Handbook for the

Judiciary on the Management of Gender-based Violence in South Africa

United Nations
Office on Drugs and Crime

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This publication is the result of a collective effort, led by Linda Naidoo, from UNODC, Regional Office for Southern Africa. We hope this Handbook serves as a critical tool for the Judiciary in South Africa, enhancing their capacity to respond effectively to gender-based violence and promoting justice, equality, and human rights for all.

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ABBREVIATIONS AND ACRONYMS

CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CRSV	Conflict-related Sexual Violence
CSO	Civil Society Organizations
DEVAW	United Nations Declaration on the Elimination of Violence against Women
DFSA	Drug-facilitated sexual assault
GBV	Gender-based Violence
GBVAW	Gender-based Violence against Women
GPS	Global Positioning System
ICT	Information and communication technologies
LGBTIQ+	Lesbian, Gay Bisexual, Transgender, Intersex, Queer plus other identities (e.g. pansexual)
NGO	Non-Governmental Organization
OHCHR	Office of the High Commission for Human Rights
SADC	Southern African Development Community
SOGIESC	Sexual Orientations, Gender Identities, Gender Expression and Sex Characteristics
TFGBV	Technology-facilitated Gender-based Violence
ToT	Training of Trainers
UN	United Nations
UNDP	United Nations Development Programme
UNODC	United Nations Office on Drugs and Crime
UN	Women United Nations Entity for Gender Equality and the Empowerment of Women
VAW	Violence against women
WHO	World Health Organization

GLOSSARY OF KEY TERMS

[Additional terms are defined in boxes throughout the handbook]

- **Complainant** is a legal term designating a person who has made a complaint of a crime which has not yet been proven in court.

- **Defendant** in this handbook refers to a person who has been accused of a crime involving gender-based violence.

- **Discrimination** is a difference in treatment based on certain grounds such as race, color, language, religion, belief, caste, employment, political opinion, nationality, social origin, disability, age, location, region, indigenous and minority status, sex, gender, sexual orientation, gender identity, or other status, which has the effect of nullifying or impairing the enjoyment or exercise of rights. Discrimination may be direct (when the act or law explicitly authorizes differentiated treatment which adversely affects the enjoyment of rights of one group in particular) or indirect (when the act or law seems to be neutral, but its consequences adversely affect the enjoyment of rights of one or more groups in particular (Bangkok General Guidance for Judges in Applying a Gender Perspective).

- **Domestic violence** refers to all acts of physical, sexual, psychological or economic violence that occurs within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim (Istanbul Convention). Domestic violence is a broad term that includes various forms, such as child abuse, elder abuse, interpersonal or partner abuse, and involves different social and psychological dynamics and power differentials. While domestic violence is a form of GBV, not all domestic violence is GBV.

- **Gender** refers to the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for individuals based on the sex they were assigned at birth (IOM SOGIESC Full Glossary of Terms).

- **Gender-based violence** is an umbrella term for any act of violence targeting an individual on the basis of their gender. It includes acts that inflict physical, sexual or psychological harm or suffering, the threats of such acts, coercion and arbitrary deprivation of liberty, whether occurring in public or private life (IOM SOGIESC Full Glossary of Terms). The SADC definition of GBV is "all acts perpetuated against women, men, boys and girls on the basis of their sex which causes or could cause them physical, sexual, psychological, emotional or economic harm, including the threat to take such acts, or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed or other forms of conflict" (SADC Protocol on Gender and Development).

- **Gender-based violence against women** is violence directed toward, or disproportionately affecting women because of their gender or sex. This term makes explicit the gendered causes and impacts of the violence. Such violence takes multiple forms, including acts or omissions intended or likely to cause or result in death or physical, sexual, psychological or economic harm or suffering to women, threats of such acts, harassment, coercion and arbitrary deprivation of liberty (CEDAW Committee General Recommendation No. 35).

- **Gender equality** refers to the equal rights, responsibilities and opportunities of all individuals regardless of gender. Equality does not mean that all individuals are the same, but that their rights, responsibilities and opportunities will not depend on one's sex assigned at birth, physical sex characteristics, gender assigned by society, gender identity or gender expression. Gender equality also implies that the interests, needs and priorities of all individuals should be taken into consideration. Equality between people of all genders is seen both as a human rights issue and a precondition for, and indicator of, sustainable people-centred development (IOM SOGIESC Full Glossary of Terms, modifying the Gender Equality Glossary of the Training Centre of UN Women).

- **Gender-inclusive language and communication** are linguistic and visual assets that portray women, men and people with diverse SOGIESC as equal, taking into account contextual factors and different expressions of people's genders, and do not convey gender stereotypes. Using such language and communications means avoiding word or imagery choices that may be interpreted as biased, discriminatory or demeaning by implying that one sex or social gender is the norm (adapted from UNODC Guide to gender-inclusive communication).

- **Gender inequality** refers to unequal treatment or perceptions of individuals based on their gender.

- **Gender mainstreaming** refers to a strategy for assessing the gendered implications of any planned action, including policies, programming or legislation, and for ensuring gender concerns and experiences are an integral consideration in the design, formulation, implementation, analysis and monitoring of planned action (IOM SOGIESC Full Glossary of Terms).

- **Gender-responsive justice** means ensuring that the laws, the justice institutions, the justice processes and the justice outcomes do not discriminate against anyone on the basis of gender. It necessitates taking a gender perspective on the rights themselves, as well as an assessment of access and obstacles to the enjoyment of these rights by women, men and people with diverse SOGIESC, and adopting gender-sensitive strategies for protecting and promoting them.

- **Gender role** refers to a set of societal norms dictating what types of behaviors are generally considered acceptable, appropriate or desirable for a person based on their actual sex or perceived sex or gender (IOM SOGIESC Full Glossary of Terms).

- **Gender sensitivity** means using respectful and non-discriminatory language and taking into account the different situations, needs and attributes of women, men and others, in order to make sure behaviours, mindsets or programmes respect human rights of all persons (OHCHR).

- **Gender stereotype** is a generalized view or preconception about attributes or characteristics, or the roles that are or ought to be possessed by, or performed by individuals based on their actual sex or perceived sex or gender. A gender stereotype is harmful when it limits an individual's capacity to develop their personal abilities, pursue their professional careers and make choices about their lives. Harmful stereotypes can be both hostile/negative (e.g., women are irrational) or seemingly benign (e.g., women are nurturing).

- **Gender stereotyping** refers to the practice of ascribing to an individual specific attributes, characteristics, or roles by reason only of their membership in a social group based on their actual sex or perceived sex or gender.

- **Masculinity / femininity** describe the possession of the qualities associated with men and women in a particular society at a particular time (IOM SOGIESC Full Glossary of Terms).

- **Myths** are widely held but false beliefs or ideas. Myths about gender-based violence are based on prejudices and harmful gender stereotyping.

- **Perpetrator** in the present handbook refers to a person who commits GBV.

- **Secondary victimization** is the victimization that occurs not as a direct result of the criminal act but through the inadequate response of criminal justice institutions and providers to the victim (UN Updated Model Strategies and Practical Measures).

- **Sex** refers to a person's physical, physiological and biological status, usually characterized as male, female or intersex (Bangkok General Guidance for Judges in Applying a Gender Perspective). While infants are usually assigned the sex of male or female at birth based on the appearance of their external anatomy alone, a person's sex is a combination of a range of bodily sex characteristics (IOM SOGIESC Full Glossary of Terms).

- **SOGIESC** refers to sexual orientations, gender identities and / or expression and sex characteristics. All people have SOGIESC (UN Women Diverse SOGIESC Rapid Assessment Tool Guidance Note).

- **People with diverse SOGIESC** refer to non-normative conforming forms, e.g. those of LGBTIQ+. This handbook uses the term people with diverse SOGIESC in preference to LGBTIQ+ as it includes people whose lives do not fall into the categories of lesbian, bisexual, gay, transgender, intersex or queer, including cultural non-binary people such ashijra, waria, bakla, fa'afafine, people who use non-English terms that convey distinct experiences of gender and sexuality, and people who may view their diversity as practice rather than as identity (UN Women Diverse SOGIESC Rapid Assessment Tool Guidance Note).

- **Victim** refers to the people impacted by GBV or against whom violence has been committed. This handbook has chosen to use the term "victim" rather than "survivor" as the report is primarily discussing the criminal justice process, and this designates a legal status.

- **Violence against children** refers to all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse against children (i.e. human beings below the age of eighteen years old unless under the law applicable to the child majority is attained earlier) (UN Model Strategies and Practical Measures on the Elimination of Violence against Children in the Field of Crime Prevention and Criminal Justice).

- **Violence against women** is 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 (UN Declaration on the Elimination of Violence against Women). Moreover, it also includes economic harm and that it can happen in peace time and during situations of armed conflicts or of war (Protocol to the African Charter on Human Rights and Peoples' Rights on the Rights of Women in Africa).

FOREWORD

Gender-based violence and femicide (GBVF) is a profound violation of human rights that disproportionately affects women and girls, and remains a grave concern within our societies. Despite substantial progress in legal frameworks and policy measures, GBVF continues to be pervasive, deeply entrenched, and distressingly unabated in South Africa. This violence often manifests in the very spaces where individuals should feel most secure - within homes and communities - undermining the safety, dignity, and rights of countless women and girls.

The statistics related to GBVF is alarming. Yet, the extent of other forms of GBV, such as rape, sexual harassment, and technology-facilitated violence, remains under-reported and often concealed due to societal stigma, fear of retribution, and systemic gaps in the criminal justice response. The judiciary, as the final arbiter of justice, holds a pivotal role in breaking this cycle of violence and ensuring accountability, protection, and support for survivors.

It is within this context that the Judicial Handbook on Gender-Based Violence has been developed. This Handbook serves as a critical resource for the judiciary, aimed at empowering judges and court officials with the tools and knowledge necessary to respond effectively and sensitively to GBVF cases. It is founded on the principles of victim centered justice, perpetrator accountability, and a commitment to upholding the dignity and rights of those affected by violence. The Handbook also seeks to address deep-seated biases and gender stereotypes that often influence judicial decision-making and contribute to the re-victimization of survivors within the court system.

Through this Handbook, it is my hope that judges and judicial officers throughout South Africa, will find the guidance and inspiration to approach GBVF cases with a critical mind, a compassionate heart, and an unwavering commitment to justice. By ensuring that our courtrooms become spaces where victims / survivors are met with empathy, fairness, and respect, we can begin to restore faith in the justice system and contribute to a society where violence is neither tolerated nor ignored.

South Africa has taken important steps to strengthen legal and policy frameworks to combat GBVF, yet much work remains to be done. This Handbook is a testament to our shared commitment to improving access to justice and to fostering a judiciary that is not only equipped with legal expertise but also sensitized to the complex dynamics of gender-based violence. I commend all the stakeholders who have contributed to this Handbook and urge our judicial officers to embrace its contents with an open mind and a resolve to champion the rights of women and girls.

In closing, I wish to underscore that this Handbook is not merely a set of guidelines—it is a call to action. It is an invitation for the judiciary to rise to the challenge of transforming the justice system into a beacon of hope and protection for survivors of gender-based violence. By leveraging our unique position of influence, we can advance gender equality and help eradicate the scourge of GBV from our communities. My sincere gratitude to our partners the United Nations Office on Drugs and Crime, Regional Office for Southern Africa for this excellent product that embraces all human rights instruments in the compilation of the handbook.

MML Maya
Chief Justice of South Africa

INTRODUCTION

> "[W]hile there has been a marked ideological shift in the ways Judges adjudicate matters relating to gender based violence and femicide in recent times … the fate of these victims should not be left to the off-chance that the individual Judges hearing their cases will be attuned to the sensitivities. There should be a formalization and standardization of these norms so that it is incumbent on the Courts to pay particular attention to the treatment of victims in these cases"[1].

A HANDBOOK FOR THE SOUTH AFRICAN JUDICIARY

Gender-based violence (GBV) is a human rights violation that is deeply rooted in existing harmful social norms that promote gender inequality and discrimination. Such violence targets individuals on the basis of their gender, often based on who they are or perceived to be in a social context of gendered hierarchy. Although people of all genders can experience GBV, for the most part in patriarchal societies GBV disproportionately affects women, girls and individuals with diverse sexual orientations, gender identities and / or expression and sex characteristics (SOGIESC). Because of pervasive gender inequality, it is typically women, girls and people with other diverse gender identities who are excluded, are discriminated against and experience violence due to their lower social position or perceived as transgressing against gender norms.

GBV is widespread, systematic and culturally entrenched in all countries across the globe, including in South Africa. In February 2024, the President has, during the State of the Nation Address, described GBV as the country's 'second pandemic' and called to intensify collective efforts to bring it to an end.[2] In 2022, of the 89,000 women intentionally killed globally, Africa had the highest number of reported femicides compared to other regions.[3] The rate at which women are killed by intimate partners in South Africa is five times higher than the global average.[4] South Africa is known to be the rape capital of the world. Approximately, one in four women have been victims of severe physical violence, such as beating, burning and strangling) by an intimate partner.[5] GBV is a serious violation of human rights. It is a violation of human dignity and, in its worst form, violates the right to life. It is also an extreme expression of inequality on the ground of sex. The African Union's Agenda 2063 recognizes that GBV acts as a barrier to human security, peace and development.[6] Research indicates that women accounted for the majority of GBV, with the vast majority of perpetrators being current or former male partners and/or spouses.

South Africa is committed to and working on establishing positive conditions for everyone to access criminal justice. High-level governmental commitments to end GBV have been made, dedicated laws criminalizing GBV offenses have been passed; national policies and action plans have been created; and specialized courts have been organized.[7] However, this has not translated in a dramatic reduction of GBV. Such violence remains a highly prevalent, socially tolerated and largely unpunished crime, globally, regionally and nationally. Studies in the region find that GBV remains largely under-reported due to fear of stigma and shame, financial barriers, lack of awareness of available services, fear of revenge, lack of law enforcement action and attitudes surrounding

1 Statement of Justice Mandisa Maya, President of the Supreme Court of Appeal in South Africa at the Gender Violence and Femicide Summit, Pretoria, 1 Nov. 2018.

2 Republic of South Africa. State of the Nation Address 2024, Making communities safer, document at (stateofthenation.gov.za/ priorities/ making-communities-safer/gender-based-violence.

3 UN Women, UNODC. 2023. "Gender-related killings of women and girls (femicide/ feminicide), 2022, UNODC".

4 UNODC. 2024. "Quick Reference Guide for Traditional Leaders on the Management of Gender Based Violence and Femicide".

5 UNODC. 2024. "Quick Reference Guide for Traditional Leaders on the Management of Gender Based Violence and Femicide".

6 African Union. Agenda 2063, document at (au.int/sites/default/files/documents/36204-doc-agenda2063_popular_version_en.pdf).

7 For more details see: UNOHCR, UNODC, UN Women. 2024. "Gender-based Violence against Women and Girls in Southern Africa: Key Human Rights Trends". gbv_advocacy_brief-key_human_rights_trends_in_southern_africa.pdf

violence as a normal component of life.[8] An attrition study of rape cases from South Africa found that the rate of dismissed cases remains high, with only 65% of reported cases being referred for prosecution and only half of those being accepted for prosecution and enrolled for trial with only 8.6% of the cases ultimately resulting in conviction.[9]

The judiciary plays a critical role in the justice response to GBV. They are key to ensuring that their state complies with its international obligation of due diligence to prevent, investigate and punish acts of GBV. They ensure that relevant criminal laws, including those relating to GBV are interpreted through the lens of international and regional norms and standards; are effectively enforced; protect victims from violence, including from the re-occurrence of further violence; hold perpetrators accountable; and provide for effective reparations for victims. The judiciary has the responsibility to ensure the defendant's right to a robust defence do not eclipse the victim's rights to be treated with dignity and respect. Judges have the inherent ability to ensure that victims are not subjected to secondary trauma by the justice system. They are the ones that can receive victims with seriousness and recognition of what's at stake for them, their reputations, the airing of their most intimate and violating traumas, a public dissection of their characteristics and behaviour. Judges come to the Bench with their built-in and often strongly held set of values and therefore have the duty to ensure that prejudices and harmful gender stereotypes do not influence proceedings or undermine gender-based violence victim's credibility. Judges are in the position to manage their courtrooms in a way that addresses biases that lead to victim blaming, disbelief in the victim's story and ultimately, put the victim on trial. As final arbitrators, judges have the power to protect victims, punish offenders, and send a clear message to the community that such violence will not be tolerated.

Professional development courses can equip judges and court administrators with the skills, knowledge and abilities to manage GBV and to inspire a critical thinking frame of mind that is open to the spirit of inquiry on effective gender-responsive ways to handle each case of GBV. Such courses can ensure that prejudices and gender stereotypes do not influence proceedings or undermine the victim's credibility; that there has been meaningful assessment of all the evidence; that courtrooms are managed in a way that addresses biases that often lead to victim blaming and disbelief in the victim's story; and that perpetrators are appropriately punished. Professional development can also greatly contribute to shaping institutional cultures and practices that have proved ineffective in the past and can also support these professionals to instil a sense of trust in victims regarding the justice system. This professional development resource is grounded in victim/survivor-centred, gendered, and perpetrator accountability justice approaches. It focuses on developing critical thinking and a spirit of inquiry for judges and court administrators on how to be guided by these core principles.

PURPOSE OF THE HANDBOOK

The primary purpose of the handbook is to serve as a resource for facilitators in South Africa for planning and conducting interactive adult learning-centred professional development courses for the judiciary on effective criminal justice responses when managing and handling GBV cases.

The ultimate aim of the professional development programme is to sensitize judges in South Africa to the issue of GBV and to respond effectively to such violence by fostering a critical thinking frame of mind based on a victim/survivor-centred, perpetrator accountability approach. This also includes a component on institutional strengthening for the court system managers or administrators in managing these cases. The overall objectives of the training are fourfold:

1. Sensitize the judiciary to recognize and overcome structural discrimination and promote gender equality.

[8] Muluneh MD, Stulz V, Francis L, et al. 2020. "Gender based violence against women in sub-Saharan Africa: a systematic review and meta-analysis of cross-sectional studies". Int J Environ Res Public Health 2020; 17.

[9] Mercilene Machisa, Ruxana Jina, Gerard Labuschagne, Lisa Vetten, Lizle Loots, Sjeema Swemmer, Bonita Meyersfeld, Rachel Jewkes. 2017. "Rape Justice in South Africa: A retrospective study of the investigation, prosecution and adjudication of reported rape cases from 2012". Pretoria: South African Medical Research Council.

2. Change standards and behaviours of judges and improve judicial performance.
3. Improve access to justice for victims of GBV and reduce their risks to secondary victimization.
4. Promote the enhancing of the institutional good practices in South Africa by sharing good practices from the SADC region to help ensure that those who report GBV cases receive proper protection and support during the criminal justice process.

SCOPE OF THE HANDBOOK: WHAT IT IS MEANT TO COVER AND WHAT IT DOES NOT

- **Scope in terms of targeted users of the handbook:** This handbook is for facilitators of professional development course for the judiciary who are responsible for developing and delivering a wide range of courses on the topic of gender-based violence. In this handbook, the term **"judiciary"** refers to both the system of courts of justice in a country and judges collectively, whereas the term **"judge"** means any person exercising judicial power, however designated.

- **Scope in terms of countries:** This handbook is a handbook aiming to assist the judiciary in South Africa.

- **Scope in terms of GBV:** GBV is an umbrella term for any act of violence targeting an individual on the basis of their gender. While anyone can be and are victims of GBV, the handbook will pay particular attention to women and girls as well as people with diverse SOGIESC, recognizing that such violence affects those experiencing gender inequality and discrimination disproportionately. Moreover, this reflects the gendered nature of this violence, understanding that the majority of victims of sexual violence and intimate partner violence are female and the majority of perpetrators are male. There are different kinds of violence, including physical, verbal, sexual, psychological, and socio-economic violence, which can be perpetrated in the family, in the community, by the state as well as through technology and which can manifest in various forms of violence such as rape and sexual violence, domestic violence, honour-related crimes, and human trafficking.

- **Outside the scope of the handbook:** The handbook's focus is on GBV. It recognizes the concept of intersectionality premised on the idea that marginalized individuals often experience overlapping forms of discrimination, for example based on age, that compound vulnerability to violence and cannot be understood in isolation from one another. However, the term "GBV" should not be confused with the term "domestic violence"[10] or "child abuse"[11]. Both are broad terms involving various forms of violence that involve diverse social and psychological dynamics and power differentials, whose examination is beyond the scope of this handbook. The various forms of domestic violence and child abuse that will be covered in the handbook will be limited to those that are of a gendered-natured, such as in the cases of intimate partner violence.

[10] Domestic violence is a broad term referring to violence taking place in the home and includes various forms, such as child abuse, elder abuse, interpersonal or partner abuse. These forms of domestic violence involve different social and psychological dynamics and power differentials. Research has found that physical and psychological violence against children or against parents or grandparents in the home has no clear correlation with gender, while domestic violence between adults is distinctly gendered. Partner-related violence disproportionately victimizes women more than men, whilst men are overrepresented as perpetrators. It is also strongly related to socially determined power differentials between men and women. It is the gendered nature of partner-related violence that distinguishes it from violent crime in general as well as from other types of violence in the home. Furthermore, domestic interpersonal violence cannot be considered to be predominately a problem of married couples. The extent to which intimate violence is reported by teenagers and young women shows that marital status, or even cohabitation, are not essential conditions for violence between partners. See: See Council of Europe, Committee of Ministers, 1037 Meeting, 8 October 2008 European Committee on Crime Problems Feasibility study for a convention against domestic violence.

[11] Violence against children or child abuse is a broad term covering all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse against a child. It is a reflection of an imbalance of power between the victim and the perpetrator due to age and often characterized by a betrayal of trust. That said, it is important to be aware of the gender dimensions of violence against children and how gender is one of many factors that may increase vulnerability for children to violence. Resources for prosecuting crimes against children are included in the annex.

STRUCTURE THE HANDBOOK

This handbook is firmly grounded on international standards and is divided into three main parts, using a modular structure to cover a range of topics. The intention of the modular approach is to be practical, concrete and useful, summarizing the key issues on the topic and providing ideas for participatory exercises in order to assist facilitators in preparing their own professional development courses.

PART 1. A CONCEPTUAL FRAMEWORK UNDERPINNING AN EFFECTIVE JUDICIAL RESPONSE TO GBV

This Part is divided into six modules which provide information for trainers to increase the conceptual understanding of GBV (its key drivers and causes and enabling factors, prevalence and attrition rates of GBV in SADC, intersectionality issues), based on international and regional standards and norms, centred on the SADC GBV Model Law, focused on the laws of South Africa, grounded on a trauma-informed approach, and free of myths and gender stereotypes.

PART 2. GOOD PRACTICE GUIDELINES FOR THE ADJUDICATION OF GBV CASES IN THE CRIMINAL COURTS

Building on the foundational information contained in Part 1, this Part focuses on the knowledge, skills and attitudes that trainers will want to impart to judges as they perform their roles along the justice continuum. This includes: protection; interacting with victims and managing the courtroom; evidentiary issues; analyzing facts; writing decisions, and sentencing.

PART 3. GOOD PRACTICES FOR ENHANCING THE INSTITUTIONAL RESPONSE BY THE COURTS IN GBV CASES

This Part focus on the knowledge and good practice institutional approaches that facilitators will want to impart to policy-makers, management and administrators in the courts. It will look at promising innovative practices to enhance institutional issues for the courts. This includes such topics: creating specialization within the institution; providing for a gender responsive, victim centred and safe environment within the institution; good practices in capacity building; mainstreaming gender equality within the institution; accountability issues such as standards of conduct; and dealing with secondary or vicarious trauma among the judiciary.

SOME ADDITIONAL NOTES

Use of the term "victim" and "survivor"

These terms refer to the individuals impacted by GBV or against whom violence has been committed. The handbook recognizes the ongoing debate raised by the UN Secretary-General's In-depth Study on Violence against Women about this terminology wherein some suggest that:

> "[T]he term "victim" should be avoided because it implies passivity, weakness and inherent vulnerability and fails to recognize the reality of women's resilience and agency. For others the term "survivor" is problematic because it denies the sense of victimization experienced by women who have been the target of violent crime".[12]

The handbook primarily uses the terms "victim" and "complainant" as this resource is primarily discussing the judges' role in the criminal justice system. The term "victim" designates a legal status in the criminal justice

[12] United Nations. 2006. Secretary-General's In-depth Study on Violence against Women. A/61/122/Add.1.

system and is used in order to recognize a right to justice, protection, support and compensation. The term "complainant" is a legal term designating a person who has made a complaint of a crime which has not yet been proven in court. Using these terms does not mean that victims should be seen as passively enduring violence; it is important to acknowledge that victims try in many ways to prevent, resist and cope with the violence they experience. Victims are active in the process of prevention and intervention, not just objects of the process; they are "experts by experience" who need to be respected and empowered to be agents of change in their lives. The use of the terms "victim" and "complainant" is not intended to negate terms that have been utilized in other contexts to refer to individuals who have suffered GBV, such as survivor.

Note to facilitators

This handbook is meant to aid facilitators from South Africa. It is important for facilitators who are using this handbook to note that this is a resource tool that provides for a range of topics and interactive learning exercises and case studies. It is not meant to be a one size fits all training course but rather a resource tool for facilitators who have been asked to prepare a professional development course for judges and court administrators on this subject.

> If you require additional tips on preparing for a professional development course, please see UNODC. 2023. "Handbook for Prosecutors on the Management of Gender-based Violence Cases in Southern Africa", Part 4: Preparing for a Professional Development Course.

United Nations
Office on Drugs and Crime

PART 1.

A CONCEPTUAL FRAMEWORK UNDERPINNING AN EFFECTIVE JUDICIAL RESPONSE TO GENDER-BASED VIOLENCE

> "Judges do not enter public office as ideological virgins. They ascend to the Bench with build-in and often strongly held set of values, pre-conceptions, opinions and prejudices. These are invariably expressed in the decisions they give, constituting "inarticulate premise" in the process of judicial reasoning".[13]

Laws and procedures should not be interpreted and applied in the abstract. Cases of GBV are often treated differently from other cases, in terms of how these offences are conceptualized, investigated, prosecuted and adjudicated. Having a better understanding of the reality faced by GBV victims, their right to physical and sexual autonomy, their experiences with trauma, and how myths and gender stereotyping can influence how laws are interpreted, all can contribute towards a more effective judicial response to GBV cases. Even when laws and procedures are reformed, this is only one step. If such laws continue to be interpreted through a lens that views GBV as normal behaviour, tainted by myths and stereotypes, and lacking in understanding trauma, many victims will not obtain justice.

This Part of the handbook introduces the conceptual framework that should underline all responses to GBV. Judges and the courts should keep in mind that their work is: (1) based on a tailored and contextual understanding of GBV; (2) based on international and regional standards; (3) centred on the SADC GBV Model Law; (4) focused on the national laws (5) grounded in a trauma-informed approach; and (6) free of myths and stereotypes.

[13] Justice Cameron, E. 1990. "Judicial Accountability in South Africa". South African Journal on Human Rights 6(2): 251-265.

MODULE 1.

Understanding GBV for a Tailored, Contextual Response

STEPS FOR A CONTEXTUAL TAILORED UNDERSTANDING OF GBV FOR THE JUDICIARY

1. **Understand the gendered nature of this violence.** While GBV refers to any harmful act directed toward, or disproportionately affects an individual because of their gender, it is important to appreciate that such violence disproportionately victimizes women and girls more than men and boys due to the social context of gendered hierarchy, as well as individuals who are perceived as transgressing against gender norms. Furthermore, the gendered nature of the violence correlates to the weak criminal justice response.
2. **Appreciate the complexities and manifestations of GBV.** GBV can often manifest in a continuum of multiple, inter-related and sometimes recurring forms (physical, sexual, psychological and economic violence); thus judges should ensure that the unlawful conduct is appropriately dealt with.
3. **Comprehend the need for a gender equality framework in the work of the judiciary.** The root causes/ key drivers of GBV are gender inequalities and discrimination. Therefore judges should reject patriarchal social norms, masculine and feminine ideals and all attitudes and beliefs that see women and people with diverse SOGISC as inferior to men.
4. **Identify risk factors.** While risk factors (such as history of child abuse, witnessing family violence, harmful use of alcohol, low education, poverty), cannot be considered direct causes of victimization, they can individually or together contribute to an increased likelihood of victimization.
5. **Consider the contextual factors.** Contextual factors can shape violent behaviours towards those who already experience gender inequalities and discrimination and place them at greater risk. These factors include exposure to other forms of violence like armed conflict; economic hardship /poverty; and instability, such as climate change and environmental degradation, natural disasters and emergencies, such as COVID and living in humanitarian settings (e.g. refugee or displaced camps).
6. **Recognize the intersectionality characteristics.** Power inequalities, stereotypes and prejudices based on a combination of factors, such as specific personal characteristics and situational circumstances, expose women, girls and people with diverse SOGIESC to a greater risk of being targeted by various forms of violence and greater obstacles to accessing justice.

All of these considerations assist judges to provide for a tailored and contextual response. Judges should respond to each case according to the facts of the particular situation and victim.

1.1 UNDERSTAND THE GENDERED NATURE OF VIOLENCE

DEFINITIONS UNDER INTERNATIONAL LAW

Gender-based violence is an umbrella term for any act of violence targeting an individual on the basis of their gender. It includes acts that inflict physical, sexual or psychological harm or suffering, the threats of such acts, coercion and arbitrary deprivation of liberty, whether occurring in public or private life (IOM SOGIESC Full Glossary of Terms). The SADC definition of GBV is "all acts perpetuated against women, men, boys and girls on the basis of their sex which causes or could cause them physical, sexual, psychological, emotional or economic harm, including the threat to take such acts, or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed or other forms of conflict" (SADC Protocol on Gender and Development).

Gender-based violence against women is violence directed toward, or disproportionately affecting women because of their gender or sex. This term makes explicit the gendered causes and impacts of the violence. Such violence takes multiple forms, including acts or omissions intended or likely to cause or result in death or physical, sexual, psychological or economic harm or suffering to women, threats of such acts, harassment, coercion and arbitrary deprivation of liberty (CEDAW Committee General Recommendation No. 35).

