57]

[52] Simone Cusack. 2014. *Eliminating Judicial Stereotyping: Equal Access to Justice for Women in Gender-Based Violence Cases*. p. 17.

[53] Rebecca J. Cook and Simone Cusack. 2010. *Gender Stereotyping: Transnational Legal Perspectives*. Philadelphia: University of Pennsylvania Press. p.10.

[54] 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.

[55] CEDAW Committee, *V.V.P. v. Bulgaria* (2012), Communication No. 31/2011, para. 9.6 [emphasis added].

[56] CEDAW Committee, *R.K.B. v. Turkey* (2012), Communication No. 28/2010, para. 8.8 [emphasis added].

[57] 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.

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 com- bat stereotyping.[58]

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.[59]

These international and regional obligations to combat stereotypes and stereotyping apply to all branches of government, including the judicial branch.[60]

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).[61]

[58] Articles 12(1) and 14(1).

[59] 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.

[60] 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.

[61] Simone Cusack. 2014. *Eliminating Judicial Stereotyping: Equal Access to Justice for Women in Gender-Based Violence Case*s: *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.

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.[62]

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).
- Perpetuate harmful stereotypes by failing to challenge stereotyping.[63]
- 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.[64]

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".[65]

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

[62] CEDAW Committee. 2015. *General Recommendation No. 33 on Women's access to justice*. para. 8.

[63] Simone Cusack. 2014. *Eliminating Judicial Stereotyping, equal access to justice for women in gender-based violence cases*. p. 2.

[64] See CEDAW Committee. 2015. *General Recommendation No. 33 on Women's access to justice*. para. 26.

[65] Ibid para. 28.

> 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." (Gabriella Knaul. 2011. *Report of the Special Rapporteur on the independence of judges and lawyers* UN Doc. A/66/289. para. 48)

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.

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 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...."

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[66]".

Roma women are subjected to degrading stereotypes, often depicted as "fertile" and "promiscuous", thus making them particularly vulnerable to involuntary sterilization[67].

[66] 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.

[67] *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.

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[68].

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[69].

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[70].

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[71]".

A number of strategies may be employed to support, empower and enable justice actors to avoid gender stereotyping in their work[72].

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.
- improving the gender sensitivity of justice actors and judicial capacity to address gender stereotypes.[73] 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

[68] 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.

[69] See Module 4. 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.

[70] ECtHR, *Konstantin Markin v. Russia* [GC], Application No. 30078/06, judgment of 22 March 2012. para. 127.

[71] Ibid para.143.

[72] 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.

[73] 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.

- creating institutional behavioural interventions by changing practices and procedures that limit justice actors' opportunities to exercise bias.[74]

Exercise on the Consequences of Gender Stereotyping

Divide the participants into small groups. give flip charts, papers and pens to each group. Ask the participants to discuss the following questions, and record their responses in two separate sheets:

Sheet 1: Label this sheet "Act-like-a-lady/Be a man"

1. What comments do people make to indicate how you are supposed to "Act-like-a-lady"/ "Be a man"?
2. What messages does society convey to you if you meet these 'expectations'?

Sheet 2: Consequences of stepping out of the prescribed norms

1. What 'names' or 'comments' were made if you stepped out of these ascribed roles/images?
2. What are some of the repercussions, both social and physical against girls/boys who step out of their socially desirable roles?

Discuss the differences, if any, in the stereotypes and consequences of breaking the norms for girls and boys.

Discuss the following to the whole group (after all four groups have made their presentations):

1. *What messages do these convey to boys and girls?*
2. *Are the consequences of these stereotypes fair?*
3. *Can these be used as a basis for discrimination against women?*

Facilitator's Tips

Participants need to be encouraged to reflect and share their experiences from their childhood and adolescent when they were constantly being told how they should behave. Whether they were under pressure to perform these roles at all times, and were punished if they stepped out of these socially constructed roles. What comments were made when they tried to step out of these norms? It may be noted that many of these comments/names would refer to appearance or sexual behaviour. Usually, this exercise is not difficult, since most individuals will have experienced restrictions on their behaviour at many stages of their lives.

[74] *See* Iris Bohnet.2016. *What Works. Gender Equality by Design.* Cambridge and London: the Belknap Press of Harvard University Press.

1.5. ARMENIAN CONTEXTUAL FRAMEWORK

Although the national legislation provides for various tools aimed at ensuring gender equality, *de facto* gender equality is difficult to achieve due to conservative societal norms and deeply rooted gender stereotypes. Hence, the main challenges in protection of gender equality are patriarchal customs and gender stereotypes that are not eliminated in the society at large or in the justice system. Many studies[75] show that in Armenian society the role of women is primarily seen in the household and in motherhood. Taking care of the children and family is deemed as the women's most important role. A 'good' woman is a 'feminine' woman. And femininity is understood as being obedient, modest and follow the rules defined by the men of the family, be it the father, the husband or the brother. If the woman breaks the rules and seeks equality and independence, she is punished, if not by violence, then by intolerant attitude of her inner and outer circle. Traditional gender attitudes are reflected in parenting strategies: in the upbringing of boys, Armenians value such qualities as trust, self-confidence, unselfishness, generosity, and respect for others. In the upbringing of girls, more people value obedience.[76]

It is noteworthy that manifestations of inequality between men and women are not defined as inequality in the wider society. Moreover, defining inequality as inequality itself faces serious resistance.[77]

The stereotypes resulting in inequality and violence are reproduced in the mass culture. A group of researchers studied Armenian TV series and found that violence against women in those series is presented as a component of masculinity. Not only negative but also positive characters are prone to violence against women and the characters are tolerant towards violence against women. The most worrisome finding of the study is that the viewers show tolerance towards gender-based violence in general and domestic violence in particular.[78]

Gender stereotypes created unequal distribution of power in the society. This is reflected in in the Gender Gap Report, according to which Armenia ranks 98th out of 153 countries for gender equality. While equality of education improves Armenia's rank (45th), the lack of participation of women in politics (114th) and poor health outcomes (148th) as well as opportunities in economy (78th) demonstrate a profound gap in equality between women and men. Lack of gender equality is vividly demonstrated in the statistics of women's representation in high-level government positions, judiciary, prosecution, territorial management and other spheres.[79]

[75] See among others Ա. Կոջոյան, Ա. Գևորգյան, «Առնականությունն ու գենդերային բռնությունը հայկական սերիալներում», available at: http://ysu.am/files/Reserch %20paper%2003.09.2014..pdf, Gender Barometer Survey, Yerevan, 2015, available at: http://www.ysu.am/files/Gender%20Barometer.Armenia.English.pdf

[76] See Gender Barometer Survey, Yerevan, 2015, page 4.

[77] See ԱՂԱՍԻ ԹԱԴԵՎՈՍՅԱՆ, «ԿԻՆԸ ԵՎ ՏՂԱՄԱՐԴԸ ԱՌՕՐՅԱ ԿՅԱՆՔՈՒՄ. ԱՆՀԱՎԱՍԱՐՈՒԹՅԱՆ ԽՆԴԻՐԸ ԱՎԱՆԴՈՒՅԹԻ ԵՎ ՊՐԱԿՏԻԿԱՆԵՐԻ ՀԱՏՈՒՅԹՈՒՄ», available at: http://www.ysu.am/files/Gender-2016-1466074117-.pdf, page 157.

[78] See Ա. Կոջոյան, Ա. Գևորգյան, «Առնականությունն ու գենդերային բռնությունը հայկական սերիալներում», available at: http://www.ysu.am/files/Reserch%20paper%2003.09.2014..pdf, page 4.

[79] See Human Rights Defender's Yearly Report on the State of Human Rights and Fundamental Freedoms Protection in Armenia of 2019, pages 635-638.

Multiple/Intersectional discrimination

When it comes to multiple/intersectional discrimination, the most vulnerable groups seem to be those of particular national minorities, women older the age of 50-55 on labour market, women with disabilities and women with non-traditional sexual orientation and gender identity.

Yazidi girls

Challenges with respect to gender equality in the Yazidi community arise in relation to several rights: access to education, autonomy and independence, security, sex-selective abortions and others.

In particular, one of the most widespread problems is that Yazidi girls have very limited access to high school (from 9th to 12th grade). Yazidi communities mostly live in rural areas and not all villages have their own high schools. Hence, students have to go to neighbouring villages or towns to continue their education. For Yezidi girls this is much more challenging since:

1. the traditional conservative lifestyle does not allow for young girls to frequently leave the hometown, move freely, appear in public places and communicate with strangers out of their families' control. Male members of family are therefore reluctant to let the girls travel to the schools out of their villages,
2. since the practice of kidnapping is still alive, there is a risk that the girls can be kidnapped on their way to the school or back home.

In addition, early marriages are still very widespread in this community. This is: "*caused on the one hand by the cultural perceptions of marriage and the distribution of gender roles and, on the other hand, by the very narrow circle of potential partners for marriage due to sex-selective abortions and double (ethnic and caste-based) endogamy*."[80]

Furthermore, early marriages are often motivated by the real risk of kidnapping.

Early marriages result in the dramatic drop-out of young girls from the school. This practice limits their access to education and jobs, may have negative effects on their health, limits the perspectives of economic independence and autonomy and finally deprives them of the opportunity to make informed decisions and choices about their future, including the future husband. It is concerning therefore that there is no state policy to overcome the practice of early marriages. Moreover, there is a widespread viewpoint that the practice of early marriage is a 'national and religious tradition' of Yazidi community and it should therefore be tolerated by the state.[81]

[80] See in more details Isabel Broyan, Parandzem Paryan, Hayastan Martirosyan, Eviya Hovhannisyan, "Issues Related to the Rights of and Opportunities for Yezidi Girls Residing in Armenia", EPF university 2020, page 21.

[81] See among others .

Women with disabilities

Another extremely vulnerable group is women with disabilities. A special focus is needed on the rights of the women who are kept in mental health facilities especially as regards their reproductive health and maternal rights. Staff of the Human Rights Defender's office during one of their visits came across a patient who became pregnant and gave birth to a child. Since the mental health facility was her guardian according to the law, they simply signed the papers on the withdrawal of the child and parental rights on behalf of their patient. The child was then placed in an orphanage and lost for her mother who still has no information about her child. The report of the Ombudsperson also highlights the problem of access to gynaecological services, means of contraceptives and feminine hygiene products for women who are placed in mental health facilities. In one of the facilities, it was found out that women patients were engaged in the cleaning functions, contrary to legal regulations.[82]

In addition, a study conducted by UNFPA and the Ombudsperson's office revealed that the reproductive health, including right to abortion and post-abortion medical care is related to widespread stereotypes, assumptions and false persuasions according to which persons with disabilities cannot enjoy their reproductive rights, especially when women with mental disabilities are concerned.[83]

These issues must therefore be given a careful consideration by the court when ruling on placing women in mental health facilities and appointing a guardianship.

Women with non-traditional sexual orientation and gender identity

One of the most marginalised groups in Armenian society is the LGBT+ community. There is evidence of widespread and targeted hate speech against them, not only by regular citizens but also by high-level officials, including MPs. Intolerance and disrespect of Armenian society towards LBT women is unfortunately reflected in the justice system too. Examples include cases where law-enforcement officers intentionally did not intervene to protect transgender women who were being attacked, and where the court allowed offensive questions and comments against the plaintiffs, made inappropriate jokes and asked irrelevant questions on sexuality in a case involving LGBT plaintiffs.[84]

An important legislative development to combat some forms of hate speech, including against LBT women is Article 226.2 of Criminal Code (hereafter referred to as "CC") which criminalises public calls for violence, public justification or propaganda of violence. The *actus reus* reads as follows: "*Public calls for violence, public justification or propaganda of violence against an individual or a group of people based on their sex, race, skin colour, ethnic or social origin, genetic characteristics, language, religion, worldview, political or other views, ethnic minority, property status, birth, disability, age or other circumstances of personal or social nature*." Furthermore, committing the crime by using the official status

[82] See Human Rights Defender's Yearly Report on the Activities of Human Rights Defender as a National Preventive Mechanism of 2019, pages 95 and 123.

[83] See Human Rights Defender's Yearly Report on the State of Human Rights and Fundamental Freedoms Protection in Armenia of 2019, page 631.

[84] See G. Hakobyan, "Training Manual for Judges and Prosecutors on Ensuring Women's Access to Justice. National Chapter on Armenia", 2017, pages 16-17.

is considered an aggregating circumstance. However, rather surprisingly, no criminal proceedings have been initiated under this article (adopted on 15.04.20) as of May 2021 despite there not being a shortage of public justification or propaganda of violence against transgender, transsexual and homosexual persons.

Exercise

Solve the problem-based case scenario:

Z. is a 15 years old Yezidi girl. She lives in a village where there is only a basic secondary school. In order to attend a high school, she must go to the neighbouring town every day. There is no transportation provided by the school or the municipality. She had a hard time persuading her father and elder brother to let her go to high school. Eventually they agreed but with a condition that her father or elder brother would take her to the school because kidnapping of girls in their community was widespread. Apart from going to school, Z. was fully engaged in the household, helping her mother with the housework and agriculture. She was not allowed to leave the house alone, meet with the boys who were not her relatives and was raised in accordance with the Yezidi national traditions.

Once her father and brother were busy and could not take her to school, so she went on her own. On her way to the school she was kidnapped by H. who was 20 years old. H, told her that he wanted to marry her and the day after the kidnapping took her to his family house. When her parents learnt about her kidnapping, they visited Z. in H.'s house and told her that although they are angry with him for kidnapping, it is too late already. She should marry him, otherwise it would be a shame on their family name. Honour is the most important thing that their family has.

Someone from the neighbours reported to the police about the kidnapping. When the police came, Z.'s parents along with H. persuaded her to tell them that she went to H.'s house on her free will and that she was not kidnapped. Z. agreed and all of them told the police the same story. Based on this, the police did not initiate any proceedings. Soon Z. and H. got married according to Yezidi traditions. An official marriage was not registered since Z. did not reach the marital age prescribed in Armenian legislation.

Z. dropped out of school and one year later gave birth to a child. When the hospital learnt about her age, they reported to the police. The police initiated criminal proceedings against H. under Article 141 of Criminal Code.

Questions:
In terms of your actions as an investigator, prosecutor, judge;

- *Identify any gender equality issues that you noticed based on both international and national legal framework;*
- Identify any legislation and state policy gaps.

Note to the Facilitator: This exercise is aimed at demonstrating the lack of social and legal policies to ensure equal opportunities for Yazidi girls to access education, labour market and to participate in the public life on equal basis with others. Ensure that the peculiarities of intersectional/multiple discrimination are discussed and that the participants understand the risks of early and forced marriages (forced marriages are already criminalized in the new Criminal Code) and the human rights violations of the girls subjected to such marriages (limitations of access to education and jobs, personal autonomy, opportunities of financial and social independence, health issues, etc.), invite the participants to discuss the issues of lack of due diligence in investigating the cases of kidnapping of Yazidi girls and lack of state policy to fight against such practices as well as impunity for having sexual intercourse with a person below 16 years old. Finally, the state tolerance towards 'national traditions' concerning early marriages and lack of state funded awareness-raising and women empowerment activities within Yazidi community to put an end to gender-discriminatory practices should be discussed. Talk about the state's positive obligations to ensure equality.

MODULE 2.
INTERNATIONAL, REGIONAL AND NATIONAL LEGAL FRAMEWORK ON ENSURING GENDER EQUALITY

2.1. INTERNATIONAL AND REGIONAL LEGAL FRAMEWORK ON ENSURING GENDER EQUALITY

This module is an overview of the international and regional legal frameworks that apply to women's human rights.

2.1.1. 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**,[85] 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.[86] 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

[85] 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.

[86] 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.

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 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) 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.[87] Some treaty bodies can undertake inquiry into gross or systematic violations of rights in the State that has accepted its competence[88] and some can consider requests for urgent action or early-warning procedures in order to prevent or halt serious human rights violations.[89] 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.

[87] 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.

[88] 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.

[89] The Committee on the Elimination of Racial Discrimination, the Committee on the Rights of Persons with Disabilities, and the Committee on Enforced Disappearances.

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

CEDAW is an international human rights treaty which requires states to protect and promote the rights of women and girls. It was adopted by the UN General Assembly in 1979 and has been ratified by 187 of the 194 member nations of the United Nations.

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.

CEDAW is the first and the only human rights treaty that obliges the States Parties to modify and abolish social attitudes and cultural patterns and practices which are based on the idea of the inferiority or the superiority of either sex or on stereotyped roles for men and women.[90] Addressing prevailing gender relations and the persistence of gender-based stereotypes is one of the three obligations central to efforts to eliminate all forms of discrimination against women. This norm entails an obligation to combat gender-based stereotypes in social and cultural life and to eliminate them in law and public policies, both of which State Parties should fulfil loyally, with due diligence, in good faith and without delay. Furthermore, CEDAW requires States Parties to react actively against any act of discrimination against women, regardless of whether such acts or omissions are perpetrated by State agents or by private actors.[91]

CEDAW places a **positive obligation** on states to bring about changes in cultural norms and practices which are 'based on the idea of the inferiority or the superiority of either of the sexes.'[92] This is a positive duty which requires states to take proactive steps to bring about gender equality. Thus, the Convention provides a positive legal framework which 'legitimises women's claims for rights and equality'.[93]

It can be used 'to define norms for constitutional guarantees of women's human rights, to interpret laws, to mandate proactive, pro-women policies and to dismantle discrimination'.[94]

Signatory states can be held accountable for compliance with CEDAW in three ways, all of which are administered by the CEDAW Committee. These consist of:

- the reporting mechanism;
- the complaints procedure;
- the inquiry procedure.

[90] See articles 2(f) and 5(a), CEDAW.

[91] See article 2(e), CEDAW.

[92] Article 5 (a) CEDAW.

[93] Anuradha Rao and the International Women's Rights Action Watch (2008) 'Domestic Application of the Convention on the Elimination of All Forms of Discrimination against Women: Potential and Actuality', p. 13.

[94] Ibid.

Under the reporting mechanism all states which are parties to CEDAW must report to the Committee every four years detailing compliance measures and their effectiveness. NGOs also participate in this process by the submission of shadow reports. After considering all the relevant information, the Committee provides 'concluding observations' which contain comments and recommendations for the state. Under the complaints procedure CEDAW's Optional Protocol[95] provides a mechanism for certain participating states by which individuals are able to submit complaints directly to the Committee about violations of their rights. Following consideration of such complaints, the Committee produces its 'decisions/views' in the form of a report which provides conclusions and recommendations. The concluding observations and decisions/views are not legally binding. They are intended to exert pressure on member states by highlighting certain aspects of public policy and practice which are deemed to be non-compliant with CEDAW. Under the inquiry procedure, Article 8 of the Optional Protocol empowers the Committee to initiate confidential inquiries upon receipt of 'reliable information indicating grave or systematic violations by a State Party of rights set forth in the Convention.' The state is invited to cooperate in the inquiry and to submit observations regarding the information concerned. Once the inquiry is concluded, the Committee submits a report containing observations and recommendations to the state concerned which has six months to provide a written response.

States Parties are required to comply with CEDAW provisions, and compliance mechanisms are a method used to hold States Parties accountable for meeting the objectives of CEDAW. A compliance mechanism could be, for example, reporting to the UN CEDAW Committee a State's progress towards meeting CEDAW.

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 2014, the CEDAW Committee has issued 30 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), women's access to justice (No. 33) and gender based violence (No.35) and trafficking (No. 37) Under the Optional Protocol to the treaty, the CEDAW Committee has also reviewed a number of individual complaints, including from the Ukraine[96] , Moldova[97], North Macedonia[98] and Bulgaria.[99] CEDAW has now adjudicated on a wide area of issues which include, violence against women, employment and family law. Relevant decisions in these areas by CEDAW will be covered in Module 3. The CEDAW Committee has, however, made a number of significant statements regarding gender stereotyping within the area of access to justice for women.

[95] The Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, available: http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCEDAW.aspx.

[96] O M v Ukraine CEDAW/C/73/D/87/2015

[97] Natalia Ciobanu v The Republic of Moldova CEDAW/C/74/D/104/2016

[98] LA et al v North Macedonia CEDAW/C/75/D/107/2016

[99] S.L v Bulgaria CEDAW/C/73/D/99/2016

CEDAW CASELAW ON GENDER STEREOTYPING

In **Karen Tayag Vertido v. The Philippines CEDAW/C/49/D/20/2008 (2011),** the CEDAW Committee stressed that stereotyping affects women's right to a fair and just trial and that the judiciary must take caution not to create inflexible standards of what women or girls should be or what they should have done when confronted with a situation of rape based merely on preconceived notions of what defines a rape victim or a victim of gender-based violence, in general.

In **R.P.B. v. The Philippines CEDAW/C/57/D/34/2011 (2014),** para. 8.8, the CEDAW Committee affirmed that stereotyping affects women's right to a fair trial and urged the State Party to:

1. Ensure 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;
2. Provide adequate and regular training on the Convention, the Optional Protocol thereto and the Committee's general recommendations, in particular general recommendations Nos. 18 and 19, to the judiciary and legal professionals so to ensure that stereotypes and gender bias do not affect court proceedings and decision-making.

