

Workshop of Regional and Sub-regional Courts

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Session 4b) Judicial stereotyping in cases of sexual and gender based violence

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**Honourable Judges**

**Dear Colleagues,**

**Ladies and Gentlemen,**

It is a pleasure to be here and speak at this event, which is placed in a series of meetings designed to enhance cooperation between the United Nations and regional mechanisms for the promotion and protection of human rights. The topic of this panel is very timely, notably in light of the entry into force of the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) on 1 August 2014 and the beginning of its monitoring work in September this year.

Legal definitions of rape have long focused on the perpetrator’s rather than the victim’s perspective. Instead of asking whether or not the victim had wanted the encounter, the law has been preoccupied with the forceful actions of the perpetrator. The Istanbul Convention, following the jurisprudence of the European Court of Human Rights, is asking Europe and beyond to introduce a fundamental change in how we think about rape. **What do victims experience and what would it take to deliver justice from their perspective?**

In my presentation, I would like to touch upon the following topics (**Slide 1: Outline**)

* Gender stereotyping
* Judicial ethics requires impartiality, not neutrality
* Sexual violence, including rape: changing the definition
* Gender stereotypes and the prosecution of sexual violence
* The role of Courts in naming and contesting gender stereotypes in sexual and gender-based violence cases
* Dynamics and synergies within the Council of Europe
* Listening to victims of sexual violence

**Slide 2: (Gender) stereotyping**

Stereotyping is part of human nature. It is a way we categorise individuals, often unconsciously, into particular types or groups, in part to simplify the world around us. Stereotypes are both descriptive (perceiving all members of a certain group to have the same attributes regardless of individual differences) and prescriptive (setting the parameters for “acceptable” behaviour).[[1]](#footnote-1)

Stereotyping is part of the mechanisms that underlie inequality and discrimination. Increasingly, with the removal of overt discriminatory provisions in laws and other written regulations, these mechanisms have become more hidden from view. Indirect discrimination is the most widespread form of discrimination against women in Europe today and it is perpetuated by persistent gender stereotypes. If we want to realise women’s rights, we must challenge such gender stereotypes.

**Slide 3: Judicial ethics requires impartiality, not neutrality**

The likelihood for judges to get involved in challenging (gender) stereotypes, including in judicial practice, is often limited by expectations or perceptions of judicial neutrality. In reality, as one of the former Vice-Presidents of the European Court of Human Rights, Judge Françoise Tulkens, put it: “the neutral judge does not exist”. No judge can be entirely neutral, because he/she is always the product of his/her history, environment, opinions, assumptions and convictions. Neutrality is distinct from judicial impartiality, which is a fundamental element of securing a fair trial and access to justice for all. Impartiality means that every judge, male or female, must strive to take up a right distance, including a distance from him- or herself, under the influence of the facts and the case file.

As long as it hides behind the claim of neutrality, stereotyping can comprise the impartiality of judges’ decisions. And it is all the more important to specifically acknowledge and address judicial stereotyping, as judges’ opinion is very influential and it can be used to rebalance power inequalities and injustices in society.

**Slide 4: Sexual violence, including rape: changing the definition**

Addressing gender stereotypes is crucial in cases of sexual and gender-based violence, where spurious ‘myths and misconceptions’ continue to inform both the popular and penal imagination.

Rape is a pervasive, highly gendered, type of abuse, which is reproduced through stereotypes that devalue women; through the practices of socialisation, that orient boys towards power, control and endorsement of violence; through the media’s glorification of violence and the sexualisation of women and girls; but also through the weak or limited implementation of the law, which signals to rapists that they can act with impunity; and, not least, through the failure of the criminal justice system to respond.

Consequently, the offence of rape was defined in many national jurisdictions to require the use of physical force to overpower the victim’s resistance. Many countries continue to place too much emphasis on the use of force and require robust evidence that women resisted their attacker’s advances to the utmost, both verbally and physically.

The past two decades witnessed a steady evolution of rape laws from a narrow focus upon force towards an emphasis on consent. At the European level, this shift was brought about by the landmark judgement of the European Court of Human Rights (ECtHR) in the case of *M.C. v Bulgaria*, in 2003. While the ECtHR had taken up the issue of rape in previous judgements also, this was the first case to consider a definition of rape. In accordance with contemporary standards and trends, the Court stated that “*the [European Convention on Human Rights] 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*”. The Court went on to consider rape legislation that focuses exclusively or unduly on proving the use of force rather than the lack of consent of the victim to be in violation of the European Convention of Human Rights. The Istanbul Convention incorporated this judgement by requiring states parties to adapt their criminal legislation on sexual violence and rape to focus on the lack of consent as the constituent element of the crime (Article 36).