Violence against women is 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 (UN Declaration on the Elimination of Violence against Women). Moreover, it also includes economic harm and that it can happen in peace time and during situations of armed conflicts or of war (Protocol to the African Charter on Human Rights and Peoples' Rights on the Rights of Women in Africa).

Particular attention to be paid to individuals who experience gender inequality. While GBV is a broad term involving violence against a person due to gender differences, research has found that such violence disproportionately victimizes those who experience gender inequality. When gender inequality exists, it is typically women and girls, and individuals who are perceived as transgressing against gender norms (e.g. transgender women, other transgender people, non-binary people and people with diverse gender identities) who are excluded or disadvantaged, as compared to men. Men are over-represented as perpetrators. It is strongly related to socially determined power differentials between female, male and non-binary.

As noted in the SADC Model Law on Gender-based Violence:

> "It's important to emphasis that while the focus of the GBV Model Law seems to be more on violence against women and children, the GBV Model Law takes a gender-based approach. The provisions of the GBV Model Law should be read broadly to apply to all forms and components of GBV, without discrimination, to all victims and offenders of GBV. However, in general, women and girls are more vulnerable to, and experience more, sexual violence, more severe physical violence, more abuse and more control largely from the male gender, and that's the reason acute focus is made, in certain instances, on women and children, who are disproportionately affected by GBV".[14]

The gendered nature of the violence. Such violence is directed at the victim because of their gender, often because she is a woman or is disproportionately perpetuated against women, in a social context of gendered hierarchy. The term also describes targeted violence against people with diverse sexual orientations, gender identities, gender expression and sex characteristics when referencing violence related to norms of masculinity/femininity and/or gender norms.

[14] SADC Parliamentary Forum. 2022. SADC Model Law on Gender-based Violence, page 18.

As UN Women has stated:

> "Gender-based violence (GBV) refers to harmful acts directed at an individual or a group of individuals based on their gender. It is rooted in gender inequality, the abuse of power and harmful norms. The term is primarily used to underscore the fact that structural, gender-based power differentials place women and girls at risk for multiple forms of violence. While women and girls suffer disproportionately from GBV, men and boys can also be targeted. The term is also sometimes used to describe targeted violence against LGBTQI+ populations, when referencing violence related to norms of masculinity/femininity and/or gender norms".[15]

ILLUSTRATION OF THE GENDERED NATURE OF DOMESTIC VIOLENCE

Domestic violence is a form of GBV but not all domestic violence is GBV. Domestic violence is a broad term referring to violence taking place in the home and includes various forms, such as child abuse, elder abuse, interpersonal or partner abuse. These forms of domestic violence involve different social and psychological dynamics and power differentials. Research has found that physical and psychological violence against children or against parents or grandparents in the home has no clear correlation with gender (both sexes can be victims and perpetrators), while domestic violence between adults is distinctly gendered.[16] Partner-related violence disproportionately victimizes women more than men, whilst men are overrepresented as perpetrators. It is also strongly related to socially determined power differentials between men and women. It is the gendered nature of partner-related violence that distinguishes it from violent crime in general as well as from other types of violence in the home. Furthermore, domestic interpersonal violence cannot be considered to be predominately a problem of married couples. The extent to which intimate violence is reported by teenagers and young women shows that marital status, or even cohabitation, are not essential conditions for violence between partners.

Gender inequality, systematic discrimination and unequal power relations are the root cause of GBV against men and boys. Violence against men and boys that is rooted in gender discrimination is considered GBV. GBV is understood as predominately men's violence against women and girls; however, it also includes some forms of violence against men and boys. At the heart of this interpretation is the understanding that violence is used with the view of reinforcing dominant forms of masculinity linked to power in order to maintain in place a gendered order / hierarchy. Men and boys may be exposed to violence committed for the explicit purpose of reinforcing inequitable gender norms of masculinity and femininity. In addition, they may also be targeted because of reduced power and status in view of diversity characteristics or other intersecting inequalities.

1.2 APPRECIATE THE COMPLEXITIES AND MANIFESTATIONS OF GBV

Forms of GBV

GBV is manifested in a continuum of multiple, inter-related and sometimes recurring forms – physical, sexual, psychological and economic harm and suffering. Such violence can be experienced in a range of settings, from private to public and transcend national borders. All forms of GBV are human rights violations; and many constitute criminal offences in the legal framework of most states, although the definitions or elements of these offences may vary. Broad categories of GBV include:

- **Physical violence** refers to bodily harm suffered as a result of the application of immediate and unlawful physical force. It also includes violence resulting in the death of the victim.
- **Psychological violence** refers to any intentional conduct that seriously impairs another person's psychological integrity through coercion or threats.

[15] https://www.unwomen.org/en/what-we-do/ending-violence-against-women/faqs/types-of-violence

[16] See Council of Europe, Committee of Ministers, 1037 Meeting, 8 October 2008 European Committee on Crime Problems Feasibility study for a convention against domestic violence.

- **Sexual violence**, including rape covers all forms of sexual acts performed on another person without the person's freely given consent and which are carried out intentionally. It includes non-consensual vaginal, anal or oral penetration of a sexual nature with any bodily part or object; other non-consensual acts of sexual nature; causing another person to engage in non-consensual acts of sexual nature with a third person.
- **Economic violence** includes denying a person access to and control over basic resources, including time, money, transportation, food or clothing.

Such violence can manifest into specific types of offences, such as femicide (gender-related killings), rape, marital rape, sexual assault, sexual harassment, stalking, domestic violence and intimate partner violence, forced and early marriage, human trafficking, female genital mutilation and the digital dimensions of GBV (e.g. revenge pornography, upskirting, cyberflashing, etc).

Key points for judges to consider:

- The **two most common forms** of gender-based violence are: (1) **non-partner sexual violence**, including rape, sexual assault, unwanted sexual acts and sexual harassment perpetrated by a relative, friend, acquaintance, neighbor, work colleague or stranger; and (2) **intimate partner violence**, which includes a range of physical, psychological, sexual and economic violence against adult and adolescent women by a current or former intimate partner.
- There are some **forms of violence specifically experienced by girls**. These include: early and forced marriage, female genital mutilation, statutory rape, sale of children, child prostitution, and child pornography.
- There are some **forms of violence specifically experienced by people with diverse SOGIESC**. These include "corrective sexual violence", outing or threats to out survivor's sexual orientation or gender identity, threats of ostracization from their community, and physical and verbal abuse related to someone's gender identity, sexuality or sex characteristics[17].
- The types of GBV and their evolution have become increasingly complex as seen by increasing rates of violence **committed using information and communications technology**, such as online harassment, cyber-bullying, stalking and distribution of denigrating images.

Common characteristics of GBV for judges to be mindful of:

- Victims often experience a **continuum of violence** that includes all the different and varied manifestations of behaviours of gender inequality and patriarchal domination.[18] The idea of a continuum does not mean a hierarchy of seriousness, but rather reflects the continuum of complex and interlinked experiences of harassment, violation, abuse and assault in the lives of individual victims. This means that GBV is not necessarily deviant and episodic but rather part of the norm for many women, girls and people with diverse SOGIESC in their everyday lives.
- Many victims experience **repeated victimization**. They are much more likely to experience frequent acts of violence rather than a one-off incident. Intimate partner violence often involves many different and diverse events that form a continuum pattern of different types of coercion and assaults which are used to control the victim. Sexual violence often involves repeated assaults by the same and sometimes different perpetrators.[19]
- The **majority of perpetrators are known to the victim**. In most forms of GBV, the majority of perpetrators are current and ex-intimates, family members, neighbours, work colleagues, friends and acquaintances.[20] This runs counter to the myth that "real cases" of GBV are those committed by strangers, involving weapons and injury.

[17] For more information see Canadian Women's Foundation and Wisdom2Action. 2022. "Queering Gender-based Violence Prevention and Response in Canada".

[18] The concept of the continuum of violence was first outlined by Liz Kelly. 1988. "Surviving Sexual Violence".

[19] Kelly, L. et al. 2005. "A Gap or a Chasm: Attrition in reported rape cases". Home Office Research.

[20] Skinnider, E., Montgomery, R. and Garrett, S. 2017. "The Trial of Rape: Understanding the Criminal Justice Sector Response to Sexual Violence in Thailand and Viet Nam". UN Women, UNDP and UNODC.

EMERGING FORMS OF GBV – TECHNOLOGY-FACILITATED GBV

Technology-facilitated GBV (TFGBV) takes different forms, which is increasing at a rapid rate, as new technologies are developed.[21] TFGBV extends to any act of GBV that is committed, assisted, aggravated and amplified in part or fully by the use of information and communication technologies (ICT) or digital media.[22] TFGBV is a more expansive term as compared to "on-line violence" (i.e. GBV perpetrated in online spaces) of "digital violence" (i.e. GBV perpetrated through digital media), as it refers to GBV that is perpetrated by any type of technological means, information and communications technology and digital media, including phones, Global Positioning System (GPS) tracking devices, drones and non-Internet connected recording devices.[23] Currently, mobile phones are the most commonly used tool to perpetuate TFGBV, especially in emerging regions like Africa. Furthermore, emerging digital technologies, such as the use of artificial intelligence, can create new forms of violence, such as deepfakes.[24] It is important for judges to appreciate the continuity and interrelation between offline and online violence, harassment and discrimination against victims and how GBV can be assisted, aggravated or amplified by the use of technology. It is committed as part of a pattern of violence perpetrated both online and offline. As in other forms of GBV, TFGBV can be perpetrated by intimate partners or ex-intimate partners, state actors, and strangers and trolls.

Some common forms of TFGBV

Catfishing	Catfishing is a form of online exploitation - cyber fraud via online dating sites. It is a deceptive activity where a person creates a fictional persona or fake identity on a social networking service, usually targeting a specific victim. The scammer wants to steal personal information, money, or both.
Sextortion	Sextortion is the abuse of power to obtain a sexual benefit or advantage. Online predators use fake profiles as their identity to chat and lure victims on social networking sites. After gaining the trust and confidence of victims, they convince them to engage in video calls or to send private intimate images. These videos and images are captured and recorded by online predators and used to harass and or extort them morally as well as for monetary gains. In some cases, when victims refuse to act in favour of online predators, their pictures are posted on their social networking profiles or even sent to the victim's friends.
Cyberbullying	Cyberbullying can take place through digital devices like cell phones, computers, and tablets. It can occur through SMS, Text, and apps, or online in social media, forums, or gaming where people can view, participate in, or share content. Cyberbullying includes sending, posting, or sharing negative, harmful, false, or mean content about someone else. It can include sharing personal or private information about someone else causing embarrassment or humiliation. Victims may also be tricked into giving out personal information. Cyberbullies may also send threatening or cruel messages or impersonate somebody else to send mean or embarrassing messages.

[21] Commission of the Status of Women. 67th Session on Innovation and technological change, and education in the digital age for achieving gender equality and the empowerment of all women and girls. Agreed Conclusions. March 2023. E/CN.6/2023/L.3.

[22] The information in this section is from: UNODC. 2022. "A Training Handbook for Criminal Justice Practitioners on Cyberviolence against Women and Girls (CVAWG). Please see the Handbook for more detailed information.

[23] UNFPA. 2021. Technology-facilitated Gender-based Violence: Making All Spaces Safe.

[24] Commission of the Status of Women. 67th Session on Innovation and technological change, and education in the digital age for achieving gender equality and the empowerment of all women and girls. Agreed Conclusions. March 2023. E/CN.6/2023/L.3.

Cyberstalking	Cyberstalking is using the Internet to threaten or make unwanted advances toward someone else. Cyberstalking can also be described as "the use of technology to stalk and monitor someone's activities and behaviours in real-time or historically". It is often an extension of offline stalking, using technological tools, and it involves a set of unwanted, repetitive, intrusive, threatening, and harassing behaviours which in some instances are seen as a relatively normal relational or dating practice. Cyberstalking involves, for example, monitoring or tracking a person's location and/ or activities using GPS trackers, spyware, cameras and microphones, and location-based dating apps, checking email, call or message histories, as well as monitoring a person's social media profiles.
Online harassment	Online harassment is the use of technology to repeatedly contact, annoy, threaten or scare another person. Online harassment is an ongoing behaviour over time rather than an isolated incident. Online harassment can be perpetrated by a single individual or mobs of individuals (mobbing), usually networks of male perpetrators who target women and minorities.
Online sexual harassment	Online sexual harassment is a specific form of harassment that may involve unwanted sexual attention and sexual coercion. It is defined as "any unwanted sexual behaviour via electronic means and can include unwanted sexual solicitation; unwanted requests to talk about sex; unwanted requests to do something sexual online or in person; receiving unwanted sexual messages and images; having sexual messages and images shared without permission; and revealing identifying and personal information about a person online".
Image-based abuse (IBA)	IBA consists of "using images to coerce, threaten, harass, objectify or abuse". One form of IBA is image-based sexual abuse (IBSA), which involves at least one of three behaviours taking, sharing or threatening to share sexually explicit images without consent. This may also include: upskirting (i.e. non-consensually taking an image up a person's skirt or dress); deepfakes (i.e. non-consensually created sexual imagery that sexually depict the victim, usually developed using AI tools); and cyberflashing (i.e. sending unsolicited images of their own genitals to another person. Other examples include photographing or filming someone without their consent or knowledge, or coercing someone to engage in unwanted sexual behaviour online.
Image-based abuse	Another form of image-based abuse (often trivialized as "revenge porn") is the dissemination or posting of sexually explicit media, without the consent of the individual in the media, particularly where the intent is to shame, humiliate or frighten the person or otherwise cause them harm. The images can be distributed via social media, text messages, e-mails or even uploaded onto pornographic websites.
Doxxing	Doxxing is the non-consensual disclosure of personal information. It involves the public release of an individual's private, personal, sensitive information, such as home and email addresses, phone numbers, employer and family member's contact information, or photos of their children and the school they attend. Doxxing is a form of online harassment that rarely occurs in isolation; rather it is accompanied with other forms of harassment such as IBA.
Impersonation	Impersonation is the process of stealing someone's identity to threaten or intimidate, as well as to discredit or damage a user's reputation. Perpetrators may take over or create fake online accounts and websites of women to spread false information and damage their reputation, to ruin their personal and/or professional relationships, to call for violence against them through sex work advertisements or dating apps or to obtain information about the survivor.
Hacking	Hacking is the use of technology to gain illegal or authorized access to systems or resources for the purposes of acquiring personal information, altering or modifying information, or slandering and denigrating the victim.

Recruitment and the use of technology to locate victims in order to commit GBV	Technology can be used to lure potential victims into violence situations or to facilitate in-person physical or sexual assault. This can be done through fraudulent posts and advertisements in dating sites and apps, "marriage agencies" or publish false employment and study opportunities. In cases of intimate partner violence, technologies such as spyware and GPS tracking is used to track the movement and activities of victims, monitor, control and locate them, with the purpose of intimidating or assaulting them.

Source: UNODC. 2022. "A Training Handbook for Criminal Justice Practitioners on Cyberviolence against Women and Girls

PREVALENCE OF GBV IN THE SADC REGION AND IN SOUTH AFRICA

The true extent of the phenomenon of GBV is not known owing to a range of factors such as limited official data, a lack of mechanisms to collect data, a hesitancy to share information due to security concerns, and a reluctance to speak about GBV seen as a taboo topic. Furthermore, such violence can take place in different settings, such as conflict and post conflict, humanitarian situations, as well as occur in everyday lives, which create additional challenges in understanding the full picture.

- In the SADC region, some countries register levels that are even higher than the global average.[25] Recent estimates suggest that between 16% and 47% of ever-partnered women have experienced physical and/or sexual violence by an intimate partner in their lifetime, with past 12-month prevalence estimates ranging between 8% and 36% (see table below).[26]
- Findings from VAW Baseline Studies in six SADC countries, namely Botswana, Lesotho, Mauritius, South Africa, Zambia, Zimbabwe, indicated prevalence for lifetime experience of GBV a range of 50 to 86%; prevalence for lifetime intimate partner violence ranged from 49 to 69% and prevalence for non-partner rape was 4 to 29%, in 5 out of the 6 countries.[27]
- The 2018 SADC GBV Study indicates that emotional violence is the most predominant form of violence in the region, at approximately, 26.8% prevalence, while slightly over one in every ten persons had experienced physical violence (11.2%) and sexual violence (12.0%).
- In South Africa, the intimate partner femicide rate of 4.5/100,000 population is five times higher than the estimated 2017 global rate of 0.8/100,000 population.[28]
- A study from Eastern Cape, South Africa found about 47% of the respondents (n = 604) had experienced sexual violence either as victims of attempted rape, rape or both.[29]

Summary of WHO prevalence estimates of lifetime and past 12 months physical and/or sexual intimate partner violence (IPV) among ever-married/partnered women aged 15–49 years, 2018[30]

Country	Lifetime physical and/or sexual IPV (%)	Past 12 months physical and/or sexual IPV (5)
Global	27%	13%
Sub-Sahara Africa	33%	20%
Angola	38%	25%
Botswana	34%	17%

[25] SADC. 2019. "SADC Regional Strategy and Framework of Action for Addressing Gender Based Violence: 2018-2030". Gaborone, Botswana.

[26] Violence against women prevalence estimates, 2018: global, regional and national prevalence estimates for intimate partner violence against women and global and regional prevalence estimates for non-partner sexual violence against women. Geneva: World Health Organization; 2021.

[27] SADC Gender Protocol Barometer, 2016.

[28] UNODC. 2019. Global Study on Homicide 2019, booklet 5, Gender-related Killing of Women and Girls, p. 11.

[29] UNODC. 2024. Handbook for Criminal Justice Professionals: Forensic Evidence Processing in Gender-Based Violence Cases. Chapter 1.

[30] Violence against women prevalence estimates, 2018: global, regional and national prevalence estimates for intimate partner violence against women and global and regional prevalence estimates for non-partner sexual violence against women. Geneva: World Health Organization; 2021.

Country	Lifetime physical and/or sexual IPV (%)	Past 12 months physical and/or sexual IPV (5)
Comoros	16%	8%
D.R. of Congo	47%	36%
Eswatini	-	18%
Lesotho	40%	16%
Madagascar	-	-
Malawi	30%	17%
Mauritius	-	-
Mozambique	30%	16%
Namibia	27%	16%
Seychelles	-	-
South Africa	24%	13%
Tanzania	-	-
Zambia	41%	28%
Zimbabwe	35%	18%

Table replicated from UNODC 2023. "Handbook for Prosecutors on the Management of Gender-based Violence Cases in Southern Africa"

TOLERATED AND UNPUNISHED CRIMES

GBV is a tolerated crime. Most men supported using violence against a wife for disagreeing with or arguing with the husband or going out without notifying him.[31] The approval of physical abuse in marriage was particularly widespread in Zambia (71%). Women also show tolerance of men's use of physical tactics against wives.[32] Research finds that women who endorsed wife abuse were more likely to be recipients of partner violence.[33] In those communities where the government was unlikely to uphold laws protecting women against abuse or rape, more women were victimized; conversely, rates were lower in those states banning the practice with sanctions.[34] The state's explicit messages, therefore, shape community norms surrounding violence in marriage; laws and policies prohibiting GBV may directly reduce rates of perpetration in communities. Adolescent boys who express strong beliefs in "courtship patriarchy", which highlights the importance of girls' subordinate role and behavior in a dating relationship, are more tolerant of attitudes supporting GBV, particularly intimate partner violence.[35]

GBV is often unpunished crime. GBV is often considered a "tip of the iceberg or silent epidemic" as victims are hesitant to reveal or report their experiences of violence due to many barriers, including fear of stigma and shame, financial barriers, lack of awareness of available services, fear of revenge, lack of law enforcement action and attitudes surrounding violence as a normal component of life.[36] Subsequently there are high rates of underreporting as well as challenges in accurately measuring the prevalence of GBV. Studies across the globe illustrate that only a minority of cases of GBV are ever reported to the police and an even smaller percentage of reported cases result in charges laid against a perpetrator, and only in a small fraction of those cases is there

[31] Uthman et al., 2009 as cited in McCloskey, L.A. et al 2016. "Determinants of Intimate Partner Violence in Sub-Saharan Africa: A Review of Prevention and Intervention Programs" Partner Abuse, Volume 7, Number 3, 2016.

[32] Koenig et al., 2003 as cited in McCloskey, L.A. et al. 2016.

[33] Linos et al., 2013 as cited in McCloskey, L.A. et al. 2016.

[34] McCloskey, L.A. et al "Determinants of Intimate Partner Violence in Sub-Saharan Africa: A Review of Prevention and Intervention Programs" Partner Abuse, Volume 7, Number 3, 2016.

[35] Lichter & McCloskey, 2004 as cited in McCloskey, L.A. et al "Determinants of Intimate Partner Violence in Sub-Saharan Africa: A Review of Prevention and Intervention Programs" Partner Abuse, Volume 7, Number 3, 2016.

[36] Muluneh MD, Stulz V, Francis L, et al. Gender based violence against women in sub-Saharan Africa: a systematic review and meta-analysis of cross-sectional studies. Int J Environ Res Public Health 2020;17. doi:10.3390/ijerph17030903.

a conviction. A dated international study from 2008 found that the likelihood of charges being laid against a perpetrator is between 1-7% of all reported incidents. The likelihood that cases will result in a conviction is just 1-5%.[37] The only attrition study from the SADC region, an attrition study of rape cases in certain districts in South Africa, is also dated, analyzing data from 2012.[38] That study found 65% of reported cases to the police were referred for prosecution, with about half of these being accepted for prosecution (34.4% of the reported cases), and these were enrolled for trial. Ultimately, 8.6% were concluded with a guilty verdict. Of those convicted of rape, 72.6% were imprisoned, 20.2% received suspended prison sentences, 2.4% were referred for correctional supervision and 4.1% were fined for lesser offences. Despite the prescribed minimum sentence of 10 years for rape convictions (referring to the data from 2012), 24% of all adults convicted of rape were handed a sentence of few than 10 years.

While the above noted studies are somewhat dated, more recent attrition studies from various countries reflect that the situation has not improved. For instance, in North America, few police-reported sexual assaults proceed to court as only 0.09% of sexual assault cases in the United States are referred to the prosecutor[39] and only 20% of police-reported sexual assaults in Canada make it to the court process[40] In England and Wales, the data estimates that less than one in six female victims of rape reported the crime to the police[41] and that the charge rate for rape remains low and has been decreasing, as seen in the statistic of 3% for the year 2017-2018[42].

1.3 COMPREHEND THE NEED FOR A GENDER EQUALITY FRAMEWORK TO UPROOT THE KEY DRIVERS OF GBV

Root causes / key drivers of GBV. Root causes or key drivers of GBV are gender inequalities and discrimination in all aspects of life, including social, economic, religious and political, as well as the harmful cultural and traditional practices and entrenched institutional arrangements that are patriarchal. Gender inequalities are often manifested through unequal power relations between women and men, low status of women in society, gender biased socialization, beliefs and attitudes as well as gender norms that support male superiority and entitlement. Gender inequalities are also reinforced by laws, policies and procedures that do not adequately incorporate the specific needs, experiences and aspirations of women, men and others in an equitable manner.

The structural nature of GBV. The international standards recognize the structural nature of GBV, as both a cause and consequence of unequal power relations between women, men and people with diverse gender identities and expressions. As the CEDAW Committee has noted, gender-based violence against women is violence that encompasses a range of acts seeking to exert power and control over women and is "one of the fundamental social, political and economic means by which the subordinate position of women with respect to men and their stereotyped roles are perpetuated".[43] Indicators of women's lower status or inequality, such as polygyny, bride price, dowry payments, have been seen to increase women's vulnerability to GBV.[44]

It is essential to have a solid understanding of concepts related to gender when responding to GBV. Often there is confusion between the terms "sex" and "gender". In many languages there is little or no linguistic distinction. While the term "sex" refers to biological and physical characteristics of a person, usually characterized as male, female or intersex, gender is defined as the socially constructed roles, behaviours, activities and attributes that

[37] Johnson et al. 2008. "Violence against Women: An International Perspective". HEUNI.

[38] Mercilene Machisa, Ruxana Jina, Gerard Labuschagne, Lisa Vetten, Lizle Loots, Sjeema Swemmer, Bonita Meyersfeld, Rachel Jewkes. 2017. "Rape Justice in South Africa: A retrospective study of the investigation, prosecution and adjudication of reported rape cases from 2012". Pretoria: South African Medical Research Council.

[39] Department of Justice 2017. Office of Justice Programs, Bureau of Justice Statistics, National Crime Victimization Survey, 2010-2016.

[40] Rotenberg. C. 2017. From arrest to conviction: Court outcomes of police-reported sexual assaults in Canada, 2009-2014. Juristat: Canadian Centre for Justice Statistics.

[41] Office for National Statistics. 2021. Sexual offences in England and Wales overview: Year ending March 2020.

[42] Her Majesty's Inspectorate of Constabulary and Fire and Rescue Service. 2019. Rape monitoring group digest.

[43] UN Committee on the Elimination of Discrimination against Women. 2017. General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19.

[44] Vyas S, Mbwambo J, Heise L. "Women's Paid Work and Intimate Partner Violence: Insights from Tanzania". Fem Econ 2015;21:35–58.

a given society considers appropriate for individuals based on the sex they were assigned at birth. Importantly the term "gender" applies to everyone.

KEY GENDER-RELATED CONCEPTS

Gender refers to the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for individuals based on the sex they were assigned at birth.

Gender role refers to a set of societal norms dictating what types of behaviors are generally considered acceptable, appropriate or desirable for a person based on their actual sex or perceived sex or gender.

Sex refers to a person's physical, physiological and biological status, usually characterized as male, female or intersex (Bangkok General Guidance for Judges in Applying a Gender Perspective). While infants are usually assigned the sex of male or female at birth based on the appearance of their external anatomy alone, a person's sex is a combination of a range of bodily sex characteristics.

Source: IOM SOGIESC Full Glossary of Terms

In addition, "gender" refers to the social attributes and opportunities associated with being male and female and the relationships between women and men and girls and boys. These attributes, opportunities and relationships are socially constructed and are learned through socialization processes. They are context- and/or time-specific and changeable. Gender determines what is expected, allowed and valued in a woman or a man in a given context. In most societies, there are differences and inequalities between women and men in responsibilities assigned, activities undertaken and access to and control over resources and decision-making opportunities. Gender is part of the broader sociocultural context, as are other important criteria for sociocultural analysis, such as class, race, poverty level, ethnic group, sexual orientation and age.[45]

Avoid gender stereotyping as they can reproduce unwanted and harmful practices and make GBV acceptable. For example, if judges believe in such gender stereotypes, like women should dress modestly or women are sexually passive, then they will believe that immodestly dressed women are responsible for their own rape or women are disposed to submissively surrender to men's sexual advances and this will have negative impact on how they assess such cases.

Be aware of unconscious biases. Society, including judges, may have unconscious biases about how they perceive gender attributes, differences and gender roles. Stereotypical characteristics about men are that they are competitive, acquisitive, autonomous, independent, confrontational, concerned about private goods. Parallel stereotypes of women hold that they are cooperative, nurturing, caring, connecting, group-oriented, concerned about public goods. Stereotypes are often used to justify gender discrimination more broadly and can be reflected and reinforced by traditional and modern theories, laws and institutional practices. Messages reinforcing gender stereotypes and the idea that women are inferior come in a variety of "packages" – from songs and advertising to traditional proverbs.

[45] Gender Equality Glossary of the Training Centre of UN Women.

Gender stereotype is a generalized view or preconception about attributes or characteristics, or the roles that are or ought to be possessed by, or performed by individuals based on their actual sex or perceived sex or gender. A gender stereotype is harmful when it limits an individual's capacity to develop their personal abilities, pursue their professional careers and make choices about their lives. Harmful stereotypes can be both hostile/negative (e.g., women are irrational) or seemingly benign (e.g., women are nurturing).

Gender stereotyping refers to the practice of ascribing to an individual specific attributes, characteristics, or roles by reason only of their membership in a social group based on their actual sex or perceived sex or gender.

Masculinity / femininity describe the possession of the qualities associated with men and women in a particular society at a particular time

Source: Adapted from UN Women Gender Equality Glossary

Misogyny attitudes contribute to the widespread normalization of GBV. There is strong evidence supporting the role of patriarchal social norms and masculine ideals in contributing to GBV. A study from Tanzania found that men's views on gender and sexuality that were aligned with patriarchal norms such as "wives should obey their husbands", were used to justify GBV when women transgressed or men felt the need to reinforce these gender roles.[46] Acceptance of violence among both men and women was a strong predictor of men's perpetration and women's experiences of different types of violence, with the strongest associations found when both partners supported the use of violence in relationships.[47] Moreover, the severity of intimate partner violence increased when male partners had more accepting attitudes to violence.[48] There was also evidence of an association between community-level attitudes that support the use of GBV in relationships and an increase in women's experiences of intimate partner violence.[49]

Understanding masculinity. The social meaning of manhood is constructed and defined socially, historically and politically, rather than being biologically driven. There are many socially constructed definitions for being a man and these can change over time and from place to place. The term relates to perceived notions and ideals about how men should or are expected to behave in a given setting. Like women, men's decisions and behaviours are also profoundly shaped by social and cultural expectations. Harmful masculinity can be associated with expectations to suppress emotions, mask distress or to show dominance; maintain an appearance of hardness and violence as an indication of power and strength, and to objectify women, or to show sexual prowess. Men are not simply born with these traits, nor are they explained by hormones. These historically constructed ideas of manhood often impact individuals and communities in unhealthy ways. Masculinities are not just about men; women perform and produce the meaning and practices of the masculine as well.[50]

[46] Manji K, Heise L, Cislaghi B. "Gender norms and intimate partner violence in Kirumba, Tanzania". Violence Against Women 2020;26:2062–82; Kohli A, Perrin N, Mpanano RM, et al. "Family and community driven response to intimate partner violence in post-conflict settings". Soc Sci Med 2015;146:276.

[47] Klomegah RY. "Intimate partner violence (IPV) in Zambia: an examination of risk factors and gender perceptions". J Comp Fam Stud 2008;39:557–69; Tlapek SM. "Women's status and intimate partner violence in the Democratic Republic of Congo". J Interpers Violence 2015;30:2526–40; and Okenwa L, Lawoko S. "Social indicators and physical abuse of women by intimate partners: a study of women in Zambia". Violence Vict 2010;25:278–88.