In **Angela González Carreño v. Spain Communication No. 47/20 12, UN Doc. CEDAW/C/58/D/47/2012 (2014)**, the CEDAW Committee determined that the State Party had violated articles 2(a)-2(f), 5(a) and 16(1)(d) of CEDAW, read with article 1 and its *General Recommendation No. 19*. In reaching its determination, the Committee affirmed that child custody and visitation decisions should be based on the best interests of the child, not on stereotypes, with domestic violence being a relevant consideration. In addition, it stressed that stereotypes affect women's right to an impartial judicial process and the judiciary must not apply inflexible standards based on preconceived notions about what constitutes domestic violence. Turning to the facts, the Committee concluded that the decision to grant F.R.C. [the perpetrator/parent] unsupervised visits with Andrea [the child] was based on stereotypes about domestic violence that prioritised his (male) interests and minimised his abusive behaviour, over the safety of Andrea and Angela; did not take into account the long-term pattern of domestic violence; and did not specify necessary safeguards.

In ***S. F. M v Spain,*** CEDAW/C/75/D/138/2018, 28 February 2020, the CEDAW Committee considered gender stereotypes in the context of obstetric health services. S.F.M. alleged that Spain violated her rights under CEDAW articles 2, 3, 5 and 12 through the obstetric violence she suffered in hospital during childbirth. She argued this was due to structural discrimination based on gender stereotypes regarding sexuality, maternity and childbirth which were perpetuated in the administrative and judicial proceedings relating to her case.

The Committee found that in spite of the various items of evidence and reports that demonstrated the cause-and-effect relationship between the health service's actions and the harmful outcome, the administrative and judicial auth-

orities gave credence only to the hospital reports and made assumptions based on stereotypes. The Committee stated that stereotyping affects the right of women to be protected against gender-based violence, in this case obstetric violence, and that the authorities responsible for analysing responsibility for such acts should exercise particular caution in order not to reproduce stereotypes. The Committee found that there was an alternative to the situation experienced by S.F.M, given that her pregnancy had progressed normally and without complications and that there was no emergency when she arrived at the hospital but that, nevertheless, from the moment she was admitted, she was subjected to numerous interventions about which she received no explanation and was allowed to express no opinion.

The Committee concluded that the administrative and judicial authorities of the State Party applied stereotypical and thus discriminatory notions by assuming that it was for the doctor to decide whether or not to perform an episiotomy; stating without explanation that it was "perfectly understandable" that the father was not allowed to be present during the instrumental delivery; and taking the view that the psychological harm suffered by S.F.M was a matter of "mere perception" and found a violation of CEDAW Articles 2(b), (c), (d) and (f), 3, 5d 12.

2.1.2 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 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. 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 section in Module 3.

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.[100]

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**[101] is a far-reaching and comprehensive treaty that addresses human rights, gender equality and criminal law. The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence sets forth the minimum standards that State parties are required to implement to effectively address violence against women. The 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.

[100] 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.

[101] Information about the Convention, including the Convention text in all CoE languages, can be accessed from: http://www.coe.int/en/web/istanbul-convention/home.

[102] 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.

[103] 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.

2.1.3. 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 sphere of women's access to justice. Key judgements were issued particularly in cases concerning gender equality, and judicial gender stereotyping. Other key decisions in the thematic areas of violence against women, employment law and family law will be covered in the relevant sections of Module 3.

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.[102] 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.

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)).

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."[103]

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).

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).[104]

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:

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

"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.

Konstantin Markin v. Russia (Appl. No. 30078/06), judgement of 22 March 2012, paras. 127, 142-3

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 Unal 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.**

Carvalho Pinto de Sousa Morais v. Portugal (Application no: 17484/15) 25th July 2017

The applicant suffered from a gynaecological condition for which she had to undergo surgery. The operation failed and she started to experience serious pain, incontinence and trouble sitting and walking. She could not have sexual relations, was depressed, and considered suicide. The Supreme Administrative Court reduced the compensation for non-pecuniary damage awarded at first instance from 80,000 to 50,000 Euros. It also reduced the amount allocated to pay a domestic worker from 16,000 to 6,000 Euros. The reasons for reducing the compensation for non-pecuniary damage included: 1) the applicant's complaints were not new (the operation had only aggravated her situation) and 2) the applicant at the time had two children and was fifty "an age when sex is not as important as in younger years, its significance diminishing with age." One of the reasons for reducing the amount allocated to pay the cost of house work was that, given the age of the applicant's children, she "probably only needed to take care of her husband."

The applicant complained of discrimination on the grounds of sex and age, in particular about the fact that the domestic judges who reduced the compensation had not considered sex life important for her, a fifty-year-old woman at the time. By five votes to two, the Court ruled in the applicant's favour, finding a violation of Articles 14 and 8 ECHR. In what is probably the most remarkable part of the analysis, the Court names the stereotypes at work in Portugal's Supreme Administrative Court's reasoning:

52 … The question at issue here is not considerations of age or sex as such, but rather the assumption that *sexuality is not as important for a fifty-year-old woman and mother of two children as for someone of a younger age.* That assumption reflects *a traditional idea of female sexuality as being essentially linked to child-bearing* purposes and thus ignores its physical and psychological relevance for the self-fulfillment of women as people. Emphasis added.

In its ruling the Court examined the role that these assumptions played in the domestic decision: "the applicant's age and sex appear to have been decisive factors in the final decision, introducing a difference of treatment based on those grounds" (§ 53). It also pointed to reports on gender stereotypes in the Portuguese judiciary (§ 54) and contrasted the applicant's case with the approach taken in two other domestic judgments concerning medical practice suffered by men in their fifties (§ 55). In these cases, the Court noted, the

Portuguese Supreme Court found that the two men could no longer have sexual relations and considered how this affected their self-esteem, regardless of their age and of whether they had children (§ 55). The male plaintiffs were awarded 224,459 Euros and 100,000 Euros, respectively.

2.2. NATIONAL LEGAL FRAMEWORK ON ENSURING GENDER EQUALITY IN ARMENIA

2.2.1. Constitutional and General Legislative Framework

Public discourse on gender equality in Armenia has become active and insightful only over the recent years. Among the most solid legal achievements in this regard were the constitutional amendments of 2015 which from a general regulation on equality and prohibition of discrimination went on to explicitly address gender equality by stipulating that women and men are equal before the law. Furthermore, the Constitution involved "promotion of *de facto* equality between men and women" in the list of the state's economic, social and cultural policy priorities (Article 86). This objective was further reflected in various laws and gender strategies.

In particular, the Judicial Code regulates that considering the representation of sexes of Supreme Judicial Council's judge members, the number of the representatives of the same sex must be limited to maximum 3 members with certain exceptions stipulated by law. This means that out of 5 judge members of Supreme Judicial Council elected by the General Assembly of judges, at least 2 should be women. It would be commendable if a similar provision was introduced to the Law on National Assembly which regulates the procedure of election of lay members of Supreme Judicial Council.

Moreover, the Judicial Code provides for a gender quota also for candidate judges. In particular, if the number of judges of either sex is less than 25% of the total number of judges, then the list of candidate judges shall have up to 50% seats for that sex given that the candidates received minimum more than the half of votes of Supreme Judicial Council votes. The legislation on ensuring gender representation in judiciary would be more effective if it targeted not only proportionality in the context of general number of judges but also women's representation per court and per instance, since there are courts, both regional and specialized, where women amount to less than 20% of judges.[105]

Another example of gender quotas can be found in the Electoral Code which provides for at least 30 per cent representation for either sex. The positive development is that each sex has to be represented not only by at least 30 per cent in the general party list, but, more im-

[105] Based on the analysis of the data introduced on the website.

portantly, each three positions in that list shall have at least one representative of opposite sex. Nevertheless, as of May 2021 the National Assembly women hold only 32 out of 132 mandates. Other gender equality related legal regulations are discussed below.[106]

For further discussion on gender quotas please see Chapter 3 of this manual.

2.2.2. Law on Ensuring Equality Between Men and Women

The only specific law on gender equality in Armenia is the Law "On Provision of Equal Rights and Equal Opportunities for Women and Men" (hereafter addressed to as "Gender Equality Law") adopted in 2013. The law was adopted in a controversial political atmosphere which probably affected the "toothless" nature of the law. As a result, the law never reached its full potential in terms of application in practice.
The Gender Equality Law was the first to ever use the notion of gender on legislative level. The purpose of the law is to ensure gender equality in all spheres of public life, legal protection of women and men from gender discrimination, support for the formation of civil society, and the establishment of democratic relations in society.

The Law addresses both direct and indirect gender discrimination as well as gender mainstreaming. Hence, according to the law, gender discrimination (direct, indirect) is any differentiation, exclusion or preference that restricts the rights and interests of persons based on sex and is aimed at or results in restriction or elimination of recognition, use or realisation of equality of women and men in political, economic, social, cultural or other spheres of public life.

The forms of direct gender discrimination are:

1) Discrimination on the basis of marital status, pregnancy, fulfilment of family responsibilities;
2) Different remuneration for the same or equivalent work, any change (increase or decrease) of the remuneration or the deterioration of working conditions based on sex;
3) Sexual harassment;
4) When a person has been, is or may be treated worse or more unfavourably in the same or similar situation.

The forms of indirect gender discrimination are:

1) Reproduction of gender stereotypes through mass media, education and culture;
2) Establishment of such conditions and requirements, which resulted or may result in negative consequences in the forms of causing harm to the persons of certain sex.

[106] As displayed on the website.

Although the definitions used in this law are not always in conformity with the international standards (e.g. indirect gender discrimination is defined as a discrimination without a direct reference to sex), it is an important step forward to legal protection of gender equality. However, since the law does not provide for institutional and procedural safeguards for its implementation (*inter alia* shift of the burden of proof), the opportunities created by it have not been fully used.

Nevertheless, the law can and should be used to promote gender-sensitive adjudication of cases and address especially indirect discrimination considering that there are no other legal opportunities in place. The current judicial practice oftentimes lacks in-depth analysis of the specific context of the dispute, special status, needs and vulnerabilities of the parties involved and gender-sensitive approach when it comes to cases related to child custody and visitation rights, family disputes and gender-related cases (see in more details below in the respective chapters). It is, therefore, highly recommended that judges adjudicate all the relevant cases on family, labour, other respective disputes also in the light of the Gender Equality Law, especially the notions of direct and indirect discrimination, equal opportunities and equal treatment. This approach to justice directly derives from the Venice Commission Rule of Law Checklist where one of the criterion is equality before the law. The Commission stresses that equality is not merely a formal criterion but should result in substantively equal treatment.[107]

2.2.3. Draft law on Ensuring Equality Before the Law

Over the past years in several official documents the Government expressed its commitment to introduce a comprehensive anti-discrimination legislation (e.g. the previous and current human rights strategies). Eventually the draft Law on Ensuring Equality Before the Law was introduced to the public in July 2019. It will be the first legislative act to thoroughly regulate the legal relations concerning ensuring equality, defining different forms of discrimination, providing specific judicial procedures for protection from discrimination and establishing an equality body. It is, therefore, important to become familiar with the regulations of the draft law in order to make its adaptation process smooth.

Hence, according to the draft law, discrimination is an action, inactivity, regulation, treatment or policy that has been manifested by differentiation, exclusion, limitation of or preference towards a person's rights and freedoms, without a reasonable proportionality between the legitimate aim pursued, its necessity and purpose in a democratic society and the means employed, based on one's sex, race, colour of skin, ethnic and social origin, genetic features, language, religion, worldview, political or other views, belonging to national minority, property status, birth, disability, age or other personal or social circumstances, actual or perceived. The draft law provides for 7 types of discrimination which are defined as follows:

1. Direct Discrimination: a manifested behaviour, inaction, regulation, treatment or policy towards an individual as a result of which the person appears in a less favourable situation than the other person in similar circumstances because of

[107] See Venice Commission, Rule of Law Checklist, 2016, available at: , page 19.

one or more protected characteristics or other characteristics associated with those.

2. Indirect discrimination: Apparently neutral politics, inaction, regulation, treatment or policy, which, if applied, on grounds of one or more protected characteristics or in association with them, disproportionately adversely affects a group of people; or an equal treatment with respect to persons being in different conditions, with the exception of cases when conditions specified in Paragraph 2 of Article 4 of this law are applied.[108]
3. Incitement to discrimination: an order, instruction or a call directed to a person to discriminate against another person.
4. Harassment: unwanted treatment against a person on grounds of one or more protected characteristics or in association with them, with the effect or purpose of creating unfriendly, hostile, offensive, humiliating or rejecting atmosphere for that person.
5. Segregation is expressed by a decision, action or inaction, which directly or indirectly results in differentiation, separation, distinction of a person or group of persons from other persons on grounds of certain characteristics, with the exception of cases when conditions specified in Paragraph 2 of Article 4 of this law are applied.
6. Victimisation: Intentional action or inaction, which has resulted in negative consequences for the person who filed an appeal or complaint to competent authorities or published a case of alleged discrimination for the protection of his or her rights in the frame of the present law.
7. Associative discrimination: Discrimination against a person, who despite not bearing any of the protected characteristics, is connected by means of kinship, marriage or has any other links with a person or groups of people who bear any of those characteristics.

One of the most important steps taken by this act is the shift of the burden of proof which is stipulated in the main law and the Civil and Administrative Procedure Codes. According to this provision, when reviewing a complaint or claim about the discrimination by the court, the Human Rights Defender or other State body, the applicant or the plaintiff presents the data and arguments that prima facie justify existence of behaviour qualified as discrimination, and the obligation to prove the absence of discrimination is brought to the respondent or to the person against whom the complaint is filed.

This would be a completely new approach to the rules of evidence in the domestic procedural law. When/if the law passes, it is important that judges of both civil and administrative specialization apply this new rule on the burden of proof in all cases where discrimination is under consideration. The reason for such a shift is that proving discrimination with the traditional rules of evidence can be very difficult in comparison to other civil or administrative claims. At the outset, those who are accused of discrimination do not demonstrate their

[108] The exception refers to the existence of a legitimate aim, necessity in a democratic society and reasonable relationship of proportionality between the means employed and the aims sought to be achieved. These are the conditions the existence of which exclude discrimination, according to the draft at hand.

prejudices. Moreover, those prejudices can be implicit, not realised even by those who hold them. Furthermore, plaintiffs mostly do not have access to the necessary information to prove, for example indirect discrimination. That information, e.g. other job seekers' profiles, pay information, etc., would normally be in the possession of the respondent.

With these legislative amendments, persons, including women experienced discrimination, will be enabled to seek and receive judicial protection which is problematic in the current legislative framework. In particular, the draft provides that:

> "1) Any natural person may apply to the Administrative Court with discrimination cases, if he/she considers that in the course of implementation of administrative action his/her rights and freedoms envisaged by the Law "On Ensuring Equality Before the Law" of the Republic of Armenia have been violated by an administrative action body or its official through adopted administrative act or committed act or inaction, including if:
>
> a. obstacles have been raised to implement these rights and freedoms;
>
> b. necessary conditions for the implementation of the rights were not provided, but they are to be provided due to the Constitution, international treaties, law or other legal acts;
>
> 2) he/she has been illegally imposed a liability on;
>
> 3) he/she has been illegally imposed an administrative liability on.".

Specific amendments are envisaged also for the civil proceedings with a short processing time of three months. A significant development is that the victims of discrimination committed by the state bodies or officials would be entitled to compensation of non-pecuniary damage.

Another important achievement of the draft law will be the establishment of the Equality Council as a consultative body adjunct to the Human Rights Defender, with a purpose to assist the Human Rights Defender in ensuring equality and protection from any type of discrimination. The Ombudsperson, in turn, will exercise the following powers in the capacity of the equality body:

1. Monitor the application of the provisions of the Law "On Ensuring Equality Before the Law";
2. Make public reports on the rights of individuals subjected to discrimination;
3. Submit recommendations to the competent authorities on the development of legal acts on ensuring equality before the law or draft legal acts on ensuring equality before the law or corresponding practices;
4. Submit to the Constitutional and Cassation Courts a supplementary observation (amicus curiae) on discrimination cases on the basis of a request from that courts.

2.2.4. Gender Equality Strategies and Gender Mainstreaming

Armenia has been developing different gender equality strategies starting from 2010.[109]

The most ambitious and transparent strategy is probably the current 2019-2023 Strategy of Implementation of Gender Policy and the Action Plan. The strategy is based on the problems identified in practice by state bodies, domestic women's rights organisations and the recommendations of international organisations. In particular, in 2016, two UN human rights monitoring bodies, CEDAW and Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, discussed the national reports of Armenia. As a result, the committees adopted final observations with relevant recommendations addressed to the Government. These recommendations include integrating the gender component in the legislation and state policy, access to justice and legal appeals mechanisms, improving the national mechanism for the advancement of women, overcoming existing stereotypes in society, preventing domestic violence, ensuring women's participation in politics and public life, protecting women belonging to vulnerable groups, the expansion of economic capacities, the solution of the existing problems in the spheres of education and healthcare and the fight against sex-selective abortions.

These goals are reflected in the current gender strategy which puts forward five priorities:

- Priority 1. Improving the national mechanism for the advancement of women, equal participation of women and men in management filed and at the decision-making level
- Priority 2. Overcoming gender discrimination in the socio-economic sphere, expanding women's economic opportunities.
- Priority 3. Enhancing full and effective participation of women and men and equal opportunities in education and science.
- Priority 4. Enhancing equal opportunities for women and men in the field of healthcare.
- Priority 5. Prevention of gender discrimination.

Another strategy targeting gender equality is the 2020-2022 Human Rights Strategy which declares once again that the establishment of *de facto* equality between women and men is a priority for the Government. It also emphasises preventing gender-based violence as the Government's particular focus in the path towards equality. In general, the strategy accepts that despite certain positive changes in recent years, the level of protection and realisation of women's rights is still not sufficient.

It is also noteworthy that in 2019 the Government adopted the 2019-2021 National Action Plan of implementation of the UN Security Council 1325 Resolution on Women, Peace and Security. The Action Plan focuses on the issues of economic and social development of women in border communities, as well as the issues of providing special protection to displaced women and girls.

[109] See among others the Gender Policy Concept Paper of 11 February 2010 and the Gender Policy Strategic Programme 2011–2015 of 20 May 2011.

Gender mainstreaming is mentioned in the Gender Equality Law and is described as a strategy through which the interests of women and men become an integral part of the process of developing, implementing, monitoring, and evaluating legal acts, policies, programs, measures aimed at eliminating inequality between women and men. The law also provides for gender expertise, monitoring and impact assessment of normative legal acts. However, there is no clearly defined state policy to make it truly work in practice. So far, gender mainstreaming has been exercised by and through civil society institutions more than by the state bodies.

CoE Group of Specialists on Mainstreaming developed four criteria to determine good practices in gender mainstreaming: 1) a political initiative at a high level of responsibility in order to achieve reorganisation of policy processes necessary for mainstreaming, 2) the aim should be to incorporate a gender equality perspective into everyday policies, and 3) those policies should aim to do so by involving ordinary actors who are normally engaged in these policies, 4) the policies should be not rhetoric but concrete and specific.[110]

There are various good practices of gender mainstreaming over the world that satisfy these conditions. For example, in Sweden there is a dedicated Minister for Gender Equality, with responsibility for policy implementation and development, as well as for anti-discrimination and anti-segregation. Minister for Gender Equality is also tasked with coordination, development and follow-up of gender mainstreaming. Nevertheless, in accordance with the principle of gender mainstreaming, each minister is responsible for taking a gender equality perspective in their own decisions and activities within their areas of responsibility. Each ministry has a Gender Equality Coordinator, who is part of an inter-ministerial working group on gender mainstreaming. The work of this group is supported by a special Gender Equality Unit that drafts gender equality policy for the government, as well as provides input to information, publications and training. By 31 March each year, the Gender Equality Agency shall present, collect and analyse the measures adopted by relevant government agencies and other actors in order to reach the goals of Sweden's gender equality policy. Sweden also established an independent Gender Equality Body (The Equality Ombudsperson) whose tasks are to influence, guide and encourage employers, agencies, municipalities and others to minimise discrimination.[111]

In the Netherlands a specific gender impact assessment tool (GIA) was introduced as early as in 1994 and was further constantly adapted. The aim of GIA was to construct an instrument that could assess the impact on gender relations of any policy proposal at the national level. The tool provides for an ex-ante evaluation before the given policy is adopted. The GIA sets two criteria to decide whether impacts will be positive or negative: equality in the sense of equal rights and (un)equal treatment of (un)equal cases, and autonomy, in the sense of the possibility for women to decide about their own lives. Based on this evaluation, in some cases, the policy proposals have been changed to counter potential negative impacts on gender relations.[112]

[110] See CoE Group of Specialists on Mainstreaming, "Gender Mainstreaming: Conceptual Framework, Methodology and Presentation of Good Practices", 1998, Strasbourg, page 44.