Reliance on consent in rape laws gives centrality to the victim’s perspective and agency. Women may feel unable to resist the sexual demands of a more powerful man, or they may exhibit non-conforming behaviour, for example, by drinking alcohol, or dressing in a way that transgresses cultural codes of ‘female modesty’. It is important to ensure that the interpretations of rape legislation and the prosecution of rape cases are not influenced by gender stereotypes and myths about male and female sexuality.

**Slide 5: Gender stereotypes and the prosecution of sexual violence**

Rape remains among the crimes least reported, the least frequently prosecuted and the least likely to result in conviction of the offender.

Due to the prevalence of gender myths and stereotypes, women often face additional risks when reporting rape to the authorities, and there is often no guarantee that they will be believed and treated respectfully by the judicial system. The tenacity of misconceptions in relation to the prevalence of false rape reporting also contributes to the low number of prosecutions and convictions.

Existing comparative research shows that in Europe, the vast majority of reported rapes do not end in a conviction.[[2]](#footnote-2) At the same time, the proportion of cases designated as false allegations is extremely low, ranging from 2% to a maximum of 9%. This is extremely strong evidence that the extent of false allegations is exaggerated by professionals, but this over-estimation creates a culture of skepticism (Kelly et al, 2005).

During trials, delay in reporting an assault is often presented as suspicious. In reality, many victims of sexual assault never report offenses, and many more will delay reporting often for significant periods. A victim's lack of physical resistance or injury during an attack or a calm demeanor while recounting events at trial may fail to convince judges of their victimization. In reality, many victims - for a number of reasons - offer no physical resistance and suffer no serious physical injury; and many will react to sexual assault by exhibiting extreme calm, often as a conscious - or unconscious - coping strategy.[[3]](#footnote-3)

**Slide 6: The role of courts in naming and contesting gender stereotypes in sexual and gender-based violence cases**

In *Karen Tayag Vertido v. the Philippines* (CEDAW, 2010), a rape case, the CEDAW Committee expressed its views under the Optional Protocol and accepted the applicant’s allegation that, in her case, the Court relied on gender-based myths and stereotypes, without which the accused would have been convicted. Seven myths were described, as below:

**Rape myths in Vertido v. the Philippines**

1. To be raped by means of intimidation, the victim must be timid or easily cowed. In reality, the victim’s character is not an element of the crime of rape. Rape victims have no ‘typical’ personality traits.
2. To conclude that a rape occurred by means of threat, there must be clear evidence of a direct threat. In reality, requiring proof of physical force of the threat of physical force in all circumstances risks leaving certain types of rape unpunished.
3. Rapes are committed by pathological individuals who are strangers to the victim. When the victim and the perpetrator know each other that indicates the sex was consensual. In reality, in the vast majority of cases, the victim knows the aggressor, who may be a friend, a colleague or a family member, often a spouse or partner.
4. Rape victims resist the attack with all their physical might and struggle to escape at every opportunity. In reality, many acts of rape and sexual violence are carried out without the use of physical force.
5. The rape victim could not have resisted the sexual attack, if the man were able to proceed to ejaculation. In reality, rape is not a crime of lust or passion associated with love and desire. Whether or not the man ejaculated is completely immaterial to a prosecution for rape, does not prove that the intercourse was consensual, and does not negate the resistance of the victim.
6. Older men are not capable of rape. In reality, sexual prowess is not an element of the crime of rape.
7. Rape accusations are ‘easy’ to make and more difficult for the accused to disprove. In reality, the vast majority or rapes are never reported to the police, because victims fear they will not be believed.

The European Court of Human Rights has not yet directly addressed the issue of gender stereotypes in cases of sexual and gender-based violence, although it has dealt with stereotyping and especially gender stereotyping in other cases (ex. *Konstantin Markin v. Russia* 2012).

In general, the ECtHR has examined possible violations of Article 14 in very few cases involving sexual and gender-based violence (see the publication “[*Equal access to justice in the case-law on violence against women before the European Court of Human Rights*](http://www.coe.int/t/DGHL/STANDARDSETTING/EQUALITY/03themes/access_to_justice/Court%20doc%20eng.pdf)”, available at: www.coe.int/equality). The decision in *Opuz v. Turkey* is a landmark one, in which the Court has found that:

“200. Bearing in mind […] 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 [...].”

