

## Chapter 4

# Access to Justice for Victims of Violence

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### Objectives

This chapter provides an overview of the obstacles that victims and survivors of violence face in accessing the justice system in Asia. The aim is to highlight the common hurdles and provide some guidelines which may assist judges and other stakeholders to detect and address those hurdles and provide victims and survivors of violence with effective access to the justice system.

The right of access to justice for women is essential to the realisation of all the rights protected under the CEDAW. Unhindered access to justice for women is a critical pathway for the achievement of gender equality. Respect and protection of human rights can be guaranteed only if effective domestic remedies are available.<sup>1</sup>

The right of equal access to justice has been recognised by several international treaties as being a basic human right.<sup>2</sup> It requires states parties to treat women and men equally in all matters relating to the law, including civil, contractual and property matters, at all stages of proceedings before courts and tribunals. Access to justice demands identifying and redressing obstacles that prevent women from reporting violence committed against them, and from receiving protection and redress. It also includes criminalisation of relevant behaviours, enforcement of existing laws, securing prosecutions and avoiding secondary victimisation and ensuring adequate reparations for survivors and victims.<sup>3</sup>

In ensuring access to justice, multiple steps and stakeholders are involved: from the initial reporting to the police to the involvement of health and social services, civil society organisations, access to legal aid, investigations and prosecutions, and the eventual judicial decision which needs to be duly enforced.

### 4.1 Barriers to women's access to justice

Persisting inequalities between women and men, gender bias and stereotypes result in unequal access of women and men to justice. Women face the following common obstacles to accessing justice:

- gender bias and stereotyping amongst institutional service providers, law enforcement agencies and courts
- Lack of decision-making power
- Pressures to fulfil gendered expectations
- Lack of knowledge and awareness about their rights in relation to access to justice
- Lack of faith in the justice system
- Stigmatisation by lawyers and police officers
- Coercion and bribery
- Difficulty of giving evidence
- Social stigma
- Secondary victimisation by the criminal justice system
- Lack of resources.<sup>4</sup>

The CEDAW Committee has identified a number of obstacles and restrictions that impede women from realising their right of access to justice on a basis of equality. They include a lack of effective jurisdictional protection offered by the States parties in relation to all dimensions of access to justice. These obstacles occur in a structural context of discrimination and inequality, due to factors such as gender stereotyping, discriminatory laws, intersecting or compounded discrimination, procedural and evidentiary requirements and practices, and a failure to systematically ensure that judicial mechanisms are physically, economically, socially and culturally accessible to all women.<sup>5</sup>

The committee has further observed that the centralisation of courts and quasi-judicial bodies in the main cities, their non-availability in rural and remote regions, the time and money needed to access them, the complexity of proceedings, the physical barriers for women with disabilities, the lack of access to quality, gender-competent legal advice, including legal aid, as well as the deficiencies often noted in the quality of justice systems (gender-insensitive judgments/decisions due to the lack of training, delays and excessive length of proceedings, corruption, etc.) all prevent women from accessing justice.<sup>6</sup>

Belonging to a particularly vulnerable group of women can result in an increased restriction of access to certain rights. Women living in rural areas, elderly women, women with disabilities, lesbian/bisexual/transgender women, trafficked women, migrants (including refugees, asylum seekers and undocumented women), and women from certain ethnic or religious groups may be disadvantaged. This may be due to specific disadvantages at

the socioeconomic level, but can also be the result of a lack of awareness of their specific needs among justice or law enforcement officials. Women from these groups are also often victims of stereotyping, which can result in bias and insensitivity on the part of the justice system.<sup>7</sup> Women belonging to such groups often do not report violations of their rights to the authorities for fear that they will be humiliated, stigmatised, arrested, deported, tortured or have other forms of violence inflicted upon them, including by law enforcement officials.<sup>8</sup>