[111] See https://eige.europa.eu/gender-mainstreaming/countries/sweden

[112] See CoE Group of Specialists on Mainstreaming, "Gender Mainstreaming: Conceptual Framework, Methodology and Presentation of Good Practices", 2004, Strasbourg, page 36.

Good practices of gender mainstreaming can also include:

- Competence development on mainstreaming;
- Establishment of a gender unit or focal point with a clear mandate and necessary resources to promote and support mainstreaming;
- Indication of management commitment to mainstreaming;
- Establishment of accountability mechanisms;
- Development of guidelines, manuals, and other tools to support mainstreaming;
- Establishment of a resource base of relevant gender equality expertise for mainstreaming.[113]

Exercise

Group discussion

What can you in your professional capacity do for gender mainstreaming?

[113] See https://www.un.org/womenwatch/osagi/goodpraexamples.htm

MODULE 3.
PROMOTING GENDER EQUALITY IN JUDICIAL PRACTICE

3.1. BARRIERS TO EFFECTIVE LITIGATION IN THE CONTEXT OF ENSURING GENDER EQUALITY IN PRACTICE

Barriers to effective litigation and access to justice are both of socio-economic (traditional gender roles, unequal distribution of power, economic dependency, etc.) and legislative-institutional nature. There seems to be a consensus among the experts and lawyers in Armenia that the main barrier is judicial stereotyping (it concerns not only the court but the judicial system in general). Judicial stereotyping makes legal professionals reach a conclusion based on prejudices, pre-existing beliefs rather than on objective examination of evidence.

Gender stereotypes are often implicit, but they may result in explicit discrimination including in the justice sector. Below are some of the main discriminatory practices caused by judicial stereotyping in Armenia that perpetuate traditional gender roles and stereotypes:

- Shaming and judgmental attitude against women who speak about violence by family members or discrimination within the family, since bringing the family issues to the public sphere, especially creating legal problems for family members is stigmatised by the society at large and is reflected in the law-enforcement;
- Tolerance towards some forms of domestic violence (e.g. if it is used as an upbringing tool for children or to limit the freedom of wives or daughters 'for their own good') and as a consequence, a lack of will and due diligence to effectively deal with those cases;
- Victim blaming, including intolerance against certain victims (due to their sex life or alleged unfaithfulness, other 'morally unacceptable' behaviour such as being a sex worker, etc.);
- Secondary victimisation, especially as regards the investigation and adjudication of sexual violence cases;
- Lack of context-based evaluation of facts and sensitive treatment of the victims of gender-based violence;

- Playing a mediating role in divorce proceedings in the context of domestic violence and beyond, persuading women to preserve the family;
- Reluctance to interfere with the family's internal affairs since domestic violence is seen as a minor issue, a family business until it escalates into a 'serious crime';
- Allegations that women exaggerate the magnitude of threat and potential danger; or that they do not seriously intend to separate from their husbands which means that the officers should not show particular diligence in processing their complaints;
- Failure to address the unequal balance of power and access to resources when adjudicating on property disputes in the context of divorce proceedings;
- Impressions that women must undergo certain sacrifices, including 'mild forms of abuse' in order to preserve the family, because preserving the family and taking care of it is their primary responsibility.

Due to the above-mentioned problems, some forms of discrimination are considered not realistic to challenge in the justice system. For instance, sex workers face serious discrimination when police officers in the scope of 'fight against infectious diseases' force them to take HIV test. Police officers first take them to the police station and fine them since sex work is an administrative offence prescribed by Article 179[1] of the Code of Administrative Offences. Then they take the sex workers to the medical facility where medical personnel are informed about the identity and profession of the women. This is concerning given that sex workers can face a range of problematic attitudes in the healthcare system such as: the refusal of medical care, disrespectful, degrading treatment, medical intervention without the consent of the person, the inability to select or change medical care providers, negligence, unnecessary pain and the disclosure of personal information to a third party.[114]
Furthermore, the results of medical tests are sent to the police first which then send them to the beneficiaries. This not only constitutes discrimination but also a violation of the right to medical confidentiality. However, there has, to date, been no legal challenge in relation to this practice brought before the courts, presumably due to concerns that the legal system will continue or uphold this treatment. As a result, these women practically have no equal access to justice. In addition, legislation provides for no right to compensation for non-pecuniary damage in discrimination cases unless it is a case of direct insult and slander. The draft Law on Ensuring Equality Before the Law provides for limited opportunity for such compensation, only if discrimination was committed by a state official or a state body.

The next barrier in the given sphere is the lack of state provided legal aid for the victims of discrimination which is an obstacle for their access to justice. The draft law does not solve this issue either because it does not envisage *pro-bono* legal services for the victims of discrimination.

A further issue is an unnecessarily conservative attitude towards the interpretation and application of law. This stops judges from creative and context-based analysis. Even if some

[114] See N. Margaryan, L. Ghazaryan, 'Violation of the Rights of Sex Workers in Armenia, in the collection of materials of the Conference on "Գենդերային անհավասարությունը աշխատաշուկայում. հիմնախնդիրները եւ լուծումները լոկալ եւ գլոբալ համատեքստում", Yerevan State University, 2015, pages 187-194.

legal concepts are widely acknowledged and practiced around the globe, courts will avoid applying them until and unless an explicit regulation in national legislation is brought about. This can be illustrated in relation to two examples: first, the treatment of children who witnessed domestic violence as indirect victims. Often the courts do not take into account the domestic violence history as grounds for limiting the violent parent's (predominantly fathers) visiting rights since the children were not direct victims of physical violence as required by the relevant international standards (see for example ECtHR judgement on Bevacqua and S v. Bulgaria). Second, the case-law on rape is not built upon the absence of consent as the main element of rape as suggested by contemporary international human rights law (e.g. ECtHR case-law, the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence), but rather on violence or lack of resistance. In this respect, it would be helpful if the courts directly applied international law, both hard and soft, for formulating legal positions as is the practice with the high courts. While there has been a positive development in recent years with first instance courts referring to ECtHR judgments in their case-law, it almost never happens in domestic or sexual violence cases. Even when the high courts refer to the international standards, is usually limited to the ECtHR, despite the relevance of international soft law such as CEDAW or other UN human rights treaty bodies' general recommendations/comments, their concluding observations regarding Armenia, CoE Committee of Minister's recommendations, opinions of Venice Commission and other similar institutions. In some cases, even international tribunals' jurisprudence that do not have jurisdiction over Armenia, such as the International Criminal Court, can be useful to refer to, although it is not traditionally considered international soft law. For instance, the case-law of International Tribunal for the Former Yugoslavia has significantly influenced the contemporary legal developments on the rape laws (it is illustrated for example in the ECtHR judgement in M.C. v. Bulgaria). International soft law may also often provide for more specific, detailed and elaborate legal analysis in relevant areas and the national legislation allows the courts to use those sources in their legal reasoning. Hence, Article 81§1 of Constitution provides that when interpreting the provisions of the Constitution on fundamental rights and freedoms, the practice of the bodies operating on the basis of international human rights treaties ratified by the Republic of Armenia is taken into account. Such bodies are CEDAW, Convention on the Rights of the Child, Convention on the Rights of People with Disabilities and, after the ratification of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, will also be GREVIO. Furthermore, Law on International Treaties (Article 5§1) explicitly provides: "The norms of RoA international treaties entered into legal force apply directly in the territory of RoA". A more direct and comprehensive application of international law would undoubtedly have a positive impact on judicial protection of gender equality.

Further specific barriers and legislative gaps will be discussed in Session 4.

3.2. EVIDENCE GATHERING AND ASSESSMENT

Given the specific circumstances of gender discrimination and particular needs of its victims, especially victims of gender-based violence, certain recommendations have been developed to ensure effective evidence gathering and assessment based on the respect for the victims' rights.

Most of those recommendations concern the investigation of gender-based violence which puts the victims in a particularly vulnerable position. Apart from gender stereotypes common in the society at large, legal professionals may often bear the same gender biases or rape myths. This approach is an obstacle to building a proper communication and cooperation with the victim as well as conducting an objective investigation. Biased attitudes can, for example, cause lack of due diligence and lenient sentences in domestic violence cases, secondary victimisation and victim blaming in sexual violence cases and unfair adjudication in child custody and property distribution cases.

A problematic approach in domestic and sexual violence cases revealed in Armenia and elsewhere in the world has been requiring or expecting corroborating evidence from the victim. Moreover, the judges are reluctant to sentence the perpetrators without non-victim evidence (an example will be provided in Module 4) whilst the investigation often does not demonstrate due diligence in maintaining such evidence. This practice is problematic first because it is based on the assumption that the victim is not credible (can be illustrated in the requirement of proof of physical resistance from the sexual violence victim), second because in cases where the victim refuses to cooperate with the investigation and testify in the court (for various reasons such as shame, fear, secondary victimisation, etc.), the case is at risk of failure. Therefore, the investigators and prosecutors are recommended to diligently collect and introduce corroborating/non-victim evidence to secure the outcome of the case and not to shift the burden of on the shoulders of the victim.[115]

One of the most widespread problems with evidence assessment in domestic violence cases in Armenia is that although the investigator and prosecutor have at their disposal evidence proving a long domestic violence history (testimonies of neighbours, relatives, the victim and sometimes even medical record), they initiate prosecution only for the one last episode of battery which was reported to the police or do not initiate criminal proceedings if that isolated act does not reach the level of battery under Article 118. **Somehow**, **in the act of indictment the perpetrator is often accused of an isolated act under Article 118 which is a private prosecution case with a very lenient sanction instead of Article 119 (a public prosecution case) which would be the fair and adequate legal qualification of the committed actions**.[116]

As a result, the previous chain of violence is neglected and not given adequate legal assessment whilst all episodes and the entire history of abuse must be documented and reflected in the charges to ensure proportionate liability of the perpetrator and justice for the victim.

[115] See a checklist of corroborating evidence in domestic violence cases in CoE "Training Manual for Judges and Prosecutors on Ensuring Women's Access to Justice. General Chapter, page 79.

[116] See Gap analysis of Armenian criminal law in light of the standards established by the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, J. Truchero, A. Urrutia, L. Sargsyan, 2017, page 21, G. Hakobyan, "Training Manual for Judges and Prosecutors on Ensuring Women's Access to Justice. National Chapter on Armenia", 2017, page 23.

Another serious problem is biased treatment of sexual violence victims unless the victim complies with the 'ideal victim' expectations of officers. The investigators are usually men which can make it difficult for the victim, who was assaulted by a man, to share her story. Furthermore, investigators often do not have the sufficient gender sensitiveness to work through the psychological difficulties of the victim which creates difficulties for obtaining evidence. [117] Even for the most experienced investigators dealing with sexual violence cases is challenging due to the particularly sensitive nature of such crimes. The victims may be reluctant to speak about their traumatic experience and reveal embarrassing facts. It is thus important to show patience and remain non-judgmental even if the victim is not cooperating.

Gender bias also results in adjudication based on certain expectations regarding the moral characteristics of women. **Because the requirements of morality for women are higher than for men, women end up being judged and punished for behaviour that is considered almost normal for men**. For example, being unfaithful in marriage, or having alcohol dependency. This is true for both criminal and civil justice and there are a number of examples of cases when judges openly showed judgmental treatment to certain victims during the court trial.[118]

In addition, due to gender insensitive assessment of evidence, judges and prosecutors often do not take into account the phenomenon of 'battered woman's syndrome' in cases when women commit violence against their intimate partner. This phenomenon addresses women who have experienced long-term or repeated domestic violence and responded by assaulting or killing their partner.[119]

The history of domestic violence should be carefully examined by the decision-makers to gain insights of psychological peculiarities which make the victim to resort to violence and even murder of the aggressor and has been used in a number of jurisdictions to prove defences of provocation and self-defence.[120]

In the context of gender sensitive evidence gathering, the methodology of interrogation is of particular importance. The following table sets out some recommendations on interviewing the victims of gender-based violence based on international good practices:[121]

- using a preliminary assessment to explore interviewees' needs and capacities;
- choosing a safe, inviting interview location – preferably not one used for interrogations, or likely to be intruded upon by others;
- selecting appropriate, vetted, trained interpreters where necessary;
- ensuring confidentiality;

[117] See Sexual Crisis Support Center, Report on **Sexual violence situation analyses in Armenia,** 2019, pages 22-23.

[118] See G. Hakobyan, "Training Manual for Judges and Prosecutors on Ensuring Women's Access to Justice. National Chapter on Armenia", 2017, page 16, L. Mann and L. Sargsyan, Training Manual on "Preventing and Combating Violence Against Women and Domestic Violence in Armenia, 2018, page 99.

[119] CoE "Training Manual for Judges and Prosecutors on Ensuring Women's Access to Justice. General Chapter, page 92.

[120] See among others the case of Sally Challen, UK. Sally Challen was found guilty in 2011 of having murdered her husband the year before, but her conviction was thrown out in 2019 after new evidence showed that she had been subjected to coercive control, a criminal offense in Britain since 2015. In a groundbreaking appeal, Ms. Challen's charge was changed from murder to manslaughter on grounds of diminished responsibility and she was released after serving 9 years in prison.

[121] Kim T. Seelinger, H. Silverberg, R. Mejia, "THE INVESTIGATION AND PROSECUTION OF SEXUAL VIOLENCE", 2011, page 28, Adapted, in part, from UNODC, Handbook on effective police responses.

- explaining the objectives of the interview and allowing for follow-up meetings as necessary;
- putting the victim at ease by using safe, supportive language;
- avoiding judgment and expressing non-judgment to the victim;
- permitting free narration by the victim, without interruption by the interviewer;
- seeking clarification with open-ended questions (allowing the victim to control the flow of information and avoiding the risk of imposing the investigator's personal views of what the victim means to say);
- identifying risk factors, as well as other potential sources of information (obtaining consent to discuss the attack with others, where appropriate);
- taking careful notes throughout the interview of everything communicated, not just those pieces of information that seem helpful to the case;
- concluding the interview by asking the victim if there is anything else he/she knows or wants to share that was not covered;
- thanking the victim for his/her time and explaining next steps.

In terms of complaints on gender discrimination in civil and administrative justice, it is important to acknowledge the difficulties and particularities of proving indirect discrimination in particular. This is why examining and assessing evidence such as statistics will be necessary to prove the disadvantage within a certain group of people with one or multiple protected characteristics. Also, given that these rules of evidence, when adopted, will be completely new for court users, judges are recommended to play a more active role in requiring necessary data and performing *ex officio* responsibilities in obtaining evidence.

The table below demonstrates different types of evidence used to prove indirect discrimination, including gender discrimination, in many jurisdictions.[122]

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.
Questionnaires	In some jurisdictions, national law gives victims the opportunity or obligation to contact the alleged discriminator

[122] See CoE "Training Manual for Judges and Prosecutors on Ensuring Women's Access to Justice. General Chapter, pages 77-78.

	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."[123]
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).

Exercise

1. **In a format of group discussion, compare the cases of V.M. and R. M. in the light of Article 105 of CC and its application in male vs. female defendants.**
2. **Discuss the applicability of self-defence to the second case.** The trainer may use the case of Sally Challen discussed in reference 117.

The circumstances of the case of V.M.

V. M. murdered his partner D. N. in presence of her daughters because, in his words, "she had been cheating on him for several months". V. M. killed her in the course of a fight multiply wounding her (21 times) with two knifes. After three years, the court decided that the defendant was in a state of cumulative affect because of immoral behaviour of the victim and sent him only to 3 years and 6 months of imprisonment under Article 105. In the pre-trial stage of the proceedings a forensic examination was carried out according to which the defendant was not in a state of insanity while wounding his wife. However, the second examination showed otherwise. Eventually, according to the third

[123] Ibid.

forensic examination conducted during the trial stage, the possibility that the defendant was in a state of insanity at the moment of the criminal episode, was high.

The circumstances of the case of R. M.

R. M. is accused of murdering her husband with an axe while he was asleep. The investigation collected evidence that she had been subjected to domestic violence by her husband over many years. Eventually, on the day of the incident, after another episode of violence, when her husband fell asleep, she axed him. R. M. is accused under Article 104 §1 of CC, namely regular murder. She undergone two forensic examinations one of which did not reveal a state of insanity (affect) but was somewhat vague. The court required a second examination the results of which are not publicly available yet.

3.3. REMEDIES

In order to ensure women's equal access to justice, CEDAW recommends that the remedies are "adequate, effective, promptly attributed, holistic and proportional to the gravity of the harm suffered".[125]

When making a decision on whether the remedies provided to the victim of discrimination in particular case satisfies the mentioned requirements, the following checklist might be considered:[126]

- 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).

One of the most common remedies for the victims of discrimination, including gender-based violence, is compensation. The domestic legislation provides for compensation to be paid by the party to the judicial proceedings who lost the case. Nevertheless, the national legislation does not explicitly provide for compensation mechanisms for domestic violence vic-

[125] CEDAW General Recommendation No. 33, para 19(b).

[126] CoE "Training Manual for Judges and Prosecutors on Ensuring Women's Access to Justice. General Chapter, page 82.

tims to be provided by the state, as prescribed by the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence. Moreover, when signing this convention, Armenia made a reservation regarding the compensation clause. The Law on Prevention of Domestic Violence, Protection of Domestic Violence Victims and Restoration of Peace Within the Family (hereafter referred to as "DV Law" provides for financial support scheme for the victims which is governed by the Ministry of Labour and Social Affairs and the Council on Prevention of Domestic Violence attached to it. It is a one-time support of AMD 50.000-150.000 and is not provided to all the victims but only to those who satisfy the requirements set by the Government decree of 29.03.2019, N 333-Ն.

The victim may also apply to a civil court for pecuniary damage compensation. An alternative would be claiming the same compensation within the scope of the criminal case on domestic violence. However, most often when the perpetrator pays the fine to the state and covers the court fees, he has no money left for the victim (at least money officially belonging to him). This factor should be taken into account by the judges who sentence the perpetrator to a fine. Furthermore, the compensation only includes the material damage, i.e. hospital expenses. Non-pecuniary damage cannot be claimed under the national legislation as long as it is not directly caused by the state body or official (Civil Code, Article 162.1). In sum, one can only claim compensation for non-pecuniary damage regarding certain rights provided by ECHR and Constitution of RA if the criminal prosecution authority or the court has confirmed that the decision, act or inaction of the authority has violated the particular right of the applicant.

Other remedies include reinstatement, measures aimed at ensuring non-repetition, such as providing the victim with a protective order, obliging the perpetrator to undergo specified psychological or medical programmes. The courts (usually the high courts) can require measures of more general nature to target the gender stereotypes, power relations and bias that are at the core of violence against women, such as changes in the company policy, change of legal norms, awareness raising, trainings, etc.

3.4 ALTERNATIVE DISPUTE RESOLUTION (ADR)

ADR in gender discrimination cases should be discussed regarding criminal proceedings, specific domestic violence legislation and general civil justice. Under the CC, Article 73 provides that a person who has committed a "not grave" offense (e.g. battery or light damage to health), can be exempted from criminal liability if he/she reconciles with the victim and mitigates or compensates the inflicted damage in some other way. This general notion that does not even oblige the law-enforcement to make sure that the reconciliation is made on the victim's free will, does not take into account the particularities of domestic violence, and does not provide protection from imposing such a decision on the victims through intimidation and fear, in some cases resulted in dangerous consequences for domestic violence victims.[127] This regulation is against international standards and the new CC rightly abolishes this opportunity in domestic violence cases.

[127] G. Hakobyan, "Training Manual for Judges and Prosecutors on Ensuring Women's Access to Justice. National Chapter on Armenia", 2017, pages 30.

Domestic violence legislation provides for a specific procedure for reconciliation between the victim and the perpetrator which can result in the abolishment of emergency intervention and protective orders. Although the law provides for some guarantees, for instance meetings are to be held by the Support Centre and with the presence of their staff members who has to make sure that the victim consents freely, this regulation is still concerning given the unequal negotiating power between the perpetrator and the victim and the usually long history of abuse and cyclic nature of domestic violence.

International soft law has been promoting the approach of abolishing alternative dispute resolution mechanisms in cases of domestic violence. Among the issues these mechanisms create, are the removal of cases from judicial scrutiny, presuming that both parties have equal bargaining power, reflecting an assumption that both parties are equally at fault for violence, and reducing offender accountability.[128]

The Organization for Security and Cooperation in Europe/Office for Democratic Institutions and Human Rights in the Opinion on Draft Amendments to the Legal Framework on Preventing and Combating Domestic Violence in Moldova welcomed legislative amendments abolishing such practices: "It is welcome that current paragraph 4 of Article 11 of the Law, which provides for the possibility of mediating domestic violence cases, has been repealed. This is in line with international standards, which recommend to prohibit mediation in all cases of violence against women."[129]

In addition, the mechanism on reconciliation is not consistent with the policy on emergency intervention orders which are imposed regardless of the victim's will in order to protect her. Emergency intervention orders are imposed by police officers regardless of the victim's will based on risk assessment (Article 7 of DV Law). It is therefore not entirely clear why would the state on one hand impose such an order even against the victim's will to protect her but on the other hand allow for abolishment of that same order based on reconciliation which is supposed to be carried out by Support Centres without a proper risk assessment tool. As a result, it is unsurprising that this mechanism has not been properly implemented by any of the Support Centres since the adoption of the law.