However, the Court’s reasoning in *Opuz v. Turkey* has not been followed in cases of sexual violence, in as much as the nature of sexual violence as discrimination against women is concerned. The Court does states, as a general obligation, the State’s positive obligation to effectively investigate and punish all forms of rape and sexual abuse (see, for example, *I.G. v. Moldova*, 2012). (And for a more detailed discussion of the case law of the ECtHR, please consult the abovementioned recent publication.)

**Slide 7 and Slide 8: Dynamics and synergies within the Council of Europe**

The case-law of the ECtHR on violence against women played an important role in the negotiations of the Istanbul Convention (especially the landmark cases *Opuz v. Turkey* and *M.C. v. Bulgaria*, already mentioned). Many of the issues raised by the court are now codified as obligations on the Parties of the Istanbul Convention.

We are now eagerly waiting to see how the European Court of Human Rights will use the Istanbul Convention in its reasoning, for the application of the European Convention on Human Rights. The Court has indeed begun to refer to the Istanbul Convention in recent case-law, including the following: Y. v. Slovenia (no. 41107/10, final on 28/8/2015) and Rohlena v. The Czech Republic (no. 59552/08, Grand Chamber judgment, 27/1/2015). Other regional and sub-regional courts could also make reference to the standards of the Istanbul Convention.

The Istanbul Convention puts into place measures that, if implemented, will increase the number of prosecutions of rape, provide better protection for the victims, and alter the social, cultural and legal contexts that make sexual violence possible.

**Remove barriers to access to justice for victims of rape, in particular:**

* The Istanbul Convention asks Parties to ensure that investigations into or prosecution of rape offences shall not be wholly dependent upon a report or complaint filed by a victim (Article 55)**.** Law enforcement authorities should investigate in a proactive way to gather evidence in order to make sure that the proceedings may be carried out even if the victim withdraws her complaint.
* Evidence relating to the sexual history and conduct of the victim is permitted only when relevant and necessary (Article 54), since such evidence is sometimes used to challenge the respectability, the credibility and the lack of consent of the victim.
* It is in the nature of a crime of sexual violence that victims are invariably left with a feeling of helplessness and vulnerability, while the perpetrator exudes a sense of power and dominance. Consequently, the Istanbul Convention requires parties to prohibit mandatory participation in alternative dispute resolution processes, including mediation or reconciliation, in relation to sexual violence (Article 48).
* Victims are protected at all stages of investigations and judicial proceedings (Article 56)
* Victims of sexual violence are particularly vulnerable during investigations and criminal proceedings, when they may have to face their aggressors, in a confined space. The Istanbul Convention asks that measures be taken to avoid contact between victims and perpetrators within court and law enforcement agencies premises, when possible (Article 56).
* Victims should have access to legal assistance and to free legal aid (Article 57).
* The Istanbul Convention also recognises that children victims of sexual abuse may not be in a position to even comprehend their experience until they are adults, let alone make it known to the authorities. In order to allow for initiation of proceedings in these cases, Article 58 provides that the limitation period for initiating legal proceedings continues to run for a sufficient period of time, after the victim has reached the age of majority. (This reflects also Article 33 of the Lanzarote Convention, the Council of Europe Convention on Protection of Children against Sexual Exploitation and Sexual Abuse, which entered into force on 1 July 2010.)

**Slide 9: Listening to victims of sexual violence**

I started by asking what would take to deliver justice from the victims’ perspective. Perhaps the first step required is to carefully listen to what they say and believe it. No other victims of crime are so profoundly mistrusted and viewed with so much suspicion as victims of rape. Due to persistent stereotyped attitudes, victims are as likely to be shamed and humiliated in their own families, schools, or churches, as in the police station or the courtroom.It is time that the voices of victims of rape are brought from the margins of the justice system to the center. It is time that their voices are heard.

In the words of victims of violence, the crime of rape cannot be dissociated from the larger social and community context in which it happens.

*It’s too easy to say it’s just the perpetrator. . . . It really has so little to do with him, because . . . had the community, had my family, had the people around the school system who watched my disintegration— and nobody paid attention even to see that I was out of it. Nobody said a word—they’re the ones that should be ashamed.*

1. Cook R. and Cusack S. (2010), *Gender stereotyping: transnational legal perspectives*, University of Pennsylvania Press, p. 1. [↑](#footnote-ref-1)
2. Jo Lovett and Liz Kelly (2009) *Different systems, similar outcomes. Tracking attrition in reported rape cases across Europe*. London: CWASU, London Metropolitan University. (Funded by Daphne II). [↑](#footnote-ref-2)
3. L. Ellison and V. Munro in Rethinking Rape Law 2010 [↑](#footnote-ref-3)