## 4.2 Bias in the courtroom

Gender bias is well entrenched in the legal systems of the target countries, as is evidenced by the discussion on case law in subsequent chapters. Gender bias is more prevalent in the informal justice system and customary law. Very often victims of violence turn to the informal system for dispute resolution and assistance especially in rural areas, and they rarely access the formal justice system. Stereotyping and gender bias in the judicial system impede women's access to justice in all areas of law, and may particularly impact on women victims and survivors of violence. Stereotyping distorts perceptions and results in decisions based on preconceived beliefs and myths rather than relevant facts. Often judges adopt rigid standards about what they consider to be appropriate behaviour for women and penalise those who do not conform to these stereotypes.<sup>9</sup>

The impact of judicial stereotyping is wide-ranging. It might:

- Distort judges' perceptions of what occurred in a particular situation of violence or the issues to be determined at trial
- Affect judges' vision of who is a victim of gender-based violence
- Influence judges' perceptions of the culpability of persons accused of gender-based violence
- Influence judges' views about the credibility of witnesses
- Lead judges to permit irrelevant or highly prejudicial evidence to be admitted to court and/or affect the weight judges attach to certain evidence
- Influence the directions that judges give to juries
- Cause judges to misinterpret or misapply laws
- Shape the ultimate legal result.<sup>10</sup>

Gender stereotypes and discriminatory attitudes play a significant role in denying victims' access to justice. For instance, the Thailand Supreme

Court in Case 4465/2530 ruled that a previous relationship between the complainant and the accused precluded an allegation of 'date rape'. In the Supreme Court Case 536/252, the Court refused to return a verdict of statutory rape on the basis that the 11-year-old victim did not cry out for help. In another Supreme Court case 2957/2544, the Court convicted the accused only because the Bench believed that the victim, who was a virgin, could not have fabricated the details of the rape incident.<sup>11</sup>

Some recurrent gender stereotypes include:

- A 'genuine' victim of gender-based violence will report the violence at the first available opportunity
- Women make false allegations of violence to avenge themselves or extort money
- Most gender-based violence is committed by strangers
- A genuine victim will resist rape and show signs of struggle or sustain physical injuries
- Violence is only a problem if it happens to 'good' or 'innocent' women and girls
- A woman or girl's manner of dress or behaviour, for example walking alone at night, may imply consent to sexual assault
- Sexual violence is not perpetrated by family members
- Sexual violence only occurs at certain levels of society, and only affects the poor
- Rape or sexual assault perpetrated by husbands/intimate partners is not a crime.<sup>12</sup>

These broad and unsubstantiated views, while having no objective basis, too often inform the practice of courts.<sup>13</sup>

The CEDAW Committee has identified specific examples of how gender stereotyping has impacted on and prevented justice outcomes. For instance, the accused in a rape trial was acquitted<sup>14</sup> by a court in the Philippines relying on gender-based myths and stereotypes about rape victims and challenged the credibility of the victim on the grounds that 'an accusation of rape can be made with facility' and that the victim had ample opportunities to escape her attacker.<sup>15</sup> It is essential to ensure that any person when deciding a case sets aside their own biases and prejudice when considering evidence and arguments.<sup>16</sup>

The CEDAW Committee has observed that judges, magistrates and adjudicators are not the only actors in the justice system who apply, reinforce

and perpetuate stereotypes. Prosecutors, law enforcement officials and other actors often allow stereotypes to influence reports,<sup>17</sup> investigations and trials, especially in cases of gender-based violence, with stereotypes, undermining the claims of the victim/survivor and simultaneously supporting the defences advanced by the alleged perpetrator. Stereotyping, therefore, permeates both the investigation and trial phases and finally shapes the judgment.<sup>18</sup>

Institutionalised secondary victimisation is also apparent within the criminal justice system. The whole process of the criminal justice system from the investigation to trial and eventually the ultimate sentence or acquittal may cause secondary victimisation.<sup>19</sup>

The CEDAW Committee has recommended to State parties to:

- Take measures, including awareness-raising and capacity-building for all actors of justice systems and for law students to eliminate gender stereotyping and incorporate a gender perspective in all aspects of the justice system;
- Include other professionals, in particular health professionals and social workers, who can play an important role in cases of violence against women and in family matters, in these awareness-raising and capacity-building programmes;
- Ensure that capacity-building programmes address in particular the inflexible standards often developed by judges and prosecutors on what they consider as appropriate behaviour for women; and
- Raise awareness on the negative impact of stereotyping and gender bias and encourage advocacy related to stereotyping and gender bias in justice systems, especially in gender-based violence cases.<sup>20</sup>

### 4.3 Guidelines for judges

Increasingly, legal systems across the world recognise that judges need to understand and respond to the special requirements of particular sections of the community, including women, to ensure effective and impartial access to, and the delivery of, justice.

As mentioned above, judges may have their own personal biases and preconceptions about many issues. However, when involved in the process of judging, whether in a civil or criminal case, it is essential to ensure that each judge is fully aware of her/his own biases and prejudices, and that these are set aside when considering evidence and arguments. This involves avoiding generalisations or making assumptions about any person based on the community they belong to or the general background from which they come, and instead treating them as individuals.<sup>21</sup>

The list of potential biases is not exhaustive, but these are some common examples applicable to cases of VAW. To do justice, courts need to avoid relying on myths, and instead rely on evidence, taking pains to establish the facts of each case. Every woman or girl who is a complainant should be treated as an individual, avoiding a common assumption that all women are the same or that all women are likely to act in the same way. Judges should not be swayed or influenced by a victim's physical appearance, including her clothing, etc., when assessing the victim's credibility.<sup>22</sup>

Doing justice also requires an understanding that litigants do not have one set of life experiences, beliefs or values. As a consequence, different people will experience their presence and participation in court proceedings differently, with some having to overcome greater obstacles to seek justice.<sup>23</sup>

Judges may adapt the nature of the proceedings to take account of each person's situation, to enable them to give their evidence, and receive a fair hearing, by taking all or any of the following steps:

- Speak more slowly or in simpler language, or through an interpreter, depending on whether the person being spoken to is a child, very elderly or hard of hearing, or speech impaired, or is a litigant in person, and not familiar with the court process;
- Use the correct form of oath or affirmation depending on the individual's belief or faith;
- Take evidence on commission from a person who cannot attend court due to extreme ill-health or a severe physical disability;
- Use appropriate and respectful language to avoid causing offence to any person;
- Provide breaks or opportunities to drink water to the elderly, children or people with disabilities, or pregnant or nursing/breastfeeding women, who may find the proceedings particularly exhausting;
- Clear the courtroom in sensitive matters, or where children are involved;
- Avoid false assumptions, e.g. that a woman sex worker does not want custody of her children;
- Treat every woman as an individual, and avoid generalising that all women are the same or that all women are likely to act in the same way; and
- Intervene if lawyers, during cross-examination, appear to be stereotyping, unfairly alluding to the women's gender, or asking intrusive or humiliating questions.<sup>24</sup>

Judges have to recognise specific difficulties and concerns faced by women, identify their implications in a court setting and understand what should be done to compensate for areas of disadvantage without prejudicing other parties. These points may also be considered and avoided:

- Do not judge an individual woman by how society thinks women ought to behave, or by the way a man would have behaved in that situation;
- Do not use language which may cause offence to or humiliate individuals and/or is inappropriate for their actual roles;
- do not assume or imply that a woman is of a lesser status than a man; and
- Do not refer to a woman's physical appearance, including her clothing, etc.<sup>25</sup>

Some additional issues that judges may take into account depending on the nature of offence are set out below.