As regards family, labour, customer and other relevant disputes those are subject to mediation under general regulations of Chapter 19 of Civil Procedure Code. It is difficult to elaborate on the practice of mediation in those cases due to the fact that mediation in civil procedure is almost never applied in practice.

Exercise

Discussion: In your opinion, what are the advantages and risks of mediation in domestic violence cases?

Unbalanced negotiating power between the victim and perpetrator causes great risks to the process as victim can be threatened, dependent on the perpetrator and on societal pressure which might influence the decision-making of the victim and the outcome of the process. Other risks are the false assumption on shared responsibility for the violence, lack or reduction

[128] UN Women Handbook for Legislation on Violence against Women, 2012, §3.9.1.

[129] OSCE/ODIHR Opinion on Draft Amendments to the Legal Framework on Preventing and Combating Domestic Violence in Moldova, 2015, §68.

of liability for the perpetrator, the cyclic nature of domestic violence which means a relatively high risk of repetition of violence even after the mediation, etc.

Discuss the Draft amendments to the "Law on Mediation" (https://www.e-draft.am/projects/3259/about) establishing mandatory mediation for family disputes before applying to the court with no exception for cases where there is a domestic violence history (for example if there are protective orders issued).

Use CEDAW General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, §32 which reads as follows: "Ensure that gender-based violence against women is not mandatorily referred to alternative dispute resolution procedures, including mediation and conciliation. The use of those procedures should be strictly regulated and allowed only when a previous evaluation by a specialized team ensures the free and informed consent of victims/survivors and that there are no indicators of further risks to the victims/survivors or their family members. Procedures should empower the victims/survivors and be provided by professionals specially trained to understand and adequately intervene in cases of gender-based violence against women, ensuring adequate protection of the rights of women and children and that interventions are conducted with no stereotyping or revictimization of women. Alternative dispute resolution procedures should not constitute an obstacle to women's access to formal justice.".

3.5. GENDER SENSITIVE CASE AND COURTROOM MANAGEMENT

Gender sensitive case and court management is important not only in terms of avoiding secondary victimisation and ensuring objective adjudication but also in decreasing latency and combating impunity since many victims, especially those of gender-based violence, do not report fearing disrespectful or otherwise insensitive treatment by the justice system. This concern was confirmed in a survey which revealed that among victims of domestic violence who did not report to the law-enforcement, 21.9% did so due to being embarrassed by the incident and fear of its publicity, and for a further 20.2% it was the desire to avoid red-tape.[130]

Furthermore, ensuring confidentiality and sensitive treatment and removing the need for the victim to retell their story multiple times are *sine qua non* requirements of gender sensitive case management.

Different ways to increase sensitivity to the victim's needs in gender-based violence cases have been developed in international practice. One of them is to conduct a "*preliminary as-*

[130] Proactive Society NGO, Analysis of the Survey on Domestic Violence in Armenia, conducted with the commission of OSCE, 2011, available at:

sessment" before the official interview. For example, an investigator may conduct a preliminary assessment to ascertain: a) whether the victim is in risk of danger, b) whether the suspect still has access to the victim, c) whether the victim needs medical attention, d) whether there is potential for loss and/or destruction of evidence, e) whether the suspect is known versus unknown.[131]

For prosecutors good practice is preparing the victim for trial. In Armenia there is no such practice or when it exists it is conducted by the victim's representative who usually does not have the same opportunities and access to information as the prosecutor. Recommended international practice victim preparation for trial includes the following:

- giving the victim a chance to meet the trial lawyer who will examine her in court;
- familiarising the victim with the courtroom, the court staff, and all aspects of the court proceedings (for example, explaining the process of examination and cross-examination);
- familiarising the victim with the roles and responsibilities of all participants in the court proceedings;
- familiarising the victim with her own role, rights and responsibilities (for example, her obligation to tell the truth when testifying);
- discussing matters related to the victim's security and safety, in order to determine the need for protective measures;
- allowing the victim to review her prior statements before she testifies in order to refresh her memory and to identify deficiencies and inconsistencies in them;
- ask the victim the questions the prosecutor intends to ask her during trial and/or show the victim potential exhibits about which she will be asked during trial. [132]

In addition, from the perspective of the role of prosecutor, it is crucial to avoid delays in gender-based violence cases. The victim is often more willing to cooperate immediately after the incident, rather than later, when the abuser may have reasserted control over the victim.[133]

In terms of the trial stage, measures that courts can undertake to ease victims' experience of trial and related activities can be classified into three groups: (1) confidentiality measures, (2) privacy measures, and (3) victim support measures.[134]

Confidentiality measures are aimed at protecting the identity of the victim from the press and the public to avoid stigmatisation. These measures include:

- removing any identifying information such as names and addresses from the court's public records and withholding them from media and the public and in exceptional cases also from the accused;

[131] Kim T. Seelinger, H. Silverberg, R. Mejia, "THE INVESTIGATION AND PROSECUTION OF SEXUAL VIOLENCE", 2011, page 24.

[132] Ibid., page 48.

[133] UN Women, "Incorporate knowledge of gender-based violence into polices and protocols", 2011, available at: http://www.endvawnow.org/en/articles/1017-incorporate-knowledge-of-gender-based-violence-into-policies-and-protocols.html

[134] Supra note 116, pages 46-47.

- using a pseudonym for a victim;
- prohibiting the disclosure of the identity of the victim (or identifying information) to a third party;
- permitting victims to testify behind screens or through electronic or other special methods;
- allowing any part of the trial to be held *in camera*, i.e., excluding the public from part or all of the victim's testimony meaning not only excluding the public from hearing the victim's testimony but also removing her testimony from all public records.

Privacy measures are designed to limit the questions that can be posed to a victim during her trial testimony. These rules are especially important for victims of sexual violence considering that the defence counsel would try to challenge the victim's credibility with irrelevant questions based on sexist stereotypes about women's sexual history. Privacy measures include prohibiting questions about the victim's prior or subsequent sexual conduct; about whether she consented to the sexual violence; not requiring corroboration of the victim's testimony.

Finally, *victim support measures* are designed to ease victims' experience during their testimony. These measures were designed to safeguard the victims' psychological and emotional well-being during their testimony and include permitting the victim to testify in a manner that allows her to avoid seeing the accused; limiting the frequency, manner and length of questioning; permitting a support person such as a family member or friend to attend the trial with the victim.

One of the most important goals in gender sensitive case management, as mentioned above, is to ensure victim safety during the proceedings which is extremely challenging. The perpetrators learn the whereabouts of victims, constantly threaten them, their family members and lawyers. Effective protection measures may include:

- consistently prosecuting and sanctioning the perpetrators for the threats against the victims, their family members and support team under Article 137 of Criminal Code;
- consistently exercising the requirement of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, according to which States ensure that the victim/survivor is informed about liberty of alleged perpetrators (whether bail, permanent or temporary release or escape even before the ratification of the convention;
- apply protection measures envisaged under Chapter 12 of Criminal Procedure Code which surprisingly have never been used with regard to for example domestic violence victims;
- ask for/apply stricter preventive measures, such as detention, if there is a history of intimidation and coercion by the accused against the victim;
- ask for/apply stricter sanctions in the cases on violations of the requirements of emergency intervention and protective orders.

Finally, it is crucial to avoid unnecessary confrontation of the victim with the perpetrator in gender-based violence cases. In this respect, there was an important development in Criminal Procedure Code adopted in June 2020 (Article 209.1) regarding questioning the victims and witnesses through a videoconference (տեսակապ). However, it concerns only the pre-trial stage. In addition, it does not explicitly mention domestic violence or sexual violence as grounds for using this mechanism of questioning. Instead, it lists other grounds such as the age and the health status of the victim or the witness, the need to ensure their safety and if it is necessary to conduct an effective investigation. It is recommended that these grounds are given a wide interpretation as to include the need of avoiding secondary victimisation and ensuring comfortable environment for the victim to testify. There seem to be no obstacles to apply this tool in the courts as well.

Exercise

S.B., a former sex worker, filed a complaint of rape. She argued that the suspect, D.N., was a police officer that had once fined her for providing sex services. He ran into her in a night club and offered to 'spend time together', but S.B. refused as she decided to start a new life and was no longer working in that sphere. D.N. did not take her words seriously, was offended by her refusal and raped her. Afterwards he gave S.B. money.

During the inquiry D.N. explained that he believed that S.B. did not mind having sexual intercourse with him since he knew she was a sex worker and thought she was dressed provocatively in order to chase clients. He thought that her unwillingness was a game, and he did not realise that he was raping her, especially because she did not resist. Otherwise he would never use force.

Questions:

If you were the investigator or the prosecutor, would you bring charges against D.N.? Explain your reasoning either way.

In a form of role play, please:

- *Question S.B. as an investigator*
- *Question S.B. as a judge*

Note to the Facilitator: This exercise is aimed at revealing the typical gender stereotypes in the area of sexuality of men and women, stereotypical thinking about sexual violence and discussing those in a calm atmosphere. Pay attention to and then discuss with the audience the nature of the questions asked and tone of asking questions, introduce the particularities of the gender neutral vs. gender sensitive court management, emphasise the questions asked that might result in secondary victimization or are based on gender stereotypes, take into account whether the 'judge' removes questions aiming at compromising the credibility of the victim or judging her previous sex life, explain the particularities of freely given consent and the role of previously given consent, dispel the myth around the 'ideal victim'. Encourage the objective and stereotypes-free arguments and questions.

3.6. COLLECTING AND SHARING DATA

One of the most common violations of the rights of gender-based violence victims is the unjustified and unnecessary disclosure of their personal data and breach of their right to privacy.

The Domestic Violence Law mentions protection of integrity of private and family life as one of the leading principles of law. Moreover, it has a separate article (Article 22) aimed at protection of the mentioned right which read as follows:

1. "Personal data received by the competent authorities on domestic violence cases and (or) on crimes against domestic violence or alleged domestic violence victims are confidential. It is prohibited to disclose information about the victim or alleged victim of domestic violence in the mass media or in any other way that would allow to identify them, unless otherwise provided by the legislation of the Republic of Armenia.
2. Police officers, support center staff and shelter staff are prohibited from disclosing the whereabouts of the victims of domestic violence, persons under their care, or other information that may be used reveal their location.
3. Violation of the right to confidentiality of private or family life gives rise to liability provided by law, and the harm caused to a person is subject to compensation in the manner prescribed by law."

Nevertheless, the sub-law regulating relations and procedure of sharing data for the purposes of statistics (Government decree N 1381–Ն of 10.10.2019) requires that the relevant bodies share rather detailed personal data with the Ministry of Labour and Social Affairs. This is a completely unnecessary and unjustified dissemination of one's personal data in the light of its aim, namely maintaining disaggregated data.

Another important issue worth discussing is medical confidentiality in domestic violence cases. Medical personnel are often the first respondent to domestic violence. It is the first place where the victims seek support and it is of utmost importance to ensure that victims do not avoid turning to medical facilities out of fear to be engaged in criminal proceedings. The current regulation on disclosing medical data in domestic violence cases (Decision of the Minister of Healthcare N 3177-Ա 29.10.2019) has a very strict position on this topic: all cases have to be immediately reported to the police, and to the National Security Service in case of foreign citizens. It does not provide for any risk assessment, balancing exercise and does not take into account the will of the victim. Eventually, the victim ends up being deprived of her right to autonomy and making her own choices. Only this time, instead of the perpetrator, such an imposition comes from the state. There may be grounds in some cases to report regardless of the victim's will, such as in cases of child abuse, abuse against a person with mental disability or where there are reasonable grounds to assume a risk of serious abuse in future based on the previous medical record. However, there are cases where, if she does not consent to the reporting, it will be better to provide her with the necessary information, direct her to support centres and let her make an informed decision.

The basic criteria for such a choice are stipulated in the Explanatory Report to the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence:

"*146. Under this article Parties to the Convention must ensure that professionals normally bound by rules of professional secrecy (such as, for example, doctors and psychiatrists) have the possibility to report to competent organisations or authorities if they have reasonable grounds to believe that a serious act of violence covered by the scope of this Convention has been committed and that further serious acts of such violence are to be expected. These are cumulative requirements for reporting and cover, for example, typical cases of domestic violence where the victim has already been subjected to serious acts of violence and further violence is likely to occur. 147. It is important to note that this provision does not impose an obligation for such professionals to report. It only grants these persons the possibility of doing so without any risk of breach of confidence. (…)".*

The convention hence sets out two cumulative conditions for the disclosure of confidential information: (a) violence, or rather, the damage caused by it must be severe, that is, it must have serious consequences, and (b) there must be a risk of continuing or repeating the violence.

Relevant factors for making the assessment whether the domestic violence case should be revealed against the victim's will can be:

- the age and mental health of the victim;
- the medical record on the past violent behaviour against the victim;
- the reasons why the victim does not consent to the reporting;
- risk factors for the victim.

In any event, it is significant that the medical staff informs the victim about their intention of reporting and its consequences.

Also, it is important to remember that the aim of such reporting has to be protection of life and limb of victims rather than the initiation of a criminal investigation. This must be a leading principle when assessing the lawfulness of disclosure of medical data against the victim's will.

Although there is no well-established international consensus over mandatory reporting against adult and competent DV victims' will (there is a consensus on child abuse or abuse against persons with mental disability, etc.), there seems to be a consensus that a balanced approach based on assessing different interests should be applied. The British Medical Association, for instance, suggests:

"*The decision to disclose is based partly on a balancing of several moral imperatives, including the risk and likelihood of harm if no disclosure is made, the risk and likelihood of harm if a third party disclosure is made and the need to maintain the trust of the patient. (…) The BMA's advice is that, where feasible, healthcare professionals should try to envisage the seriousness of the potential harm from the viewpoint of the person likely to suffer it. While a refusal to disclose information by a competent adult can be overridden in order to protect a third party, such as a child or vulnerable adult, who may be in the household, it becomes more difficult where an adult refuses to disclose information in order to protect him or herself. (…) In some circumstances health professionals may seek to disclose information on the basis of the public interest in order to protect competent adults where they have a reasonable belief that the individual will be the victim of serious crime such as violent assault. Here a difficult balance will need to be found between respecting a patient's decision-making rights and an assessment of the likelihood of a serious crime being pre-*

vented by disclosure. The healthcare professional should ensure that the patient will not be put at increased risk following disclosure. Ultimately, the decision as to whether to disclose information about abuse to a third party rests with the healthcare professional responsible for the patient's care."[135]

Victims of sexual violence also face significant problems regarding personal data disclosure during the investigation. According to a recent report from a Sexual Crisis Support Centre, some victims had to recount the details of the crime during ten interrogations and confrontations and during the interrogations, third parties, such as other investigators or participants of other proceedings, were present which had a negative psychological effect on them. Furthermore, questions asked are sometimes of no relevance for the case and unprofessional as the aim is to satisfy personal curiosity.[136]

Furthermore, the official database of judicial acts, which is publicly available, still contains cases on sexual violence, even with minor victims, which includes all the details of these painful experience and personal data. This is completely unacceptable.

3.7. SUPPORTING GENDER EQUALITY IN THE JUSTICE SECTOR

Supporting gender equality in the justice system concerns both ensuring equal gender representation in legal profession and gender competence of legal professionals which should be consistently improved through capacity building activities. While there are sufficient efforts regarding the second component, female representation in the Armenian justice system still needs to be improved. Thus, although women constitute around 28% of judges, they are underrepresented in some regions (sometimes women amount to only 10-17% of judges in that region) and in the courts of higher instances. In particular, women constitute only 17% of judges in the Criminal Court of Appeal, 20% in Administrative Court of Appeal and 37% of Civil Court of Appeal. From 15 judges of the Cassation Court only 4 are women. And from 9 judges of Constitutional Court only one is a woman. [137]

In terms of the prosecutorial system, women amount to approximately 13% of prosecutors. To break this down further, 15% of prosecutors in the Prosecutor General's office are women and women constitute 20% of prosecutors in Yerevan's and regional prosecutorial offices and 10% of military prosecutors.

According to the Investigative Committee, women amount to 10.5% of investigators, from which 37% serve in Yerevan and 63% in regional offices. [138]

Gender quotas are needed not only in the judiciary, but also in other professions contributing to the justice chain, specifically, in prosecution. Apart from that, there is a need for other measures to be taken to promote legal professions among women, including combating gender stereotypes and other obstacles for women to equally apply and perform jobs in the judicial sector, including criminal justice.

[135] BMA Board of Science, "Domestic Abuse", 2007 updated in 2014, page 63.

[136] Sexual Crisis Support Center, Report on **Sexual violence situation analyses in Armenia,** 2019, pages 21-22.

[137] As displayed on the website.

[138] Human Rights Defender's Yearly Report on the State of Human Rights and Fundamental Freedoms Protection in Armenia of 2019, page 636.

Finally, a good practice of supporting women in the justice sector would be to form associations of women judges and other legal professionals in order to network, to address the challenges that they face in their professions due to gender inequality, to advocate and promote regulations and practices aimed at women's rights protection, gender equality, gender-sensitive approaches in the justice system and improvement of women's access to justice.[139]

The purpose and need of gender quotas

Women's empowerment and their full participation on the basis of equality in all spheres of society, including participation in the decision-making process and access to power, are fundamental for the achievement of equality, development and peace (). To this end, many countries adopted gender quotas in order to correct a previous gender imbalance in different areas and at different levels, including in political assemblies, decision-making positions in public, political life and economic life (corporate boards).[140]

This policy derives from the idea that in most countries women represent at least 50% of population (more than 50% in Armenia) and should therefore be equally represented in decision-making process and leadership positions.

Quotas are a form of affirmative action or equal opportunity measure designed to address the slow pace of change in the participation of women and minority groups in areas of society where they are historically under-represented, including employment, education and in political institutions. Quotas generally involve setting a certain number or percentage of places to be occupied by the under-represented groups.[141]

The use of gender quotas in countries where de facto equality has not been reached is justified because:

- Gender quotas proved to be the most effective way to achieve a better gender balance in the respective area;
- Quotas 'fast-track' women's equal representation;
- Quotas for women do not discriminate but rather compensate for barriers that prevent women from achieving equal representation in decision-making;
- Women who are as well qualified as men are sometimes undervalued in a male-dominated political system or culture.[142]

While quotas represent a temporary special measure to 'fast-track' women into leadership roles, long-term strategies are needed to address cultural, social and economic barriers that prevent women from equal representation and participation in the public life.

[139] CoE "Training Manual for Judges and Prosecutors on Ensuring Women's Access to Justice. General Chapter, page 101.

[140] European Institute for Gender Equality, available at: https://eige.europa.eu/thesaurus/terms/1203.

[141] Dr Joy McCann, "Electoral quotas for women: an international overview", 2013, available at: https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1314/ElectoralQuotas#_ftn15

[142] Ibid.

MODULE 4.
ENSURING GENDER EQUALITY IN PARTICULAR AREAS

4.1. ENSURING GENDER EQUALITY IN EMPLOYMENT LAW (INTERNATIONAL STANDARDS, ARMENIAN LAW, GAPS IN PRACTICE)

4.1.1. International Standards and Practices

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. For the most part, however, the labour codes of Council of Europe members states 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".[143]

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.[144]

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 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,

[143] World Economic Forum. 2016. The Global Gender Gap Report 2016. Geneva. p. 30.

[144] Ibid.

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."[145]

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.[146]

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'".[147]

[145] 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.

[146] 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.

[147] 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 **European Social Charter** prohibits discrimination on the grounds of sex in the context of employment and occupation. Likewise, the 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 Armenia is not an EU member, 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.'[148]

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".[149]

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 **Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence**, 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 relating to Employment Based Discrimination

There is limited national jurisprudence on employment-based discrimination claims in Armenia, 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

[148] See paragraph 178 (c)

[149] 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.

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 the ombudsperson's office, 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),[150] and the first case to claim a violation of this law was decided in 2016 (claiming unfair dismissal due to pregnancy).[151]

International Case-law examples: *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 pro- visions 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 La- bour 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."[152] 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.[153] 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 their educational and career prospects."[154] 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 2019, the European Committee of Social Rights (ECSR) adopted the 15 decisions on state compliance with the right to equal pay, as well as the right to equal opportunities in the workplace, following complaints

[150] The Law on Equal Opportunities for Women and Men of 2012.

[151] 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.

[152] CEDAW Committee, *Svetlana Medvedeva v. Russian Federation*, Communication No. 60/2013, decision of 25 February 2016, para. 3.3.

[153] Ibid. para 11.7

[154] Ibid. para. 11.3

which were lodged within the framework of the collective complaints procedure by the international NGO University Women Europe (UWE). The decisions concern the 15 States which have accepted the complaints procedure (Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Finland, France, Greece, Ireland, Italy, the Netherlands, Norway, Portugal, Slovenia and Sweden). The decisions were adopted by the ECSR on 5 and 6 December 2019 and became public on 29 June 2020.