[48] Fine SL, Kane JC, Murray SM, et al. "The role of violence acceptance and inequitable gender norms in intimate partner violence severity among couples in Zambia". J Interpers Violence 2021;36:NP10744–65.

[49] Vyas S, and Heise L. "How do area-level socioeconomic status and gender norms affect partner violence against women? Evidence from Tanzania". Int J Public Health 2016;61:p. 971–980

[50] UN Women Gender Equality Glossary.

Gender equality refers to the equal rights, responsibilities and opportunities of all individuals regardless of gender. Equality does not mean that all individuals are the same, but that their rights, responsibilities and opportunities will not depend on one's sex assigned at birth, physical sex characteristics, gender assigned by society, gender identity or gender expression. Gender equality also implies that the interests, needs and priorities of all individuals should be taken into consideration. Equality between people of all genders is seen both as a human rights issue and a precondition for, and indicator of, sustainable people-centred development.

Gender inequality refers to unequal treatment or perceptions of individuals based on their gender.

Source: IOM SOGIESC Full Glossary of Terms, modifying the Gender Equality Glossary of the Training Centre of UN Women

Gender equality is crucial for the prevention and response to violence. The international standards are firmly based on the premise that only real equality between all people and a change in power dynamics and attitudes can truly prevent GBV and form the most effective response to such violence. The persistent attitudes and beliefs that see women as inferior to men and a culture of male domination socializes both men and women to accept, tolerate and even rationalize violence and to remain silent about such experiences. It is essential judges understand these entrenched attitudes and traditional cultural assumptions about gender equality and gender roles in their response to crimes involving GBV.

1.4 IDENTIFY RISK FACTORS

While risk factors cannot be considered direct causes of victimization, they can individually or together contribute to an increased likelihood of victimization. Research suggests that some groups of people are more at risk. Factors can occur at individual, family, community and wider society levels that interact with each other to increase (risk factors) or reduce risk (protective factors). Some are associated with being a perpetrator of violence, some are associated with experiencing violence and some are associated with both. While these risk factors cannot be considered direct causes of victimization, they can individually or together contribute to an increased likelihood of victimization.

What are some of the common risk factors? WHO has identified some common risk factors for both intimate partner violence and sexual violence.[51]

Risk factors for both intimate partner and sexual violence include:

- Lower levels of education (perpetration and experience)
- A history of exposure to child maltreatment (perpetration and experience)
- Witnessing family violence (perpetration and experience)
- Antisocial personality disorder (perpetration)
- Harmful use of alcohol (perpetration and experience)
- Harmful masculine behaviours, including having multiple partners or attitudes that condone violence (perpetration)
- Community norms that privilege or ascribe higher status to men and lower status to women
- Low levels of women's access to paid employment
- Low level of gender equality (discriminatory laws, etc.)

[51] WHO. 2021. Violence against Women Fact Sheet.

Risk factors specifically associated with intimate partner violence include:

- Past history of exposure to violence
- Marital discord and dissatisfaction
- Difficulties in communicating between partners
- Male controlling behaviours towards their partners

Risk factors specifically associated with sexual violence perpetration include:

- Beliefs in family honour and sexual purity
- Ideologies of male sexual entitlement
- Weak legal sanctions for sexual violence

Why do judges need to be aware of risk factors? Risk factors and their expression in daily life create a climate where individuals are made highly vulnerable to GBV. It is important to point out that this does not mean that victims are responsible for the violence. Judge should be aware of the characteristics that can make a person more vulnerable than others.

1.5 CONSIDER THE CONTEXTUAL FACTORS

While GBV exists in every country, the rate it does is uneven, with large differences in prevalence both within and between countries. In addition to the root causes of GBV and the factors already mentioned above, research has also looked at a number of contextual factors that can exacerbate GBV. While there has been a limited understanding of which contextual factors drive high rates of GBV in certain settings, research suggests that multiple, overlapping risks are responsible for a heightened prevalence of GBV, rather than a single factor.[52]

Considerations for judges regarding contextual factors. Contextual factors can shape violent behaviours towards women, girls and people with diverse SOGIESC and place them at risk. These include exposure to other forms of violence like armed conflict; economic hardship /poverty; and instability, such as climate change and environmental degradation, natural disasters and emergencies, such as COVID and living in humanitarian settings (e.g. refugee or displaced camps).[53] There is an interconnectivity of these factors, for example, unequal power relations, poverty and unequal access to resources in displaced camps increase the prevalence of GBV.

[52] Mannell J, Lowe H, Brown L, et al. "Risk factors for violence against women in high-prevalence settings: a mixed-methods systematic review and metasynthesis". BMJ Global Health 2022;7.

[53] Perry, A. "Risk Factors of Gender-based Sexual Violence". RTM Insights, 23 (2012: Ruetgurs Centre on Public Security). For a review of selected studies from the SADC region on different contextual factors, see UNODC. 2023. "Handbook for Prosecutors on the Management of Gender-based Violence Cases in Southern Africa".

	Considerations for judges to be aware of:
Economic factors – poverty	• Women living in poverty are disproportionately affected by GBV[54] and that poor food security appears to be risk factor associated with GBV.[55] • Poverty-related stress and the stress of men's unemployment can trigger discord, which increases the risk for partner violence.[56] • High levels of unemployment force women to take jobs that place them at greater risk; such as field work or as sex workers. [57] • Women's economic dependence on men not only continues to heighten women's vulnerability to GBV but also their ability to seek help and justice. • It has been suggested that it is not poverty or unemployment itself that may be a risk factor for violence, but the existence of only one partner supporting the household was a risk factor.[58] It is the potential of conflict over resources and power disparities between partners as a better explanation than sociodemographic factors.
Conflict and insecurity	• War violence exposure has been associated with increased perpetration among men and victimization among women, including increased risks of intimate partner violence and non-partner sexual violence.[59] • Conflict-related sexual violence (CRSV) happens both as a result of general lawlessness and as a political or military tactic used frequently and deliberately to target civilians, inflicting long-term trauma and humiliation, fracturing families and the social fabric, triggering displacement, and fueling armed actors' activities.[60] • It is the interconnectivity of war, economic hardship and the conditions that place women at risk of GBV. • Exposure of large numbers of people to violent events such as armed conflict increases mental ill health and consolidates acceptance of violence as normal. • Armed conflict has exacerbated existing structural factors that contribute to GBV, including gender inequalities, police corruption and poverty. • Many victims will not seek or have access to medical treatment or justice services due to the complexities of the situation and the sensitivity of the issue. • The trauma of such violence continues even long after the conflict ends.

[54] McCloskey, L.A. et al. "Determinants of Intimate Partner Violence in Sub-Saharan Africa: A Review of Prevention and Intervention Programs" Partner Abuse, Volume 7, Number 3, 2016.

[55] Studies cited in: Mannell J, Lowe H, Brown L, et al. "Risk factors for violence against women in high-prevalence settings: a mixed-methods systematic review and metasynthesis". BMJ Global Health 2022. See also: Messersmith LJ, Halim N, Steven Mzilangwe E, et al. "Childhood trauma, gender inequitable attitudes, alcohol use and multiple sexual partners: correlates of intimate partner violence in northern Tanzania". J Interpers Violence 2021;36; Hatcher A.M., Stockl H., McBride R.S., Khumalo M., Christofides N. "Pathways From Food Insecurity to Intimate Partner Violence Perpetration Among Peri-Urban Men in South Africa". Am. J. Prev. Med. 2019;56:765–772; and Gibbs A., Carpenter B., Crankshaw T., Hannass-Hancock J., Smit J., Tomlinson M., Butler L. "Prevalence and factors associated with recent intimate partner violence and relationships between disability and depression in post-partum women in one clinic in eThekwini Municipality, South Africa". PLoS ONE. 2017;12.

[56] Perry, A. "Risk Factors of Gender-based Sexual Violence". RTM Insights, 23 (2012: Ruetgurs Centre on Public Security).

[57] Krug E, Dahlberg LL, Mercy J, Zwi, A, Lozano, R. World Report on Violence and Health. Geneva (Switzerland): World Health Organization.

[58] Jewkes, Levin, and Penn-Kekana (2002) study discussed in McCloskey, L.A. et al. "Determinants of Intimate Partner Violence in Sub-Saharan Africa: A Review of Prevention and Intervention Programs" Partner Abuse, Volume 7, Number 3, 2016.

[59] Kelly J, Kabanga J, Cragin W, et al. 'If your husband doesn't humiliate you, other people won't': gendered attitudes towards sexual violence in eastern Democratic Republic of Congo. Glob Public Health 2012;7:285–98.

[60] OHCHR: Women's human rights and gender-related concerns in situations of conflict and stability, 1996-2022. Available online at https://www.ohchr.org/en/women/womenshuman-rights-and-gender-related-concerns-situations-conflict-and-instability

Climate change and environmental degradation	• Environmental crisis aggravate pre-existing patterns of discrimination and GBV, where women become more dependent on their partners, which increases the risk of GBV. Diverse factors, such as social status, gender, poverty level, access to resources and discrimination affect one's capacity to adapt to climate change.[61] • Climate change and slow environmental degradation exacerbates the risk of GBV due to displacement, resource scarcity and food insecurity and disruption to service provision to survivors. • There is increased risk of violence in camps and temporary settlements such as domestic violence, child, early or forced marriage, trafficking in persons and forced prostitution.[62] • Poor and marginalized women have less adaptive capacities due to fewer resources and lesser access to justice in the wake of climate change induced disasters, displacements and conflicts.[63] • Family structures may be destabilized, and the resulting social isolation may provide an environment where violence can occur undetected. • After disasters, law enforcement may be less effective due to strained resources, and in many cases there is a breakdown of law enforcement (a breakdown of law and order curbs their access to reporting and protection mechanisms). • Women and girls face greater barriers in reporting violence and in accessing essential services such as health and social services, including lack of safe and accessible infrastructures. Migrant women and displaced women in particular face challenges when trying to report the violence. In some cases the women themselves are imprisoned by authorities.[64]
COVID and similar emergencies	• Emergencies, such as the COVID-19 pandemic, can magnify existing structural problems and systematic criminal justice failures.[65] • Such disasters create challenging conditions that exacerbate the risk factors that drive GBV, which already takes place at alarming rates. The Covid-19 pandemic deepened economic and social stress, enforcing restricted movement and social isolation measures, resulting in increased risks of GBV, particularly in the domestic context, as well as extended forms such as online and ICT-facilitated violence.[66] • In such crisis, often resources are diverted away from the criminal justice system towards more immediate measures (e.g. health measures to deal with COVID-19). • Justice agencies have less time and human resources to respond to incidents of GBV, may lack specific plans on how to respond to such incidents during the emergency and are likely to shift priorities towards the emergency itself or to public unrest caused by such an emergency. • Courts might be suspended or postponed resulting in a backlog of cases. • This effect on justice and other services can negatively impact victim's ability to access justice.

[61] Report of the Office of the United Nations High Commissioner for Human Rights. 2019. Analytical study on gender-responsive climate action for the full and effective enjoyment of the rights of women, 1 May 2019. A/HRC/41/26

[62] CEDAW Committee General Recommendation No. 37 (2018).

[63] For instance, the Special Rapporteur on violence against women, Ms. Reem Alsalem's report to the 77th session UN GA (Sept 2022) on violence against women and girls in the context of the climate crisis, including environmental degradation and related disaster risk mitigation and response.

[64] Astrid Puentes Riaño, Independent Consultant on human rights and climate change.

[65] UNODC. 2021. "The Impact of COVID-19 on Criminal Justice System Responses to Gender-based Violence Against Women: A Global Review of Emerging Evidence".

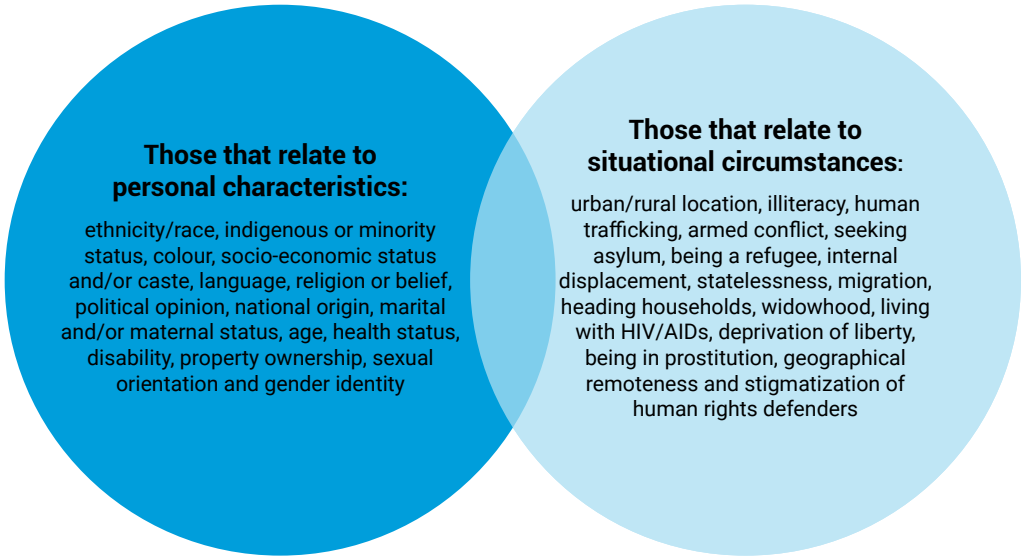
[66] BMJ. 2020. "Violence against women during covid-19 pandemic restrictions".

Why do judges need to be aware of contextual factors? Having a better understanding of the risk and contextual factors can assists frontline judges in their day to day tasks, such as ensuring for a more fulsome risk assessment in determining protection measures; and providing for a more targeted and appropriate response when deciding on protection and support measures that can allow for victims to more fully engage in the criminal justice process. For the courts, having a better understanding of the risk and contextual factors can feed into developing policies to enhance access to justice by addressing structural inequalities and prioritizing cases with multiple risk factors.

1.6 RECOGNIZE THE INTERSECTIONALITY CHARACTERISTICS

Victims are not a homogenous group. Victims of GBV are not affected in the same way by the multiple manifestations of violence and social injustices produced by patriarchal structures. Judges must recognize that the violence that affects victims is determined not only by their sexual and gender status but also by multiple and intersecting forms of discrimination. Stereotypes and prejudices based on a combination of factors, such as specific personal characteristics and situational circumstances, expose people who already experience gender inequality to a greater risk of being targeted by various forms of violence.

Intersectional discriminatory factors.[67] These factors reflect an understanding of how power imbalance can lead to forms of GBV as well as influence beliefs, narratives and behaviours around GBV. As previously noted, within patriarchal systems, men and boys are given more power than women, girls, and gender non-conforming people and these power inequalities result in higher risks of GBV for them and greater obstacles to accessing justice. However, in addition to gender and sexuality, other characteristics compound the inequalities experienced by women, girls and non-conforming individuals, including ageism, ableism, ethno-centrism, transphobia, xenophobia, classism, colonialism, racism, and homophobia.



The importance of applying an intersectional analysis to managing GBV cases. Applying an intersectional analysis to GBV allows for considering the different ways that discriminations interact with other varied and complex factors of exclusion, without subordinating or qualifying one in favor of the other. For judges who have been assigned a GBV case, using an intersectionality lens can assist in understanding how inequalities exacerbate each other, which intensifies the risk of GBV, how the victims experience the violence and their challenges in accessing justice. It is important for judges to look at how different people experience discrimination in diverse ways in order for GBV cases to be managed in an intersectional and equitable way.

[67] The Committee on the Elimination of Discrimination against Women lists a number of intersectional discriminatory factors, CEDAW G.R. No. 35.

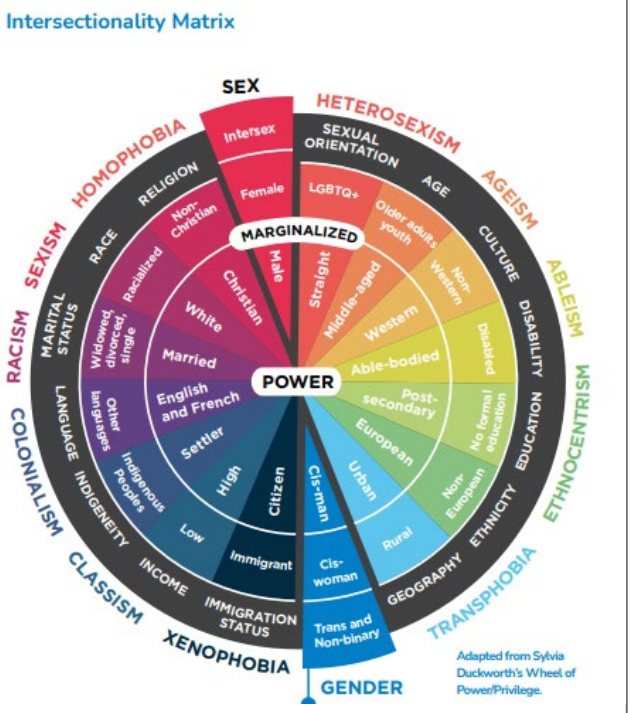
EXAMPLE OF SOME DO'S AND DONT' S

- AVOID describing a person based simply on their identity (e.g., lesbian woman, disabled woman).
- DO NOT identify diverse participants by pointing out or identifying their age, disability, sexual orientation, gender identity, religion, ethnicity, or other characteristic, as this can be harmful and stigmatizing.
- DO remember to let the person tell you how they identify themselves.

INTERSECTIONALITY MATRIX

This diagram:

- Sets out various systems of oppression – heterosexism, ageism, ableism, ethnocentrism, transphobia, xenophobia, classism, colonialism, racism, sexism and homophobia.
- Lists a number of different 'identity characteristics' – sex, sexual orientation, age, culture, disability, education, ethnicity, geography, gender, immigration status, income, indigeneity, language, marital status, race and religion.
- The identity characteristics closer to the centre reflect the dominant groups who have greater power and privilege in societies, communities and interpersonal relationships. While those on the outer part of the circle represent those more marginalized.
- For example, an adolescent girl with an intellectual disability puts her at higher risk of GBV than her non-disabled male peer in a society that perpetuates ableism, sexism, and ageism.



Source: Handicap International Humanity & Inclusion. 2022. Intersectionality in Gender-Based Violence Programming A Toolkit for Humanitarian and Development Practitioners

CONSIDERATIONS FOR JUDGES:

- Regarding ensuring a better understanding of the victim: Which characteristics describe the victim in your case? Are there combining identity factors that may increase the risk of GBV for this victim? What are the inequities and discrimination the victim could experience in accessing the criminal justice system based on the interaction between their diverse identities and systems of oppression and power?
- Regarding assessing your own attitudes as judges: Do you think the judge's identity — such as their gender, race, socio-economic status, education, disability, ethnicity, religion and sexual orientation — could cause them to act in a biased way, either positively or negatively, toward someone else? Are the courts tailored to the needs of diverse victims?

- Regarding identifying possible approaches: What are the ways judges and the courts could address these challenges and remove barriers? How can they work with other actors to address these challenges and remove barriers? Ensure that all judges have the right training, attitudes and skills to support GBV victims in all their diversity.

ADDITIONAL INFORMATION REGARDING MARGINALIZED AND VULNERABLE GROUPS

Certain groups of people are more at increased risk of experiencing GBV because of the interaction between their gender and other personal factors such as age, sexual orientation, religion, social class, migration status, etc. This may lead to specific forms of discrimination and therefore less power. Because they also may be more dependent on others, this can have a negative impact on their capacity to access justice. Below is some additional information for judges to consider when handling cases involving victims who face multiple and intersecting forms of discrimination.

The child. Children often face unique risks of gender discrimination and GBV. This includes:

- Suffering different manifestations of GBV due to their gender and their status as children, such as grooming and sexual violence, human trafficking, child, early and forced marriage, and sexual exploitation and abuse.
- Girls and young women are particularly vulnerable to certain forms of GBV given their subordinate status within families and communities. These include rituals relating to their reproductive functions such as FGM or initiation rites.
- Harmful myths make them an easy target. E.g., in some African countries, some believe that having sex with a virgin girl or a girl with albinism may cure HIV/AIDS and other STIs, or that it brings luck and wealth.
- Children seek help in different ways compared with adults, and rarely make direct disclosures. Children may find it difficult to trust or talk to adults, especially adults they do not know well; they experience fear, embarrassment or shame, or they are afraid of expressing their emotions.

The elderly. Older people often face unique risks of gender discrimination and GBV. This includes:

- Elderly women face various forms of violence, including forms of abuse and neglect. Another form, common in Tanzania and South Africa, is violence committed against older women accused of witchcraft[68].
- Older women are at greater risk of physical and psychological abuse due to discriminatory societal attitudes. Older women encounter negative views of ageing, that is, ageism, worsened by sexist social norms, and have lower standards of living in older age due to decreasing opportunities for economic security and education throughout their life because of their gender.
- There are assumptions that an older person with communication barriers or cognitive functional limitation cannot provide meaningful information about an assault they have experienced.
- Older persons with mobility issues can have limited access to the justice system

Living with disabilities. Women and girls living with disabilities face increased risk of GBV as well as discrimination when seeking justice.

- They are 3 times as likely to experience physical and sexual violence, and are especially vulnerable to being sexually assaulted while sleeping or while incapacitated as a result of their disabilities or medication.[69]
- They are at more risk to violence due to: stigma associated with disability whereby they are considered by society to be "not completely human and of less value"; may be in situations of dependence towards their caregivers and may be stuck in an abusive relationship; they often experience social isolation and limited access to protection-related information; and may have difficulty to comply with their assigned gender roles.

[68] Anouk van Eerdewik et al. 2018. The State of African Women Report. Chapter 5. Gender-based violence against women.

[69] Benedet and Grant 2007. "Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Consent, Capacity and Mistaken Belief". McGill Law Journal [online]. 52 (2), 243-289.

- Society and even legal frameworks might not recognize the capacity of persons with disabilities to consent and/or take decisions, even if their disabilities do not impede them in making choices or in expressing consent. However, it is important to note that consent should also be taken into consideration when engaging in a sexual relationship with someone with mental or intellectual disabilities.
- Persons with disabilities are often perceived as asexual, girls and young women with disabilities are presumed to be virgins and easy to target because of their disabilities, which may make it less likely that the violence will be reported or prosecuted.[70]
- Harmful myths also create obstacles in accessing justice. For example, persons with disabilities are often portrayed as abnormal, untrustworthy or deviant, and the concept of disability has been equated with incapacity. This stigmatization has given rise to negative attitudes and false beliefs on the part of criminal justice providers which can result in persons with disabilities being considered and treated as less credible in legal proceedings. Persons with cognitive disabilities may have more difficulty with long term memory or remembering the sequence of events, which may make them appear less credible.
- They may fear losing custody of their children in intimate partner violence cases, fear of unjustified termination of parental rights may cause women with disabilities to stay in abusive relationships.[71]

Indigenous and ethnic minority groups. Indigenous women, girls, men and boys, and ethnic and religious minorities, can be particularly vulnerable to social discrimination, exclusion and oppression.

- Some ethnicities are excluded from economic opportunities and are at increased risk of trafficking, including sexual exploitation. This risk multiplies in a situation of displacement, especially for women and girls with diverse ethnic and religious affiliations.
- Reports on missing and murdered Indigenous women and girls found that they experience disproportionately high rates of sexual violence and their harms are often overlooked by the justice system.[72] Other studies have noted high prevalence rates of intimate partner violence among Indigenous women (e.g. 7 times higher than the national average)[73] and they were more likely to experience severe abuse and for longer periods of time[74]. Indigenous women and girls have increased vulnerability to sexual exploitation and entry into the survival sex trade during the transition from rural to urban centres.[75]
- If the group itself is forcibly "assimilated", women are highly vulnerable to politically motivated killings, unlawful detention, militarization of their ancestral territory, harassment, threats and intimidation, and GBV. In addition violence and discrimination against them results from poverty, dependence and particularly strong social mores concerning the obedient and submissive role of a woman. The individual rights of indigenous and minority women are bound to the collective rights of the groups to which they belong.[76]

Stateless, refugees and migrants. The phenomenon of violence against migrants and displaced populations has significantly increased over recent years, manifesting itself in forms such as physical violence, labor exploitation, trafficking, sexual harassment and abuse, discrimination and hate speech. Violence against migrants and a displaced population is further exacerbated along gender, age and disability lines.

[70] Devandas Aguilar, C. 2017. "Sexual and Reproductive Health and Rights of Girls and Young Women with Disabilities. UN Special Rapporteur on the rights of persons with disabilities". Presented at the 72nd session of the UN General Assembly.

[71] Disability Discrimination Legal Service. 2003. "Beyond Belief, Beyond Justice: The Difficulties for Victims/Survivors with Disabilities when Reporting Sexual Assault and Seeking Justice—Final report of State One of the Sexual Offences Project".

[72] Amnesty International. 2009. "No More Stolen Sisters: The Need for a Comprehensive Response to Discrimination and Violence Against Indigenous Women In Canada". London: Amnesty International.

[73] Blaney, E. & Janovicek, N. 2004. "Reflecting on Violence Prevention Programs in Rural Communities: Defining the Six Lenses / Analysis Screens".

[74] Atlantic Centre of Excellence for Women's Health Rural Research Centre and Transition House Association of Nova Scotia. 2011. "Positive mental health outcomes for women experiencing violence and abuse in rural and remote areas".

[75] Inter-American Commission on Human Rights. 2014. "Missing and Murdered Indigenous Women in British Columbia, Canada".

[76] Asia Indigenous People's Pact. 2013. "Indigenous Women in Southeast Asia: Challenges to their access to justice" and Christian Michelsen Institute. 2010. "Indigenous Women's Access to Justice in Latin America". Working Paper 2010:2. Bergen: CMI.

- Numerous studies have highlighted the vulnerability of women and children in displacement settings, often based upon the premise that camps are spaces where political and power structures reinforce and strengthen the patriarchal tendencies of displaced communities.[77]
- Women and girls are likely to experience a continuum of GBV at all stages of migration, from bullying and verbal, physical and psychological abuse, to sexual violence. In addition, those who are using irregular channels, face increased risk of becoming victims of people trafficking, especially for the purpose of sexual exploitation, as well as labor exploitation and domestic servitude.
- The context in which they live create barriers to accessing justice; routine harms such as unpaid wages, unsafe work conditions, inadequate rest, inhumane housing conditions, confiscation of identity documents by employers, contract substitution which makes them at risk for and fundamental changes in the nature or conditions of work.[78] This also makes them less likely to report cases of GBV. They fear losing their jobs, partners or residency status.

SOGIESC (sexual orientation, gender identity, gender expression and sex characteristics). People with diverse SOGIESC are often discriminated against based on their sexual orientation and gender identity.

- Research has documented widespread physical and psychological violence against SOGIESC people – including murder, torture, intimidation, assault, kidnapping, rape, sexual violence, killing in private homes and public spaces, extortion by blackmailers who threaten to reveal their identity to the public, and abuse from officials including arbitrary arrest and detention.[79]
- SOGIESC people often face violence and discrimination when seeking justice. With some countries still criminalizing consensual same-sex relationships between adults and cross-dressing, this exposes individuals to the risk of arbitrary arrest, prosecution, imprisonment — even the death penalty in some countries.[80]
- Heterosexism, homophobia and transphobia perpetuate stigma and discrimination, as well as hate crime, police abuse, torture and ill-treatment, family and community violence, and negatively affect SOGIESC by impeding access to justice.
- It is important to appreciate that violence in same-sex relationships can be distinct from violence in heterosexual relationships. This includes how perpetrators may threaten "outing" the victim to family, friends or colleagues which can increase the sense of extreme isolation among victims; realizing why victims may not want to contact the police or use the justice system as this may force them to reveal their sexual orientation or gender identity; understanding that their reluctant to seek help may be out of fear of showing a lack of solidarity with the LGBTQIA+ community; and considering that victims may be more likely than heterosexual women to fight back, and that this could incorrectly lead criminal justice providers to assume that the fighting was mutual, ignoring the history of violence, power and control.

[77] Fiddian-Qasmiyeh, E. 2014. "Gender and Forced Migration". Mixed Migration Review. 2018. "Women on the Move - Drivers, Choices and Risks".

[78] Caritas Lebanon Migrant Centre, 2007. "Access to Justice of Migrant Domestic Workers in Lebanon". Lebanon: Caritas Lebanon Migrant Centre. Open Society Foundation, 2013. "Migrant Workers' Access to Justice at Home: Indonesia". New York: OSF.

[79] International Gay and Lesbian Human Rights Commission. 2009. "Human Rights Abuses in Asia On the Basis of Sexual Orientation, Gender Identity and Gender Expression (2000-2009)"; Savoni, 2011. "Report on Discrimination against Women in Singapore based on Sexual Orientation and Gender Identity".

[80] OHCHR. 2015. "Ending violence and discrimination against lesbian, gay, bisexual, transgender and intersex people".

TERMINOLOGY RELATED TO SOGIESC

Assigned (female or male) at birth. The sex (usually female or male) recorded at birth (e.g. on a birth certificate), but which does not necessarily align with one's gender.

Cisgender. A person whose gender matches with their sex assigned at birth.

Gender identity. Each person's deeply felt internal and individual experiences of gender which may or may not correspond with their sex assigned at birth.

Gender expression. The external presentation of gender identity, expressed in many ways, including through clothing, haircut, voice, bodily movements and the ways one interacts with others.

Gender binary. The assumption that all people identify as one of two genders, women or men, which is often inscribed in law, institutions and social practices.

Gender diverse. A person whose gender does not fit within the binary or other normative expectations of gender identity or gender expression, including notions that gender is fixed.

Sex characteristics. Genetic, hormonal, and anatomical characteristics used by the medical system (and informed by social norms) to classify the sex of bodies.

Sexual orientation. A person's capacity for profound emotional, romantic, or sexual attraction to individuals or people of a different gender, the same gender, or more than one gender.