#### **4.3.1 Rape**

Judges may consider the following issues in rape cases:

- Give the victim immediate protection if necessary;
- Ensure confidentiality of rape victims or other complainants;
- Hold the trial proceedings in camera, and make the trial process as comfortable for the victim as possible through the powers available to the court; and
- Take into consideration that lack of consent does not necessarily mean physical evidence of force or resistance.<sup>26</sup>

On the other hand, judges may consider avoiding the following:

- Do not endorse or state in court the following unfounded assumptions myths about rape and/or sexual assault:
  - A genuine victim will report the rape at once
  - False allegations of rape are common
  - Most rapes are committed by strangers
  - Rape victims should put up a fight and show signs of struggle
  - Women can provoke or ask to be raped or assaulted; and
- do not allow the defence in cross-examination to unduly refer to the above assumptions.<sup>27</sup>

### 4.3.2 Forced, child and early marriages

Judges may consider the following issues in cases of forced and child marriages:

- Give due consideration to the wishes and choice of the woman or girl, including in cases where her parents are alleging rape/abduction/ kidnapping and she claims to have married of her own free will; and
- Ensure that the woman/girl in question is able to communicate her wishes to the court securely and safely (in the judges' chambers or after clearing the courtroom, or during an in-camera hearing).<sup>28</sup>

Judges should avoid directing that any adult woman be placed in safe custody without determining whether she has consented to this.

### 4.3.3 Domestic violence

In dealing with cases relating to domestic violence, judges may adopt the following positive measures:

- Direct interim relief for maintenance, residence and shelter and child custody where appropriate;
- Child custody is a sensitive issue and in making custody decision, the best interests of the child should be a primary consideration;
- In considering prayers for bail by the accused for breach of protection orders, or otherwise, ensure that the woman/girl victim's safety is not prejudiced;
- Note that the threats of violence against women by husbands or ex-husbands often tend to be ongoing and continual;
- Bear in mind the impact of domestic violence on any woman/girl, and that it may make her/him lose their self-confidence, appear nervous or frightened; and
- Consider the difficulty for women/girls in giving evidence in court about domestic violence, and take appropriate measures, e.g. making sure they are comfortable in the courtroom as far as possible, using alternative methods (trial in camera) of taking evidence if appropriate, controlling the quality of cross-examination to be less hostile or biased.

Judges may avoid the following:

- Do not endorse or state the following unfounded assumptions myths about domestic violence:

- A woman can easily leave a violent man if she wants to
- A woman provokes her husband/partner to rage and violence
- When a woman says ‘no’, she means ‘yes’
- Women are sexually assaulted only by strangers
- Women ask to be assaulted or raped; and
- do not allow the defense in cross-examination to unduly refer to the above assumptions.<sup>29</sup>

#### 4.3.4 Sexual harassment

Judges may wish to consider the following in sexual harassment cases:

- Consider how to ensure that the identity of the complainant is kept confidential by passing appropriate orders;
- Consider allowing hearings in camera in certain circumstances, and where an application is made by the complainant; and
- Restrain defence lawyers if they seek to base their cross-examination or questions on myths or baseless assumptions, e.g. about women’s clothing or actions ‘inviting’ harassment or stalking.

Judges may seek to avoid the following:

- Do not repeat or take into account unfounded assumptions or myths about women and girls ‘asking to be harassed or stalked by their clothing, actions.’<sup>30</sup>