The decisions identify clear and strong standards in the field of equal pay and, more precisely, they require that the right to equal pay has to be guaranteed in law (UWE Decisions Factsheet). The ECSR has identified the following obligations for States:

- To recognise the right to equal pay for equal work or work of equal value in their legislation;
- To ensure access to effective remedies for victims of pay discrimination;
- To ensure and guarantee pay transparency and enable pay comparisons;
- To maintain effective equality bodies and relevant institutions in order to ensure equal pay in practice.

Moreover, the right to equal pay implies the obligation to adopt measures to promote it. This obligation has two elements: on the one hand, collecting reliable and standardised data to measure and analyse the gender pay gap and, on the other hand, designing effective policies and measures aimed at reducing the gender pay gap on the basis of an analysis of the data collected. The States are also under an obligation to show measurable progress in reducing the gender pay gap.

The ECSR acknowledges that the gender pay gap is no longer solely or even primarily a result of discrimination as such. The gap arises mainly from differences in the so-called "average characteristics" of women and men in the labour market. These differences result from many factors, such as horizontal segregation, where there is the concentration of one sex in certain economic activities (sectoral gender segregation) or the concentration of one sex in certain occupations (occupational gender segregation), as well as vertical segregation. The decisions highlight the positive obligations of States to tackle these phenomena in the labour market, including by promoting the advancement of women in decision-making positions within private companies.

14 out of the 15 States were found to be in violation of one or more of the above-mentioned aspects of the obligation to guarantee the right to equal pay and the right to equal opportunities in the workplace. However, the ECSR also noted various positive developments. Measures taken by some States in recent years have led to some progress in reducing the gender pay gap, but the progress is slow. The ECSR's decisions clearly demonstrate that problems and practices, such as segregation in the labour market, lack of pay transparency, secrecy regarding pay levels, obstacles to access effective remedies and retaliatory dismissals continue to exist and prevent full realisation of the equal pay principle.

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."[155] 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."[156]

[155] CEDAW Committee, *Anna Belousova v. Kazakhstan*, Communication No. 45/2012, decision of 13 July 2015, para. 10.8

[156] Ibid.

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."[157]

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.'[158]

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 EU Council Recommendation on the promotion of positive action for women, effectively obligates EU member states to address gender stereotyping.[159]

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."[160]

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. [161]

[157] bid. para. 10.13.

[158] Frances Raday. 2012. "Article11,"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.

[159] 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".

[160] *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.

[161] CEDAW Committee, *R.K.B. v. Turkey*, Communication No. 28/2010, decision of 13 April 2012, para. 8.7.

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.[162] 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.[163]

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 over others.[164] 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. [165]

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 workplace. However, sexual harassment demeans a woman's contributions in the workplace, 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.[166]

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

[166] Խախտումների մասին հաղորդումներ տալիս ժամանակային տարրը գնահատելիս «համատեքստ-զգայական պատնեշ» չափանիշը սահմանված է Ֆիլիպինյան Աելոուս Ավտոմոբիլային Միավորված Կորպորացիան ընդդեմ Աշխատանքային հարաբերությունների ազգային հանձնաժողովի և Ռոսալինդա Կորտեսի, Գ, Ռ [Philippine Aeolus Automotive United Corporation v. National Labour Relations Commission and Rosalinda Cortez, G,R] գործում, թիվ 124617, 2000 թվականի ապրիլի 28 (Ֆիլիպիններ), որը մեջբերված է «ՄԱԿ-Կանայք» կառույցում և Իրավագետների միջազգային հանձնաժողովում: 2016 թվական, Գենդերային կարծրատիպերն օրենքներում և դատարանի որոշումներում՝ Հարավարևելյան Ասիայում. Հղում արդարադատություն իրականացնողների համար, էջ 93:

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.

THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Article 14 of the Convention enshrines the protection against discrimination in the enjoyment of the rights set forth in the Convention. According to the Court's case-law, the principle of non-discrimination is of a "fundamental" nature and underlies the Convention together with the rule of law, and the values of tolerance and social peace (*S.A.S. v. France* [GC], 2014, § 149; *Strain and Others v. Romania*, 2005, § 59). Furthermore, this protection is completed by Article 1 of Protocol No. 12 to the Convention which prohibits discrimination more generally, in the enjoyment of any right set forth by law.

When it comes to discrimination on grounds of sex, the Court has repeatedly stated that the advancement of gender equality is today a major goal in the member States of the Council of Europe (*Konstantin Markin v. Russia* [GC], 2012, § 127) and that, in principle, "very weighty reasons" had to be put forward before such a difference in treatment could be regarded compatible with the Convention (*Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 1985, § 78; *Burghartz v. Switzerland*, 1994, § 27; *Schuler-Zgraggen v. Switzerland*, 1993, § 67; *Konstantin Markin v. Russia* [GC], 2012, § 127; *J.D. and A. v. the United Kingdom*, 2019, § 89).

The Court has held that references to traditions, general assumptions or prevailing social attitudes in a particular country were insufficient justification for a difference in treatment on grounds of sex (*Konstantin Markin v. Russia* [GC], 2012, § 127). For example, States were prevented from imposing traditions that derive from the man's primordial role and the woman's secondary role in the family (*Ünal Tekeli v. Turkey*, 2004, § 63; *Konstantin Markin v. Russia* [GC], 2012, § 127). The reference to the traditional distribution of gender roles in society could not justify, for example, the exclusion of men from the entitlement to parental leave. 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, ethnic origin, colour or sexual orientation (*Konstantin Markin v. Russia* [GC], 2012, § 143).

The Court has found that differential treatment on the grounds of sex violated Article 14 in different areas, such as:

- equality in marriage (*Ünal Tekeli v. Turkey*, 2004; *Burghartz v. Switzerland*, 1994);
- access to employment (*Emel Boyraz v. Turkey*, 2014);
- parental leave and allowances (*Konstantin Markin v. Russia* [GC], 2012);
- survivor's pensions (*Willis v. the United Kingdom*, 2002);

- civic obligations (*Zarb Adami v. Malta*, 2006; *Karlheinz Schmidt v. Germany*, 1994);
- family reunification (*Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 1985);
- children's surnames (*Cusan and Fazzo v. Italy*, 2014); or
- domestic violence (*Opuz v. Turkey*, 2009; *Volodina v. Russia*, 2019).

Generally speaking, in the context of Article 14 in conjunction with Article 1 of Protocol No. 1, the Court applied the "manifestly without reasonable foundation" test only to circumstances where an alleged difference in treatment resulted from a transitional measure designed to correct a historic inequality (*Stec and Others v. the United Kingdom* [GC], 2006, §§ 61-66; *Runkee and White v. the United Kingdom*, 2007, §§ 40-41; *British Gurkha Welfare Society and Others v. the United Kingdom*, 2016, § 81). The Court has, for instance, recognised that a difference in treatment between men and women in the State pension scheme was acceptable as it was a form of positive measures aimed at correcting factual inequalities between the two genders (*Stec and Others v. the United Kingdom* [GC], 2006, § 61; *Andrle v. the Czech Republic*, 2011, § 60).

In *Napotnik v. Romania*, 2020, the Court for the first time examined a case of alleged discrimination on the basis of pregnancy. It considered that, since only women can be treated differently on grounds of pregnancy, such a difference in treatment amounted to direct discrimination on grounds of sex if it was not justified (§ 77). It further found that the early termination of the applicant's diplomatic posting abroad due to her pregnancy had been necessary for ensuring and maintaining the functional capacity of the diplomatic mission, and ultimately the protection of the rights of others. The domestic authorities had provided relevant and sufficient reasons to justify that measure and the applicant had thus not been discriminated against.

4.1.2. Armenian Law and Practice

Discrimination against women as regards employment has many layers and is oftentimes hidden under legally accurate formulations. This is when the in-depth understanding of true equality, the knowledge of different forms of discrimination should contribute to the effective protection of women who are discriminated against based on their sex, age and other characteristics.

Under the Labour Code discrimination is forbidden in numerous articles. Relatively recently, in 2019, a new provision (Article 3.1) was introduced to the code stating that discrimination is direct or indirect differentiation, exclusion or restriction, the purpose or result of which is the manifestation of less favourable treatment in the event of the origin (or) change (or) termination of the collective and (or) individual employment relationship or the recognition of any right under labour law on an equal basis with others and (or) the prohibition or denial of implementation, on the grounds of sex, race, skin colour, ethnic or social origin, genetic characteristics, language, religion, worldview, political or other views, ethnicity, property status, birth, disability, age or other personal or social circumstances, unless such differentiation, exclusion or restriction is objectively justified for the lawful purpose pursued; the

measures taken to achieve that purpose are proportionate and necessary. In employment announcements (competitions) and during the employment relationship, it is prohibited to establish any conditions other than practical features, professional training and qualification, which can be grounds for discrimination, unless it flows from the requirements inherent in the job. Also, para. 3 of Article 180 underlines that "In case of the application of the qualification system of work one and the same criteria shall be applied for both men and women and this system shall be developed in a way, which will exclude any gender discrimination".

The principle of non-discrimination, however, has not been fully implemented in practice. Practically speaking, there is de facto vertical (as regards non-equal opportunities for promotion and occupying high positions) and horizontal (as regards certain professions and spheres) discrimination against women.[167]

The statistics shows[168] consistent inequality between men and women in employment relations. The table below demonstrates the difference between labour force participation and inactivity rates of men and women.

According to the National Statistics Commission, labour force participation rate is much higher among men than women. 71.2% of the male and 48.2% of the female population aged 15 to 74 are employed or seeking job. In addition, women hold on 27% of the managerial positions (legislators, senior officials, managers) whereas men hold 73% of these positions. The gender gap in managerial positions is 46 percentage points. This means men hold managerial positions 2.7 times more often than women. Finally, in 2019 the women's earnings amounted to 65.3% of men's earnings, i.e. the gender pay gap is amounted to 34.7%.

Apart from this, the National Statistics Committee surveyed the reasons for not working.

[167] Human Rights Defender's Yearly Report on the State of Human Rights and Fundamental Freedoms Protection in Armenia of 2019, page 632.

[168] See the Statistical Booklet on "Women and Men in Armenia" 2020, prepared by the National Statistics Committee of RoA available at: https://armstat.am/file/article/gender_2020.pdf.

[169] The inactivity rate is the proportion of the population that is not in the labour force. When added together, the inactivity rate and the labour force participation rate will sum to 100 per cent.

[17] Labour force refers to the sum of all persons of working age who are employed and those who are unemployed. The labour force participation rate expresses the labour force as a percentage of the working-age population.

99% of those who mentioned family circumstances (engagement in family responsibilities) as the reason not to work are women, whilst only 1% are men.[171]

Discrimination in Armenia starts from the selection of professions where there are widespread stereotypes regarding 'proper' and 'improper' professions for women. These stereotypes are later reflected in the job announcements. According to a study in the scope of which 2711 announcements were examined, 320 of them contained a requirement on the applicant's sex, 45 of them targeted male applicants and 275 required female candidates. Thus, for female applicants, jobs like secretary (69), shop assistant (53) and phone operator (40) were common. Apart from those, some jobs of administrator and manager were offered to females. It is also worth mentioning that apart from sex requirement, age requirement (usually under 30 or 25) and sometimes other characteristics like good-looking, active, friendly and others are mentioned in the announcements for female candidates. To the contrary, jobs offered to male applicants included programmer, accountant, deputy director, treasurer and driver. At first sight, it might seem that these announcements are equally discriminatory for both sexes. However, it is deeper, with multiple layers discrimination in case of women since the jobs offered to them do not require high qualification, do not suppose career advancement and are low paid in contrast with the jobs offered to men. Apart from that, in the announcements targeting women there are other features, like the requirements on appearance, that are never the case in those targeting men. This is another demonstration of deeply rooted gender stereotypes. Such a practice derives from a widespread societal perception that occupations that demand high level of dependency, passivity and nurturance are extremely feminine.[172]

In labour relations discrimination against women is often conditioned by pregnancy. Armenian legislation provides pregnant women with a number of privileges and consequently, with a number of obligations for the employer which the latter would like to avoid. There have been cases when during the interview the applicants were directly asked whether they had small children or were planning to give birth. Sometimes they had to promise not to have children in several subsequent years.

In one of the identified cases of discrimination based on pregnancy a company raised wages of all employees besides women who returned from pregnancy and maternity leave. The justification was that they raised the wages of those staff members who had been working over the last three years and contributed to the company's prosperity.[173] Women who return from maternity leave most of all are not provided with special training to catch up with the latest developments which limits their career perspectives.

It is noteworthy, however, that these problems do not end up in courts in Armenia, there is no litigation and no case-law on gender discrimination neither in criminal, nor in civil jurisprudence. On the one hand, it is due to the absence of anti-discrimination legislation, and on the other a lack of awareness among lawyers and judges about legal opportunities to challenge discrimination in the court.

[171] See the Statistical Booklet on "Women and Men in Armenia" 2020, prepared by the National Statistics Committee of RoA available at: https://armstat.am/file/article/gender_2020.pdf.

[172] G. Shahnazaryan, Z. Aznauryan, "PERCEPTION OF GENDER-BASED DIFFERENCES IN THE ARMENIAN LABOR MARKET", 2015, in the collection of materials of the Conference on "Գենդերային անհավասարությունը աշխատաշուկայում. հիմնախնդիրները եւ լուծումները լոկալ եւ գլոբալ համատեքստում", Yerevan State University, 2015, page 80.

[173] From the interview with a lawyer, available at: https://infocom.am/Article/30238

Another reflection of gender discrimination in labour relations is the list of jobs and professions dangerous for women, minors, and people with limited capabilities for work, contained in RA Government's decision N 2308-N of December 29 2005.[174] This kind of list is a leftover from Soviet heritage and as recommended by CEDAW should be abolished.

The next important issue worth analysing is sexual harassment at work. This topic has traditionally been a taboo. Victims are reluctant to reveal their experiences due to the fear of losing their jobs as well as of public opinion or stigmatisation. In addition, harassment almost never has evidence which contributes to its latency.

Recent studies have, however, revealed different forms of sexual harassment against women on the labour market of Armenia - from harassments by employers, managers and colleagues to abuses by customers and clients. This included behaviour such as:[175]

- Too much/unwanted attention shown by men;
- Verbal conduct including comments, jokes and anecdotes with sexual content;
- Performance of sexual acts;
- Unwelcomed Sexual advances and demands of sexual favours.[176]

It is concerning therefore that the state has failed to address and regulate the practices of sexual harassment on legislative level which makes it almost impossible for the victims to seek justice in court.

Conclusions and Recommendations:

- Indirect discrimination in employment relations has become much more frequent than direct discrimination and needs to be addressed with special regulations on burden of proof and special types of evidence, including statistical data and expert opinion;
- As a judge, be active and take initiative in requiring relevant evidence in discrimination cases;
- Due to lack of awareness of the matter, gaps in legislation and gender bias in the justice system, women avoid bringing cases to court which results in dangerous inaction multiplying discriminatory practices. Therefore, it is important to grant a *locus standi* to NGOs and other dedicated groups which raise the issues of discrimination in the workplace (and major discrimination patterns in general) in the courts in the interest of vulnerable victims and society at large. Although practices such as actio popularis might not be directly allowed under current legislation (except for environ-

[174] Available at https://www.refworld.org/publisher,CEDAW,,ARM,,,0.html, page 8.

[175] N. Melkonyan, Y. Melkumyan, "SEXUAL HARASSMENT OF WOMEN AS A MAIN FACTOR IMPENDING ON WOMEN'S CAREER: THE STUDY OF CURRENT SITUATION IN ARMENIA", available at: http://www.ysu.am/files/Nvard%20Melkonyan%20and%20Yuliana%20Melkumyan-eng.pdf, page 7.

[176] Ibid, page 9.

ment protection cases), the high courts, provided a relevant complaint, may start a legal discussion around it and address the absence of such opportunity as a legislative gap in protection of substantive equality;

- The failure of the state to address, forbid and punish sexual harassment at workplace is a breach of the state obligation to ensure *de facto* gender equality and provide adequate remedies for those who have been discriminated against. Before the draft law on Ensuring Equality is adopted with a specific reference to sexual harassment, it can currently be punished under Article 140 or 143 of Criminal Code depending on the circumstances.

Exercise

A judge candidate, Mr. A.M., challenged the Supreme Judicial Council's decision on not including him in the judge candidates' list in Administrative Court. He complained that although he received more votes from the council members, in the list of candidates he was replaced by a female candidate based on the gender quota stipulated in Article 109 para. 5. He is from a religious minority group and has been himself subjected to discrimination on several occasions and, argues that he has never received special treatment from the state.

The Administrative court suspends the case and applies to the Constitutional Court to rule on the constitutional nature of gender equality.

How would you rule in the capacity of Constitutional Court judge?

For the trainer: Facilitate the discussion around the following topics:

- *What are the advantages of affirmative action (positive discrimination)?*
- *What can be the risks of affirmative action (positive discrimination)?*
- *How, in your opinion, should the affirmative action be applied in order to ensure proportionality?*

During the discussion the trainer can introduce the European Court of Justice controversial judgment on C-450/93, Kalanke v. Freie Hansestadt Bremen[177], 1995 and invite the participants to comment on the judgment and compare it with the Armenian legislation. The trainer could also use the table on gender quotas introduced in Chapter 3 of this Handbook.

[177] In the mentioned judgment, European Court of Justice ruled that a positive action law, which provided for the promotion of equally qualified women when under-represented in an area of employment, violated the laws prohibiting gender discrimination in the European Union. In particular, the court indicated that national rules guaranteeing women "absolute and unconditional priority" go beyond "promoting equal opportunities" and overstep the boundaries of Article 2(4) of Directive 76/207. The court interpreted Article 2(4) strictly, stating that a Member cannot substitute the result of equality for equality of opportunity.

4.2. ENSURING GENDER EQUALITY IN FAMILY LAW (INTERNATIONAL STANDARDS, ARMENIAN LAW, GAPS IN PRACTICE)

4.2.1. International Standards and Practices

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.[178] 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 most countries, including Armenia, do not, on the whole, 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 and 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."[179]

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).

[178] 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*.

[179] Council of Europe Gender Equality Commission. 2013. *Feasibility Study: Equal Access to Justice for Women*. p. 17.

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 Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence 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 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.[180] 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.

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 common 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. Divorce is often the primary remedy that women seek to escape abusive relationships, usually after many years of experiencing abuse. Note that the FRA study included

[180] 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.

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".[181]

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 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, the perpetrator of violence has power and control over the victim, 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.
- Practitioners should be aware that witnessing domestic violence is traumatising to children and means that they should also be regarding as victims of the violence as a result. The Explanatory Report to the Council of Europe Convention on Preventing and Combating Violence against Women and Girls[182] noted that 'domestic violence against children is widespread and studies have revealed the link between domestic violence against women and child physical abuse, as well as the trauma that witnessing violence in the home causes in children. Where children are concerned, it is acknowledged that they do not need to be directly

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

[182] See paragraphs 4 and 27.

affected by the violence to be considered victims but that witnessing domestic violence is also traumatising and therefore sufficient to victimise them.'

Case 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.

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."[183] 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."[184]

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. 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.[185]

[183] CEDAW Committee. 2014. *González Carreño* v. Spain, Communication No. 47/2012, decision of 15 August 2014. para. 9.4.

[184] Ibid., para. 9.7.

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.[186] Such prioritisation also violates the best interest of the child.

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.[187]

> **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.[188] 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.[189]

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

Exercise

Discussion points:

- Using the checklist[1], identify and discuss the harms caused by the stereotypes and myths set out in the table below[1].
- 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?

[185] *See Ángela González Carreño v Spain*, CEDAW CommunicationNo47/2012,AmicusCuriaeBriefpreparedbySimoneCusack,2February 2014. para.35

[186] *Isatou Jallow v. Bulgaria*, Communication No. 32/2011, UN Doc. CEDAW/C/52/D/32/2011 (2012), para. 8.6.

[187] *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.

[188] ECtHR. E.B v France. Application No. 43546/02, decision of 22 January 2008, para. 96

[189] Rebecca J. Cook and Simone Cusack. 2010. *Gender Stereotyping: Transnational Legal Perspectives.* Philadelphia: University of Pennsylvania Press. p. 31.

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. Family structures, gendered labour division within the family and family laws affect women's economic well-being. 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. 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. 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. 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. 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.

Myths and Stereotypes	Inference/consequence	Good practice
Customary/religious unregistered marriages: Only when a marriage is registered should the property rights of the spouses be protected. 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 penalised 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. Lesbian women or gay men cannot be good parents. Parents with disabilities are not able to look after their children as well as able bodied parents.	Lesbians and gay men should not be allowed to become parents or to adopt children due to their "deviant" behaviour. 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. Parents with disabilities are not competent parents,	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. Disabilities are not determinative of a parents ability to look after a child's best interests. An objective assessment of the impact of a parents disability upon the welfare of the child should be made along with any measures which can assist parents in this regard. Courts should not discriminate against parents with disabilities.