Source: UN Women Diverse SOGIESC Rapid Assessment Tool Guidance Note

Living in rural and remote areas. People living in geographical and social isolation experience an impact on their ability to disclose, report, seek help and receive justice.[81]

- They often experience greater severity of physical abuse, greater frequency of violence, and remain trapped in abusive relationships longer than urban counterparts because they live much further away from available resources; and that there is greater potential to physically isolate women and girls as a tactic of abuse and prevent escape.[82]

LIVING WITH HIV/AIDS

- They are more vulnerable to poverty, deprivation of essential services and GBV. If their partner dies and widows cannot assert their inheritance and property rights, they risk destitution, violence and, if they turn to prostitution to survive, transmitting the disease.[83]

[81] Wendt et al.; Moore, Elizabeth. 2009. "The Pilot Domestic Violence Intervention Court Model (DVICM): Toward Evidence-led Practice in Wagga Wagga in Rural Australia." New Scholarship in Human Services. 8.1.

[82] Campo, Monica & Tayton, Sarah. 2015. "Domestic and Family Violence in Regional, Rural and Remote Communities: An Overview of Key Issues." Australian Institute of Family Studies.

[83] Open Society Foundation, 2007. "Ensuring Justice for Vulnerable Communities in Kenya: A Review of HIV and AIDS-related Legal Services".

1.7 OPTIONS FOR EXERCISES

Below are a number of possible options for delivering the material in this Module. Based on the background and experience of the participants in the course, you can decide whether you need to start with the basic concepts of gender or you may want to focus more on trauma and understanding the dynamics of violence. It will depend on the training need assessment of the participants.

EXERCISE: Video: Masculinity vs femininity? What is a man? What is a woman?

Instructions

Show the video www.youtube.com/watch?v=383aRjfNljk

Ask for comments from the plenary.

EXERCISE: Video: The feminist on cellblock Y

Instructions

Show the video "Male Prisoners Tackling Toxic Masculinity Head On". Warning, the video contains language which may be offensive to some viewers. Viewer discretion is advised.

https://www.cnn.com/videos/us/2018/04/20/the-feminist-on-cellblock-y-digital-short.cnn

Ask for comments from the plenary.

Facilitator's notes:

Masculinities: A gender perspective, or way of analyzing the impact of gender on people's opportunities, social roles, and interactions, allows us to see that there is pressure on men and boys to perform and conform to specific roles. Thus, the term masculinities refers to the social meaning of manhood, which is constructed and defined socially, historically, and politically, rather than being biologically driven. There are many socially constructed definitions for being a man and these can change over time and from place to place. The term relates to perceived notions and ideals about how men should or are expected to behave in a given setting. Masculinities are not just about men; all individuals perform and produce the meaning and practices of the masculine as well.

EXERCISE: Brainstorming exercise – plenary discussion

Instructions

Questions to the plenary:

1. What are the characteristics of women and men? Which of the female/male characteristics can or cannot be changed? Which characteristics can both male and females have?
2. What are some examples of gender stereotypes?
3. What are some examples of gender stereotypes related to GBV?

Facilitators notes:

Q1: What are the characteristics of women and men? If participants are having difficulty, give examples, and ask them to work it out: pregnancy and childbirth; child rearing; muscle mass/physical strength; breastfeeding; men are rational, women are emotional; baldness, boys are better at science and math than girls; physical stamina; changing voices at puberty; girls are more gifted at sewing; growing beards. After the list is completed, go through each item. Ask which of the female/male characteristics can or cannot be changed? Which characteristics can both male and females have? For example, if under the heading of "women", such characteristics of "patient" or "caring" are mentioned, ask if men can also be "patient" or "caring". If so, mark that characteristic with a "yes" or with a "+" sign. Characteristics that cannot be changed, should be marked with a "no" or "-" sign. Highlight the difference between "sex" and "gender" from the examples provided and provide the group with the definitions of these terms.

Q2. What are some examples of gender stereotypes?

- Women always patient / emotional/nurturing. Men always strong / rational / logical.
- Women should be mothers, they should be the ones concerned with matters related to bearing and rearing of children.
- Men are the breadwinners, they work hard and so should not have to be involved in child-rearing.

Q3. What are some examples of gender stereotypes related to gender-based violence?

- Men cannot control their sex drive.
- There are good women and there are bad women.
- A sexy outfit is evidence of sexual availability.
- Women say "no" when they mean "yes".
- Violence against women is a private matter.
- Women deserve to be beaten; it shows that the man is the master.
- Real victims cannot resume her normal activities after the alleged violation.
- Real victims do not forget details.

Q4. Why is violence against women referred to as gender-based violence?

- Violence against women is referred to as gender-based violence because it evolves in part from women's subordinate gender status in society.
- Unequal power relationships between women and men created and maintained by gender stereotypes is the basic underlying cause of violence against women.
- The persistent attitudes and beliefs that see women as inferior to men and a culture of male domination socialises both men and women to accept, tolerate and even rationalise violence and to remain silent about such experiences.

EXERCISE: Small group exercise on gender stereotyping – "good, better, best"

Instructions

Divide the group into two smaller groups (group A and B).

Give each group an envelope with a set of cards, a sheet of A3 paper and a worksheet with the appropriate instructions. Tell participants to read the instructions on their worksheet and work as quickly as they can to carry out the task. They need to place each card on the A3 paper in the appropriate column. For group A, they will place the cards according to whether they think each one is "masculine" or "feminine", and for Group B, according to whether society tends to regard the quality as "Positive / Desirable" or "Negative / Undesirable". Allow the groups 10 to 15 minutes to complete the task

In plenary, divide a piece of flipchart paper into two columns, and write "Feminine" at the top of one, and "Masculine" at the top of the other. Ask Group A to list the qualities they put into the "Feminine" column, and after each adjective, ask Group B if they placed that adjective in the Positive/ Desirable or the Negative/ Undesirable column. Record this information beside each adjective using a plus (+) or minus (–) sign. Repeat the procedure for the "Masculine" column.

Set of cards could include: "dependent", "independent" "emotional", "rational", "objective", "subjective", "submissive", "dominant", "passive", "active", "indecisive", "decisive", "ambitious", "unambitious", etc….

Facilitators notes:

This activity looks at how gender stereotypes affect people's lives and at the value society places on "feminine" and "masculine" qualities.

- By way of introducing the conclusion to the debriefing, you could inform participants that research has found that children as young as 5 or 6 years of age use gender related stereotypes.
- Groups with "undesirable" characteristics are generally regarded as being less valuable, and they tend to have a lower status in society. This usually means that they are more often exposed to prejudice and to verbal or physical violence.
- Ask participants to identify groups who have been affected by such problems in their local area and how they think these can be overcome. Try to link this with human rights and ask the group to identify human rights issues related to gender-based violence.

Source: Council of Europe. "Training programme for youth and gender-based violence".

EXERCISE: Small group exercise to discuss terminology

This exercise could be used if the trainees already have some familiarity with the subject matter and serve as a review.

Instructions:

In advance, on flash cards, put down one term per card – "sex"; "gender"; "gender stereotype"; "gender equality"; "gender-based violence", "violence against women" and "domestic violence". Make up as many cards as participants, using the terms more than once. During the training session, hand out one flash card per participant. Ask the participants to pair up with someone they have not met before. Give them five to ten minutes to discuss with each other how they would define the term on one of the flash cards. Then ask them to switch to the other card for discussion, for the same amount of time. Bring them back to plenary and review each term (use the material in the module).

EXERCISE: Energizer: role play – the power walk

This exercise could be used anytime during the training to energize the participants and provide further opportunities to discuss the issues of power and privilege.

Instructions:

This exercise of the "power walk" is to help participants understand the idea of privilege and make them aware of their own privilege.

To avoid causing discomfort and embarrassment to participants, it is recommended to use the role-play method and assign fake identities to the participants (e.g. male lawyer, woman police officer, victim of GBV, unemployed single mother, blind elderly man, 10 year old street boy, grandmother taking care of orphans, male shopkeeper, male school teacher, female member of parliament, migrant ethnic minority, male literate factory worker) and ask them to "steps into the shoes" of another person. As each statement is read aloud, if these apply to them, they step forward. If not, they do not move. In the end, participants visually see how much power, access to resources and opportunities some individuals in society have compared to others. Based on this, discuss how power and privilege is relative to a person's gender, socio-economic position, ethnicity and other cross-cutting issues.

The statements suggested by UN Women for this exercise include:

- I have access to and can read newspapers regularly.
- I eat at least two nutritious meals a day.
- I would get legal representation if I am arrested.
- I would be confident if I had to speak directly to a judge.
- I am not in danger of being sexually harassed or abused.
- I have a regular income or means of supporting myself.
- I can speak in meetings of my extended family.
- I would not be treated violently or roughly if I am arrested.
- I can afford and access appropriate healthcare.
- I can question spending of community funds.
- I can name some of the laws in the country.
- Someone would immediately be told if I was arrested.
- I have left over money at the end of the week that I can spend on myself.
- I can travel anywhere I like without assistance or permission.
- I do not feel threatened in the workplace by any issues of my identity.
- I do not feel socially uncomfortable in most situations to voice my opinions.
- I can do what I like in my home without fear.

Facilitators notes:

It is important for judges to be aware of their own privilege position in society and how this can have implications for how they communicate with those, particularly victims, who come from different backgrounds.

See https://www.youtube.com/watch?v=hD5f8GuNuGQ for an example

EXERCISE: Self-reflection exercise: Intersectionality Survivor-Centred Attitude Scale

Instructions

Provide the participants the Attitude Statements (without the scores) at the end of the training day and ask the participants to fill in the survey. Explain the purpose: this is an assessment to better understand their personal beliefs and feelings about GBV and those who experience it. All answers should be honest and self-reflective.

Discuss the next day without requiring them to share their responses.

Note: Distributing the survey can be a couple of different ways. One is the simple paper handout.

Another way is using Mentimeter which allows for interactive polls using a free app which allows for real time feedback (check out www.mentimeter.com)

ATTITUDE STATEMENTS

Attitude statement	Strongly agree	Agree	Disagree	Strongly disagree
All survivors of GBV have the right to receive help, regardless of their gender, age, disability status, race, ethnicity, religion, sexual orientation, and other identity factors.	4	3	2	1
If LGBTQIA+ individuals who behave inappropriately are raped, it is their fault.	1	2	3	4
If a survivor with disabilities can't answer questions about the incident, they must not be telling the truth.	1	2	3	4
If a caregiver forces a woman with a disability to be sterilized, it is for her own good and not a form of GBV	1	2	3	4
Poor women often lie about having been raped or abused so that they can get attention, money or resources.	1	2	3	4
Women from certain religions cause their husband's violence because of their behaviour	1	2	3	4
If a young girl does not have citizenship, her father has the right to force her to marry.	1	2	3	4
A husband can take away his disabled wife's assistive device as punishment for her not obeying him	1	2	3	4
Violence between spouses or dating partners that occurs within certain ethnic or religious groups should be handled within that community as they have their own culture or practices	1	2	3	4
A survivor with disabilities should have the right to make decisions about what actions are best for them.	4	3	2	1
Men who assault LGBTQIA+ individuals are justified because that individual makes them uncomfortable	1	2	3	4
Refugee women are uneducated and can only do household jobs.	1	2	3	4
All women have the same vulnerability to GBV, regardless of their other identity factors.	1	2	3	4

My identity — such as my gender, race, socioeconomic status, education, disability, ethnicity, religion and sexual orientation — could cause me to act in a biased way, either positively or negatively, toward someone else.	4	3	2	1
Identity factors, such as gender, race, socioeconomic status, education, disability, ethnicity, religion and sexual orientation, can have a huge impact on the opportunities we have throughout our lives.	4	3	2	1
Bias is a natural part of being human and is something everyone experiences	4	3	2	1
If a topic, such as gender identity, race, disability, ethnicity, religion and sexual orientation, makes me uncomfortable, I'll try to avoid it.	1	2	3	4

Facilitators notes

Go over the questions and the scoring (as above)

Further discussion questions can include:

1. Is this really what I think, or is this what my society, my family, my friends, or the media are telling me?
2. Is it possible that my biases, and the biases of the people and organizations around me (such as my workplace, my church/mosque), influence me in how I work on a daily basis?
3. Is it possible that my assumptions may cause me to forget to ask certain questions? Is it possible that I do not always understand the answers because I have a totally different experience compared with the survivors I work with?
4. Why is learning about unconscious bias important in the work we do with survivors who don't look like me, sound like me, or have the same identities as me?
5. What do I need to learn more about when it comes to how to work with diverse GBV survivors?

Source: Handicap International Humanity & Inclusion. 2022. Intersectionality in Gender-Based Violence Programming A Toolkit for Humanitarian and Development Practitioners

MODULE 2.

Based on international and regional standards and norm

GUIDANCE FOR JUDGES IN APPLYING INTERNATIONAL AND REGIONAL LAW IN THEIR WORK

1. Consider the relevant sources of international and regional law that are applicable in GBV cases.
2. Become familiar with key obligations under international and regional law.
3. Consider the appropriate approach to judicial application of international and regional law at the national court level.
4. Use international standards to interpret the rights of equality and non-discrimination to the greatest extent possible in ways which facilitate a victim-centred, gender-responsive and perpetrator accountability approach.
5. Use international standards to balance the rights of the accused to a fair trial and the rights of the victim to protection and justice.

2.1 RELEVANT SOURCES OF INTERNATIONAL AND REGIONAL LAW APPLICABLE IN GBV CASES

In recent decades, developments in international and regional law to promote a comprehensive and multi-sectoral response to GBV, including a gender-responsive criminal justice system, have had an increasing influence on national legal systems, and thereby also on the day to day performance of judges' duty. Judges play an essential role in upholding international and regional obligations, norms and standards to effectively prevent and respond to GBV. Knowledge of these rights and norms is also important to assist judges in adopting a victim-centred approach, where the paramountcy of safety and dignity for victims and empowerment of women, girls and others facing gender discrimination is core while holding the perpetrators accountable for the violence.

Being aware of the international and regional treaties their states have ratified or acceded to and the relevant standards and norms adopted by the Member States of the United Nations, can assist the judiciary is the performance of their duties. The main international and regional instruments for dealing with GBV are set out below.

REGIONAL INSTRUMENTS

RELEVANT SOURCES OF REGIONAL LAW

African region

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (1995) (the Maputo Protocol)

- The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (1995) (the Maputo Protocol)
- Considered one of the world's most comprehensive and progressive women's human rights instruments with progressive provisions on ending VAW and addressing harmful traditional practices, such as child marriage and female genital mutilation.
- Defines VAW to mean "all acts perpetrated against women which cause or could cause them physical, sexual, psychological and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed conflicts or of war".
- Requires states parties: to enact and enforce laws to prohibit all forms of VAW including unwanted or forced sex whether the violence takes place in private or public; and to adopt legislative, administrative, social and economic measures to ensure the prevention, punishment, and eradication of all forms of VAW.
- Punish the perpetrators of VAW and implement programmes for the rehabilitation of women victims.
- Guidelines on Combating Sexual Violence and Its Consequences in Africa, adopted by the ACHPR (2017)
- Sets out three principles to guide states response: the non-discrimination principle; the "do no harm" principle and the due diligence principle.
- Protection against Violence and other Human Rights Violation against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity (Resolution 275, ACHPR, 2014).
- Strongly urges states to end all acts of violence and abuse, whether committed by state or non-state actors, including be enacting and effectively applying appropriate laws prohibiting and punishing all forms of violence including those targeting persons on the basis of their imputed or real sexual orientation or gender identities, ensuring proper investigation and diligent prosecution of perpetrators and establishing judicial procedures responsive to the needs of victims.

RELEVANT SOURCES OF INTERNATIONAL LAW

Hard law (treaties, conventions)

Convention on the Elimination of All Forms of Discrimination against Women (1979) (CEDAW)

- Sets out discrimination against women as a violation of their human rights.
- Articulates the following individual rights: the right to life and personal integrity; the right not to be tortured or to cruel, inhuman or degrading treatment or punishment; the right to equal protection under the law/ due process; the right to equality in the family; the right to the highest standard of attainable physical and mental health.
- Includes CEDAW General Recommendation No. 35 on gender-based violence against women (2017) updating General Recommendation No. 19 on violence against women (1992), and frames "gender-based violence against women" within the overall context of discrimination; expands the definition to include specific acts of gender-based violence against women that can amount to torture or cruel, inhuman or degrading treatment.
- Includes CEDAW General Recommendation No 33 on women's access to justice.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

- The Committee Against Torture recognizes violence against women as a form of torture and discrimination irrespective of the situation in which the violence takes place – whether in armed conflict or peacetime, in the home, the street or in places of detention.

Soft law (declarations, guidelines)

UN Declaration on the Elimination of Violence against Women (1993)

- Defines "violence against women" and sets out range and manifestations of VAW. Reiterates that women are entitled to the following rights: right to life; right to equality; right to liberty and security of the person; right to equal protection under the law; right to be free from all forms of discrimination; right to the highest standard attainable of physical and mental health; right to just and favourable conditions of work; right not to be subjected to torture.

Beijing Declaration and Platform for Action (1994)

- Expanded the definition to violations of rights of women in situations of armed conflict and recognized the particular vulnerabilities of certain groups of women.

UN Updated Model Strategy and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice (2010)

- Sets out guiding principles for all criminal justice responses (including victim-centred; perpetrator accountability) and calls on states to criminalize and prohibit all forms of violence against women. Also includes strategies to improve investigations, evidentiary rules, court room procedures, and victim's rights.

UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power

- Covers principles dealing with victims of crime, access to justice and fair treatment, restitution, compensation, assistance and victims of abuse of power.

A NOTE ON THE INTERNATIONAL INSTRUMENTS ON JUDICIAL PRINCIPLES

Primary responsibility for the promotion and maintenance of high standards of judicial conduct lies with the judiciary in each country. The importance of a competent, independent and impartial judiciary to the protection of human rights is given emphasis by the fact that the implementation of all the other rights ultimately depends upon the proper administration of justice. Public confidence in the judicial system and in the moral authority and integrity of the judiciary is of the utmost importance in a modern democratic society.

INTERNATIONAL INSTRUMENTS ON JUDICIAL PRINCIPLES

United Nations Basic Principles on the Independence of the Judiciary

- Designed to secure and promote the independence of the judiciary, and are addressed primarily to States.

The Bangalore Principles of Judicial Conduct 2002

- Sets out principles which are intended to establish standards for ethical conduct of judges and include six core values: independence, impartiality, integrity, propriety, equality, competence and diligence.

Particularly relevant to addressing GBV is Value 5 of the Bangalore Principles of Judicial Conduct which covers equality. The Principles provides that "ensuring equality of treatment to all before the courts is essential to the due performance of the judicial office".

BANGALORE PRINCIPLES OF JUDICIAL CONDUCT – THE APPLICATION OF VALUE 5: EQUALITY

5.1. A judge shall be aware of, and understand, diversity in society and differences arising from various sources, including but not limited to race, colour, sex, religion, national origin, caste, disability, age, marital status, sexual orientation, social and economic status and other like causes ("irrelevant grounds").

5.2. A judge shall not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice towards any person or group on irrelevant grounds.

5.3. A judge shall carry out judicial duties with appropriate consideration for all persons, such as the parties, witnesses, lawyers, court staff and judicial colleagues, without differentiation on any irrelevant ground, immaterial to the proper performance of such duties.

5.4. A judge shall not knowingly permit court staff or others subject to the judge's influence, direction or control to differentiate between persons concerned, in a matter before the judge, on any irrelevant ground.

5.5. A judge shall require lawyers in proceedings before the court to refrain from manifesting, by words or conduct, bias or prejudice based on irrelevant grounds, except such as are legally relevant to an issue in proceedings and may be the subject of legitimate advocacy

2.2 KEY OBLIGATIONS UNDER INTERNATIONAL AND REGIONAL LAW

For judges complying with international and regional standards means to ensure that victims have access to the protection and remedies offered by justice mechanisms, and that they are not exposed to discrimination within the context of these mechanisms; and create enabling environments that allow them to participate in criminal justice processes, and take measures to prevent retaliation against the victims seeking recourse in the justice system.

The obligation of due diligence. The international standards articulate the concept of due diligence in the context of violence against women. States are required to exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women whether those actions are perpetrated by the state or by private person. According to CEDAW General Recommendation No 35, the failure of states to take all appropriate measures to prevent acts of gender-based violence against women when its authorities know or should know of the danger of violence, or a failure to investigate, prosecute and punish, and to provide reparation to victims of such acts, provides tacit permission or encouragement to acts of GBVAW.

For judges, this means:

- **Prevention and protection.** Judges need to prevent further violence from recurring to victims whose cases are before them and ensure effective protection throughout the criminal process. This means that any judicial decisions with respect to protection orders, pre-trial detention or pre-trial judicial release and special protection measures during trial should have as a central consideration the safety of the victim.
- **Investigation and prosecution.** Judges should ensure that the police and prosecution function effectively in practice. Judges, who hold prosecutors accountable during the trials, are to ensure fair and effective prosecutions are done. The primary obligation to pursue prosecution is on the prosecutor and not on the victim and should be done in a timely manner, with the avoidance of re-victimization and pursuing of justice and accountability of the perpetrator for the violence.
- **Punishment and provision of redress and reparations.** Judges should ensure that the punishment is adequate, effective and dissuasive and that victims have access to adequate and appropriate redress. The sentences should send a message that such violence will not be tolerated, be capable of preventing recidivism, rehabilitate the perpetrator and denounce and deter GBV.

Ensuring women's access to justice. Within the broader due diligence standards, judges have a key role to play to ensuring women have access to justice when they are victims of violence. The right of access to justice is multidimensional, and encompasses "justiciability, availability, accessibility, good-quality and accountability of

the justice systems and provision of remedies for victims".[84] Access to justice includes access to both criminal and civil justice.

Not condoning gender stereotypes. Due diligence requires that the legal definitions of acts of GBV and relevant evidentiary rules are not to be overly restrictive, inflexible or influenced by gender stereotypes. There should be no assumption in law or in practice that a person gives their consent because they have not physically resisted the sexual conduct, regardless of whether the perpetrator threatened to use or used physical violence. Judges should not be guided by notions of what a person 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. Judges should not pay undue attention to the fact that the victim and the perpetrator knew each other, explaining that it indicates reliance on gender-based myths and misconceptions.

The "do no harm" principle. The "do no harm" principle articulated by the Guidelines on Combating Sexual Violence and Its Consequences in Africa, adopted by the ACHPR requires states to take all legislative and other measures to guarantee the well-being and security of both victims and witnesses. This also includes minimizing "the negative impact that actions to combat sexual violence and its consequences can have on victims and witnesses", in particular investigative procedures on sexual violence acts, as well as the prosecution of perpetrators.

Practical ways to ensure the obligation of due diligence. In order to assist criminal justice systems and professionals in meeting their due diligence obligations, in December 2010 the General Assembly adopted the UN Updated Model Strategies and Practical Measures. This is another form of 'soft law'. The Model Strategies embody internationally recognized principles in crime prevention and criminal justice and represents a common ideal of (i) how the criminal justice system should be structured; (ii) how criminal policy strategies should be developed; and (iii) how crime prevention and criminal justice should be secured. The Model Strategies provide a comprehensive set of criminal justice strategies and measures which can assist criminal justice professionals in better addressing the needs of women and ensure their fair treatment in the justice system. They represent a map or a compass to navigate international standards throughout the criminal justice continuum.

- **Criminal laws.** All forms of violence against women are criminalized and prohibited; that criminal laws are comprehensive and effective in eliminating violence against women; and remove any provision that allow or condone violence against women or increase the vulnerability or re-victimization of women who have been subjected to violence.
- **Investigations.** Investigations should be carried out with a gender perspective, consider the specific vulnerabilities and the victims' needs, and use techniques that minimize intrusion into the lives of the victims while abiding by standards for the collection of evidence.
- **Investigations and prosecutions.** Investigations and prosecutions should be initiated ex officio (i.e. by virtue of one's office) and without delay by competent authorities.
- **Evidentiary rules.** Evidentiary rules should be non-discriminatory, allow the admission of all relevant evidence and preclude the admissibility of the defence of honour or provocation. Evidence of prior acts of violence by the perpetrator should also be considered during court proceedings.
- **Victims' rights.** Victims should be enabled to testify through measures that protect their privacy, identity and dignity while ensuring their safety and avoiding secondary re-victimization. Victims should be enabled to speak to a female officer and should be informed of the offender's release from detention or imprisonment.
- **Exercise of powers.** The exercise of powers by police, prosecutors and other criminal justice officials should be in line with the rule of law and codes of conduct and that such officials should be held accountable for any infringement thereof through appropriate oversight and accountability mechanisms.

[84] CEDAW General Recommendation No 33 on women's access to justice, CEDAW/C/GC/33, 23 July 2015, para 14.

2.3 JUDICIAL APPLICATION OF INTERNATIONAL AND REGIONAL LAW AT THE NATIONAL COURT LEVEL

A State can use a number of methods for implementing international and regional law instruments. How a treaty is implemented, that is, how it is given force under domestic law, or what legal or regulatory changes are made to allow the State to act in accordance with its international obligations, often varies enormously from State to State. In broad terms, there are two main systems: monism and dualism.

- **Monism:** the State's constitution allows in principle for the direct incorporation of international norms into domestic law once the treaty has been ratified and published in the official gazette (treaties become self-executing).
- **Dualism:** generally require a distinct step (typically through the adoption of legislation) for international obligations to be incorporated into the domestic legal system.

The role of the judiciary in applying international law in domestic courts. Domestic courts can consider applying the provisions of international treaties either directly or as interpretative standards.

- Direct application of international standards. If international standards are incorporated into national legislation, it is easier for the judiciary in that country to apply them directly. In monist countries where treaties are part of domestic law, the judiciary can apply them directly. In dualist countries, the treaty provisions must be formally incorporated into domestic law before the judiciary can apply them directly.
- Indirect application by using international standards as interpretive guides. When international law instruments have not been formally incorporated into domestic law, the judiciary still can and should consider using international norms and standards as guidance in interpreting national law.

The judiciary is in a position to acknowledge, in principle, the relevance of international and regional standards for interpreting domestic law. They should be taking into account international law where it is necessary to ensure that the state's conduct is consistent with its obligation under international law. It is generally accepted that domestic law should be interpreted as far as possible in a way which conforms to a state's international legal obligations.

SUMMARY OF SADC STATES AND INTERNATIONAL AND REGIONAL LAW

SADC state	Monist/dualist	International legal instruments – state party	Regional legal instruments
Angola	Monist (by Constitution)	CEDAW (1986) CRC (1990)	African Charter (1990) Maputo Protocol (2007) SADC Protocol G&D (2008) Revised SADC Protocol
Botswana	Dualist	CEDAW (1996) CRC (1995)	African Charter (1986) SADC Protocol G&D (2016) Revised SADC Protocol
Comoros		CEDAW (1994) CRC (1990)	African Charter (1986) Maputo Protocol (2004) Revised SADC Protocol
D.R. of Congo	Monist (Constitution Art 215)	CEDAW (1986) CRC (1990)	African Charter (1987) Maputo Protocol (2008) SADC Protocol G&D (2008) Revised SADC Protocol

SADC state	Monist/dualist	International legal instruments – state party	Regional legal instruments
Eswatini	Dualist	CEDAW (2004) CRC (1995)	African Charter (1995) Maputo Protocol (2012) SADC Protocol G&D (2008) Revised SADC Protocol
Lesotho	Dualist	CEDAW (1995) CRC (1992)	African Charter (1992) Maputo Protocol (2004) SADC Protocol G&D (2008) Revised SADC Protocol
Madagascar	Monist Constitution, Art 137	CEDAW (1989) CRC (1991)	African Charter (1992) Maputo Protocol (not yet ratified signed Feb 2024) SADC Protocol G&D (2008) Revised SADC Protocol
Malawi	Dualist	CEDAW (1987) CRC (1991)	African Charter (1989) Maputo Protocol (2005) SADC Protocol G&D (2008)
Mauritius	Dualist	CEDAW (1984) CRC (1990)	African Charter (1982) Maputo Protocol (2017)
Mozambique	Monist	CEDAW (1997) CRC (1994)	African Charter (1989) Maputo Protocol (2005) SADC Protocol G&D (2008) Revised SADC Protocol
Namibia	Monist	CEDAW (1992) CRC(1990)	African Charter (1992) Maputo Protocol (2004) SADC Protocol G&D (2008) Revised SADC Protocol
Seychelles	Not easily classified as monist or dualist	CEDAW (1992) CRC (1990)	African Charter (1992) Maputo Protocol (2006) SADC Protocol G&D (2016) Revised SADC Protocol
South Africa	Dualist (Constitution, s. 231)	CEDAW (1991) CRC (1995)	African Charter (1996) Maputo Protocol (2004) SADC Protocol G&D (2008)
Tanzania	Dualist	CEDAW (1985) CRC (1991)	African Charter (1984) Maputo Protocol (2007) SADC Protocol G&D (2008) Revised SADC Protocol
Zambia	Dualist	CEDAW (1985) CRC (1991)	African Charter (1985) Maputo Protocol (2006) SADC Protocol G&D (2008) Revised SADC Protocol
Zimbabwe	Dualist	CEDAW (1991) CRC (1990)	African Charter (1986) Maputo Protocol (2008) SADC Protocol G&D (2008) Revised SADC Protocol

TIPS FOR JUDGES IN APPLYING INTERNATIONAL AND REGIONAL LAW IN THEIR WORK

- Determine the meaning and status of relevant international and regional norms; if the norms are relevant and nothing in legislation overrides it, or if inconsistency can be fairly resolved, the court should interpret to preserve the maximum scope for both; but if conflict is unavoidable, then the court must choose the prevailing norm according to the hierarchy of laws applicable to their domestic systems.
- When faced with a choice between an interpretation of domestic law which would enable the state to comply with international and regional law and one that would place the state in breach of international and regional law, judges have the inherent ability to follow the first choice.
- Interpret the rights of equality and non-discrimination to the greatest extent possible in ways which facilitate the full protection of all rights for women, girls and people with diverse gender identities.
- Do not apply existing legal provisions that permit discrimination, such as particular provisions that allow, tolerate or condone forms of violence against women and domestic violence.