## Notes

- 1 UN Women, ‘UN Women welcomes CEDAW General Recommendation on women’s access to justice’ (2015), <http://www.unwomen.org/en/news/stories/2015/8/cedaw-general-recommendation> accessed 15 January 2016.
- 2 See Articles 6–11 UDHR, Articles 14–16 ICCPR, Article 15 of CEDAW.
- 3 Christine Chinkin, ‘Addressing violence against women in the commonwealth within states’ obligations under international law’. *Commonwealth Law Bulletin*, Vol. 40, Issue 3, 2014: Special Issue on the Commonwealth Law Ministers Meeting 2014, pages 471–501.
- 4 E. Skinnider et al, ‘A Discussion Paper on The Trial of Rape – Understanding the criminal justice system response to sexual violence in India, Thailand and Viet Nam’ (UN Women, UNDP, UNDOC and Unite, 2015).
- 5 See CEDAW Committee, General Recommendation 33, 13 July 2015, para 3.
- 6 Ibid, para 13.
- 7 Council of Europe, ‘Gender Equality Strategy 2014–2017 Guaranteeing Equal Access of Women to Justice’ (2016), [http://www.coe.int/t/dghl/standardsetting/equality/03themes/access\\_to\\_justice/Factsheet%20A2J%20Jan%202015%20English.pdf](http://www.coe.int/t/dghl/standardsetting/equality/03themes/access_to_justice/Factsheet%20A2J%20Jan%202015%20English.pdf) (accessed 2 January 2016).
- 8 See CEDAW Committee, General Recommendation 33, 13 July 2015, para 10.

- 9 Ibid, para 27.
- 10 Council of Europe, '*Eliminating judicial stereotyping*' (2014), [http://www.coe.int/t/dghl/standardsetting/equality/03themes/access\\_to\\_justice/judicial\\_stereotyping2014.pdf](http://www.coe.int/t/dghl/standardsetting/equality/03themes/access_to_justice/judicial_stereotyping2014.pdf) accessed 2 January 2016.
- 11 UN Women, '*Women's Access to Justice*' (2013), <http://asiapacific.unwomen.org/~media/field%20office%20eseasia/docs/publications/2014/7/sea%20judicial%20colloquium%20final%20pdf.ashx> accessed 3 January 2016.
- 12 E. Skinnider et al, 'A Discussion Paper on The Trial of Rape – Understanding the criminal justice system response to sexual violence in India, Thailand and Viet Nam' (UN Women, UNDP, UNDOC and Unite, 2015).
- 13 S. Hossain, '*CEDAW Bench Book*' (Ministry of Law, Justice and Parliamentary Affairs, (Legislative and Parliamentary Affairs Division, Bangladesh and UN Women, Bangladesh, 2013).
- 14 S. Priya, '*Study Related to Discrimination against Women in Law and in Practice in Political and Public Life, Including during Times of Political Transitions: In Asia Pacific*', (OHCHR, Working Group, 2012), [www.ohchr.org/Documents/Issues/Women/WG/PublicPoliticalLife/AsiaPacific\\_1.docx](http://www.ohchr.org/Documents/Issues/Women/WG/PublicPoliticalLife/AsiaPacific_1.docx) accessed 10 October 2015.
- 15 Women and Justice Database '*16 Cases on Gender-Based Violence – Day 6*' (2013), <http://womenandjustice.tumblr.com/post/68627761819/16-cases-on-gender-based-violence-day-6> accessed 14 December 2015.
- 16 S. Hossain, '*CEDAW Bench Book*', Ministry of Law, Justice and Parliamentary Affairs, Legislative and Parliamentary Affairs Division, Bangladesh and UN Women, Bangladesh, 2013.
- 17 *Isatou Jallow v Bulgaria*, views adopted on 23 July 2012, para 8.6. See also Case of *González et al. ('Cotton Field') v Mexico*, Judgment of 16 November 2009 (Preliminary Objection, Merits, Reparations, and Costs), paras 400-401 (Inter-American Court of Human Rights).
- 18 CEDAW Committee, General Recommendation No. 33, para 27.
- 19 Ibid, para 48.
- 20 Ibid, para 29.
- 21 S. Hossain, '*CEDAW Bench Book*', Ministry of Law, Justice and Parliamentary Affairs, Legislative and Parliamentary Affairs Division, Bangladesh and UN Women, Bangladesh, 2013.
- 22 Ibid.
- 23 Ibid.
- 24 Ibid.
- 25 Ibid.
- 26 Ibid.
- 27 Ibid.
- 28 Ibid.
- 29 Ibid.
- 30 Ibid.