4.2.2. Armenian Law and Practice

The Armenian Family Code provides for equal rights and obligations for both parents (Article 49). Part 1 of Article 54 of the Family Code of the Republic of Armenia stipulates that a parent living separately from a child has the right to communicate with the child, to participate in her upbringing, to solve the issues of the child's education. The parent with whom the child lives should not interfere with the other parent contact with the child, if such contact does not harm the child's physical and mental health, her moral development. The law also provides for the child's best interests as a leading principle. However, these regulations sometimes find surprising interpretation in judicial practice.

In particular, in some cases on child custody the fact of domestic violence, if it was not committed directly against the child, is not seen as a ground for limitation of the father's visiting rights. This often happens in the context of divorce proceedings accompanied by protection order. The court grants the protection order for the direct victim of domestic violence - the mother - but refuses to grant it for the children. As a result, the perpetrator gets to know the victim's address, the chain of violence continues and sometimes the perpetrator even kidnaps the child during the granted meeting. The same applies to the provisional timetable of meetings pending the final decision on custody. The courts usually provide for equal rights as regards spending time with the child.

An interesting case[190] on setting the provisional timetable of meetings is interesting to discuss.

Case example

In the context of divorce proceedings, M.A., a father of a girl, who had been subjected to emergency intervention order by the police for domestic violence, applied to the court demanding visiting rights with the child and ban on the girl's transfer to another country by her mother, S.A (who intended to take the child abroad). The court granted the motion for provisional measure (հայցի ապահովման միջոց), banned the girl's transfer and set a provisional timetable of four days (five hours each) for the meetings between the father and daughter in spite M.A.'s violent record and drug issues (he was registered at a drug treatment facility). At the meeting, M.A. kidnapped the child. S.A., the mother of the girl, applied for changing the provisional measure and introduced two emergency intervention orders that police had imposed on M.A. forbidding him to approach her and their daughter. Both orders had been issued before the court's decision on provisional timetable. The court mentioned that this information (regarding the emergency intervention orders) changed its perspective and that it was not familiar with them before. Based on these orders, the court suspended the initial decision and prescribed a forensic psychological examination of M.A. after which it proceeded to the final decision on the matter. The court ordered that M.A. returns the kidnapped child to her mother and that S.A. does not transfer the daughter to another country without his permission. The court ordered and received additional examination results from the guardianship body. Nevertheless, the court did not change the initial timetable of meetings and did not limit the father's visiting rights. The child is still with M.A.

[190] Case no. ԱՐԱԴ/2075/02/20.

Exercise

Discussion points:

Trainer facilitates the discussion in the light of Article 203 §2 of Civil Procedure Code of RoA, and the ECtHR judgment on Bevacqua and S v. Bulgaria case.

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 well-being of the child and that insufficient measures had been taken in response to the domestic violence perpetrated by the former husband.

Another problem identified with regards to child custody concerns the way courts evaluate the financial status and well-being of both parents. Sometimes, this factor is given too much weight which puts women in disproportionately disadvantageous position since in a number of cases they are put in a position where it is hard for them to gain the same level of material welfare and financial independence as men. The reasons for that are: 1) discrimination on the labour market, 2) social norms that make women quit their jobs and take care of the children and family or take long maternity leaves which makes their career perspectives and opportunities rather limited, 3) customs based on which the young couples live with the man's parents meaning that the woman does not have any property rights over the house and is often left with no real estate after divorce, 4) many couples do not register their marriage which puts the woman in a vulnerable position as regards the rights to their common property, including the house.

Excerpt from a judicial act

"(…) the court considers the claim of the counter-plaintiff to be well-founded, with the following reasoning: the child is already almost three and a half years old, that is to say, the child is no longer breastfed, performs many actions independently.

(…)

Examining the photos presented in the case, the court can see the housing conditions of the parties, in particular, the private house located at (…) Yerevan, is bigger, has a large yard where the child can play, is further away from the city

centre. The area is less populated, there are fewer cars, so the air is relatively less polluted, while A. S.'s [the child's mother] apartment is in the centre of the city, where the air is more polluted, it is much smaller, the windows of the apartment are quite low, which means that the child can open the windows, climb on the windowsill, fall, therefore, V. A.'s [the child's father] housing conditions are more prosperous, safer.

The court also took into account that A. S. lives separately and V. A. lives with his parents and sister, which means that the child will be in the centre of attention not only of the father but also of the latter's parents, sister and, if necessary, housekeepers. In this case, it is very important, because both A. S. and V. A. work. A.S. said that she does the work at home, when the child is asleep, but the child is still a child, it is preferable to be in the centre of attention of other people for the sake of the child's safety. While A. S.'s parents live in the same building, due to living in separate apartments, they cannot keep the child in the centre of attention as much as V. A.'s parents."

Exercise

Think about examples of gender discrimination in family and property law.

Note to the Facilitator:
Below is a possible example that could be used during facilitation of the discussion.

An important area regarding women's property rights is their share in the joint owned marital property. In particular, it has been a centuries-long tradition for the newly married couple to live with the husband's family in their house. Eventually the house is inherited by the husband. The wife is the one who cleans and takes care of the house every day, decorates it, etc. However, after the divorce she cannot have any claims about the house since the inherited property does not constitute a part of joint owned marital property (Article 201 para. 2 of Civil Code). This apparently neutral provision disproportionately affects women since they are the ones who have to live in the house of their parents' in law for decades, take care about it and eventually not have any share of that house.

Discuss the possibility of the application of para. 4 of the same article if the wife has not made significant monetary contribution to a renovation.

Trainer may ask if any of the judges would apply to the Constitutional Court regarding such a case.

This exercise can be done in the form of a moot court depending on the audience.

4.3. ENSURING GENDER EQUALITY IN THE AREA OF VIOLENCE AGAINST WOMEN AND IN CRIMINAL JUSTICE

4.3.1. International Standards and Practices

The Declaration on the Elimination of Violence Against Women defines "violence against women" (VAW) as "any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life."

In 1992, the CEDAW Committee in its General Recommendation No. 19, asserted that **violence against women is a form of discrimination**, directed towards a woman because she is a woman or that affects women disproportionately. This violence seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men. In December 1993, the Declaration on the Elimination of Violence Against Women, recognised that **violence against women violates women's rights and fundamental freedoms** and called on states and the international community to work toward the eradication of violence against women. The same year, the Vienna Declaration and Programme of Action recognised that **the elimination of violence against women in public and private life is a human rights obligation**.

The then Commission on Human Rights condemned gender-based violence for the first time in 1994 and the same year appointed a Special Rapporteur on violence against women, its causes and consequences. The 1995 UN World Conference on Women held in Beijing reaffirmed the conclusions of the Vienna Conference, listing violence against women as one of the critical areas of concern. In 2017, the CEDAW Committee, marking 25th anniversary of its General Recommendation No. 19, further elaborated international standards on gender-based violence against women in its General Recommendation No. 35. In General Recommendation No. 35 (GR 35), the CEDAW Committee recognised that **the prohibition of gender-based violence against women has evolved into a principle of customary international law,** binding all States.

The Declaration on the Elimination of Violence Against Women and the CEDAW General Recommendation No. 35 provide for the concept of due diligence obligation of States. Under this obligation, States have a duty to take positive action to prevent and protect women from violence, punish perpetrators of violent acts and compensate victims of violence. The principle of due diligence is crucial as it provides the missing link between human rights obligations and acts of private persons.

Moreover, intersectionality is a theme throughout GR 35 that reinforces inclusivity by recognising 'gender-based violence may affect some women to different degrees or in different ways' and, accordingly, different responses must be developed. The catalogue of affecting factors has also been considerably extended: 'ethnicity/race, indigenous or minority status, colour, socioeconomic status and/or caste, language, religion or belief, political opinion, na-

tional origin, marital and/or maternal status, age, urban/rural location, health status, disability, property ownership, being lesbian, bisexual, transgender or intersex, illiteracy, trafficking of women, armed conflict, seeking asylum, being a refugee, internal displacement, statelessness, migration, heading households, widowhood, living with HIV/AIDS, deprivation of liberty, being in prostitution, geographical remoteness and stigmatisation of women fighting for their rights, including human rights defenders.' (para 12).

Key Cases on VAW

In ***A.T v. Hungary,*** 2005 Communication No. 2/2003, UN Doc. CEDAW/C/32/D/2/2003 (2005)

The Committee found Hungary in violation of its positive obligations to protect A.T. against domestic violence. It affirmed that:

- gender-based violence against women is a form of sex discrimination that states parties are required to eliminate.
- states parties are accountable for the conduct of private actors 'if they fail to act with due diligence to prevent violations of rights or to investigate and punish...' violations by such actors, including domestic violence.

In ***Fatma Yildrim v. Austria, 2007*** / ***Goekce v. Austria, 2007*** Communication No. 6/2005, UN Doc. CEDAW/C/39/D/6/2005 (2007) Communication No. 5/2005, UN Doc. CEDAW/C/39/D/5/2005 (2007) both applicants were murdered by their husbands after suffering prolonged domestic violence, including threats to kill. In both cases, the state took some action against the perpetrators, but it was not sufficient to prevent them murdering the applicants. In their cases, the CEDAW Committee expanded on the content of the standard of positive action required by the state's duty of due diligence for the actions of non-state actors.

The CEDAW Committee noted that Austria had "established a comprehensive model to address domestic violence that includes legislation, criminal and civil-law remedies, awareness raising, education and training, shelters, counselling for victims of violence and work with perpetrators." These formal measures, while necessary, were nonetheless found to be insufficient by themselves when the political will they expressed, was not supported by state actors in adherence to Austria's due diligence obligations.

In ***V.K. v. Bulgaria*** Communication No. 20/2008, UN Doc. CEDAW/C/49/D/20/2008 (2011) the applicant had unsuccessfully sought a permanent protection order to ensure her safety from harm by her abusive husband. The CEDAW Committee found that the state had required too high a level of violence to be proved before issuing an order. The Committee decided that when assessing whether a protection order should be granted, national courts should take account of all forms of gender-based violence affecting an applicant, not just life-threatening violence. Courts should also be aware that many forms of violence, particularly domestic violence, are courses of conduct which take place over time. Failure to take this into account violates women's rights not to be subjected to gender stereotyping.

In the case of ***Karen Tayag Vertido v the Philippines,*** Communication No. 34/2011, UN Doc. CEDAW/C/57/D/34/2011 (2014) the applicant was raped in a hotel room by a work contact, who she thought had a gun. He was acquitted by a judge who considered that Ver-

tido had failed to take reasonable opportunities to escape, and therefore must have consented to sexual contact.

In finding violations of articles 2(f) and 5(a), the Committee affirmed that CEDAW requires states parties to "take appropriate measures to modify or abolish not only existing laws and regulations, but also customs and practices that constitute discrimination against women". It also stressed that: …stereotyping affects women's right to a fair and just trial and that the judiciary must take caution not to create inflexible standards of what women or girls should be or . . . have done when confronted with a situation of rape based merely on preconceived notions of what defines a rape victim…'

The CEDAW Committee found that the trial judge's decision contained "several references to stereotypes about male and female sexuality being more supportive for the credibility of the alleged perpetrator than for the creditability of the victim" and many of the judge's comments focused on the personality and behaviour of the applicant, even though these issues are not part of the definition of the crime of rape.

In ***Isatou Jallow v. Bulgaria*** Communication No. 32/2011, UN Doc. CEDAW/C/52/D/32/2011 (2012) Jallow, an illiterate woman, moved from the Gambia to Bulgaria with her Bulgarian husband and was subsequently subjected to domestic abuse. Her daughter was also subjected to abuse. The CEDAW Committee also noted that Bulgaria ignored Jallow's vulnerable position and disregarded evidence concerning the disproportionate impact of domestic violence on women. The CEDAW Committee urged Bulgaria to compensate Isatou Jallow and her child M.A.P. for violating their rights under CEDAW. It also recommended that the state party adopt measures to ensure that women victims / survivors of domestic violence, including migrant women, have effective access to justice and other services (e.g., translation services). It also called on the state party to provide regular training on CEDAW and the Optional Protocol and to adopt legislative and other measures to ensure that domestic violence is taken into account in the determination of custody and visitation rights of children.

In ***R.P.B. v The Philippines***, a case of sexual violence against a disabled woman, who was mute and had a hearing disability. When R.P.B. was 17, she was raped by her neighbour. In the course of the investigation and trial, R.P.B. was not given translator support to enable her to participate in the investigation, and only limited assistance in the trial proceedings. The trial court relied on many rape myths during the trial, "[the court]… also questioned R.P.B.'s credibility because, in its view, she had not responded to the attack in the manner expected (i.e. she had not summoned "every ounce of her strength and courage to thwart any attempt to besmirch her honour and blemish her purity"). The court was particularly critical of R.P.B.'s "failure to even attempt to escape … or at least to shout for help despite opportunities to do so", which in its view, "casts doubt on her credibility and renders her claim of lack of voluntariness and consent difficult to believe". The CEDAW Committee affirmed that stereotyping affects women's right to a fair trial and urged the state party to ensure that all criminal proceedings involving rape and other sexual offences are conducted free from prejudices or stereotypical notions regarding the victim's gender, age and disability. The Committee also called on the Philippines to institute effective training of the judiciary and legal professionals to eradicate gender bias from court proceedings and decision-making.

Angela González Carreño v. Spain Communication No 47/2012, UN Doc. CEDAW/C/58/D/47/2012 (2014) - in this case, Angela González Carreño had separated from F.R.C., the father of her child Andrea, after being subjected to domestic violence for several

years; often F.R.C. committed acts of violence against Angela González Carreño in the presence of Andrea. Eventually F.R.C. killed Andrea and then committee suicide. The CEDAW Committee recommended that the state party provide Angela González Carreño reparations and investigate whether failures in its structures and practices led to Angela González Carreño and Andrea being denied appropriate protection. Other recommendations included: ensuring domestic violence is taken into account in custody and visitation matters and that the best interests of the child prevail in related decisions; ensuring that its authorities exercise due diligence and respond appropriately to domestic violence; and providing mandatory training for judges and administrative personnel on the legal framework concerning domestic violence and gender stereotyping.

X and Y v. Georgia Communication No. 24/2009, UN Doc. CEDAW/C/61/D/24/2009 (2015)

This case was brought by a mother (X) and daughter (Y) who complained of Georgia's failure to prevent, investigate and punish prolonged physical violence, and sexual and psychological abuse, suffered at the hands of their former husband and father respectively. Despite reporting the incidents of physical and sexual abuse to the authorities on more than five occasions (supported by first-hand evidence from X and Y, among others, and medical reports confirming physical injuries sustained by X at the hands of her husband), the complaints were never investigated and no criminal charges were brought against her husband. Her husband was only ever asked by the police to sign unenforceable written declarations that he would not use further violence against his family.

Without justice from domestic courts, X and Y took their case to the (represented by and) – however their application was found inadmissible. Undeterred, X and Y (and their defenders) filed a complaint with the Committee on the Elimination of All Forms of Discrimination against Women (the "Committee"). In 2013 their case was found despite the previous inadmissible application to another international body. While the application to the European Court was focused on the personal impact of the abuse suffered by the applicants, it never referred to the sex-based discrimination inherent in the authorities' failure to prevent the violence suffered by the applicants; this argument was the essence of the application made before the Committee. Consequently, the Committee acknowledged X and Y's application was factually and legally distinguishable to the one previously submitted to the European Court.

In its first decision against Georgia, the CEDAW Committee recognised the violation by the state of the authors' rights under the Articles relied upon:

- Article 2(b)-(f): Policy measures and obligations in conjunction with Article 1 (definition of discrimination against women) and 5(a) (gender stereotyping and prejudice) (para. 9.2)
- General Recommendation No. 19 on Violence against Women (para. 9.3)

The CEDAW Committee found that the Georgian State had failed to enact criminal law provisions to effectively protect women and girls from physical and sexual abuse within the family, provide equal protection under the law to victims of domestic violence and sexual abuse, and protect them from domestic violence (violations of Articles 1, 2(b)-(f) and 5(a) of the CEDAW Convention). The Committee also cited the state's due diligence obligations (under Articles 1 and 2 of the Convention read in conjunction with the Committee's General Rec-

ommendation No. 19 on violence against women) to prevent, investigate, and punish acts of domestic violence by non-state actors (para. 9.3).

The Council of Europe Convention on preventing and combating violence against women and domestic violence

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

Preventing violence, protecting victims, prosecuting perpetrators and the need for integrated polices at the national level, are the cornerstones of the 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.
- The 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.

THE EUROPEAN COURT OF HUMAN RIGHTS

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:[191]

- ***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) Ebru Dinçer v. Turkey (2019)
- ***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). E.B. v. Romania (2019)
- ***Domestic violence against women:*** Kontrová v. Slovakia (2007); Branko Tomašić and Others v. Croatia (2009); Opuz v. Turkey (2009); A v. Croatia (2010); Haiduovaì 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); Valiulienèl 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); O.C.I. and Others v. Romania (2019); Volodina v. Russia (2019); J.D. and A v. the United Kingdom (2019); Levchuk v. Ukraine (2020); Buturugã v. Romania (2020); Tërshana v. Albania (2020)

[191] See: Press Unit of the European Court of Human Rights. 2021. Factsheet - Violence against Women; and the Factsheet – Domestic Violence, 2021. See also the website of the Council of Europe dedicated to the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence 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).

- ***Violence by private individuals, who are not intimate partners or family members:*** Sandra Janković v. Croatia (2009); Ebcin v. Turkey (2011); Sabalić v. Croatia (2021).
- ***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 admissi- bility), Sow v. Belgium (2016); Bangura v. Belgium (2016, strike-out decision) of crimes in the name of honour: A.A. and Others v. Sweden (2012); R.D. v. France (2016). of social exclusion N. v. Sweden (2010); W.H. v. Sweden (2015, Grand Chamber); R.H. v. Sweden (2015). of 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); S.M. v. Croatia (2020).

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),[192]
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**.[193]

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)

192 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.

193 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.

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).[194] 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).

In *Volodina v. Russia*, 2019, the Court found that the Russian legal framework – which did not define domestic violence, whether as a separate offence or an aggravating element of other offences, and established a minimum threshold of gravity of injuries required for launching public prosecution – fell short of the requirements inherent in the State's positive obligation to establish and apply effectively a system punishing all forms of domestic violence and providing sufficient safeguards for victims. Such an absence of legislation defining domestic violence and dealing with it at a systemic level indicated the authorities' reluctance to acknowledge the seriousness and extent of the problem of domestic violence in Russia and its discriminatory effect on women. By tolerating for many years a climate which was conducive to domestic violence, the Russian authorities had failed to create conditions for substantive gender equality that would enable women to live free from fear of ill-treatment or attacks on their physical integrity and to benefit from the equal protection of the law.

More recently the Court has recognised the impact of cyberbullying. *Buturugã v. Romania* (2020) concerned allegations of domestic violence and of violation of the confidentiality of electronic correspondence by the former husband of the applicant, who complained of shortcomings in the system for protecting victims of this type of violence. The applicant complained in particular of the ineffectiveness of the criminal investigation into the domestic violence which she claimed to have suffered. She also complained that her personal safety had not been adequately secured and criticised the authorities' refusal to consider her complaint concerning her former husband's breach of the confidentiality of her correspondence.

The Court held that there had been a violation of Article 3 and Article 8 of the Convention on account of the State's failure to fulfil its positive obligations under those provisions. It found in particular that the national authorities had not addressed the criminal investigation as raising the specific issue of domestic violence, and that they had thereby failed to provide an appropriate response to the seriousness of the facts complained of by the applicant. The investigation into the acts of violence had been defective, and no consideration had been given to the merits of the complaint regarding violation of the confidentially of correspondence, which was closely linked to the complaint of violence. On that occasion the Court lastly pointed out that cyberbullying was currently recognised as an aspect of violence

[194] 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.

against women and girls, and that it could take on a variety of forms, including cyber breaches of privacy, intrusion into the victim's computer and the capture, sharing and manipulation of data and images, including private data.

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 south-eastern 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 com- plaints 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 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 subject- ed 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 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. 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 Opuz and her mother, but that under the applicable domestic law, criminal prosecution depended on complaints lodged or pursued by the victim. Since 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 of- fences, 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 dis- played 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 d 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. Al- though 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 be- cause 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 circum- stances 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 and became legally binding. The 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 convention constitute a **core element** of ensuring equal access of women to justice. The principle and standards enunciated above also apply in cases that do not concern violence against women and in particular in employment matters and family matters.

4.3.2. Protection of Gender Equality in Armenian Criminal Law, Introduction to the Anendments to the THE Criminal Code and AND Their Interpretation

The new Criminal Code (CC) was adopted by the Parliament in the second hearing on 05.05.2021 and will enter into legal force on 01.07.2022. The old CC currently in force has two relevant, older articles related to gender equality apart from those concerning violence. This chapter presents the relevant articles related to gender equality as well as the new amendments adopted in the new CC.