EXAMPLES OF USING INTERNATIONAL AND REGIONAL LAW INSTRUMENTS IN JUDGMENTS FROM THE SADC REGION

South Africa - Naidoo v Minister of Police (20431/2014) [2015] ZASCA 152 (2 October 2015)

[27] Counsel for the amicus referred us to a number of international and regional instruments whose purpose is to eradicate all forms of gender-based discrimination that have the effect of impairing the enjoyment by women of fundamental rights and freedom. It is internationally accepted that states that subscribed to those instruments must take all measures necessary to provide effective protection to women against all forms of violence. The Convention on the Elimination of All Forms of Discrimination Against Women and the Protocol to the African Charter on Human Peoples' Rights on the Rights of Women in Africa, amongst others, have as their particular focus the protection of the right to human dignity and the protection of women against all forms of violence that member states are obliged to enforce by legislative measures. Both the Constitutional Court and this court have reaffirmed the principle that the State is obliged under international law to protect women against violent crime and gender discrimination inherent in violence against women.

[28] Taking cognizance of the international and regional initiatives relating to the protection of women against all gender-based discrimination, South Africa enacted the Act. One of the objects of the Act in the preamble declares that: 'AND HAVING REGARD to the Constitution of South Africa, and in particular, the right to equality and to freedom and security of the person; and the international commitments and obligations of the State towards ending violence against women and children, including obligations under the United Nations Conventions on the Elimination of all Forms of Discrimination Against Women and the Rights of the Child; . . .'

Carmichele v Ministry of Safety and Security[85]

The court held: "South Africa . . . has a duty under international law to prohibit all gender-based discrimination that has the effect or purpose of impairing the enjoyment by women of fundamental rights and freedoms and to take reasonable and appropriate measures to prevent the violation of those rights." Therefore, international law requires South Africa to address persistent violations of human rights, such as rape or sexual assault, and take adequate steps to prevent the recurrence of such violations. If not, the country runs the risk of sending a message that these acts go unpunished.

[85] Carmichele v Minister of Safety and Security [2001] ZACC 22; 2001(4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at para 63.

EXAMPLES OF USING THE MAPUTO PROTOCOL IN DOMESTIC JUDGMENTS IN AFRICA

Constitutional Petition No. 122 of 2013

In this case, the High Court in Nairobi found that the Government of Kenya was responsible for a "failure to conduct independent and effective investigations and prosecutions of SGBV-related crimes during the post-election violence".

109.The right to life, the right to protection from torture and right to security of the person were guaranteed under sections 70, 71 and 74 of the retired Constitution, and are also protected by Articles 3 and 5 of the Universal Declaration of Human Rights (UDHR); Articles 6, 7 and 9 of the International Covenant on Civil and Political Rights (ICCPR); Articles 4, 5 and 6 of the African Charter on Human and People's Rights (Banjul Charter); and Article 4 of the Protocol to the African Charter on Human and People's Right on the Rights of Women in Africa (Maputo Protocol).

110. According to the Human Rights Committee's General Comment No. 31 on the ICCPR at paragraph 8:"The article 2, paragraph 1, obligations are binding on States [Parties] and do not, as such, have direct horizontal effect as a matter of international law. The Covenant cannot be viewed as a substitute for domestic criminal or civil law. However, the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.

113. Sexual violence is recognised as an infringement on the right to life under Article 4 of the Maputo Protocol as it expressly states that States, in protecting and realizing the right of women to life, and the integrity and security of their person, should "enact and enforce laws to prohibit all forms of violence against women including unwanted or forced sex..." This was affirmed in the decision in Shri Bodhisattwa Gautam v Miss Subhra Chakraborty 1996 AIR 922 where the Court determined that rape violates the right to life.

2.4 ENSURING GENDER EQUALITY AND NON-DISCRIMINATION THROUGH A VICTIM-CENTRED, GENDER-RESPONSIVE AND PERPETRATOR ACCOUNTABILITY APPROACH

Ensuring gender equality and non-discrimination. GBV is a form of discrimination and an assault to the right to personal security, physical and psychological integrity. In interpreting or applying domestic law, judges could consider the following key aspects of gender equality and non-discrimination are reflecting in their decision-making:

- GBV is one of the most serious barriers to the achievement of equality as well as a manifestation of systematic marginalization of women, girls and people with diverse gender identities throughout society.
- Gender equality is a fundamental human right, but also a necessary foundation for a peaceful, prosperous and sustainable world.[86]
- There is an interdependence and linkage between GBV and the enjoyment of other rights and freedoms in equality.

[86] UN Sustainable Development Goals website. <http://www.un.org/sustainabledevelopment/sustainable-development-goals/>

- An essential aspect of gender equality is equal protection of the law. Equal protection and benefit of the law is not only fundamental to justice, but is a feature of judicial performance strongly linked to judicial impartiality.[87]
- Inherent to the principle of gender equality is the concept that all human beings, regardless of sex, are free to develop their personal abilities, pursue professional careers and make choices without the limitations set by stereotypes, rigid gender roles and prejudices.[88]
- The operation of harmful gender stereotypes in decision-making violates the principle of substantive equality by denying individuals protection based on irrelevant considerations and by denying individuals the capacity to be judged on their own circumstances and experience.
- The Bangalore Principles of Judicial Conduct emphasizes that the principle of equality of treatment to all before the courts is essential to the due performance of the judicial office and is not to, in the performance of judicial duties, by words or conduct, manifest bias or prejudice towards any person or group on irrelevant grounds, which includes diversity in society and differences arising from one's sex.

Tips for judges for interpreting the rights of equality and non-discrimination to the greatest extent possible in ways

- Be aware of, and understand, diversity in society and differences arising from various sources, including but not limited to race, colour, sex, religion, national origin, caste, disability, age, marital status, sexual orientation, social and economic status and other like causes ("irrelevant grounds").
- Not to, in the performance of judicial duties, by words or conduct, manifest bias or prejudice towards any person or group on irrelevant grounds.
- Carry out judicial duties with appropriate consideration for all persons, such as the parties, witnesses, lawyers, court staff and judicial colleagues, without differentiation on any irrelevant ground, immaterial to the proper performance of such duties.
- Not to permit court staff or others subject to the judge's influence, direction or control to differentiate between persons concerned, in a matter before the judge, on any irrelevant ground.
- Require lawyers in proceedings before the court to refrain from manifesting, by words or conduct, bias or prejudice based on irrelevant grounds, except such as are legally relevant to an issue in proceedings and may be the subject of legitimate advocacy.
- In GBV cases, make a clear connection between substantive equality and excluding stereotyping.
- Characterize the banishment of unfair stereotyping in such cases as protecting both gender equality and the truth-seeking functions of the trial.

Conferring a victim-centred, gender-responsive and perpetrator accountable approach. The Updated Model Strategies set out guiding principles to be followed when delivering justice in cases of GBV.

- **Human rights-based.** Judges should be aware of the wider dynamics of gender inequality which create gender-specific vulnerabilities that further keep women, girls and people with diverse gender identities behind, such as economic and legal dependency, and counter the negative gender stereotyping that have traditionally minimized GBV. This includes practices that ensure victims can be treated with dignity and respect as they go through the criminal justice process, while ensuring the defendant's right to a fair trial.
- **Victim-centred.** An essential feature of judicial practice is that they put the needs of the victims at the core of any intervention, and they empower women, girls and people with diverse gender identities. This includes criminal justice practices that prioritize issues of the physical and psychological safety of the victim; assist victims in their engagement with the criminal justice process rather than holding them responsible for

[87] Bangalore Principles Explanatory Notes para 184.
[88] CEDAW G.R. No. 28, para 22.

their often well-justified "reluctance" to cooperate with the criminal justice system; counter the persistent climate of tolerance and victim-blaming; and reduce experiences of secondary victimization.

- **Ensure offender accountability.** An important characteristic of judicial practice is that they contribute to effective action to hold the perpetrators accountable. Such practices include actions that penalize perpetrators of violence; and maximize the victim's cooperation with the criminal justice process.

2.5 BALANCING BETWEEN THE RIGHTS OF THE DEFENDANT AND THE RIGHTS OF THE VICTIMS

The judiciary plays a key role in the protection of human rights and freedoms. They can ensure that victims obtain effective remedies, reparations and protection and that perpetrators are brought to justice. They also ensure that anyone suspected of a criminal offence receives a fair trial according to international standards. The Bangalore Principles note that it is the duty of a judge to discharge the judicial functions with due respect for the principle of equal treatment of parties, by avoiding any bias and any discrimination, maintaining a balance between the parties and ensuring that they each receives a fair hearing. In terms of addressing gender discrimination, the judge has a role to play in ensuring that the court offers equal access to all.[89]

WHAT ARE THE RIGHTS THAT NEED TO BE BALANCED?

Accused's right	Victim's rights
• International standards recognize as fundamental the right to a fair and public hearing by an independent and impartial tribunal in the determination of any criminal charges.[90] • The right to be presumed innocent, and treated as innocent, unless and until they are convicted according to law in proceedings which meet minimum prescribed requirements of fairness. • The burden of proving the charge rests on the prosecution and a court may not convict unless guilt has been proved beyond reasonable doubt. • The right to full answer and defence allows the defence the right to examine witnesses against them, as well as the right to call and question defense witnesses. • The right to challenge the evidence against the accused enhances the likelihood that the verdict will be based on all relevant evidence. • Foundation of these principles is that criminal convictions are extremely serious and therefore should only be obtained if there is a very high degree of certainty.	• Although there is not a specific international convention on human rights for victims, these rights are enshrined in various international and regional instruments.[91] • The right for women to access justice is seen as a critical pathway for the achievement of gender equality and essential to the realization of their rights to security and all other rights. This includes rights to equal benefit and protection of the law. • The right to fair treatment. Includes treating victims with compassion and respect for their dignity and protecting them against degrading treatment and invasion of privacy. • The right to an effective remedy and reparations. • The rights to universal dignity and autonomy and the state's corresponding duty to provide witness protection and to respect and protect the rights of the victim of GBV. • The obligation of due diligence requires effective laws and investigations to protect women from violent crime as well as the protection against traumatic trial experiences.

Source: UNODC. 2019. Handbook for the Judiciary on Effective Criminal Justice Responses to Gender-Based Violence against Women and Girls

[89] Bangalore Principles, Explanatory Notes para 185.

[90] The International Covenant on Civil and Political Rights (ICCPR), signed and ratified by 154 States, stipulates in article 14(1) that "all persons shall be equal before the courts and tribunals" and that "in the determination of any criminal charge against him, or of his rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law". The Human Rights Committee, the body in charge of monitoring State compliance with the Covenant, has unequivocally stated that the right to be tried by an independent and impartial tribunal "is an absolute right that may suffer no exception". Therefore, those countries that have not acceded to or ratified these treaties are still bound to respect this right and arrange their judicial systems accordingly.

[91] UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

The role of the judiciary in balancing these rights. The just balance between protecting victims and ensuring the due process rights of those accused remains controversial and the right balance is not always easy to find. The rights of the accused and the victim are both important and no one set of rights should prevail, and both sets of rights should be afforded equal respect.

TIPS FOR JUDGES IN BALANCING THESE RIGHTS

- Have equality inform the discussion of balancing the accused's rights to a fair trial, presumption of innocence and full answer and defence with the victim's rights to equal benefit and protection of the law, treatment with dignity, invasions of privacy and effective remedy.
- Follow the Bangalore Principles. When determining how far full answer and defence extends, be reminded that the Bangalore Principles provide that a judge shall not knowingly permit those subject to the judge's influence, direction or control to differentiate between persons concerned in a matter before the judge on any irrelevant ground and shall require lawyers in proceedings before the court to refrain from manifesting, by words or conduct, bias or prejudice based on irrelevant grounds.[93]
- Acknowledge that trials can become so intimidating or intrusive as to violate victim's rights. Judiciary should consider ways to ensure that court procedures and practices are less traumatic for the victims.
- Need to recognize the gendered and derogatory constructions that are inherent in the application of the law when it comes to certain evidentiary rules in cases involving GBV. The judge might question what is at the heart of many of the criminal laws, procedures and evidentiary rules that they apply. For instance, ask what must a woman reveal about herself in order to access justice, and how do these revelations subject her to further victimization? Is there a gendered legacy of privacy that continues to influence judicial determinations of the admissibility of sexual history evidence and access to confidential records or influence decisions to accord protection against invasive credibility probing? How much do we need to know about any complainant in order for them to meet the test of credibility?

2.6 RELEVANT JURISPRUDENCE AT THE INTERNATIONAL AND REGIONAL LEVEL

Jurisprudence at the international and regional level is not considered to be binding on states parties. However, these "Decisions" are well-reasoned interpretations of the relevant treaty provisions and therefore they provide judges with important explanations about how the treaty obligations should be upheld through national law and practice.

CEDAW JURISPRUDENCE

The CEDAW Committee has addressed cases involving domestic and sexual violence for those states that have ratified the Optional Protocol. Such jurisprudence can be useful in arguments before the national courts. These include, inter alia:

A.T. v. Hungary, Communication No. 2/2003, CEDAW/C/36/D/2/2003

PRINCIPLE ESTABLISHED BY THE DECISION

- A state is accountable for its failure to act with due diligence with regard to violence perpetrated by a private actor.
- Women's rights to life and to physical and mental integrity cannot be superseded by other rights, such as the husband's right to property and the right to privacy.

[92] Bangalore Principle 5.4
[93] Bangalore Principle 5.5

Case summary

The author alleged that she had been subjected to regular severe domestic violence and treatment by her common law husband and the father of her two children (L.F.) from 1998 onwards, even after he left the couple's family home. Although L.F. had allegedly threatened to kill the author and rape the children, the author did not go to a shelter because one of her children is severely brain-damaged and reportedly no shelter in the country is equipped to take in a fully disabled child together with their mother and sister. The author reported several incidents when she was beaten severely, leading to 10 medical certificates including one incident after which she was hospitalized for one week. In proceedings regarding L.F.'s access to the family home, following the author's decision to change the locks to prevent him from gaining access, the Court found in his favour, and the decision was upheld by the regional court when she appealed. She filed for division of the jointly owned property and instituted criminal proceedings against L.F. but these lasted years, failed to issue a protection order or detain the perpetrator were still pending by the date of her initial submission on 10 October 2003. As a victim in the proceedings she had no access to the relevant court documents. No assistance was provided from child protection authorities, despite her requests by phone, letter and in person.

Points to note

The CEDAW Committee found that the state party had failed to meet its obligations under the convention to protect the petitioner against domestic violence on the basis that Hungary's legal and institutional arrangements fell short of international standards, and available domestic remedies were ineffective to protect her against her violent former partner. A delay of over three years in legal proceedings from the dates of the incidents in question amounted to an unreasonably prolonged delay, particularly considering that the author has been at risk of irreparable harm and received threats to her life during that period. It also condemned the low priority afforded by national courts to domestic violence cases.

V.K. v. Bulgaria, Communication No. 20/2008, CEDAW/C/49/D/20/2008

PRINCIPLE ESTABLISHED BY THE DECISION

- 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.
- Failure of the court to take into account that domestic violence are courses of conduct which takes place over time violates women's rights not to be subjected to gender stereotyping.

Case summary

The perpetrator only provided the victim with enough money for the family's basic needs. As they were living in Poland for his job, she could not work and thus was economically dependent. She was treated like a housekeeper, was not allowed to communicate freely with her friends and family. For years, she felt humiliated and depressed. When she insisted on returning to work, her husband ceased their financial maintenance "in an attempt to make her "behave" and "obey"". After numerous violent incidents, including against a women's centre staff member assisting the victim when she tried to contact her son, whom the husband had locked at home, the victim returned with her children to Bulgaria where she applied for a protection order. An emergency order was applied but the protection order was denied after a hearing because no violent incidents had occurred within the month preceding the application.

Points to note

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 Courts should also be aware that many forms of violence, particularly domestic violence, are courses of conduct which take place over time.

Karen Tayag Vertido v. The Philippines, Communication No. 18/2008, UN Doc. CEDAW/ C/46/D/18/2008

PRINCIPLE ESTABLISHED BY THE DECISION

- Judicial stereotyping affects women's right to a fair and just trial and courts have a duty not rely on rape myths.
- Lack of consent is an essential element of the crime of rape.

Case summary

The author, the Executive Director of the Davao City Chamber of Commerce and Industry in Davao City, was raped in a hotel room by a senior professional colleague, the 60-year-old president of the Chamber of Commerce, who she thought had a gun. The judge in the case acquitted the accused, finding that the victim should have fought off the accused once she had regained consciousness and while he was raping her, and therefore must have consented to sexual contact. The judge also doubted the victim's account of events, disbelieving that the accused would have able to proceed to the point of ejaculation as he was in his 60s. The victim claimed that she had suffered re-victimization by the state after she was raped. The author made a strong and detailed case outlining the many "rape myths" that were included in this trial process.

Points to note

CEDAW Committee determined that the Philippines had failed to comply with its obligation to ensure Ms Tayag Vertido's right to an effective remedy. 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 author, even though these issues are not part of the definition of the crime of rape. The CEDAW Committee concluded that Ms. Tayag Vertido suffered "re-victimization through the stereotypes and gender-based myths relied upon in the judgement".

Yildirim (deceased v Austria and Goekce (deceased) v Austria, Communication No. 6/2005, UN Doc. CEDAW/ C/39/D/6/2005 and Communication No. 5/2005, UN Doc. CEDAW/C/39/D/5/2005

PRINCIPLE ESTABLISHED BY THE DECISION

- It is not enough to have comprehensive legal and policy framework to respond to VAW to meet the state's duty of due diligence but such must be effectively enforced.

Case summary

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.

Points to note

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. "…[I]n order for the individual woman victim of domestic violence to enjoy the practical realization of the principle of equality of men and women and of her human rights and fundamental freedoms, the political will that is expressed in the aforementioned [model]…must be supported by state actors, who adhere to the state party's due diligence obligations". Paragraph 12.1.2 (common to both cases).

R.P.B. v. The Philippines, Communication No. 34/2011

PRINCIPLE ESTABLISHED BY THE DECISION

- Gender and disability stereotyping in a rape trial violated CEDAW.
- There should be no assumption in law or practice that a woman gives her consent because she has not physically resisted the unwanted sexual conduct. The lack of consent is an essential element of the crime of rape.
- The stereotyping of how an "ideal victim" should behave resulted in a fundamental miscarriage of justice as well as material and moral damage and prejudice to the victim.

Case summary

The author of the communication was a minor girl with disability- deaf and mute, raped by a neighbour and remained without protection by the court and any assistance and interpretation during the procedure. After almost five years after the case was filed in court, the accused was acquitted, with the court concluding that the state had failed to prove the sex was not consensual. It also questions the author'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" and "failure to even attempt to escape… or at least to shout for help".

Points to note

CEDAW Committee concluded that the state failed to provide the author with the free assistance of sign language interpreters which denied her equal protection and access to an effective remedy. States are responsible for judicial decisions that violate CEDAW. The judge formed a negative view of the author's credibility because she did not respond in the stereotypical manner expected of an "ideal victim". The trial judge relied on myths and gender stereotypes and, therefore, expected her to respond to the attack in a certain way. Stereotyping caused the trial judge to disregard the circumstances of her case, including why she responded in the manner she did (e.g. because of her age and disability and the accused's physical strength) and the fact that she did not consent to have sex with her neighbour. This was a miscarriage of justice.

AFRICAN COURT AND COMMISSION ON HUMAN AND PEOPLE'S RIGHTS

Organization Mondiale Contre la Torture et Ligue de la Zone Afrique pour la Defense des Droits des Enfants et Eleves v. Democratic Republic of the Congo African Commission on Human and People's Rights (2016) [Celine v DRC]

The complainants filed suit on behalf of a 17-year-old girl who was violently attacked and raped by two men. Local police, who allegedly knew the attackers, witnessed the beginning of the attack but did not aid the victim. The complainants further alleged that the Kinshasa police knew that an organized gang had attacked the victim and other girls and the identities of the attackers, but refused to take action to dismantle the gang due to their limited financial resources. The Commission held that the Democratic Republic of the Congo had violated several articles of the African Charter on Human and Peoples' Rights due to the

failure of (i) police to take action to prevent the rape and (ii) competent authorities to provide justice to the victim. The African Commission's decision in this case reveals that the non-effectiveness of the judicial proceedings against the alleged perpetrators of the violations exacerbates the problem of violence against women, stigmatizes the victims and thus constitutes gender-based discrimination.[94]

Zimbabwe Human Rights NGO Forum v. Zimbabwe, Africa Commission on Human and Peoples' Rights (2006)

Violence erupted in Zimbabwe between the constitutional referendum of 2000 and the parliamentary elections. Supporters of ZANU (PF) engaged in various human rights violations including the rape of women and girls. The respondent state claimed that it could not be held accountable because those committing the crimes were non-state actors and the actions were not encouraged by any government policy. The Commission determined that "[a] state can be held complicit where it fails systematically to provide protection of violations from private actors who deprive any person of his/her human rights". However, the Commission found that the complainant had the burden of "establishing that the state condones a pattern of abuse through pervasive non-action". Here, the Commission found that Zimbabwe violated the victims' rights to judicial protection and to have their case heard under articles 1 and 7(1), respectively, of the African Charter. It explained that the state had adopted Clemency Order 1 of 2000 (which permits those who have committed politically motivated crimes to be exonerated, with the exception of murder, rape, and other similar crimes) and that Zimbabwe did not "demonstrate due diligence" in providing justice for the victims of the violent crimes. The Commission requested that Zimbabwe investigate the reported crimes, bring those who committed the crimes to justice, and provide victims with adequate compensation. This case is important because it establishes that a state can be held accountable for the human rights violations of private actors. Under this case, if the state does not address mass rape with "due diligence", then the state itself can be held accountable.

EIPR and Interights v. Egypt Africa Commission on Human and Peoples' Rights (2006)

The Egyptian Initiative for Personal Rights (EIPR) and INTERIGHTS brought Nawal, Abir, Shaimaa and Iman's cases to the African Commission on Human and People's Rights. Nawal was on her way to attend an English course, when a group of NDP supporters, acting on orders from a police officer, pushed her to the ground, tore her clothes, sexually assaulted her and seized her belongings. Following the attack, investigators refused to record statements by eye witnesses and Nawal received threats from Egypt's State Security Intelligence (SSI) officers to withdraw her complaint. She was dismissed from her job at Al Gil Newspaper and her husband divorced her for the "scandal" she had become involved in. Abir and Shaimaa were a journalist for Al Doustour Newspaper covering the demonstration. In their attempt to escape the scene, Abir and Shaimaa were dragged out of the taxi and attacked. SSI officers ordered a group of female NDP supporters to tear off Abir's clothes and hit her. She was later dragged to the main street where security and police officers continued to hit, sexually assault, insult (calling her abusive names such as "whore" and "slut") and slap her face. In Saimaa's case, she was attacked and eventually rescued by others who took her into a building. In Iman's case, although police officers saw what was happening to her, they refused to come to her assistance, allow her to seek medical help or access the nearby building for protection. In all cases, following the attack, investigators refused to take eyewitness statements and they received anonymous threats to withdraw her complaint.

The Commission decided that Egypt was responsible for violating Nawal, Abir, Shaimaa and Iman's human rights. The discriminatory intent underlying the attacks was evidenced by the abusive language used at the demonstration (e.g. "slut" and "whore"), which were gendered terms "generally meant to degrade and rip off the integrity of women who refuse to abide by traditional religious, and even social norms" (para. 143). The gender-based nature of the assaults was made clear through the type of harassment and physical violence used – which can only be directed and women. Breast fondling, for example, was an obvious example of gender-based violence used. Despite witnessing the violent acts taking place, Egyptian public officials had failed to protect all four women from the violations they suffered – and, in some cases, were the cause of the

[94] For a commentary on this case, please see: "The obligation to protect and gender-based discrimination: critical review of the Céline v DRC case before the African Commission" on page 435 in African Human Rights Yearbook. 2023. Volume 7.

attacks. These failures continued after the demonstration when investigations were not undertaken to bring perpetrators to justice. The insufficient investigations led by Egyptian officials were also impacted by a lack of impartiality. By focusing on the "discrepancies" between statements given by each survivor and refusing to collect evidence from witnesses that corroborate the stories, the investigators had unjustly dismissed the process because they concluded that the perpetrators could not be identified. In order for women to access impartial and effective judicial mechanisms, states must provide the structures and mechanisms necessary to enable survivors to obtain redress.

2.7 OPTIONS FOR EXERCISES

Below are a number of possible options for delivering the material in this Module.

EXERCISE: Small group discussion – case study
Instructions:
Divide into smaller groups. Review the facts of the case contained in Handout (extract from Opuz v Turkey). Ask the first 2 groups to answer the following questions: • Q1. Do you think the state failed to exercise due diligence? • Q2. Give your reasons for deciding that it did or did not meet its due diligence obligation. Ask 2 other groups to answer the following questions: • Q1. How would this case be dealt with according to your domestic laws? (In terms of applicable criminal offences and criminal procedures)? • Q2. List any issues/gaps in the criminalization or criminal process when comparing to international legal and policy framework recommendations?
Facts
[Extract from Opuz v Turkey, European Court of Human Rights, 2009] Nahide Opuz married H.O. in 1995 and shortly thereafter H.O. began regularly abusing Opuz and her mother, threatening to kill them both. The local prosecutor filed criminal charges, however, the court dismissed the cases after she and her mother withdrew their complaints out of fear for their safety. This cycle of violence, followed by a failure of local authorities to initiate criminal proceedings against H.O., was repeated numerous times over the next several years, with the attacks becoming progressively more violent. In February 1998, H.O. pulled a knife and attacked Opuz, her mother and her sister, incapacitating each for several days. The local prosecutor decided not to file charges against H.O. because of lack of evidence. A month later, H.O. drove his car into Opuz and her mother, causing serious injuries. Following repeated death threats from her husband, Opuz filed for divorce and requested police protection. The local prosecutor filed criminal charges and H.O. was placed in detention. In October 1998, however, Opuz and her mother again withdrew their complaints out of fear of retaliation. Due to the seriousness of the alleged acts, the local court convicted H.O. and sentenced him to 3 months imprisonment, but this was later reduced to a fine. In October 2001, H.O. stabbed Opuz seven times with a knife. After this incident, the mother's attorney petitioned the local prosecutor's office, noting that both Opuz and her mother had been previously compelled to withdraw complaints against H.O. because of his continuous death threats. However, no further charges were filed against him. In March 2002, Opuz's mother was attempting to move to another community when H.O. shot and killed her with a gun in front of a witness. H.O. was charged with and convicted of murder and sentenced to life imprisonment. The local court lowered the sentence to 15 years in light of H.O.'s good behaviour during trial. Pending appeal, however, the local court released H.O.

Facilitator Notes for Discussion:

- This was a case against Turkey before the European Court of Human Rights (ECtHR) – Opuz v Turkey, 2009. The ECtHR found a violation of Article 2 (right to life) concerning the murder of H.O's mother-in-law and a violation of Article 3 (prohibition of inhuman or degrading treatment) concerning the state's failure to protect his wife.
- Turkey had failed to set up and implement a system for punishing domestic violence and protecting victims.
- The authorities had not even used the protective measures available and had discontinued proceedings as a "family matter" ignoring why the complaints had been withdrawn.
- There should have been a legal framework allowing criminal proceedings to be brought irrespective of whether the complaints had been withdrawn.
- The ECtHR also found – for the first time in a domestic violence case - violations of Article 14 (prohibition of discrimination), in conjunction with Articles 2 and 3, as the violence suffered by the two women was gender-based; domestic violence mainly affected women and it was encouraged by discriminatory judicial passivity.
- Despite reforms in the field (Law no. 4320), the unresponsiveness of the judicial system and impunity enjoyed by aggressors indicated that Turkey was not committed to tackling the problem: police officers tried to persuade women to drop their complaints, delays were frequent and courts mitigated sentences on the grounds of honour or tradition.

EXERCISE: Plenary discussion on the Guiding Principles in a quality criminal justice response

Instructions:

Ask the plenary:

- What do you think are the key principles that should guide your work to ensure a quality criminal justice response in these kinds of cases?
- After describing a key principle, ask the participants if they can name some practices they use in their country that follows such a principle.

Facilitators notes:

- A set of guiding principles have been agreed to in the UN Updated Model Strategies and Practical Measures. These core principles should guide all criminal justice responses to VAW. It is important to link how these guiding principles are reflected in your state's laws, policies and practices.
- Use the material in this module to facilitate the discussion.

MODULE 3.

Centred on the SADC Model Law on Gender-Based Violence

REVIEW THE SADC GBV MODEL LAW

1. Become familiar with key SADC standards on gender.
2. Interpret national GBV offences through the lens of the SADC GBV Model Law.
3. Appreciate the need for a paradigm shift in understanding of rape and intimate partner violence.
4. Construe procedures through the lens of the SADC GBV Model Law.

3.1 THE SADC STANDARDS

The SADC has been involved in advancing gender equality by setting standards that Member States aim to emulate. Policy development in this area has accelerated over the last decade in particular, with the adoption of the SADC Protocol on Gender and Development. SADC has also been part of efforts to encourage legislative reform with a recent example being to eradicate GBV which included the drafting of the SADC model law on gender-based violence.

In addition, SADC has developed the Regional Strategy and Framework of Action for Addressing GBV (2018-2030) and the Regional Strategy on Women, Peace and Security (2018 – 2022), all of which seek to harmonize and coordinate the regional response to GBV and to help Member States to effectively respond to GBV. Additionally, the SADC SRHR Strategy for 2030 and its corresponding scorecard include indicators to measure progress to the SDG's targets related to SDG 5.1.

SADC PROTOCOL ON GENDER AND DEVELOPMENT

The Revised SADC Protocol on Gender and Development done in 2018 provides for the empowerment of women, elimination of discrimination and the promotion of gender equality and equity through gender-responsive legislation, policies, programmes and projects. The Protocol defines GBV as "all acts perpetrated against women, men, girls, and boys based on their sex which causes or could cause them physical, sexual, psychological, emotional or economic harm, including the threat to take such acts or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peacetime and during situations of armed or other forms of conflict".

Specifically regarding GBV, the Protocol calls on state parties to:

- Enact and enforce legislation prohibiting all forms of GBV.
- Ensure that the laws on GBV provide for the comprehensive testing, treatment and care of survivors of sexual assault.

- Review and reform their criminal laws and procedures applicable to cases of sexual offences and GBV.
- Enact and adopt specific legislative provisions to prevent human trafficking and provide holistic services to the victims, with the aim of re-integrating them into society.
- Enact legislative provisions, and adopt and implement policies, strategies, and programmes which define and prohibit sexual harassment in all spheres, and provide deterrent sanctions for perpetrators of sexual harassment.