The Article 143 reads as follows:

> "**Article 143. Breach of persons and citizen's legal equality.**
>
> 1. Direct or indirect breach of the human rights and freedoms of persons and citizens, for reasons of their nationality, race, sex, language, religion, political or other views, social origin, property or other statuses, which damaged their rights and legal interests, is punished with a fine in the amount of 200 to 400 minimal salaries, or with imprisonment for up to 2 years.
> 2. The same action committed by abusing official position, is punished with a fine in the amount of 300 to 500 minimal salaries, or by deprivation of the right to hold certain posts or practice certain activities for up to 3 years, or with imprisonment for up to 3 years".

This article is formulated in rather vague terms that does not facilitate its practical application. For example, while the title stresses equality, the disposition covers human rights and freedoms which can be relevant for practically any field. In addition, there is a mandatory condition of consequences that damage the victim's rights and legal interests as if discrimination does not always violate one's rights and interests. These imperfections of formulation are probably the reason that the article in question was never applied in practice and no criminal case has ever been filed with the court on breaching equality.

It is hence important to take into consideration that despite the shortcomings of the text of the laws, the primary task of the professionals who apply the law is to ensure that it

serves the interests of justice, human rights and the spirit of that law. In this context the article on breaching the equality can be successfully applied with interpretation of equality in the light of Constitution and international human rights treaties that Armenia is a party to (the concept of equality and the types of discrimination were discussed above).

The second article that is worth discussing is gender specific and concerns the protection of labour rights of pregnant women:

> "**Article 156. Ungrounded refusal to hire a pregnant woman or a person with a child under 3 years of age, or ungrounded dismissal of such person**
>
> Ungrounded refusal to hire a pregnant woman based on her pregnancy or a person with a child under 3 years of age, or ungrounded dismissal of such a person, based on that reason, is punishable with a fine in the amount of 200 to 500 minimal salaries, or arrest for up to 1 month.".

This is another article that was barely used to initiate criminal proceedings although there are many cases of violation of pregnant women's labour rights and it is not a private prosecution case thus does not require the victim's consent for filing a criminal case.

Amendments in the new CC adopted on 05.05.2021 and entering into legal force on 1 July 2022

Amendment 1. Currently if the victim reconciles with the perpetrator in a domestic violence case, he can be freed from a criminal liability. The amendment eliminates this discretion and rules that in domestic violence cases the perpetrator cannot avoid criminal liability due to reconciliation with the victim. This is a significant step forward in ensuring victims' access to justice given the widespread practice of reconciliation and repetition of violent episodes afterwards.

Amendment 2. For the first time the law criminalises forced abortions and forced sterilisation probably inspired by the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence. It is an effective tool for combating forced sex-selective abortions.

Amendment 3. The new CC criminalises psychological influence which includes threat to murder, harming one's health, committing a sexual crime, torture, kidnapping, limiting one's freedom and damaging one's property if there is real risk of realisation of the threat, as well as social isolation and periodic humiliation of one's dignity. This is the first time when psychological violence is rather comprehensively criminalised and can be effectively applied for prosecuting psychological violence prescribed in the DV Law.

Amendment 4. The new article on physical influence criminalises hitting and other physical violence that is not covered by other articles on causing harm to health. This covers every kind of physical violence which provides for a wide range of opportunities to ensure adequate legal response against physical violence in domestic violence context without requiring unnecessary and sometimes impossible evidence on whether the violence caused physical pain or the nature of such pain, etc. It is significant that committing this crime against the same victim more than once is established as an aggravating circumstance which is specific for domestic violence cases.

Amendment 5. It is important to analyse the legal development regarding sexual violence, including rape. As it was discussed on several occasions before, the international consensus

with respect of sexual violence is that the consent should be seen as the main element and subject of proof versus resistance. This approach is established in the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence and reiterated in the case law of ECtHR. The improvement in the new CC in this regard is that the law uses the notion of "without consent" although only in one article concerning sexual violence. In particular, in Article 198 on "Violent actions of sexual nature" still uses the old concept, of "against one's will" but also refers to "neglecting (regardless of) one's will" which is part of "without consent" concept and gives rise to the new developments in analysing *mens rea* (see below). Further, in Article 199 on "Forcing actions of sexual nature" by blackmailing, threats to damaging or taking property, using the dependence of the victim or without the "reasonable confidence in her/his consent" the new code introduces the concept of affirmative consent.

Another change in this area is that unlike the old code, which prescribed that only women could be the victims of rape (while men could be victims of other sexual violence crimes but rape), the new code does not differentiate between sexes. Moreover, it does not use the word "rape" but only refers to different types of sexual violence.

Amendment 6. The next valuable amendment is criminalisation of discrimination including on the basis of sex. While this is a long-awaited regulation, the definition of discrimination refers to only differentiated treatment which humiliates one's honour and dignity or violates one's rights and freedoms or provides privileges without an objective ground or reasonable explanation. Such definition of discrimination unnecessarily limits its scope while the classic definition of discrimination stipulated in international documents, including in the case-law of ECtHR and reflected in the draft Law on Ensuring Equality Before the Law provides a more thorough understanding of discrimination: Discrimination is an action, inactivity, regulation, treatment or policy that has been manifested by differentiation, exclusion, limitation of or preference towards a person's rights and freedoms, without a reasonable proportionality between the legitimate aim pursued, its necessity and purpose in a democratic society and the means employed, based on one's sex (…). For proper protection of equality in CC it would be better if it did not offer its own description of discrimination but rather referred to the specialised legislation and ECtHR case-law.

Amendment 7. The new CC contains an article on avoiding paying the alimony which comes to support women who cannot receive alimony for their children due to the deficiencies of the judicial acts' execution system. In particular, nowadays many women complain that the fathers of their children who are ordered by the court to pay alimony for children, avoid paying it through registering their property by the names of their relatives, hiding their income from the judicial acts' enforcement service, etc. As a result, the enforcement service does not find the relevant assets officially belonging to the father and the children are left without alimonies.

Amendment 8. The mitigating *corpus delicti* based on 'immoral behaviour of the victim' currently envisaged under Article 105 is abolished by the new CC. This is a right approach because the society puts forward much higher standards of morality for women and criticises women for deeds that are considered almost normal for men. As a result, this norm has been used to justify violence against some women who were victims of 'honour crimes'.

Amendment 9. The new CC also criminalises forced marriages, forced divorces and forced giving birth to a child through violence, threats, blackmailing, humiliation and other forms of enforcement.

Amendment 10. A ground-breaking achievement of the new CC is that the commission of murder, causing damage to one's health, forced abortion and sterilisation, psychological influence, physical influence and other relevant crimes by a "close relative" is considered as an aggravating circumstance under each of the mentioned *corpus delicti* which significantly increases the severity of the punishment. The term of "close relative" is in conformity with the notion of "family member" under the DV Law. Furthermore, in some articles, for example on sexual violence, committing the crime by a partner or a former partner is considered as an aggravating circumstance.

Despite significant improvements, there are still several gaps in the new CC when it comes to ensuring gender equality. For instance, stalking is not explicitly criminalised, neither is harassment although the version of the draft code adopted in the first hearing did contain a separate article on harassment (with the elements of stalking) but it is removed in the final text.

Recommendations:

- Use Article 143 of CC as an operational tool to combat gender discrimination since it is important that in addition to compensation in civil law, there is also criminal liability for discrimination. It demonstrates the state's and the justice system's will to effectively deal with this issue. The same concerns Article 156. There are numerous cases of discrimination. However, none of those was addressed under these articles despite real legislative opportunities.
- When interpreting the *actus reus* of discrimination, it is crucial to do so taking into consideration the specialised anti-discrimination legislation (when adopted) and Gender Equality Law which provide for a more insightful understanding of discrimination and its forms. After the entry into force of the new CC it is advisable to prosecute not only individuals, but also companies for discrimination. It will contribute to the fight against discriminatory recruitment and promotion practices.
- Despite the fact that stalking is not explicitly criminalised, it is advisable to apply other relevant articles to acts constituting stalking, for example Article 194 on psychological influence, when relevant.

4.2.3. Investigating, Prosecuting and Sentencing for sexual Violence

The investigation and adjudication of sexual violence cases have traditionally been problematic due to both legislative gaps and judicial practice with elements of stereotyping and victim blaming. The statistics on sexual violence cases (notwithstanding the expected high level of latency) is noteworthy: according to the Investigative Committee, during 2015-2016, 288 cases on sexual violence were investigated, out of which 44.3 % in 2015 and 39.5% in 2016 were forwarded to the court.

According to the official criminal statistics introduced on the National Statistics Committee website, during the first ten months of 2020, 78 crimes against sexual integrity and sexual freedom were registered, compared to 87 cases in the same period of 2019, 80 in 2018 and 81 in 2017. It should be emphasised that the latency in sexual violence cases is traditionally very high (meaning a significant percentage of those crimes is not registered by the authorities) and the provided numbers do not reflect the reality. It is also worth mentioning that despite very high level of granting detention as a preventive measure in Armenia, in cases on sexual abuse the most widespread preventive measure is the written pledge not to leave the area of residence instead of detention.[195]

As regards the legislation, the issue of the absence of the victim's consent was discussed above. It is important to understand why 'without one's consent' notion is different from 'against one's will' and how it should be interpreted in the context of two different articles discussed above. The current wording of Article 138 of the old CC as well as "against one's will" notion in Article 198 of the new CC presupposes that the victim must take measures to make it clear to the offender that the sexual intercourse is against her will. In other words, the burden to ensure that the potential perpetrator realises her unwillingness to have the sexual act is on the victim. Moreover, traditionally in Armenian judicial practice the subject of proof in sexual violence cases has been the existence of violence or its threat, as well as the existence of resistance by the victim.

However, the victim may not be able to express her unwillingness for various reasons, such as shame, fear, dependence on the perpetrator, the 'fight, flight, freeze, fawn' syndrome,[196]etc. Given the psychological specifics of sexual violence, according to international human rights instruments, including case-law of ECtHR and Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (see above), the subject of proof has to be the freely given consent. As it is elaborated in the Explanatory Report on the convention: "Prosecution of this offence will require a context-sensitive assessment of the evidence in order to establish on a case-by-case basis whether the victim has freely consented to the sexual act performed. Such an assessment must recog-

195 Sexual Crisis Support Center, CRIMES AGAINST BODILY INTEGRITY AND SEXUAL FREEDOM: CRIMINAL PROCEEDINGS OF SUCH CRIMES BETWEEN 2015 AND 2016, 2017, available at: http://saccarmenia.org/files/uploads/ReportE.pdf

196 Psychologists identified the following ways in which people react to threat, including to the threat of sexual violence:
1. To fight is to confront the threat aggressively.
2. Flight means you run from the danger.
3. When you freeze, you find yourself unable to move or act against the threat.
4. You may find yourself hiding from the danger. Fawn is the response of complying with the attacker to save yourself (https://www.betterhelp.com/advice/trauma/fight-flight-freeze-how-to-recognize-it-and-what-to-do-when-it-happens/).

nise the wide range of behavioural responses to sexual violence and rape which victims exhibit and shall not be based on assumptions of typical behaviour in such situations. It is equally important to ensure that interpretations of rape legislation and the prosecution of rape cases are not influenced by gender stereotypes and myths about male and female sexuality.".[197] In this regard, investigators, prosecutors and judges, when applying this 'without consent' concept under the new CC, should take into account several particularities of *mens rea* that were stipulated in international practice years or even decades ago: 1) the accused cannot use as a justification his misperception about the existence of consent if that perception is due to voluntary drunkenness, negligence or voluntary blindness (willful blindness when the person intentionally keeps himself unaware of certain facts or information), or if the accused has not taken reasonable steps to determine whether the victim consents, 2) the defendant's perception that the victim wanted him to touch her but did not express that will could not be a proper defence, 3) if the defendant wants to build his defence on the fact that he mistakenly thought that the victim consented, there must be evidence of the consent. The belief that silence or passivity is a sign of consent/agreement cannot be considered as proper justification.[198]

Below are some of the criteria that enable to assess whether there is 'affirmative consent':

- Voluntary agreement to participate in the sexual intercourse;
- The consent given in the past does not necessarily imply consent in the future;
- Silence or lack of resistance does not necessarily mean consent;
- The consent to have sex with one person does not mean consent to have such a relationship with another person;
- The consent may be cancelled at any time,
- Coercion, violence or threat invalidates the consent.[199]

In terms of *mens rea,* the discussed concept will bring certain changes to the traditional understanding of sexual violence. The term 'regardless of one's will' prescribed in Article 198 as well as the term 'without one's consent' stipulated in Article 199 mean that sexual violence can be committed not only with direct intention, as has been the case till now, but also with indirect intention. It means that violence exists not only when the perpetrator knows that the victim did not consent to the sexual act, but also if he does not care whether there is consent or not, he does not concern himself with that or realises that the victim might not consent. However, in the new CC this concept does not cover negligent rape, when the perpetrator is not aware of the absence of consent but should have been aware, like it is done in various European countries.[200]

[197] Explanatory Report to Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, para. 192.

[198] R. v. Ewanchuk, Supreme Court of Canada, 25.02.1999.

[199] White House Task Force to Protect Students from Sexual Assault, Checklist for Campus Sexual Misconduct Policies, 2014, page 4.

[200] Գոհար Հակոբյան, «Ընտանիքում բռնության և սեռական բռնության համար քրեական պատասխանատվության առանձին հիմնախնդիրների շուրջ», ԵՊՀ իրավագիտության ֆակուլտետի պրոֆեսորադասախոսական կազմի գիտաժողովի նյութերի ժողովածու, 2 (2) 2018, Երևան 2019, էջեր 370-386:

Excerpts from judicial acts

Criminal Court of Appeal[201]

(…) Physical violence means to use physical force against a victim, to beat her or other persons, cause bodily harm or other similar acts in order to overcome the resistance shown by the victim, to deprive her of the opportunity to call for help.

(…) The crime of rape exists only if the corresponding behaviour of the woman before the violence indicates a lack of will to have sexual intercourse with the perpetrator; the violence used must be necessary to overcome the woman's actual or expected resistance.

In the case introduced below[202] the defendant was accused of crimes under Article 131§2 (1) (kidnapping by a group of people with a prior intention) and Article 138§1 (rape) of CC. S.N. (he) called L.S. (she) and demanded her to go out. Along with his friend he went to L.S.'s building and started to argue with her. He required her to go with him but after getting rejection hit the L.S.'s head twice and threatened to harm her family members if she refuses to go with him. Afterwards, he grabbed her hands and together with his friend took her to a taxi on which they got to a hotel and had a sexual act (which, according to the prosecution, was against the victim's will).

He was found innocent by the first instance court. The judgment was appealed to the Criminal Court of Appeal with no success. Here are some of the first instance court's justifications:

It is noteworthy that the victim had a cell phone, but she did not call for help. According to the victim, she only called one of her acquaintances, Davit, and allegedly failed to contact him.

(…)

The court considers it necessary to state that according to the victim's trial testimony, L. S. did not ask for help from E. K., H. D., hotel employees, when they entered the hotel room. As for the alleged episode of kidnapping, especially "with the prior intention of a group of people", the victim L. S. testified in court that she did not even remember whether A. A. [the friend] grabbed her by the hand while taking her to the entrance.

(…)

It is difficult to imagine a situation when the person who is being kidnapped, for some reason, does not try to shout, make noise, call for help, especially in

201 Case no. ԱՎԴ2/0055/01/17

202 Case no. ԵՄԴ/0012/01/16

the lobby, late at night, when any loud noise could be heard from neighbours, especially the victim's mother who was at home.

(…)

Moreover, the victim walked down the street with her "kidnappers", stopped a taxi, and before reaching the hotel, having many opportunities to turn to both the driver and the "pawnshop and gas station staff", she did not take any action in that direction.The victim behaved similarly in the hotel, while she could perfectly ask for help from the local staff; and finally to call the 1-02 service on her cell phone or to a relative or friend, and not to some David, whose identity could not be found out.

(…)

In the context of the listed arguments, the justifications of the victim that she allegedly did not shout during the kidnapping, did not seek help, and then at S.N.'s request, she had sex with him, being scared of the latter's threats against her family members, cannot face a criticism, especially since the alleged threats could not be considered real in those circumstances, they did not constitute a real threat to the lives and health of the victim and her family members.

(…)

The court considers it necessary to state that the victim L. S. did not call to the police after the violence against her, and at 16:40 local time, she went to "Erebuni" medical centre (by ambulance).

(…)

At the very least, it is not understandable and logical why, if raped, the victim would not have reported it at the outset, but only mentioned the fact that she was beaten. In this connection, the victim L. S. did not present any substantive reasoning in court.

(…)

Although the victim's personality, preferences or relationship with her mother cannot play any role for her being a victim in the alleged rape case, nevertheless, the court considers it necessary to refer to the factual data characterising the victim.

*[*from the testimonies of the witnesses*]*

S.N and L.S. were lovers, they had had sexual relations in the past …L.S. had tense relationship with her mother, they used to argue often, curse…L.S. used to visit different places with different young men…the victim brought a stranger to her apartment with whom got naked in her bedroom.

Good practice

After the Criminal Court of Appeal confirmed the judgment introduced above, the Cassation Court quashed it and sent to new examination *inter alia* on the grounds that certain formulations are stereotypical and discriminatory against women which is in contradiction with CEDAW requirements.

Good practice[203]

In a case under Article 141 of CC the relatives of the victim at some point seem to have made an agreement with the defendant who had sexual intercourse with a teenage girl, not to proceed with the case if he took care of the girl (married her). The defendant's relatives also agreed. However, the court found him guilty and imposed a punishment.

Below are recommendations on case and court management in sexual violence cases[204]:

- the credibility of a complainant in a sexual violence case is understood to be the same as that of a complainant in any other criminal proceeding;
- the introduction of the complainant's sexual history in both civil and criminal proceedings is prohibited when it is unrelated to the case;
- no adverse inference is drawn solely from a delay of any length between the alleged commission of a sexual offence and the reporting; evidence of prior acts of violence, abuse, stalking and exploitation by the perpetrator is considered during court proceedings, in accordance with the principles of national criminal law; claims of self-defence by women who have been victims of violence, particularly in cases of battered woman syndrome, are taken into account in investigations, prosecutions and sentences against them;judges should assume an active role during victims' testimony to ensure that they are not harassed by defence counsel.

And recommendations for the prosecutors at the sentencing stage:[205]

- ensuring that the court has all the information it needs to sentence appropriately;
- ensuring the court considers a risk-assessment of offender dangerousness at the time of sentencing;
- ensuring the court hears from the victim at the time of sentencing;
- recommending a sentence that consider the nature and gravity of the offence, the history of sexual and physical abuse, previous efforts at rehabilitation, the de-

[203] Case no. ՏԶ/0080/01/19

[204] UN GA, Resolution no. 65/228 on Strengthening crime prevention and criminal justice responses to violence against women.

[205] UNODC, "HANDBOOK ON EFFECTIVE PROSECUTION RESPONSES TO VIOLENCE AGAINST WOMEN AND GIRLS", 2014, page 122.

fendant's character and current rehabilitative needs and the interests of the community in protection and punishment;

- being alert to arguments in mitigation that detract from the character of a witness and be ready to challenge anything which is misleading, untrue or unfair;
- arguing against reducing sentencing for "honour-related" crimes, or where the victims are viewed as particular "types", such as sex workers or non-virgins.

Exercise

S.N. is transported to a hospital with gynaecological problems. The medical staff reveals signs of violence on her body and reports to the police. The police officers visit S.N. in the hospital and ask her about the origin of the signs of violence on her body. At first, she tells that she fell. But the nurse who was present during the interview objected explaining that the location and character of the signs prove otherwise. Afterwards, S.N. started to cry and told the officers that she was raped by the friend of her brother. It happened ten days ago, it was late at night, she was already about to sleep when her brother came with his friend. They spent some time altogether after which she went to her bedroom. Shortly afterwards the perpetrator, M.V. knocked at her door, she allowed him to come in. He grabbed her, closed her mouth with his hand for a second and asked not to make noise, because her brother is in the next room. S.N. whispered "what are you doing? Please don't" to which M.V. responded "don't play with me", after which he pushed her to the bed and penetrated her.

The officers asked her why she did not report about it earlier. They also asked why she did not shout out for help if her brother was in the same house. S.N. did not answer these questions. Then the police initiated a criminal case based on the medical record and sent the case for investigation. S.N. was interrogated by the investigator in presence of the head of his unit. They repeated the questions why she did not report the rape earlier which the victim again did not answer. Then they asked her if the suspect kept his hand on her mouth all the time to which she answered negatively. Then she was asked why she did not ask for help and otherwise resist against the violence. She answered that she was scared that her brother would listen, come to the bedroom and the two of them would fight.

She was also asked to describe all the details of the sexual intercourse and whether she has any evidence to support her claim on rape. The she had to undergo another interrogation because of the change of the investigator. Afterwards, she was required to participate in a confrontation with M.V. During the confrontation he told that he genuinely believed that S.N. was in favour of having sex with him since when she opened the door of the house she was in

her nightgown and a robe which she did not change when the three of them were hanging out and she was smiling at him. Also, she opened her bedroom's door and let him in when he knocked. Finally, she did not shout for help though her brother was in the same house. When he also asked S.N. why she did not make any noise, she answered that she was ashamed of her brother. The investigator made a remark that she was lying either now or at the last interrogation since her answers were inconsistent.

Questions:

- Please provide legal qualification to the action described above based on the old CC, new CC, Criminal Procedure Code and international standards
- Did you identify any violations of S.N.'s rights or gender bias against her?
- What would you do if you were the investigator, prosecutor and the judge in this case?

Note to the Facilitator: Facilitate the discussion around the differences between the relevant articles of the old and new CC regarding sexual violence introduced above. Focus on the absence of consent and the fact that although M.V. said that he believed the sexual intercourse was consensual, he had no grounds to believe so and there was no objective evidence to suggest the presence of consent. His behaviour showed disregard towards the victim's consent and he therefore did not care to find out whether she consented (which shows indirect intention in terms of *mens rea*). Also make sure that the participants notice lack of gender sensitive case management (multiple interrogations, confrontation with the perpetrator) secondary victimisation of the victim, victim blaming and focusing on lack of resistance and delay in reporting. Explain the fight, flight, freeze, fawn' syndrome as introduced above and address the myth around 'ideal victim', invite the participants to discuss the possible reasons for not reporting (might be shame, fear, dependence on the perpetrator, fear of non-sensitive treatment or breaching confidentiality by the law-enforcement, self-blaming) and not resisting.

4.2.4 Case-Law on Domestic Violence in Armenia: Identification of Gaps and Suggestionc for Improvement

It has been around three and half years since the adoption of Domestic Violence Law and it is time to analyse it application in the fields of Administrative Procedure, Civil Procedure and Criminal Procedure in order to detect shortcomings and improve the practice.

At the outset, it is important to look at the statistics of domestic violence cases, criminal proceedings and the use of protective measures under the new legislation which is introduced in the table below:

Table 3.[206]

	2018	2019
The total number of domestic violence cases investigated	707	485
The victim-perpetrator relationship:		
a) husband against wife	441	329
b) wife against husband	32	10
c) children against parents	70	53
d) parents against children	48	41
e) male partner against female partner	2	
f) violence by other family members	116	50
Type of violence:		
a) Physical	673	469
b) Psychological	33	14
c) Economic	1	2
Criminal cases initiated (out of the total number of investigated cases)	159	126
Discontinued cases (out of the total number of initiated cases)	130	93
Cases sent to court to trial (out of the total number of initiated cases)	29	33
Initiation of criminal case was refused (out of the total number of investigated cases)	548	359
Reasons for refusal:		
a) Paragraph 1(4) of Art. 35 of the Criminal Procedure Code		353
b) Paragraph 1(10) of Art. 35 of Criminal Procedure Code		3
c) Paragraph 1 of Art. 37 of the Criminal Procedure Code		2
d) Paragraph 1(13) of Art. 35 of the Criminal Procedure Code		1
Warrants	435	796
Emergency Intervention Orders	132	260

[206] Human Rights Defender's Yearly Reports on the State of Human Rights and Fundamental Freedoms Protection in Armenia of 2018 and 2019.

As we can see from the official statistics, 98% of rejections to initiate criminal proceedings in 2019 (353 out of 359) is reasoned by the absence of the victim's complaint. A slight positive development in this area is that in 2019 prosecutors initiated criminal proceedings *ex officio* without victims' complaints in 25 cases based on the new regulation of CPC (Article 4§183). However, in 62 cases they did not initiate the case.[207]

Unfortunately, there are no publicly available statistics on the protective orders.

Main gaps identified in practice[208]

1. Not sufficient regard to the victim's explanation, too high threshold of proof

Examination of the judicial acts on the protective measures reveals that in some cases the courts' analysis of the evidence is conducted in the manner required in criminal proceedings, that is to say the courts require rather high threshold of proof in order to grant the use of a protective measure. For example, apart from the victim's explanation and the risk-assessment, the courts expect other, 'objective' evidence or 'thorough investigation' to grant for example the imposition of an emergency intervention order.

However, it is important to remember that protective measures are not punishment, they are not provided by Criminal Code and do not have the aim of punishing the perpetrator but are aimed at protecting the victim and preventing new episodes of violence. These measures are taken in an emergency situation within a short time where the victim's safety should be an absolute priority. Therefore, there is no need for proof 'beyond reasonable doubt' standard to apply a protective order. And the central role for imposing such a measure should be the victim's explanation and position.

2. Referring to the protection or support to the family concept as a special mitigating circumstance

Some judicial acts unnecessarily emphasise principle of "support to the family as a natural and fundamental cell of the society" provided by the Constitution and Domestic Violence Law and base their legal analysis on this notion. Although this concept is prescribed in the law, it is also highlighted that ensuring the victim's safety and protection is a priority of the law and the main legal discourse should be centred around this goal.

3. Failing to treat children as indirect victims of domestic violence and take into account the prior domestic violence history when ruling on the visiting rights in the context of protective measures

One of the most sensitive issues to deal with in the context of domestic violence

[207] Human Rights Defender's Yearly Reports on the State of Human Rights and Fundamental Freedoms Protection in Armenia of 2019.

[208] Based on the examination and analysis of the relevant judicial acts carried out in the scope of this Handbook.

is whether or not limit visiting rights of the perpetrator, if the children were not directly the victims of violence. Sometimes courts interpret the notion of 'best interest of the child' in a way that they should not be separated from their parents and that both parents have equal rights in the upbringing of the children. Based on this, the courts grant visiting rights while protective measures are in force. While this is a complex issue and there are several aspects that need to be taken into account, it is important to have in mind that even if the children were not physically abused, they are indirect victims and are traumatised by the fact that they witnessed the violence. In this context, the interests of the children should prevail over the interests of their father as a parent. Apart from that, permission to meet the children can seriously compromise the security of the victim since the perpetrator might get to know her whereabouts, commit additional acts of violence, etc.

4. Choice of too lenient sanction despite the recorded history of abuse while the protective measures are in force

Examination of judgments concerning violations of the requirements of emergency intervention and protective orders (Article 353.1 of CC) shows that the most widespread choice of sanction in those cases seems to be the fine although the article enables imposition of both detention (as a punishment) and imprisonment. Whilst the charges already demonstrate that the perpetrator violated legal orders and is prone to violence even when a protective order is in force. As a result, fines as sanctions do not deter the perpetrators from future violence and do not ensure proper protection for the victims, but also can negatively impact the financial well-being of the victim and her children.

In general, sometimes the courts demonstrate too formalistic legal approach that fails to address the particularities of domestic violence context and the special needs of the victims.

As regards the investigation phase of criminal proceedings, common concerns remain to be failure to ensure victim safety, red-tape, non-sensitive case management resulting in multiple confrontations and face-to-face interrogations of the victim in the presence of the perpetrator, mild qualification of cases, etc.[209]

Exercise

Play a video on a social experiment demonstrating the societal indifference towards domestic violence https://www.youtube.com/watch?v=cPnrPx5u-84

Discuss your thoughts about the video.

[209] See in more details in G. Hakobyan, "Training Manual for Judges and Prosecutors on Ensuring Women's Access to Justice. National Chapter on Armenia", 2017.

Excerpts from judicial acts

(…) It is noteworthy that such cases have a domestic, interpersonal nature, as most of the relations are not subject to legal regulation, they are mostly regulated by social norms. Therefore, the body the law-enforcement body is obliged to take into account any other particularities related to the case, to assess the situation in the combination of factors in a short period of time. It is noteworthy that the legislator especially emphasised the principles that the competent bodies should follow in their activities in the field of prevention of domestic violence and protection of victims of domestic violence, **of which, inter alia (among others), the support of the family as a natural and basic cell of society, strengthening traditional values in the family and restoring solidarity in the family is important. In such circumstances, the Court finds that the person conducting the administration has an obligation to ensure the implementation of this principle during the proceedings, taking into account the specifics of what has happened.**

(…) In particular, the examination of the materials of the administrative proceedings reveals that the mother submitted a report to the relevant police department, stating that she had been abused by her son. **The respondent took an explanation from L. T. [*the victim]* and from the neighbour, the scene was inspected, and then L. T. filled out a questionnaire on the criteria for assessing the immediate threat of domestic violence**. Having obtained only the explanations of two persons and the questionnaire during the proceedings, as well as the protocol of the scene inspection, the Respondent [*the police*] came to the conclusion that T. T. [*the perpetrator]* had psychologically abused L. T., which in the Court's assessment was not proper administration.

(…) In the Court's assessment, the Respondent limited [*the investigation*] and relied on only the information provided by the victim while the Respondent was obliged to verify their validity by conducting a comprehensive investigation, **not excluding non-objective descriptions of the reality conditioned by the mental state of the allegedly abused person**, obtaining and examining other possible evidence, explanations of other persons, etc. In other words, it is not clear to the Court on what grounds the Respondent came to the conclusion that T. T. had committed violence against L. T., if the information about the assault had been provided exclusively by L. T.".[210]

In the decision introduced below[211] the court granted the application on the protective order only partly and did not limit the perpetrator's right to meet the children in spite of the overwhelming evidence that they witnessed violence against their mother, that there

[210] No. of the administrative case ԿԴ/9592/05/20, judgment of 28.11.2020.

[211] No. of the case ԵԴ/13821/02/20, 16.06.2020.

were several emergency intervention orders and one protective order against the perpetrator which he violated by threatening the victim (in the presence of the children) including visiting her at her parents' apartment and threatening her relatives, etc.

" (…) Part 1 of Article 54 of the Family Code of the Republic of Armenia stipulates that a parent living separately from a child has the right to communicate with the child, to participate in his / her upbringing, to solve the issues of the child's education. The parent with whom the child lives should not interfere with the other parent contact with the child, if such contact does not harm the child's physical and mental health, his moral development. In the present case, there is no evidence or circumstance that A. G. [*the perpetrator*] abused his minor children after he and J.M. [*the victim*] separated or during the period of his abuse against her, or that his parental rights are limited or there is a judicial act that has entered into legal force. **The imposed emergency intervention order does not contain any fact that immediate parental contact is not in the best interests of the children and that in the given circumstances the contact with the father at this age can adversely affect their mental and physical development, as well as their mental health.**

(…) Referring to this issue, the court states that for the sake of their children, parents should build their personal relationships, including in future meetings, so that they do not affect the proper upbringing of their children. Living separately, they should do so in a way that does not affect the children's mental world. (…) As for the restriction on imposing an obligation on A. G. to undergo a rehabilitation programme, the court finds that the plaintiff did not provide any evidence of the need to impose a rehabilitation programme on him in accordance with the law.

(…) H.S'.s [*the victim*] reasoning given in the court that during her explanation and initial testimony in the presence of a lawyer she was overwhelmed and did not remember the details of the incident of 28.01.2019 and she was not asked about that incident, is noteworthy. H.S. testimony given in the court were not confirmed by other objective evidence in the case file and the court (…) arrives with the conclusion that H.S'.s testimony on the number, severity and physical pain caused by the hitting are not valid. She seeks to punish T. S. (*the alleged perpetrator*), who ended up as a defendant based on her own controversial testimony, through criminal liability, and her testimony, as an interested person, is not sufficient to qualify the defendant's actions under Article 118 of the Criminal Code of the Republic of Armenia.[212]

[212] No. of the case ԱՐԱԴ/0021/01/19

In this judicial act the court failed to refer to the specific domestic violence legislation, base its legal analysis on the particularities of such cases or even use that term. The court based its decision on the testimony of the defendant's family members while did not consider the victim's or her family members' position as valid.

Good practice

The Criminal Court of Appeal later partly overturned the judgement introduced above on the grounds that the special context of domestic violence was not taken into consideration and the court had too much regard to the defendant's interests vs. the victim's interests.

Exercise

L.P. called the police helpline complaining that her husband battered her. The police officer visited her apartment and found her crying. There were signs of strangulation on her neck which was the only visible sign of the possible violence. Her husband, P.G. was smoking on the balcony. A broken vase was on the floor. The officer helped L.P. to fill in the risk assessment questionnaire. At the same time, he talked to P.G. who explained that usually he is a very calm and intelligent person but that day his wife managed to make him lose his patience because of her provocative behaviour. He particularly mentioned that she had visited her parents and took the children with her without his approval. She had not even informed him about that, he thought that she had kidnapped the children and got angry. He insisted that the given incident was the only time he ever resorted to violence. Everything can happen in a family but he will not do it again. He asked that the officer does not impose any sanction because it will only harm their relations.

According to L.P., her husband had assaulted her from day one of their marriage. He did not allow her to leave the apartment without his prior approval, did not allow her to work or meet with relatives and friends in his absence. When she breached those rules he always punished her with physical violence which never resulted in serious damage to her health. Usually one doctor visit was sufficient to deal with it. She said that she called because she was afraid since her husband seemed very angry with her. But she also asked the officer not to impose any sanction because she was scared that the police intervention would make him more angry and escalate the conflict.

The officer asked her about the children. She answered that they are in the next room, too afraid to get out of the room. Both of them were going to the elementary school. She said that P.G. never physically abused the children. The officer also talked to their neighbour who told him that this kind of violent episodes were frequent in that family, they often heard high voices and noise from that apartment. Moreover, sometimes the children came to her apartment when their parents were having fights. They seemed scared and frustrated.

The officer imposed an emergency intervention order requiring P.G. to leave the apartment and not approach L.P. and their children for 15 days. P.G. thought this

was an unfair decision. He went to the children's school to meet them and explain the situation. There he met L.P. and offered her to reconcile. When she rejected, he threatened her in front of the children. Later P.G. appealed this decision to the Administrative Court claiming to quash the officer's decision based on:

- the fact that the decision is one-sided. It does not take into account his explanations and is based solely on L.P.s and their neighbour's explanations which are not enough for imposing such serious limitations. There is no evidence in that decision proving that there was a risk of further violence from his side, so the decision is based on speculations;
- the apartment is his property that he inherited from his parents. L.P. does not even have a right to property over that apartment. Therefore, the decision on emergency intervention violates his right to property and cannot be imposed;
- there is no evidence whatsoever that he had committed any kind of violence against his children. There was, hence, no grounds at all to limit his visiting rights. Even if he had bad relations with his wife, it should not affect his relations with the children since he has equal right to see them.

Questions:

- Apply the relevant national legislation and international legal framework to P.G.'s actions;
- Make a decision on his complaint as a judge.

Note to the Facilitator:

Make sure that the participants respond to each of the arguments brought by the perpetrator since those are typical arguments often discussed in the court. Invite the participant's attention to the fact that the protective measures are not punishment prescribed by the Criminal Code and therefore do not require a standard 'beyond reasonable doubt' to be applied. To the contrary, they are preventive measures to protect human lives and health. Emergency interference order is imposed in a very limited time and is based on an urgent needs-assessment. It should take into account the victim's explanation firstly and then other important factors. The requirement of too high threshold of proof, therefore, as has been the case in certain hearings, would risk the victims' lives and disregard the specifics of domestic violence cases vs. other administrative cases. For this part use the Decision No. ՍԴԱՈ-65 of 06.04.2021 of Constitutional Court.

For the lawfulness of the 'go away order' use the decision of 14.04.2020 of Constitutional Court (where the Court discusses the lawfulness of this order including in cases when the accommodation belongs to the perpetrator). For the limitations of visiting rights and negative effects of domestic violence on the children see above in the Session 4.2.

ANNEX 1.
A TRAINING EVALUATION QUESTIONNAIRE[213]

Dear Participant,

Thank you for filling in the questionnaire. Please note that it is anonymous.

1. **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 exercises

   Your knowledge of the subject before the training

   Your knowledge of the subject now

2. **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

   My colleagues had indicated they were attending

   I wanted to attend to meet other colleagues

   Other: Please specify

3. **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

   Other: Please specify

213 Please note that this questionnaire was partly adapted from CoE "Training Manual for Judges and Prosecutors on Ensuring Women's Access to Justice. General Chapter, page 117.

4. **List three new terms that you learnt during the training:**

   1.

   2.

   3.

5. **Introduce two new ideas that you came across during the training:**

   1.

   2.

6. **Describe your one main conclusion/takeaway from the training:**

ANNEX 2.
SELECTED CASE-LAW

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
- *Volodina v. Russia* (2019) Application no.41261/17, judgement of 9 July 2019
- A v. the United Kingdom (2019) Application no. 34614/17
- Levchuk v. Ukraine (2020) Application no. *Application no. 17496/19*
- Buturugã v. Romania (2020) Application no. 56867/15
- Tërshana v. Albania (2020) Application no. 48756/14,
- Sabalić v. Croatia (2021) Application no. 60561/14
- S.M. v. Croatia (2020) Application no. 60561/14

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
- *S. F. M v Spain,* CEDAW/C/75/D/138/2018, 28 February 2020

ANNEX 3.
SELECTED RESOURCES ON GENDER EQUALITY AND 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=09000016806b0f41

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-stan- dards.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 jus- tice (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]
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

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.
A SAMPLE TRAINING AGENDA ON ENSURING GENDER EQUALITY THROUGH THE PRACTICE OF JUDGES, PROSECUTORS AND INVESTIGATORS

DAY I

9:00-9:15	**Registration of the participants**
9:15-9:30	**Opening** by the Academy of Justice of Armenia and partner organisations: introduction of the objectives of the training, the trainers and the training manual
9:30-10:30	**Ice-breaker:** introduction of the trainees and their expectations from the training. The participant may be asked to reflect on the ways women and men are treated differently in Armenia. Mapping the topics to be discussed during the training
10:30-10:45	**Coffee break**
10:45-11:30	**Module 1. Conceptual Framework: presentation** (international expert)
11:30-11:45	**Exercise** (according to the training manual)
11:45-12:30	**Conceptual Framework in Armenia: presentation** (national expert)
12:30-12:45	**Exercise** (according to the training manual)
12:45-13:45	**Lunch**
13:45-14:45	**Module 2. International and Regional Legal Framework on Ensuring Gender Equality: presentation** (international expert)
14:45-15:00	**Exercise** (according to the training manual)
15:00-15:45	**National Legal Framework on Ensuring Gender Equality: presentation** (national expert)
15:45-16:00	**Exercise** (according to the training manual)
16:00-16:15	**Coffee break**
16:15-17:15	**Module 3. Promoting Gender Equality in Judicial Practice: barriers to effective litigation, judicial gender stereotyping, evidence gathering and assessment, alternative dispute resolution, remedies** (national legal and gender expert)
17:15-17:30	**Exercise** (according to the training manual)

DAY II

09:00-10:00	**Module 3. Promoting Gender Equality in Judicial Practice: gender sensitive case and courtroom management, collecting and sharing data, supporting gender equality in justice sector** (national legal and gender expert)
10:00-10:15	**Exercise** (according to the training manual)
10:15-10:30	**Coffee Break**
10:30-11:15	**Module 4. Ensuring Gender Equality in Particular areas: International Standards and Practices of Ensuring Gender Equality in Employment Law** (international expert)
11:15-11:45	**Armenian law and practice of ensuring gender equality in Employment Law: presentation** (national expert)
11:45-12:00	**Exercise** (according to the training manual)
12:00-12:45	**International Standards and Practices of Ensuring Gender Equality in Family Law** (international expert)
12:45-13:45	**Lunch**
13:45-14:15	**Armenian law and practice of ensuring gender equality in Family Law: presentation** (national expert)
14:15-14:30	**Exercise** (according to the training manual)
14:30-15:30	**International Standards and Practices of Ensuring Gender Equality in the Area of Violence Against Women** (international expert)
15:30-15:45	**Coffee Break**
15:45-16:15	**Protection of Gender Equality in Armenian current and newly adopted Criminal Codes, interpretation of the amendments** (national expert)
16:15-16:45	**Investigation, Prosecution and Adjudication of Sexual Violence in Armenia: presentation** (national expert)
16:45-17:00	**Exercise** (according to the training manual)
17:00-17:30	**Case-Law on Domestic Violence in Armenia: identification of gaps and suggestions for improvement** (national expert)
17:30-17:45	**Exercise** (according to the training manual)
17:45-18:00	**Concluding Remarks, distribution of evaluation questionnaires**

The course aims at providing the participants with in-depth knowledge about the particularities of women's access to justice, gender stereotypes, the essence and forms of gender discrimination, strengthening their skills of ensuring gender equality in Employment Law, Family Law, in the area of violence against women and criminal justice applying international and national standards.

The topics covered by the course are as follows:

- the introduction to the concept of gender equality: women's access to justice, women's human rights, non-discrimination and gender stereotyping;
- international and national legal framework on gender equality;
- promotion of gender equality in the justice chain through strengthening the participants' skills in gender sensitive case and courtroom management, evidence gathering and assessment, application of remedies and ADRs, etc.

ENG