SADC MODEL LAW ON GENDER-BASED VIOLENCE

The SADC GBV Model Law adopted in 2021 provides comprehensive guidance on how to eradicate GBV, from both a normative and operational perspective, and respond to GBV, succinctly. The Model Law is based on regional and international human rights frameworks. While it aims to guide national legislators on what a GBV law should cover and how, judges should also be aware of these standards as this can assist them in interpreting and applying existing national law.

The GBV Model Law provides:

- Guidance on the scope and content of best practice GBV provisions to be incorporated in national GBV laws.
- Encourage national legislatures to enact GBV laws where these do not exist or, where they do exist but do not conform to the Model Law, to review such laws and adopt certain provisions from this GBV Model Law to ensure efficacy of National Laws on GBV.
- Support to National GBV Laws during the implementation stage, especially where gaps still exist.
- A yardstick or benchmarking tool to be used by judges as to best practices in addressing GBV.
- Reinforces a commonality of a regional approach in dealing with GBV laws, measures and strategies to help eliminate GBV.
- A stimulus for debate, awareness and advocacy.

The GBV Model Law requires a paradigm shift in the legislative systems for GBV. This includes:

- Providing a human rights-based approach to GBV laws that addresses the root causes of GBV and allows for inclusion of all marginalized groups including refugees, asylum seekers, stateless persons (whose nationality cannot be identified), persons with disabilities, prison inmates and persons without documentation and migrants and ensure that such approach is actually applied by all respondents.
- Interfacing all concepts, rules and principles of access to justice to promote seamless connectivity for efficient handling, investigating, prevention, prosecution, protection and enforcement of all GBV cases.
- Introducing innovative methods to deal effectively with GBV.
- Ensuring adequate information and financial resources are provided for intervention, prevention, protection, enforcement, regulation rehabilitation, harmonization and standardization, and that measures put in place are working, maintained and are sustainable.

3.2 GBV OFFENCES - THE SADC MODEL LAW ON GENDER-BASED VIOLENCE AND NATIONAL LEGAL FRAMEWORKS

THE SADC GBV MODEL LAW

The SADC GBV Model Law provides for prohibitions with respect to gender-based violence, which is defined in the Law to means “a harmful act directed at an individual, or a group of individuals, based on their gender, gender norms and unequal power relationships, which cause or could cause them physical, sexual, verbal,

psychological, emotional or economic harm, including coercion, the threat to take such acts, or to undertake the imposition of arbitrary restrictions on, or deprivation of, fundamental rights and freedoms, in private or public life, in peace time or during situations of armed or other forms of conflict" (Provision 6.1).

The following are specifically noted as may be included as "gender-based violence" (Provision 6.3):

- Domestic violence
- Intimate partner violence
- Sexual violence, including sexual assault and sexual harassment
- Harmful practices, including early marriage, forced marriage, female genital mutilation
- Female infanticide, prenatal sex-selection, virginity testing, HIV/AIDS cleansing
- Honour crimes, acid attacks, crimes committed in relation to bride-price and dowry, maltreatment of widows, forced pregnancy, and trying women for sorcery or witchcraft
- Femicide
- Trafficking
- Sexual slavery
- Child sexual exploitation material
- Online gender-based cyber-crimes and bullying

Some of those forms of violence are defined in the SADC GBV Model Law (Provision 6.1). See the table below:

Offence	SADC GBV Model Law definition
"Child marriage"	A formal marriage or informal union or marriage to which either or both of the contracting parties is a child, and includes child betrothal.
"Domestic violence"	Any action or omission based on gender, perpetrated by a family member, the consequences of which cause or may cause harm or suffering to a woman or child, whether physical, psychological, sexual or economic, including death, injury, deprivation, sexual abuse and moral or patrimonial damage.
"Exploitation"	Includes the making use of the prostitution of others, forced or coerced labour or services, bonded labour and debt bondage, slavery or practices similar to slavery, servitude, sexual servitude, removal of organs, forced marriage, forced or coerced begging, use in illicit or criminal activities, the trafficking or production of drugs, use in armed conflict, ritual or customary servitude, exploitative and abusive religious or cultural practices that dehumanize, degrade or cause physical or psychological harm, use of women as surrogate mothers, forced pregnancy and Illicit conduct of biomedical research on a person
"Harmful practices"	Customary, traditional, religious or social practices that negatively affect, or behavior, attitudes or rites which threaten or may threaten, the health, social welfare, dignity, physical or psychological development or life of a person or the person's enjoyment of human rights, including practices and prejudices based on the idea of inferiority or stereotyping roles of either sex or gender
"Marital rape"	Any unwanted sexual act by a spouse or ex-spouse that is committed without the other person's consent
"Sexual assault"	A violation of bodily integrity and sexual autonomy, where – (a). The victim did not give unequivocal and voluntary consent or agreement to a sexual act;

	(b). The offender did not take steps to ascertain whether the victim consented to the act; or (c). The act took place in coercive circumstances, irrespective of the nature of the relationship between the offender and the victim, including marital rape; Taking into account aggravating circumstances including, the age of the victim, the relationship of the offender and the victim, the use or threat of violence, the presence of multiple offenders, and grave physical or mental consequences of the attack on the victim. Consent is defined as "the voluntary, informed and un-equivocal agreement of the victim to engage in the sexual activity in question".
"Sexual harassment"	Any unwelcome sexual advance, request for sexual favour, verbal, display of images, or physical conduct or gesture of a sexual nature, or any other behaviour of a sexual nature that might reasonably be expected or be perceived to cause offence or humiliation to another, whether or not such sexual advance or request arises out of unequal power relations
"Trafficking in persons"	The recruitment, transportation, harbouring or receipt of persons, by means of threat, abuse of power, position of vulnerability, force or other forms of coercion, abduction, fraud or deception to achieve the consent of a person having control over another person for the purpose of, amongst other things, sexual or financial exploitation

The GBV Model Law puts emphasis on the need, by Member States, to take the requisite legislative measures to prohibit GBV, provide adequate offences on GBV and supportive measures or restraints, to assist effective charging and prosecution of a GBV offence, such as forbidding all forms of GBV criminality and creating specific GBV offences, cross-referencing to other offences created under other related laws, such as trafficking, terrorism, etc., and providing appropriate penalties, while ensuring sentencing policies are well streamlined to ensure deterrence. Supportive measures or restraints are built into the provisions on prohibitions such as, there should not be any adverse inferences if GBV cases are reported late, there should be no offence of false accusation, there should be protection of the victim during legal proceedings, sentences imposed should match gravity of the GBV offence, without exceptions and reductions, and no mitigating reasons or extenuating circumstance should be allowed.

NATIONAL LEGAL FRAMEWORKS COVERING OFFENCES

SADC Member States have different pieces of legislation to address GBV, including legislation that address specific forms of GBV such as rape and other forms of sexual violence, domestic violence, child sexual abuse, trafficking in persons, discrimination against women and other protected groups, female genital mutilation, child and/or forced marriage and other harmful practices and human trafficking.[95] While it is beyond the scope of this resource to provide an analysis of the 16 national legal frameworks in SADC, below is a quick reference to the relevant laws in each country, as a starting point for judges who require information on other state's laws.

[95] SADC Parliamentary Forum. 2022. SADC Gender-based Violence Model Law, p. 13.

SUMMARY OF SADC STATES' NATIONAL LEGAL FRAMEWORKS RELATED TO GBV OFFENCES[96]

SADC state	Relevant laws covering GBV offences
Angola	• Criminal Code (2020) distinguishes the crimes of "sexual aggression" (Article 182) and "sexual aggression with penetration" (Article 183). Additional crimes (Articles 184-187) involve sexual acts committed against persons with diminished capacity or those unable to consent. It also criminalizes FGM (Article 160). • The Criminal Code (2020) prohibits certain actions intended to violate someone's honor which include insult, defamation and slander (Articles 213-220) and penalties increase if grounds of discrimination like sex, sexual orientation. It also includes aggravating circumstances if crimes involve discrimination on the grounds of race, sexual orientation, and religion and increased sanctions for crimes committed against women. • Law on Domestic Violence (2011) defines and prohibits domestic violence, classifying such violence as a "public crime", which means anyone can report it to the police, not just the victim. The definition of domestic violence includes physical acts, sexual, psychological and verbal abuse
Botswana	• The Penal Code Act was amended in 1998 to make the offence of rape gender-neutral and to move away from a phallus-specific definition, deny bail to persons accused of the offence, and increased sanctions. • The Penal Code Amendment Bill 2018 increased the age of sexual consent from 16 to 18 years. • The Penal Code (Amendment) Act, 2021 enhanced penalties to offence of rape (Article 142) and other sexual offences; insulting modesty (Article 146), make provisions for compensation of victims of sexual offences and criminalize false allegations of sexual offences. • Domestic Violence Act, No. 10 of 2008 defines domestic violence as "any controlling or abusive behaviour that harms the health or safety of the applicant" and sets out a civil protection regime. The Act empowers Courts including Customary Courts to pass protection orders. • The Public Service Act was amended in 2000 to recognize sexual harassment as misconduct in the workplace and introduced appropriate penalty. • The Marriage Act was amended in 2001 to make it illegal for any person under the age of 18 to marry. The amendment further stipulated that no minor below the age of 21 years may marry without the consent of parents or legal guardian. • The Cybercrime and Computer-related Crimes Act of 2018 criminalized publishing, production and possession of child pornography in addition to accessing the same via any medium as well as revenge pornography.
Comoros	• Law on the Prevention and Punishment of Violence against Women of 2014 aims to combat all forms of VAW and establishes criminal offences such as domestic violence. It contains criminal, civil and social provisions. • The new Criminal Code introduced harsher penalties by criminalizing sexual assault (Article 301 -302)

[96] The information is from the UNODC. 2021. Report on Criminal Justice System Responses to Gender-Based Violence in the SADC region. It is supplemented by the UN Women Global Database on VAW. For more information about the policies and responsible agencies, please see this report.

D.R. of Congo	• In 2006, the 1940 Congolese Penal Code was reformed to introduce amendments to provisions of sexual violence, including female genital mutilation (Article 3(7) of Law no. 06/018 of July 2006).
Eswatini	• The Sexual Offences and Domestic Violence Act No. 15 of 2018 prohibits violence in all spheres, strengthens and consolidates common law and statutory provisions to adequately provide for dealing successfully with sexual offences and domestic violence. The law specifically criminalizes marital rape and other domestic violence offences and specifically criminalizes sexual harassment (s. 48). • The Children's Protection and Welfare Act (2012), endorsed on 8 September 2012, bans early/child marriages.
Lesotho	• The Sexual Offences Act of 2003 Section 3(3) of the act states that marriage or any other relationship shall not be a defence against a charge under this Act, but limits the provision to certain instances. The Act also recognizes marital rape as an offence under the prescribed circumstances. • The Penal Code was enacted in 2010 and criminalizes rape and other forms of GBV. • Counter Domestic Violence Act of 2022 defines domestic violence as any act, omission or behaviour, which results in direct or indirect infliction of physical, sexual or mental injury to a victim by the perpetrator, whether co-habiting, dating, or in a domestic relationship. The Act provides for offences of domestic violence and their penalties as well as a protection order regime. • Sexual harassment is prohibited under Section 200 of the Labour Code (1992)
Madagascar	• The Gender Based Violence Law was adopted in 2020 and establishes a national mechanism to combat GBV. It also punishes new categories of offences such as marital rape (Art 6), harmful traditional practices (Art 5), gender contempt and economic violence (Art 12) and puts in place a protection regime. Penalties range from sentences of between six months to five years in prison and fines. • The Penal Code in Article 312bis (Law no. 2000-021) criminalizes injuring or striking a pregnant women.
Malawi	• The Penal Code 1930 has been amended by the Penal Code Amendment Act 2011. The Code criminalizes rape (unlawful carnal knowledge) based on lack of consent (Article 132-133). Rape by family members comes under the offence of incest which sets out very lenient penalties as compared to the offence of rape. • The Prevention of Domestic Violence Act in 2006 provides a civil framework for addressing various acts of violence amongst people within a domestic relationship. • The Child Care, Protection and Justice Act in 2010 prohibits child betrothal, forced child marriage, and harmful practices against children.
Mauritius	• The Criminal Code's general offences can cover GBV. This includes rape, attempt upon chastity and illegal sexual intercourse (Article 249). • The Protection from Domestic Violence Act of 1997 was amended in 2004, 2007, 2011 and 2016 to ensure that all women victims of domestic violence are provided with adequate support and assistance. Under this act, a breach of a protection order is a criminal offence. The 2016 amendment provided, inter alia, for severe penalties to perpetrators of domestic violence and widened the definition of the term "domestic violence" by including stalking, physical, emotional, sexual violence and threatened violence, and economic abuse as a form of violence. • The Child Protection Act of 1995 contains some child sexual offences.

Mozambique	• The Penal Code (No 24/2019) as amended sets out sexual offences, including rape, marital rape and attack or assault against modesty. Excluded are sexual assaults committed without violence and all acts of rape based on lack of consent. • The Law on Domestic Violence Against Women Act of 2009 criminalizes a range of sexual and moral violence, which do not result in death. Moral violence consists of publishing context that offends the honor or character of a woman. The penalty for domestic violence is established according to the rules of the Penal Code.
Namibia	• Combating of Rape Act 8 of 2000 (as amended). The Act contains a gender-neutral definition of rape and covers a range of sexual acts. It focuses on the presence of coercive circumstances rather than the absence of consent and includes provisions aimed at meeting some of the needs of the rape survivor, such as increased privacy protection and procedures to make sure that the rape survivor has an opportunity to place information before the court at the bail hearing. The Act also covers a broad range of sexual acts and does not require proof of penetration. Marital rape is explicitly criminalized. • The Combating of Domestic Violence Act 4 of 2003 (as amended). This Act makes domestic violence a specific crime and has a broad definition of domestic violence that includes physical abuse, sexual abuse, economic abuse, intimidation, harassment, and serious emotional, verbal, or psychological abuse. If common law offences such as murder or assault, or statutory offences under the Combating of Rape Act, are committed in the domestic setting, the charge is read with the provisions of the Combating of Domestic Violence Act. • The Combating of Immoral Practices Act 21 of 1980 which gives protection to boys and girls under the age of 16 where there is a sexual act or any "indecent or immoral act" with someone more than three years older. Other pertinent elements of this Act includes the criminalization of Keeping of a brothel; Procuring or attempting to procure a female to have unlawful carnal intercourse with another person; Prostituting a female; Enticing a female to a brothel; Living on the proceeds of prostitution etc
Seychelles	• Penal Code adopted in 1955 with amendments in 1996 and 2016 covers GBV offences such as sexual assault which are gender neutral and cover a wide range of conduct not limited to penile penetration of the vagina. There is a draft Sexual Offence Bill being discussed that proposes to cover a wider range of sexual offences not currently addressed in the Penal Code, such as grooming and catcalling. • The Family Violence (Protection of Victims) Act of 2000 is administered by the Family Tribunal and protects family victims actual or threat of violence and sets out protection order regime. • The Domestic Violence Act of 2020 prohibits sexual, physical, verbal, emotional, economic and psychological abuse.
South Africa	• The Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007, provides the framework for the provision of adequate and effective protection to all victims of sexual offences. The 2007 Act repealed the common law offence of rape and replaced it with an expanded statutory offence based on lack of consent irrespective of gender. It also explicitly provided that it is not a valid defence for that accused person to contend that a marital or other relationship exists or existed between them and the complainant. The 2021 amendments introduced new sex crimes of "sexual intimidation"; extended the scope of the crime of incest; provided for a defined category of persons falling under "vulnerable persons"; and made amendments to the National Register for Sex Offenders.

	• The Domestic Violence Act, 116 of 1998 (DVA), which was amended by the Domestic Violence Amendment Act, 2021 (Act no. 14 of 2021), provides for protection from domestic violence, placing responsibility squarely on state organs and in particular the South African Police Service (SAPS) to ensure that survivors of domestic violence can apply for protection orders to prevent abusers from entering a mutual home or the survivor's home or place of work The DVA has an expansive definition of domestic violence that includes physical, sexual, emotional, verbal, psychological and economic abuse as well as intimidation, harassment, stalking and controlling behaviours. The amendments in 2021 introduced significant changes to the original legislation, such as expanding the definition of domestic violence to include coercive and controlling behaviour, exposing a child to domestic violence, unauthorized entry into a complainant's workplace or place of study, spiritual abuse and elder abuse. Amendments also made to simplify the process of obtaining protection orders, including allowing electronic application, and for a "domestic violence safety monitoring notice". • The Criminal Procedure Act, 1977 (Act 51 of 1977), was amended in 2022, which amendments included now a prohibition on the release on bail before a first court appearance of anyone accused of domestic violence. • The Protection from Harassment Act (2011) was passed in December 2011.
Tanzania	• The sexual offences are in the Penal Code as amended. The Sexual Offences Special Provisions Act 1998 amended the sexual offences division of the Penal Code. These amendments added new offences and modified some existing sexual offences, such as rape and indecent assault. • The amendments specified that for the crime of rape, evidence of resistance such as physical injuries to the body is not necessary to prove that sexual intercourse took place without consent, and those who abuse position of authority or trust will be subject to maximum penalty. The amendments retained the marital rape exemption • The Sexual Offences Special Provisions Act 1998 which among other things addresses sexual exploitation of women and children, incest, procuration for prostitution, trafficking of persons, cruelty to children, and child prostitution, forms of sexual abuse such as sexual harassment and criminalizes female genital mutilation. • The Law on Marriage 1971 prohibits spousal beating (s. 66).
Zambia	• The Penal Code is the main law under which perpetrators of GBV may be charged with a criminal offence. This law has undergone several amendments. • Penal Code (Amendment) Act No. 15 of 2005 introduced a number of important amendments, including with regard to sexual harassment, harmful practices and trafficking in children. • Penal Code (Amendment) Act No. 2 of 2011 introduced a minimum sentence of 15 years for anyone convicted of rape. Unfortunately it also established a defense for the charge of child defilement if the perpetrator reasonably believed that the victim was 16 years or older.[97] • The Anti-Gender-Based Violence Act of 2011 is an Act to provide for the protection of victims of GBV, establish an Anti-GBV committee and Anti-GBV fund. This law is to prevail if there are any inconsistencies with provisions of other laws except for the Constitution.[98] However, some of the offences, such as emotional and psychological abuse are not explicitly provided for in the Penal Code, making it difficult to pursue legal action against perpetrators. (Note that the Zambia Law Development Commission has made recommendations for the amendment to this Act in 2023).

[97] The World Bank. 2022. Gender-based Violence Assessment in Zambia". P. 14.
[98] The World Bank. 2022. Gender-based Violence Assessment in Zambia". P. 15.

	• The Gender Equity and Equality Act of 2015 prohibit sexual harassment and harmful social, cultural and religious practices. • The Marriage Act (Amendment) Act of 2023 prohibits early marriages (raises the minimum marriageable age from 16 to 18 years). • The Anti-Human Trafficking Act of 2008 criminalizes human trafficking according to UN Protocol.
Zimbabwe	• Criminal Law (Codification and Reform) Act includes a number of sexual offences including rape, aggravated indecent assault, sexual crimes committed against young persons or mentally incapacitated persons. • The Sexual Offences Act of 2001 criminalizing various forms of sexual abuse, including rape and non-consensual sexual acts. It protects women from sexual abuse and criminalizes marital rape and willful transmission of HIV and AIDS. The Act also prohibits the trafficking of persons for purposes of prostitution and imposes stiffer penalties for violations. • The Domestic Violence Act of 2006 defines domestic violence including; physical, sexual, emotional, verbal and psychological, and economic abuse, intimidation, harassment, and stalking. The Act further aims to protect women and criminalizes domestic violence and such acts as abuse derived from any cultural or customary rites or practices that discriminate or degrade women. It covers offences relating to property and household effects, abuse derived from certain cultural or customary rites or practices (including forced virginity testing, female genital mutilation, pledging of women or girls for purposes of appeasing spirits, forced or child marriage, forced wife inheritance, and sexual intercourse between fathers-in-law and newly married daughters-in-law) and offences relating to a person's physical, mental or sensory ability.

3.3 PARADIGM SHIFT IN UNDERSTANDING OF SEXUAL VIOLENCE AND INTIMATE PARTNER VIOLENCE

SEXUAL VIOLENCE

The obligation of international law, and as defined in the SADC GBV Model Law, requires states to formulate sexual offences with the central legal element of lack of consent.[99] This has led some states in the SADC region to embrace definitions of rape based on the lack of consent given voluntarily as a result of the person's free will. States can take different approaches in drafting the constituent element of lack of consent.[100] The "no-means-no" approach requires for the sexual act to have happened "against the will of a person", while the "only-yes-is-yes" approach, or "affirmative consent" requires voluntary participation to the sexual acts by both parties. Given the need for sexual offence definitions to fully capture the realities of victims experiencing sexual violence and their coping mechanism to deal with such violence, which include reactions such as flight, fight, freeze, flop or befriend, judges should interpret the constituent elements of sexual offences as broadly as possible, depending on their criminal code formulation.

[99] CEDAW Committee. 2017. General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19. See also CEDAW Committee decisions, including Karen Tayag Vertido v The Philippines, Communication No. 18/2008, UN Doc. CEDAW/C/46/D/18/2008.

[100] Marceline Naudi, Chair, Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO) Presentation at the Expert Group Meeting, UN Special Rapporteur on violence against women: Report on rape as a grave and systematic human rights violation and gender-based violence against women, 27 May 2020.

WHAT DOES THIS MEAN FOR JUDGES?

- The central legal element for sexual offences is the lack of consent given voluntarily as a result of the person's free will. Voluntary consent by each participant in a sexual encounter must be a pivotal and conclusive factor, thus putting the protection of deliberate sexual choice at the centre.
- Underlying the call for criminalizing non-consensual sexual activity are individuals' rights to sexual self-determination and sexual integrity. In other words, sexual violence is a violation of sexual autonomy, based on the idea that an individual has a right to make autonomous decisions about entering or not entering into sexual relations.
- The approach to interpreting sexual offences requires a paradigm shift. The shift from force-based to consent-based definitions entails a shift in how society and in particular the justice system look at the process of consenting to sexual acts.
- In handling these cases, judges should view "normal sexual behaviour" as activities that should be entered into willingly by both parties rather than view "normal sexual behaviour" based on traditional cultural paradigms and narratives of "seduction" and "enticement" and reliance on myths that see women as sexually passive and men as sexually aggressive.
- Judges need to apply a context-sensitive assessment of the evidence in order to establish, on a case by case basis, whether or not the victim has freely consented to the sexual act. Context-based assessments require a victim-centred approach and gendered understanding.
- Assessing the evidence for consent-based definition offences should be broadened from the traditional evidence assessment used for force-based definition offences. This should no longer hinge on requiring that the acts were a result of violence, threatening behaviour or a particularly vulnerable situation. This switches the focus on whether participation in the sexual act has been voluntary or not.
- Where there is little or no evidence of force, cases should not be automatically dismissed. All facts must be taken into consideration when assessing if the sexual activity was non-consensual.

SHIFTING TO AFFIRMATIVE CONSENT-BASED DEFINITION OF SEXUAL OFFENCES TACKLES HEAD ON THE COMMON MYTHS

Forced-based definitions	No means no approach	Affirmative consent-based defintions
• Forced-based sexual offences require proof of the use of violence, coercion, compulsion, threat, or intimidation. • Based on the enduring myth that a "true" victim will fight back or scream and yell to protect their "honor". • Also based on the belief that rape more often involves a stranger, physical force and physical injury. • Believing in these myths mean requiring victims to sustain physical injury; and requiring them to behave in ways society deems "honorable".	• No means no approach requires proof that the sexual act happened against the will of a person. • Consent is presumed unless it is explicitly or implicitly withdrawn by the victim. • Based on the myth that a "true" victim will show some resistance or at the very least say or clearly indicate a "no". • Additionally, myths support the idea that "no" may not actually mean "no" believing that men are sexually aggressive and women are sexually passive.	• Affirmative consent-based definitions require proof that the victim did not consent to the sexual act. • They do not require proof of resistance or a "no" to demonstrate a lack of consent. • Passivity does not signify consent to a sexual act; and silence is not presumed to be consent. • Since consent must be ongoing through a sexual activity and can be revoked at any time, the existence of a relationship or the fact of past sexual relations should never by itself be assumed to be an indicator of consent.

INTIMATE PARTNER VIOLENCE

Intimate partner violence is gendered-based domestic violence, which can be covered by state's criminal codes by a specific domestic violence offence, or under general offences that criminalize the different forms of domestic violence: physical, psychological, sexual and economic violence. Moreover, a recent trend in some countries is the establishment of the offence of coercive control. This is in part due to the current high attrition rates, sentencing data and low conviction rates in cases of domestic violence which are evidence that the criminal justice systems do not adequately recognize the experience of victimization or the harm perpetrated.[101]

Making sense of intimate partner violence has long been seen through the lens of coercive control. It has been argued that focusing on coercive control is important because that provides and reflects the "multiple tactics of coercion and control employed by primary perpetrators" of domestic violence.[102] The majority of the types of violence experienced by victims of domestic violence are designed to induce fear and control a partner in ways that impact dignity and liberty causing long term consequences to a victim's life. Victims experience "ongoing, historical, frequent, but generally low-level" assaults.[103] Historically, the focus of domestic violence was on discrete incidents of physical violence. However, if the focus is only on the latest isolated incident, this may exclude many other threats that make up ongoing coercive control and have detrimental impacts. Moreover, with the traditionally understanding that violence involves the use of force, this is limited and does not accurately reflect the experiences of those whose lives have been impacted by violence, especially when there was no use of force, such as psychological or economic violence. For those whose sense of personal agency has been taken away, without a fist ever being raised, narrow definitions of violence can lead to victims feeling like they cannot express their pain or access treatment because their experiences of violence do not fit into what society typically defines as such.

Coercive control recognizes the gendered nature of domestic violence. Studies have shown that coercive control is experienced overwhelmingly by women at a rate of 5 to 1.[104] The coercive control framework reflects the actual reality of the experiences of those impacted by domestic violence, reflecting the complexity of domestic violence, contextualizing individual acts in an overall picture of coercion and control. Over 95% of victims of domestic violence have reported experiencing coercive control.[105] Relationships with coercive control result in greater injury to the victim and are characterized by more frequent and severe violence are less likely to desist and therefore makes the need for legal intervention in cases of coercive control even more imperative, to intervene, interrupting the escalation and frequency of the abuse.[106]

WHAT IS COERCIVE CONTROL?

Coercive control is a pattern of violent behaviour that seeks to take away a person's freedom and to strip away their sense of self. The person using violence creates a world in which the person experiencing coercive control is constantly monitored and criticized; their every move is checked against an unpredictable, ever-changing, unknowable rule book. The following types of behaviour are common examples of coercive control:

- Isolating the individual from their friends or family
- Depriving of them of their basic needs
- Monitoring a person via online communication tools or using spyware

[101] Donovan, C., & Barnes, R. 2019. "Re-tangling the concept of coercive control: A view from the margins and a response to Walby and Towers". Criminology and Criminal Justice, 1–16.

[102] Myhill, A. (2015). Measuring Coercive Control: What Can We Learn From National Population Surveys? Violence Against Women, 21(3), 355–375.

[103] Stark, E. (2012). Looking beyond domestic violence: Policing coercive control. Journal of Police Crisis & Negotiations, 12(2), 199–217.

[104] Myhill, A. (2015). Measuring Coercive Control: What Can We Learn From National Population Surveys? Violence Against Women, 21(3), 355–375.

[105] Myhill, A. (2015). Measuring Coercive Control: What Can We Learn From National Population Surveys? Violence Against Women, 21(3), 355–375.

[106] Myhill, A. (2017). Context is everything. Journal of Gender-Based Violence, 1(1), 33–45.

- Controlling how much money they have and how they spend it
- Monitoring their everyday activities and movements
- Repeatedly putting them down, humiliating them, calling them names, or telling them that they are worthless
- Threatening to harm or kill them or their children or their pets
- Threatening to publish information about them or to report them to the police or the authorities
- Damaging their property or household goods
- Forcing them to take part in criminal activity or child abuse

This list is not exhaustive. Physical violence may be used alongside these other tactics of isolation, mind games and the micro-regulation of everyday life or it may never be present other than as a threat or perceived. As one researcher notes, coercive control should be understand to be a "strategic course of self-interested behaviour designed to secure and expand gender-based privilege by establishing a regime of domination in personal life".[107]

A legal element of coercive control offence usually includes "serious effect". This typically refers looking at the effect of the perpetrator's behaviour on the victim. This can include where the victim have felt serious alarm or distress and it has had a substantial effect on their usual day to day activities. The behaviour has had a substantial effect on the survivor if it has caused them to change the way they live. For example, they may have changed the way they socialize, their physical or mental health may have deteriorated, they may have changed the way they do household chores or how they care for their children.

SEXTORTION

Sextortion, as defined by the International Association of Women Judges, is "a form of sexual exploitation and corruption that occurs when people in positions of authority whether government officials, judges, educators, law enforcement personnel, or employers seek to extort sexual favours in exchange for something within their power to grant or withhold. In effect, sextortion is a form of corruption in which sex, rather than money, is the currency of the bribe".[108] While many countries have legislation that covers corruption, sexual violence, transactional sex or sexual harassment, sextortion is unique in that it's coercive and involves an abuse of power. Studies find that anti-corruption laws fail to specifically focus on sexual favours and sexual offence laws don't encompass the corruption component.[109] This means the issue is often dismissed and considered consensual instead.

Two components must be present for an act to constitute extortion:[110]

- The sexual component – a request (implicit or explicit) to engage in any form of unwanted sexual activity, which should be understood beyond simply sexual intercourse. It also includes exposing private body parts, demanding pictures or pornographic material, and unwanted touching, among other conducts.
- The corruption component – the person making the request must occupy a position of authority, which they abuse by exacting or accepting the sexual component / benefit in exchange for exercising the power that was entrusted to them. Sextortion perpetrators exercise authority for their own gain. There are thus three features to this component: (i) abuse of authority, (ii) a quid pro quo, (iii) psychological coercion.

[107] Stark, E. 2013. "Coercive control". In: Lombard N and McMillan L (eds) Violence Against Women: Current Theory and Practice in Domestic Abuse, Sexual Violence and Exploitation (pp 21-27) London: Jessica Kingsley Publishers.
[108] IAWJ. 2012. "Stopping the Abuse of Power through Sexual Exploitation: Naming, Shaming, and Ending Sextortion".
[109] International Bar Association. 2020. "Sextortion: A Crime of Corruption and Sexual Exploitation".
[110] Transparency International. 2022. "Criminalizing sextortion: challenges and alternatives".

SEXUAL GROOMING OF CHILDREN

"Child grooming techniques" involve cases where the perpetrator has psychologically manipulated the victim in the form of positive reinforcement to gain the child's trust as well as the trust of those responsible for their well-being. Grooming is defined as a "process of identifying and engaging a child in sexual activity which involves an imbalance of power and elements of coercion and manipulation with the intent to sexually exploit a child".[111] The perpetrator typically builds trust and breaks down the child's defenses by giving gifts, playing games, pretending to share common interests, flattering and making the child feel special, as well as reassuring the child's family. There is then a gradual erosion of boundaries, often with escalating physical contact and/or engaging the child in inappropriate behaviour such as drinking alcohol. The perpetrator works to construct secrecy with the child and ensuring their compliance.

3.4 CONSTRUE PROCEDURES THROUGH THE LENS OF THE SADC GBV MODEL LAW

The GBV Model Law calls on states to incorporate procedures throughout the justice proceedings that are victim-centred, reflecting international and regional standards.

The following have been considered and drafted into the GBV Model Law:

- The right to reasonable, accurate, and timely notice of any judicial institution proceeding or parole proceeding involving the crime of GBV or any release or escape of an accused;
- The victims' right to be informed of their rights, remedies and victim support services and on how to obtain them, in addition to information about their role and opportunities to participate in judicial and quasi-judicial proceedings (survivor-centred approach);
- The right to seek restitution from the offender or compensation from the State;
- The right to safety and privacy and to be free from hardship during the detection, investigation and prosecution process, which requires legal provisions to ensure the safety, privacy and dignity of victims and their families at all stages of the criminal justice process, such as witness and victim protection programmes, measures to exclude the public from the courtroom, use of testimonial aids like screens or CCTV and support persons, the prohibition to publish the victim's name or other intimate details;
- Access to free legal aid and judicial and administrative support, including interpretation services for all including asylum seekers, refugees, stateless persons and persons without documentation;
- The right to speak to a female officer, where possible, whether it be the police or any other criminal justice official;
- Claims of self-defence by women who have been victims of violence are taken into account in investigations, prosecutions and sentencing;
- Ensuring that evidentiary rules are non-discriminatory and the outmoded cautionary rule, the admissibility of hearsay evidence, and the drawing of inferences from the absence of previous consistent statements or from the length of delay between when the offence took place and when the victim reported it to the police or other law enforcement officers should not be admissible. The following are also included:
  - Introduction of the complainant's sexual history in both civil and criminal proceedings is prohibited;
  - Evidence of prior acts of violence, abuse, stalking and exploitation by the offender is considered during judicial proceedings, in accordance with the principles of national criminal law;
- Legal defences such as-
  - "Honour" or "provocation" cannot be invoked by offenders of violence against women to escape criminal responsibility in GBV cases; and
  - People who perpetrate acts of violence against women and children while voluntarily under the influence of alcohol, drugs or other substances are not exempted from criminal responsibility;

[111] Stewart, D., "Victim Grooming: Protect your child from sexual predators" available at www.parenting.org.

- Prohibit any law, customary law or practice and religious rule or practice from being used in GBV responses;
- Avoid mediation that could harm the victim;
- Prohibit discrimination based on nationality (or lack thereof), refugee or asylum- seeking status;
- Prohibit any adverse inferences if GBV cases are reported late and there should be no offence of false accusation
- Sentence imposed should match gravity of GBV crime;
- Judicial and quasi-judicial proceedings should not be a bar to civil proceedings being initiated against the offender or anyone who acted negligently;
- Pre, during and post requirement procedures and processes for and relating to GBV cases are clearly outlined, such as the following:
  - How to inform and the extent of information to be given to, a victim, the victim's rights and any basic support which may be available to assist the victim;
  - Obtaining for the victim, or advising the victim on how to obtain, shelter, medical treatment, legal services, counseling or other services that may be required in the circumstances;
  - Advising the victim of the victim's right to lodge a complaint and where the complaint may be best lodged for expeditious handling;
  - Informing the victim of remedies available;
  - Protection of the victim during legal proceedings;
  - Nature and extent of evidence to be presented in legal proceedings;
  - Protection of witness;
  - Special needs of women and children;
  - Restraining and protection orders;
  - Re-victimization provisions;
  - Provision of legal aid;
  - Re-integration and social support;
  - Mutual legal assistance in criminal matters and extradition.

3.5 OPTIONS FOR EXERCISES

Below are a number of possible options for delivering the material in this Module.

EXERCISE: Video – Understanding the issue of consent in sexual violence offences
Short video clip explaining the meaning of consent with drinking tea Developed by the Thames Valley Police. Animation courtesy of Emmeline May at rockstardinosaurpirateprincess.com and Blue Seat Studios. Copyright © 2015 https://www.youtube.com/watch?v=pZwvrxVavnQ Instructions: Show the video and ask the plenary to share their reactions to the film.

EXERCISE: Short scenarios to generate discussion on sexual offences
Instructions
Develop short case scenarios based on your local laws to generate discussion as to whether the conduct is criminalized or not under the national law. Some ideas are set out below. You could ask how the scenario would be covered under the national law, how it would be interpreted under the SADC GBV Protocol, the regional and international standards.

1. A woman was walking home from a late night shift when she was grabbed from behind and pulled into a bush. She was held down and anally raped. Other than the anal rape there was no other bodily injury. [Discussion of prohibited acts]
2. A woman was on a third date with a man she met through a friend. He invited her to go to a café and on the way they stopped at his home for him to get his wallet. Once inside the home, he had sex with her despite her pleas of no. [Discussion of consent versus forced based]
3. A husband has sex with his wife against her will. [Discussion of marital rape]
4. A woman is on a bus after her night shift and three men crowd her, grabbing her breast and taking her hand and forcing her to touch one of the men's penis. [Discussion of sexual assault]
5. An ex-boyfriend is stalking his former girlfriend. He leaves her numerous emails, texts, phone messages, showing up outside her place of work, at her home and she often sees him on the street. He says that he loves her, will not stop till she is his and she will be never be with anyone else. She is fearful of him. [Discussion of stalking/sexual harassment]

Facilitators notes

- **Differences in definition and criminal elements.** State criminal laws differ widely on the definitions both of rape and of sexual assault and on the conditions under which they are prosecuted. As the discussion will likely show, there are significant challenges in definition of elements of the crime.
- **Prohibited acts of rape.** The traditional definition of rape remains in some States, which means the crime is completed only at the time of vaginal sexual intercourse and excludes other forms of sexual violence. Legal reforms have broadened the definition in various States. This might include any act of sexual penetration, of whatever kind and by whatever means.
- **Forced based versus absence of consent.** In some countries, rape must be compelled by force or threat to constitute sexual intercourse, which excludes rape of a person who is not in the position to offer resistance. In other States, the law focuses on a lack of consent rather than on the use of force, defining sexual assault as any non-consensual contact. This can potentially shift the burden of proof to the person who acted recklessly without regard to consent or used other forms of pressure than physical force. Note the Council of Europe Convention, which provides that consent must be given voluntarily as the result of the person's free will assessed in the context of the surrounding circumstances. Other States have provisions which expand on a range of circumstances in which consent is immaterial, such as sexual assault by an individual in a position of authority (e.g. in a correctional facility) or in certain relationships (e.g. ongoing psychotherapist-patient relationship). Other States have provisions for a broad range of coercive circumstances around consent such as intimidation or fraud. Some States have expanded this to include: by trickery or artifice or by taking advantage of a person who is not in a position to give free consent or to offer resistance.
- **Marital rape.** Marriage is not a defense to the crime of sexual violence in many jurisdictions. In these jurisdictions, a spouse may be criminally prosecuted for the crime of sexual assault for any non-consensual sexual contact with his wife.
- **Sexual assault.** Some States have broadly defined sexual assault to mean any sexual act, attempt to obtain a sexual act, sexual comments or advances, which are not consensual, or acts to traffic a person's sexuality, using coercion, threats of harm or physical force, by any person regardless of relationship to the victim, in any setting, including but not limited to home, work and school.
- **Sexual assault against girls.** In establishing sexual crimes against children, States vary in how they define the age of consent, or in other words, the minimum age at which a person is considered to be legally competent to consent to sexual acts. The relevant age may also vary by the type of sexual act or relationship between the parties, for instance where there was a position of trust or dependency versus both parties being minors.

- **Sexual harassment.** A few States have criminalized sexual harassment, while other States prohibit such conduct in labour codes or in gender equality laws. The CEDAW General Recommendation No. 19 notes that equality in employment can be seriously impaired when women are subjected to gender-specific violence, such as sexual harassment in the workplace. Such conduct can be humiliating and may constitute a health and safety problem. It is discriminatory when the woman has reasonable grounds to believe that her objection would disadvantage her connection with her employment, including recruitment or promotion, or when it creates a hostile working environment. Sexual harassment can take place in the workplace, schools, streets, public transport and social situations. It includes flashing, obscene and threatening calls and online harassment.
- **Stalking.** Only a handful of States have adopted a specific law against stalking. Other States might use the offence of harassment to cover acts of stalking. An element of the criminal offence often refers to a course of conduct or series of actions that may differ in kind, which taken as individual incidents may not amount to criminal behaviour and seem no more than a nuisance, but as a series, they constitute systematic intimidation and often the constant presence of threat and the danger of escalation into life threatening attacks.

Source: UNODC 2019. Resource book for trainers on effective prosecution responses to violence against women and girls.

EXERCISE: Short scenarios to generate discussion on intimate partner violence offences

Instructions

Develop short case scenarios based on your local laws to generate discussion as to whether the conduct is criminalized or not under the national law. Some ideas are set out below. You could ask how the scenario would be covered under the national law, how it would be interpreted under the SADC GBV Protocol, the regional and international standards.

1. A man regularly yells at his wife, calling her lazy, saying he must discipline her often to make her a better wife, and he has often "disciplined" her by hitting her. She feels constantly intimidated and fearful. In the latest incident, he grabs her by the neck and chokes her until she loses consciousness. [Discussion regarding the level of physical harm and whether certain harms are seen as less serious. For example some countries do not criminalise physical harm that is less than a certain percentage or that does not result in incapacitation of less than a certain number of days. While others have defined offences such as gross violations of integrity]
2. A man has been controlling his wife's movements. He does not allow her to see her family and friends, is extremely jealous of other men looking at her and will tell her often that he will kill her if she leaves him. She has been missing work more and more because she is not feeling well. Her family, when they do try to see her, say that she has no affect and if she does, she is jittery and nervous. [Discussion of psychological violence]
3. A man forces his live-in girlfriend to have what he describes as adventurous sex, using an object to penetrate his girlfriend; she is not a willing partner. [Discussion of the definition of partner - common law relationship and sexual violence]
4. A man intentionally burns the feet of his wife with a cigarette as punishment for not bringing home enough money. Since he lost his job, he has forced his wife to go to the tourist district to beg on the streets for money. He believes if she is maimed that she will be more successful for her begging. The cigarette burn leaves scars on the feet for two weeks before healing satisfactory. [Discussion of physical injury, economic violence]

Facilitators notes

- **At the national level, States vary in their criminal justice approach to intimate partner violence and domestic violence, in general.** The call for criminalization in the international standards and norms does not necessarily mean that the form of violence against women appears as a specific named offence in the criminal or penal codes. Generally, the position is that violence should be considered violence regardless of whether it is committed by a spouse, an acquaintance or a stranger. However there is a concern that the approach to violence against women in the home and family, the very place where women should be able to expect safety and security, has not been effective, allowing for impunity and tolerance. It is therefore crucial to take effective measures to curb violence against women in the family. Generally the crimes covering domestic violence are defined in gender neutral language, covering both female and male victims, although the majority of victims are female.
- **Three (four) forms of Intimate partner violence: physical, sexual, and psychological (economic).** While intimate partner violence/domestic violence includes a range of controlling and coercive behaviours, not all of them may be defined as crimes. Most States do not have intimate partner violence/domestic violence as a specific criminal offence, rather the criminal law covers physical violence (i.e. provisions for assault or injury to a person's life, health, and physical integrity). Psychological or economic violence as a crime appears to be more difficult to define, and some jurisdictions require a certain threshold to meet before the conduct becomes criminal. In other words, some acts which constitute intimate partner violence/ domestic violence can either be criminal or civil wrongs or both. Also, depending on the jurisdiction, the discretion to proceed with a prosecution may lie with the police if it is a misdemeanour or common assault.
- States should ensure that the legal definition fully captures the experiences of intimate partner violence/ domestic violence in all its manifestations – for example consider criminalizing **repeated or habitual violence** (pattern of a series of violations) rather than limiting the definition to isolated action. Experiences of intimate partner violence can involve repeated acts involving all or some forms of violence [Examples: Swedish Penal Code, Chapter 4, section 4(a)].
- **Intimate partners should be defined as expansively as possible.** Definitions should encompass current or former spouses or partners, whether or not there is or has been cohabitation, partners of same sex, individuals with family relationships to one another and members of the same household

Source: UNODC 2019. Resource book for trainers on effective prosecution responses to violence against women and girls.

MODULE 4.

Focused on the legal framework in South Africa

REVIEW THE LEGAL FRAMEWORK OF SOUTH AFRICA[112]

1. Identify the criminal offences that are relevant to the adjudication of GBV in South Africa.
2. Appreciate the relevant criminal procedures that are applicable to cases involving GBV in South Africa.
3. Become familiar with case law relevant to interpreting laws related to GBV.

4.1 GBV OFFENCES IN SOUTH AFRICA

THE CRIMINAL LAW (SEXUAL OFFENCES AND RELATED MATTERS) AMENDMENT ACT OFFENCES

The Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007, provides the framework for the provision of adequate and effective protection to all victims of sexual offences. The 2007 Act repealed the common law offence of rape and replaced it with an expanded statutory offence based on lack of consent irrespective of gender. It also explicitly provided that it is not a valid defence for that accused person to contend that a marital or other relationship exists or existed between them and the complainant. The 2021 amendments introduced new sex crimes of "sexual intimidation"; extended the scope of the crime of incest; provided for a defined category of persons falling under "vulnerable persons"; and made amendments to the National Register for Sex Offenders.

Overview of the sexual offences

Section	Offence
3.	Rape
4.	Compelled rape
5.	Sexual assault
6.	Compelled Sexual assault
7.	Compelled self-sexual assault
8.	Compelling or causing persons 18 years or older to witness sexual offences, sexual acts or self-masturbation
9.	Exposure or display of or causing exposure or display of genital organs, anus or female breasts to persons 18 years or older ("flashing")

[112] The information in this Module has been provided by RCP Jakkie Wessels Regional Court President Limpopo Regional Division.

10.	Exposure or display of or causing exposure or display of child pornography to persons 18 years or older
12.	Incest
13.	Bestiality
14.	Sexual acts with corpse
14A	Sexual intimidation
15.	Acts of consensual sexual penetration with certain children (statutory rape)
16.	Acts of consensual sexual violation with certain children (statutory sexual assault)
17.	Sexual exploitation of children
18.	Sexual grooming of children
19.	Exposure or display of or causing exposure or display of child pornography or pornography to children
19A	Offences relating to child pornography
20.	Using children for or benefiting from child pornography
21.	Compelling or causing children to witness sexual offences, sexual acts or self-masturbation
22.	Exposure or display of or causing of exposure or display of genital organs, anus or female breasts to children ("flashing")
23.	Sexual exploitation of persons with mental disabilities
24.	Sexual grooming of persons with mental disabilities
25.	Exposure or display of or causing exposure or display of child pornography or pornography to persons with mental disabilities
26.	Using persons with mental disabilities for pornographic purposes or benefiting therefrom
55.	Attempt, conspiracy, incitement or inducing another person to commit sexual offence

RAPE (SECTION 3), COMPELLED RAPE (SECTION 4) AND SEXUAL ASSAULT (SECTION 5)

- **Section 3:** Any person (A) who unlawfully and intentionally commits an act of sexual penetration with a complainant (B), without the consent of B, is guilty of the offence of rape.
- **Section 4:** Any person (A) who unlawfully and intentionally, compels a third person (C), without the consent of C, to commit an act of sexual penetration against the complainant (B), without the consent of B, is guilty of the offence of compelled rape.
- **Section 5:** A person (A) who unlawfully and intentionally sexually violates a complainant (B), without the consent of B, is guilty of the offence of sexual assault.

CONSENT

Consent is defined as voluntary or uncoerced agreement (section 1(2)). Judges should consider the following as circumstances when consent is not voluntary or uncoerced:

- Complainant submits or is subjected to act
  - Use of force / intimidation – person / property
  - Threat of harm – person / property
- Abuse of power / authority – inhibited to indicate unwillingness / resistance
- Committed under false pretences / fraudulent means
  - Believe particular person – who is different person
  - Sexual act something other than the act

- Incapable of appreciating nature of sexual act
  - Asleep, unconscious, under influence
  - Under 12, mentally disabled

THE DOMESTIC VIOLENCE ACT OFFENCES

The Domestic Violence Act, 116 of 1998 (DVA), which was amended by the Domestic Violence Amendment Act, 2021 (Act 14 of 2021), provides for protection from domestic violence, placing responsibility squarely on state organs and in particular the South African Police Service (SAPS) to ensure that survivors of domestic violence can apply for protection orders to prevent abusers from entering a mutual home or the survivor's home or place of work. The DVA has an expansive definition of domestic violence that includes physical, sexual, emotional, verbal, psychological and economic abuse as well as intimidation, harassment, stalking and controlling behaviours. The amendments in 2021 introduced significant changes to the original legislation, such as expanding the definition of domestic violence to include coercive and controlling behaviour, exposing a child to domestic violence, unauthorized entry into a complainant's workplace or place of study, spiritual abuse and elder abuse. Amendments also made to simplify the process of obtaining protection orders, including allowing electronic application, and for a "domestic violence safety monitoring notice".

The Domestic Violence act defines coercive and controlling behaviour in section 1.

- "Coercive behaviour" means to compel or force a complainant to abstain from doing anything that they have a lawful right to do, or to do anything that they have a lawful right to abstain from doing.
- "Controlling behaviour" means behaviour towards a complainant that has the effect of making the complainant dependent on, or subservient to, the respondent and includes¬ (a) isolating them from sources of support; (b) exploiting their resources or capacities for personal gain; (c) depriving them of the means needed for independence, resistance or escape; or (d) regulating their everyday behaviour;

The definition of "domestic relationship" has been amended by Domestic Violence Amendment Act. It means a relationship between a complainant and a respondent in any of the following ways:

a) They are or were married to each other, including marriage according to any law, custom or religion;

b) They (whether they are of the same or of the opposite sex) live or lived together in a relationship in the nature of marriage, although they are not, or were not, married to each other, or are not able to be married to each other;

c) They are the parents of a child or are persons who have or had parental responsibility for that child (whether or not at the same time);

d) They are family members related by consanguinity, affinity or adoption;

e) They are or were in an engagement, dating or customary relationship, including an actual or perceived romantic, intimate or sexual relationship of any duration; or

f) They are persons in a close relationship that share or shared the same residence;

Furthermore, the definition of "close relationship" has also been amended and means a relationship between the complainant and any other person, which the court, with regard to the following criteria:

- The degree of trust between the persons
- The level of each person's dependence on, and commitment to, the other person
- Length of time the relationship has existed
- Frequency of contact between the persons
- The degree of intimacy between the persons.

Domestic violence means: (Section 1)	
a.	physical abuse
b.	sexual abuse
c.	emotional, verbal or psychological abuse
d.	economic abuse
e.	Intimidation
f.	Harassment
fA.	sexual harassment
fB.	related person abuse
g.	spiritual abuse
h.	damage to property
hA.	elder abuse
hB.	coercive behaviour
hC	controlling behaviour
hD	to expose a child to domestic violence
i.	entry into the complainant's - permanent or temporary residence without their consent, where the parties do not share the same residence; or workplace or place of study, without their consent, where the parties do not share the same workplace or place of study
j.	any other behaviour of an intimidating, threatening, abusive, degrading, offensive or humiliating nature towards a complainant, where such conduct harms, or inspires the reasonable belief that harm may be caused to the complainant

The law also describes in more detail what is meant by physical abuse, sexual abuse, economic abuse, emotional, verbal and psychological abuse, spiritual abuse, sexual harassment, and related person abuse as well as harassment and intimidation.

4.2 OVERVIEW OF THE CRIMINAL PROCEDURES IN GBV CASES

OBLIGATIONS OF FUNCTIONARIES TO REPORT

The amended section 54 of the Sexual Offence Act 32 of 2007 (as from 31 July 2022) sets out obligations to report commission of sexual offences against persons who are vulnerable. A person who has knowledge, reasonable belief or suspicion that a sexual offence has been committed against a person who is vulnerable as defined in section 40 must report such knowledge, reasonable belief or suspicion immediately to a police official. Failure to do so is an offence. A person who is vulnerable includes children, persons with mental disabilities, female under the age of 25 years who attend higher or vocational education or as part of employment, persons who are cared for in certain facilities, persons who are 60 years or older, etc. There are also obligations on certain functionaries to report domestic violence under the new Section 2A of the Domestic Violence Act (as amended).

EVIDENTIARY ISSUES

Analyzing case where the evidence is a single competent witness

Section 208 of the Criminal Procedural Act provides that a court may convict on the single evidence of a competent witness. Findings can be based on evidence of single witness but the evidence must be treated with caution. In criminal matters, a conviction on evidence of single witness usually only occurs if evidence is substantially satisfactory in every material respect or if there is corroboration. Moreover, the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, section 60 provides that the Court may not treat evidence of complainant with caution only on account of the nature of the offence.

Previous statements

The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, section 58 deals with evidence of previous consistent statements admissible. Specifically, it provides that courts may not draw any inference only from the absence of such previous consistent statements. Section 60 provides that a previous consistent statement does not provide corroboration and is not proof of the content. Such a statement is admitted only as evidence of consistency in the account given by the complainant - as matter going to the complainant's credit. The previous statement does not amount to evidence of the lack of consent or to evidence of consent. It is the complainant's testimony that is evidence of lack of consent, and the complaint does no more than support the credibility of the complainant in so testifying.

Delayed reporting

The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, section 59 deals with evidence of delay in reporting. It specifically provides that courts may not draw any inference only from the length of any delay in reporting of any alleged offence

Corroboration issues

Corroboration is confirmatory evidential material independent of evidence to be corroborated. It can be supplied by oral evidence, documentary or real evidence including fingerprint, demeanor such as distressed state. It can also be formal / informal admission in plea explanation or answer to question in cross-examination. The preferred term to use is corroborative "probative material" rather than evidence. It must be admissible and relevant. Corroboration must be from an external source; a witness cannot corroborate themselves. Previous statements made cannot be used for corroboration.

Rights of witnesses

The Service Charter for Victims of Crime in South Africa aims to eliminate secondary victimisation in the criminal justice process and ensure that victims remain central to the criminal justice process. The Charter sets out service standards that they can expect when they come into contact with the criminal justice system as well as make provision for victims' recourse when standards are not met.

Victims have the following rights:

- The right to be treated with fairness and with respect for your dignity and privacy
- The right to offer information
- The right to receive information
- The right to protection
- The right to assistance
- The right to compensation
- The right to restitution

Victims must be able to fully participate in court proceedings and have their voices heard. This includes ensuring them access to protective measures in court, such as being able to testify in camera in certain cases (for ex sexual offences); testifying using the CCTV or remote audio-visual link; and having an intermediary to assist in certain circumstances. It is important for judges to appreciate that witnesses do not need to be in or at court building. For example, they can testify with remote AV link from any place they feel safe, such as Thutuzela Care Centre.

4.3 SELECTED CASE LAW

DOCTRINE OF COMMON PURPOSE APPLIED TO THE CRIME OF RAPE[113]

In December 2019, the South African Constitutional Court found that the doctrine of common purpose applied to the crime of rape – common purpose holds that when a group of people commit a crime together they share liability for the crime, even if they did not all individually commit the criminal act. The case in question was linked to a series of attacks and rapes that had been committed by a criminal gang in Tembisa on the East Rand in the late 1990s. During a spate of robberies and housebreakings, several members of the gang had participated in raping eight different women. During some of the attacks, other gang members were posted outside to keep a lookout. Two of these men, Jabulane Tshabalala and Annanius Ntuli, had been convicted of rape under common purpose but argued that it should not apply in their case as the crime of rape specifically "required the unlawful insertion of the male genitalia into the female genitalia" (the assaults had been committed prior to the new definition of rape), that is, that rape is an instrumentality offence and "can only be committed by a male using his own genitalia" – that is, through the instrumentality of his own body and not the instrumentality of another person's body.

The Constitutional Court dismissed the applicants' appeal. In a majority judgement, the justices carefully spelled out why they had done so, describing the "instrumentality" objection as obsolete and patriarchal, and explaining that it was "necessary that the relationship between rape and power [be] considered [. . .] To characterize it simply as an act of a man inserting his genitalia into a female's genitalia without her consent is unsustainable. In instances of group rape, as in this case, the mere presence of a group of men results in power and dominance being exerted over women victims". The judgment goes on to say that ". . . rape can be committed by more than one person for as long as the others have the intention of exerting power and dominance over the women, just by their presence in the room".

"This Court would be failing in its duty if it does not send out a clear and unequivocal pronouncement that the South African judiciary is committed to developing and implementing sound and robust legal principles that advance the fight against gender-based violence in order to safeguard the constitutional values of equality, human dignity and safety and security. One such way in which we can do this is to dispose of the misguided and misinformed view that rape is a crime purely about sex. Continuing on this misguided trajectory would implicate this Court and courts around this country in the perpetuation of patriarchy and rape culture" [para 63].

Understanding consent[114]

In the case of S v Coko (2022 (1) SACR 24 (ECG)), the complainant was a 23¬year-old postgraduate student at Rhodes University, Grahamstown. She met the accused in 2017 and they started a relationship in June 2018. He was also 23 years old and employed as a paramedic. The couple discussed the question of sexual intercourse during their relationship and the complainant indicated that she was a virgin and not ready for sexual intercourse. The accused indicated to the complainant that he would not pressure her to have sex if she was not ready. They did meet often at the complainant's house where they would kiss, cuddle and touch each other intimately. After initially meeting earlier in the day on 1 July 2018 the couple planned to meet again later that evening and for the complainant to sleep over at the accused's residence. As agreed, he later fetched her from the student village and upon arrival at his residence they got into bed and watched a movie. The complainant was wearing pyjamas, a track suit, big coat and shoes. When the movie ended they started kissing and the accused started to remove the complainant's pyjama pants. As he did this, she closed her legs. He however indicated that he did not want to have sexual intercourse with her and she then allowed him to remove her pants. The complainant was not wearing underwear. The accused proceeded to have oral sex with her, to which she did not object. He then climbed on top of her and penetrated her. The complainant made a

[113] For more information see: Franaaz Khan and Kirstin Hagglund "An Analysis of the Common Purpose Doctrine and Rape in South Africa with Special Focus on Tshabalala v The State [2019] ZACC 48". For a critique of this decision, see Jolandi Le Roux¬Bouwer. 2023. "The Krugersdorp gang rapes – Another Tshabalala v S; Ntuli v S". The South African Law Journal Vol 140, Part 1.1.

[114] For more information see, Murdoch Watney "Intimate partner rape: Myths, reality and the law" Journal of South African Law 2022 768; and Stal SJ "Does Mistaken Belief in Consent Constitute a Defence in South African Rape Cases?" PER / PELJ 2023(26).

statement that during the intercourse she kept telling the accused to stop as he was hurting her and she tried to push him off. He would, however, not stop and kept saying sorry. After he ejaculated the complainant asked why the accused did not keep his promise that there would be no sex. His answer was that he got caught up in the heat of the moment. No condom was used during the intercourse. The complainant thereafter spent the night with the accused and went home the next morning.

The complainant lodged a criminal complaint of rape with the police on 2 September 2018. Several text messages were exchanged between them during July. The complainant informed the accused on 10 July 2018 that she was not pregnant. On 16 July 2018 the appellant apologized to the complainant for "going back on his word. And having unprotected sex with you". The complainant responded with the following message: "... going back on your word. That's what you call inserting your penis in my vagina without my permission. And continuing even when I told you "you hurting me". The complainant informed the accused three days later that she was ending the relationship. The trial court accepted the evidence of the complainant in total and commented that the accused was an honest witness in many respects. The court, however, rejected the accused's evidence that the complainant gave mixed messages which led him to believe that she gave consent to sexual intercourse, as false beyond reasonable doubt. The court based this conclusion on the fact that from the onset of their relationship as well as at the time of the oral sex the complainant indicated that there should be no penetration. The court further inferred from the facts that the accused in all probability planned to have sexual intercourse with the complainant when he invited her to his residence. The accused was convicted sentenced to seven years imprisonment.

On appeal, the conviction was overturned. The court emphasized the burden of proof was on the prosecution. It accepted the defence of the appellant that he did not want to have sexual intercourse without the consent of the complainant and that he genuinely believed that such consent had been given by the conduct of the complainant. The court of appeal concluded that the state failed to prove beyond reasonable doubt that the appellant knew there was no consent and that he therefore acted with intent to rape the complainant. Murdoch Watney, in her article argued that the appellant could have been under no illusion that the complainant did not consent to sexual intercourse. Not only was that the agreement which formed part of their relationship, but she reiterated it to him minutes before he decided to have intercourse with her. The appellant's explanation that their specific agreement was retracted by the body language of the complainant is insufficient to justify an inference that he bona fide, but mistakenly, believed that the complainant changed her mind.

On appeal from: Eastern Cape Division of the High Court, Makhanda (Ngcukaitobi AJ, Gqamana J concurring, sitting as court of appeal)[115]: 1 The appeal by the State against the acquittal of the respondent is upheld. 2 The acquittal of the respondent by the high court is set aside. 3 The conviction of the respondent by the regional court is reinstated. Excerpts from the judgment:

- it must be stressed that this in no way means that consent by one party to a specific form of sexual act should be taken to be a licence to every other sexual act [para 13].
- The concept of 'proof beyond reasonable doubt' has been a subject of judicial discussion in countless decisions of our courts. Therefore, it is not necessary to rehash the principles appertaining thereto in this judgment. It suffices to reiterate that proof beyond reasonable doubt does not equate to proof 'beyond all shadow of doubt' or 'absolute certainty' as to the guilt of the accused [para 37].
- Bearing the basic principles of statutory interpretation discussed above in mind, we now proceed to a consideration of what is at the heart of this appeal. Turning to s 3 of the Sexual Offences Act, we first deal with the concept of 'consent' as defined in s 1(2) with special reference to the word 'agreement'. To our mind, such a word entails the meeting of the minds of the willing participants to engage in penetrative sexual intercourse. The Sexual Offences Act explicitly requires that consent must be 'given consciously and voluntarily, either expressly or tacitly by persons who have the mental capacity to appreciate the nature of the act consented to. Moreover, for the consent to avail a person who commits a penetrative sexual act, such consent must be based on true knowledge of the material facts relating to the act in question [para 55].

[115] Director of Public Prosecutions, Eastern Cape, Makhanda v Coko (Women's Legal Centre Trust, Initiative for Strategic Litigation in Africa and Commission for Gender Equality intervening as Amici Curiae) (case no 248/2022) [2024] ZASCA 59 (24 April 2024)

- As this Court made plain in Mugridge v S, 45 mere submission, or acquiescence, or lack of resistance does not convey a willingness to engage in a penetrative sexual act. Thus, none of these would constitute consent. The court had this to say: 'The law requires further that consent be active, and therefore mere submission is not sufficient [para 56].
- These factors, considered cumulatively, impel the conclusion that the respondent, in breach of his assurances to TS, intentionally had penetrative sexual intercourse with her, well knowing that she had not consented thereto. Counsel further argued that there could hardly be a clearer example of 'proceeded recklessly' than this. The high court's acceptance of this evidence, so it was argued, clearly played into the myth that a man can take consent to one sexual act as an invitation to perform all other sexual acts; and that 'going with the moment' is an acceptable defence – which it is not. It was further submitted that '[t] he fact that the complainant gives no outward indication that she is consenting would be strong evidence that the accused['s] belief is not honestly entertained' [para 64].

Certain provisions of the Sexual Offences Act have been declared unconstitutional

In the Embrace Project et al v Ministry of Justice et al (South Africa)[116], the High Court of Pretoria, South Africa handed down a judgment on 30 September 2024 declaring certain provisions in the Sexual Offence Act unconstitutional for failing to protect GBV victims against legal bias in favour of perpetrators. Pending confirmation by the Constitutional Court, the law will change requiring that an accused person take "objectively reasonable steps to ascertain that the complainant consented to sexual conduct". The subjective rest for criminal intent has been declared unconstitutional and is to be replaced by an objective test.

Sexual grooming of children

In M. vs. S. (March 2013) – South Africa[117], M. appealed his conviction on several charges relating to the sexual abuse of his adopted minor daughter (i.e. rape, indecent assault and crimen injuria). He argued that the complainant consented to the acts and, in any event, he had subjectively believed that she had. He claimed further that she was in fact the one who had misled him and offered herself to him. The complainant started to live with the appellant, who was a senior pastor of a church, when she was 7 years old and was formally adopted at the age of 15. The year before the adoption, the complainant discovered that M. had installed a hidden video camera that could record images of her when using the shower as well as checking her diary. The relationship grew more intimate, with them starting to share secrets and going to restaurants together. He regularly bought her gifts (expensive clothes, shoes, CDs) which were hidden from his wife. Eventually M. came to frequently touch her inappropriately. He always apologized after claiming it was an accident. This evolved into sexual acts, use of drugs and alcohol. At trial, the court dealt with the evidence holistically in finding that the complainant did not consent to the acts and that the appellant had the requisite mens rea to commit same. The court rejected his defence as to consent by evaluating the complainant's behaviour in the context of the relationship that existed at the time of the commission of the offence, including the vulnerabilities of the complainant and the application of general logic. The court noted that, on the facts, the complainant had not displayed any particular conduct which indicated her lack of consent over and above her objectives. However, any perceived acquiescence could not be construed as consent, as the appellant had slowly groomed her to ensure that she ultimately submitted. The court of appeal dismissed his appeal.

The court noted that the consent is to be active, and therefore mere submission is not sufficient. All the circumstances must be taken into account to determine whether passivity is proof of implied consent or whether it is merely the abandonment of outward resistance which the women, while persisting in her objection to intercourse is afraid to display or realize is useless. In the context of sexual relations involving children, any appearance of consent to such conduct is deserving of elevated scrutiny, with particular attention to be paid to the fact that the person giving the consent is a child. The inequalities in the relationship is of great important in understanding the construction, nature and scope of the child's apparent consent to any sexual relations.

[116] The Embrace Project et al v Ministry of Justice et al. Case No: 04856/22, In The High Court of South Africa Gauteng Division, Pretoria, 30 September 2024.

[117] M. v S. (657/12)[2013] ZASCA 43 (28 March 2013).

The court also noted that any behaviour that is designed to build up a relationship of trust with a child with the longer-term goal of involving the child in some sexually related act or acts could constitute grooming.

Noting the challenges in reporting GBV cases

In Levenstein and Others v Estate of the Late Sidney Lewis Frankel and Others[118], the court noted: "Of pivotal importance to the case before us is this: that the systemic sexual exploitation of woman and children depends on secrecy, fear and shame. Too often, survivors are stifled by fear of their abusers and the possible responses from their communities if they disclose that they had been sexually assaulted. This is exacerbated by the fact that the sexual perpetrator,..., is in a position of authority and power over them. They are threatened and shamed into silence. These characteristics of sexual violence often make it feel and seem impossible for victims to report what happened to friends and loved ones – let alone state officials. Combined with this is the frequent impact of deeply-located self-blame, which, …… disables the victim from appreciating that a crime has been committed against her for which the perpetrator, and not she, is responsible".

[118] Levenstein and Others v Estate of the Late Sidney Lewis Frankel and Others 2018 (2) SACR 283 (CC).

MODULE 5.

Grounded on a trauma-informed approach

BASICS FOR TAKING A TRAUMA-INFORMED APPROACH

1. Understand the basic facts of the science of trauma – you do not have to be an expert
2. Recognize how traumatic incidents impact memory and recall
3. Identify the dynamics of intimate partner violence, power and control wheel and cycles of violence
4. Applying a trauma-informed approach in the judiciary

5.1 THE BASICS FOR UNDERSTANDING TRAUMA

Judges want to see justice done fairly and equitably. They want to exercise their professional duties as effectively as possible while avoiding causing trauma to victims. However, research shows that victims of GBV are often re-traumatized and harmed by their experience in the criminal justice system. There is a lot of misunderstanding and confusion around the behaviour of victims, both towards their reactions to the violence and why they are reluctant to participant in the criminal justice process. A better understanding of the gendered nature of GBV and ensuring that management of GBV offences more fully captures how persons experience such violence and is not re-traumatized by engaging with the criminal justice system is aided by an understanding of the science of trauma. Recent good practices in handling GBV involve adopting a trauma-informed approach, that is, one based on a neurobiological understanding of how the brain processes trauma.[119] An increase in the knowledge about victims' reactions to traumatic events, like intimate partner violence and sexual violence, has led to a deeper understanding of the neurobiological impacts on the brain's defence circuitry and on memory encoding and recall. A trauma-informed approach can contribute to effective management of GBV cases as well as reducing or eliminating secondary trauma for victims.[120]

What is trauma? A traumatic event is one in which a person experiences something that is frightening, and overwhelming, and that entails a sense of loss of control and in some circumstances, it feels like a threat to one's ability to survive. Individuals experience trauma in their own way, based on many factors including past experiences in their lives. As a result, any definition of trauma is very subjective. Traumatic events are not necessarily violent. However, they will involve a feeling of violation of a person's sense of self, security and survival.

Why is it important for judges to understand the science of trauma? There is no uniform or predictable victim response to GBV, but understanding trauma can help understand some common ways that victims may react to violence.

[119] For example, see England and Wales Legal Guidance, Sexual Offences, 21 May 2021; Department of Justice Canada. "The Impact of Trauma on Adult Sexual Assault Victims".

[120] The following notes rely on information from Department of Justice Canada. "The Impact of Trauma on Adult Sexual Assault Victims".

Some common ways victims may react can include:

- Freeze
- Not report or delay reporting
- Not remember aspects of the event
- Have blanks in memory
- Struggle with decision making
- Not say no clearly to unwanted sexual contact
- Exhibit no physical evidence of injury from an assault
- Be unable to identity the perpetrator to police
- Exhibit no apparent emotional expression following an assault
- Provide what might appear to be inconsistent statements at different points of time
- Blame themselves for the assault
- Have a relationship with the perpetrator after the assault
- Deny or minimize the assault
- Recant the experience

In the aftermath of trauma

- Victims may make statements that appear to be incomplete or inconsistent.
- They may also seek to hide or minimize behaviours they used to survive, such as appeasement, or flattery, out of fear that they will not be believed or that they will be blamed for their assault.
- But what might appear to an "inconsistency" in the way a victim reacts, or tells their story, may actually be a typical, predictable, and normal way of responding to life-threatening events and coping with traumatic experiences.
- Many responses that seem inexplicable to those who are unfamiliar with normal trauma responses can be appreciated by understanding the brain's way of coping with and processing overwhelming psychological events.

The brain's reaction to threat/trauma. Our nervous system (the 5 senses in our brain) is continually monitoring our surroundings for varying levels of threat and danger at both conscious and unconscious levels. This is the function of the limbic system. Consider the following progression:

- If we sense that our very survival is threatened, the brain takes over.
- First it immediately releases a cascade of chemicals.
- When the threat is imminent, a normal person switches to subcortical dominance. In this mode, the automatic responses are to fight, to flee or to freeze or flop. We react automatically. Some of our reactions are at the conscious level and some are unconscious and out of our control.
- The important point to remember is that the defence survival circuitry function of the brain dominates at this stage. The defence circuity includes the amygdala, in the part of the brain that predicts danger. The amygdala can be informed and reacting even before the conscious brain cortex knows what is happening.
- The amygdala sends an instant message to other parts of the brain (the hypothalamus) which relays the message eventually to the adrenal glands. The adrenal gland then releases two powerful stress chemicals (hormones): adrenaline and cortisol.

- Adrenaline's role is to support the "fight" and "flight" response by forcing the heart to beat faster, the blood vessels to constrict so that blood moves quickly to the body and brain. Cortisol suppresses the body from doing anything which isn't necessary at that moment (e.g., higher cognitive/intellectual processing.
- Once the body is filled with these chemicals, it focuses only on the immediate threat. This is key to an understanding of victims as, at this point in an event, a victim's brain, body, attention, thinking, behaviour and memory processes are altered in dramatic ways.
- Within a second of the triggering event, the amygdala signals the body to inhibit any bodily movement.
- The brain then looks for incoming attacks and seeks out possibilities for escape. This is automatic and beyond conscious control.
- The key understanding is that a person cannot make a calculated or rational intellectual assessment about what to do (freeze or flop, fight or take flight) at this point.
- The brain's capacity for intellectual rational thinking is now minimized or impaired. Normal thinking is so impaired that the victim often cannot even think of a way to escape.
- After the immediate freeze reaction a victim usually makes a split-second decision to select a response from a range of responses that they have learned during their lives: flight, fight, freeze, flop or befriend.

TERMS RELATED TO BRAIN TRAUMA

Pre-frontal cortex is the centre of executive functions in the brain. It manages complex processes like reason, logic, problem solving, planning and memory. Stress hormones flooding the brain causes a rapid and dramatic loss of prefrontal cognitive abilities. Our ability to think, plan and reason are limited when stress hormones have control of the brain.

Amygdala predicts dangerous stimuli and triggers the appropriate physiological responses to danger and threat. This is "automatic" and often largely unconscious. It takes in and stores memories that are related to intense arousal such as threats. The amygdala stores these memories in a way that makes them available for future situations that are threatening, thus aiding survival. The amygdala is dominant over the hippocampus in traumatic situations.

Hippocampus encodes and stores new thinking memories into an integrated and coherent, chronologically ordered picture. It places experience into cognitive memory that we can remember in our thinking brain or prefrontal cortex. The hippocampus integrates information entering the brain into a coherent picture. The hippocampus is overridden by the amygdala during traumatic experiences.

Freeze reaction occurs when the amygdala detects a threat and signals the brainstem to inhibit physical movement. This can happen in less than a second; it is automatic and beyond conscious control.

Adrenal glands release two types of hormones: adrenaline and cortisol.

Adrenaline is a stress hormone that bolsters the "fight or flight" response by constricting blood vessels and making the heart pump faster to rush blood to the body and brain.

Cortisol is the other stress hormone that suppresses the body from doing anything which isn't necessary, such as digestion or higher cognitive processing. This allows the brain and body to focus all of its resources into surviving the immediate threat.

Why do victims of sexual violence (and many intimate partner violence) rarely fight or flee? Women rarely respond by fighting in part because they are not trained to fight, they are generally less muscular and therefore less likely to be successful. Without specific training that prepares professional fighters / soldiers / rescue workers how to avoid freezing in a traumatic setting, most people rely on their habitual coping mechanisms. For most women, this does not involve fighting. Furthermore, GBV is often committed by men known and trusted by the victims. Consequently, an attack is a form of betrayal of trust. It will simultaneously result in destabilizing and profoundly confusing / conflicting emotions where the attacker is known to them.

What do victims do if they feel they cannot escape from an assault? Often women, who in all cultures are brought up to be polite and accommodating, will initially use habitual responses such as making excuses or attempting to appease the attacker. These responses are the result of being afraid or overwhelmed, and should not be confused with consenting. If the victim's higher executive thinking cannot devise a way to escape and the assault seems inevitable, the victim's "extreme survival reflexes" will take over. These include dissociation, tonic immobility and collapsed immobility. Victims who respond in any of these extreme survival ways have reported feeling shame because they blamed themselves for "failing" to resist. Similar reactions are common among criminal justice professionals who are uninformed about the brain's response to trauma.

TERMS RELATED TO BRAIN TRAUMA

Dissociation: The brain protects itself from being overwhelmed by splitting some aspect of the experience away from consciousness. This may include memory loss of certain time periods, events, surroundings, people and physical and emotional responses. They have a sense that things are "unreal", that they are unable to make sense of what is happening, that they are on "autopilot", in a trance state, in a dream and unable to feel their bodies.

Tonic immobility: This is similar to a state of involuntary paralysis where a person feels cold and is unable to move or speak but is fully aware of what is going on around them. Victims can move in and out of this state during an event. A Scandinavian study reported that sexual assault victims who experienced tonic immobility were twice as likely to suffer post-traumatic stress disorder (PTSD).[121]

Collapsed immobility: This state involves a sudden and drastic drop in heart rate and blood pressure that may result in fainting, feeling limp and losing muscle tone. To an uninformed observer, this behaviour may appear to be consistent with consenting behaviour. The victim's lack of physical resistance may be due to her inability to move, act or think clearly.

What factors affect the level of traumatic impact? In addition to the victim's unique psychological make-up, factors that may influence the level of trauma include: the nature of the assault, the period of time over which it occurred, the nature of physical harm, the victim's relationship with the perpetrator, a history of previous abuse, the nature of the victim's family's, friends' and justice officials' reaction to their disclosure.

What is "traumatic brain injury"? Recently, medical professionals and academics have raised the connection between victims of intimate partner violence and traumatic brain injury. Traumatic brain injury (TBI) usually results from a violent blow or jolt to the head or body. A common pattern in intimate partner abuse is hitting a victim on the head in order to conceal bruises from family, doctors and investigators. TBI can also be the result of being slammed, shaken or thrown. Anoxic brain injuries related to domestic violence may include the loss of oxygen through suffocation, strangulation, asphyxiation or attempted drowning. Unfortunately, TBIs are invisible. Cognitive, behavioral or mental symptoms for a minor traumatic brain injury may include feeling dazed, confused or disoriented (no loss of consciousness), memory or concentration problems, mood changes, depression or anxiety, and problems with sleep. Many people would not recognize some of all of these symptoms as a sign of a brain injury. In moderate to severe cases, victims may experience the loss of

[121] Moller, A., Sondergaard, H.P. and Helstrom, L. 2017. "Tonic immobility during sexual assault – a common reaction predicting post-traumatic stress disorder and severe depression". Acta Obestretricia et Gynecologica Scandinavica Volumne 96, Issue 8.

consciousness from several minutes to hours, convulsions, loss of coordination, profound confusion, slurred speech, or combativeness. Undetected or untreated TBI can result in permanent lifelong behavioral, emotional and cognitive challenges. The possibility of TBI is rarely screened for by medical professionals working with victims of domestic violence. Although some medical professionals may check for bruising, the possibility of more serious brain injury is often overlooked. It is difficult to estimate the prevalence of TBI among survivors of intimate partner violence.

The key point is that victims of intimate partner violence may exhibit behaviour that does not accord with our expectations of a victim. They may have problems providing a coherent, chronological narrative for many reasons including TBI. This may be as a result of many unknown causes. If, as is often the case, they have not received adequate medical attention, their cognitive and/or emotional impairment may be due to head injuries they have received at some point in their lives. It is important for judges not to make assumptions or draw conclusions about victims' credibility or trustworthiness as a witness based only on their behaviour.

Post-Traumatic Stress Disorder (PTSD) and intimate partner violence? PTSD can be a consequence of exposure to violent and traumatic experiences, including experiences with intimate partner violence. The symptoms of PTSD include persistent re-experiencing of the traumatic event, persistent avoidance of stimuli associated with the traumatic event and numbing of emotions, and persistent symptoms of increased physiological arousal. Research indicates that PTSD is experienced by 51% to 75% of women who are victims of intimate partner violence, rates much higher than those found in the general population or women (which is 10%). Research also indicates that the more severe the violence, the more likely that their symptoms will garner a diagnosis of PTSD.[122] Not only do the direct victims of intimate partner violence exhibit symptoms of PTSD, studies have shown that children who witness the violence also exhibited signs of PTSD.[123]

5.2 THE IMPACT OF TRAUMA ON MEMORY AND RECALL

Judges know that in GBV cases, it is critically important to elicit the most accurate and complete information from the complainant as they are usually the primary witness. People often assume and expect that we will be able to recollect major events in our lives with clear and unwavering accuracy and that this determines the "truth" of what happened. However, recent scientific research on memory has confirmed that human memory is fallible. Even in ideal non-traumatic circumstances, we do not faithfully record information in our brains that is later available to us. In the case of traumatic events such as rape and sexual assault, the brain encodes, records and recalls information differently than during routine non-stressful activities.

[122] Nathanson, A. et al. "The Prevalence of Mental Health Disorders in a Community Sample of Female Victims of Intimate Partner Violence". (US) National Library of Medicine https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3381987/

[123] Kilpatrick, K. L., & Williams, L. M. "Post-traumatic stress disorder in child witnesses to domestic violence". American Journal of Orthopsychiatry, 67(4), 639–644. https://doi.org/10.1037/h0080261.

Receiving information	Memory consolidation	Recalling
• The brain encoding function is performed by the hippocampus which forms explicit memories and the amygdala which forms implicit memories. • Explicit memory is what we usually think of as memory as it is a cognitive memory that we can remember in our thinking brain or prefrontal cortex. • Implicit memories are unconscious but can affect our thoughts and behaviors. • The memories stored in the amygdala are those with intense arousal. The amygdala stores these memories in a way that makes them available for future situations that are threatening. • These memories are critical for our survival because they enable an instant response to danger.	• Next stage is called memory consolidation where newly-formed long-term memory is stabilized in the brain. • Prior to becoming consolidated, memories are in a fragile state and can be disrupted by different types of interference. • Once memory has been consolidated, it is more stable and less likely to be disrupted. • The brain can take 2 full sleep cycles to consolidate memory of a traumatic event. • During stressful situations, the amygdala is dominant, so it focusses on a few details that will enhance our chances of survival. • Therefore, a victim may recall the most disturbing parts of the assault while not remembering elements that do not affect their survival such as the attacker's clothing.	• Victims of GBV have difficulty recalling many details of the assault in a complete or logically sequenced way. • Intense fear or stressful events generate the body's production of stress hormones which affect memory by either intensifying memory recollection or by impairing and fragmenting memory. • It is not unusual for victims to have full and vivid memories about the beginning of an assault when the initial flood of stress hormones was released. • If the stress hormones continue to flood the body, the hippocampus becomes impaired in its ability to encode and eventually store and consolidate memories. In this impaired state, the hippocampus encodes fragments of sensory memory without contextual details. • This can explain, for example, a victim's lack of memory of the layout of the room in which they were assaulted.

How threat and highly stressful events affect memory. Stress and fear heighten activation of the amygdala. This reinforces and intensifies traumatic memories while at the same time impairing hippocampal function, which is involved in episodic or explicit memory. Implicit memory refers to behaviour knowledge of an experience without conscious recall. It is not a memory we can reflect on or think about. These memories are impossible to verbalize. They are often fragmented in time, and for the most part consist of primary sensory information (images, smells, sounds) that are link to physiological fear systems. Memories of traumatic events like GBV can be fragmentary. It can be difficult for victims to recall many details of an assault in a complete or linear way.

Intensified traumatic memories: flashbulb memories and the hippocampus in overdrive. The effect of fear, threat or states of intense stress on memory can result in intensified memory recollection, or it can result in fragmented or impaired memories. Both are the result of the stress hormones released when the defence circuitry is activated. Some elements of traumatic memories are more acutely remembered. The adrenal glands release adrenaline, which has been shown to help encode memories to the hippocampus more intensely. A burst of adrenaline is thought to enhance memory storage of the events closer to the onset of a traumatic or highly stressful event. This strengthens memory pathways and creates what are referred to as "flashbulb memories'. It is not unusual for victims to have some full and vivid memories about the beginning of an assault when the defence circuitry was first triggered and the initial burst of stress hormones were released. As well, central details or aspects of the experience that were of most significance may be intensely remembered.

Experiences with emotional significance are more likely to be consolidated into episodic memory and made available for intentional, conscious recollection than those with little or no emotional significance. The brain encodes what it pays attention to. During a threatening event, the brain focuses on what is central to survival so it does not focus on insignificant and peripheral details, so it does not encode them.

From intensified to fragmented memories. When high levels of the stress hormone cortisol are secreted, along with adrenaline, the hippocampus super-encodes these intense early moments of the event. Following this, if the threat or fear continues, the hippocampus continues to be flooded with stress hormones and it is temporarily impaired and there may be minimal encoding. That is how the hippocampus goes from flashbulb mode to fragmentary mode. When the hippocampus is in this fragmented mode, it encodes (converts) fragments of sensory memory without contextual details. As a result, a victim might not recall the layout of the room where the assault happened. The hippocampus might not encode time-sequencing information because its functioning is altered during a traumatic event. The amygdala is critically involved in calculating the emotional significance of events. Fear focuses one's attention on a few details at the expense of a lot of others. As a result, a victim may not remember some details of the assault, for example, what color of clothing the offender was wearing. Conversely, the central details of an assault or the parts of the experience that were most disturbing are often well encoded and consolidated. During states of fear, the hippocampal and amygdala networks can become disassociated, resulting in a disconnection between the emotional memories of the amygdala and explicit hippocampal processing. As a result, few peripheral details, little or no context or time sequence information, and no words or narrative surrounding the memory may be recalled.

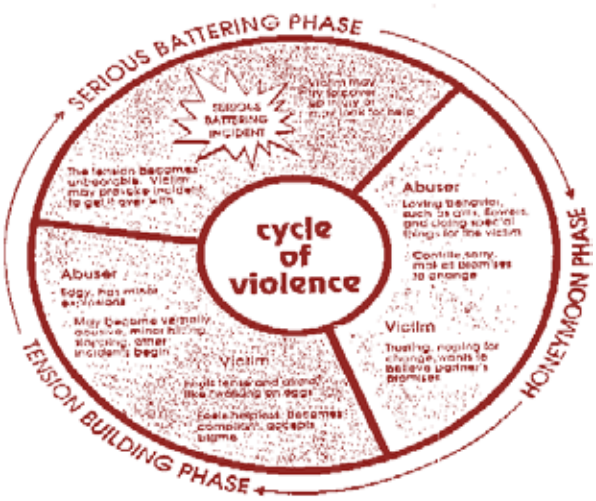
How attention and memory affect recall of traumatic events like GBV. Much of what is remembered of a traumatic or threatening event functions as if existing in separate islands of memory. Information encoding and storage are impaired for aspects of the experiences that are not considered essential for survival or are of little emotional importance. This includes the sequence of events as well as peripheral details. This often results in a disorganized and incomplete narrative memory. This is immensely important for how victims of trauma are interviewed. The primary emphasis of the interview should therefore be on the sensory, emotional memories that the victim has encoded and remembered rather than expecting the victim to give a narrative with a chronology.

Enhanced traumatic memory coexists with incomplete memory. Some elements of traumatic memories are actually more acutely remembered than others. These are called enhanced memories. They are etched more deeply in our memories precisely because they are traumatic and overwhelming to us. Victims often focus on some specific sensory details from the assault. For example, they often remember specific smells (the smell of body odor), but very few details of other aspects of what happened, for example, how long the assault lasted or the specific order in which some things happened. These are normal limitations of memory. They are caused by the stress and fear of the traumatic events and how the brain's defence circuitry affects attention and memory consolidation. While they may have these fragments of memory that seem like "burned into" memory, yet they may have no memory of other peripheral details that were irrelevant to their survival at the time of the experience. It is common for victims to have some gaps in their memory, but more often they can recall central details of what they experienced in the assault but unable to recall some of the peripheral details, such as how they got home later. Judges need to understand that lack of recall of these kinds of peripheral details does not impugn the veracity of the victim's account; instead it is consistent with the way in which traumatic memories are encoded. These kinds of normal inconsistencies have been seized upon by defence lawyers, amplified to intersect with dominant and pernicious rape myths, and used to undermine victims' credibility in GBV trials.

5.3 UNDERSTANDING THE DYNAMICS OF INTIMATE PARTNER VIOLENCE

Many victims of intimate partner violence, in their attempt to survive the ongoing trauma, undergo profound changes to the way their brains perceive themselves and the world around them. These changes can reduce their confidence and sense of self-worth. Changes in perception are often the result of being isolated from family and friends, financially controlled, and experiencing psychological violence which makes her feel that something must be wrong with her and not the abuser.

Why don't victims leave at the first instance of physical violence? Victims have often been isolated from family and friends, financially controlled, and experience psychological violence that reduces the victim's confidence and sense of self-worth which makes them feel that something must be wrong with themselves and not the abuser. By the time the abuser uses physical violence for the first time, often the victim feels they somehow deserves it. Added to this, after the violence, the abuser is contrite, apologetic with promises never to do it again. In the 1970s, Lenore Walker came up with this cycle of violence to explain the dynamics of intimate partner violence (see diagram below)[124]. Understanding the common patterns in the cycle of domestic violence can assist judges to place certain behaviours (e.g. staying or returning to the perpetrator) into a trauma-informed framework. Some victims may perceive the cycle as normal, especially if they grew up in a violent household. Or they may simply not be able to acknowledge the reality of their situation. Other victims become so hopeless and despairing that they cannot predict or control the violence. In this broken down state of mind, they sink into a state of psychological paralysis and become unable to take any action at all to improve or alter their situation. There is a tendency in victims to feel that any attempt to resist a perpetrator is hopeless.



There are three phases to intimate partner violence:

1. **Tension building phase:** begins with anger, blaming and increased tension. Many victims learn to recognize this tension building phase and try to control it by becoming nurturing and attempting to keep the peace. Often at this stage incidents are not reported to police or, if reported, the case is minimized. This encourages the abuser to proceed to the next phase.
2. **Violence phase: i**s the explosion of violence from the abuser. For victims who have experienced violence before, a threat of violence can be disabling. The victims may be grateful that the violence ends and may consider themselves lucky that it was not worse, no matter how bad their injuries are.
3. **Honeymoon phase:** is the contrite and loving stage of the cycle. Following the violence, the abuser is loving and calm, and often begs for forgiveness and promises to change. The victim recognizes the abuser as the person they loves. The abuser may portray themselves as the "true victim in life" and seeks the victim's understanding and support. The abuser may seek the victim's support against others who are trying to break up their relationship, thereby further isolating the victim.

Power and control in intimate partner violence. Intimate partner violence is characterized by dominance and control over another person. Perpetrators use coercion and violence to get what they want and maintain control. Ongoing physical attacks are associated with other forms of violence such as intimidation, threats, economic deprivation, humiliation, isolation, psychological manipulation and sexual abuse. Perpetrators often make very calculated decisions about when to use violence, how much violence to use and where to use the violence. Research has studied the common pattern of dynamics throughout the "cycle" of intimate partner violence that prevents victims from leaving abusive relationships. The power and control wheel developed by the Domestic Violence Intervention Duluth Project "Wheel of Power and Control" provides a useful illustration of common patterns of domestic abuse:

[124] Lenore Walker. 1970. UNODC Resource Book for Trainers on Effective Responses to Violence against Women and Girls Prosecutions

Using intimidation	Making them afraid by using looks, actions, gestures, smashing things, destroying their property, displaying weapons.
Using emotional abuse	Putting them down, making them feel bad about themselves, calling them names, making them think they are crazy, playing mind games, humiliating them, making them feel guilty.
Using isolation	Controlling what they do, who they see and talk to, what they read, where they go, limiting their outside involvement, using jealousy to justify actions.
Minimizing, denying, blaming	Making light of the abuse and not taking their concerns about it seriously, saying the abuse didn't happen, shifting responsibility for abusive behaviour, saying the victim caused it.
Using her children	Making them feel guilty about the children, using the children to relay messages, using visitation to harass them, threatening to take children away.
Using male privilege	Treating them like a servant, making all the big decisions, acting like the "master of the castle", being the one to define men's and women's roles.
Using economic abuse	Preventing them from getting or keeping a job, making them ask for money, giving them an allowance, taking their money, not letting them know about or have access to family income.
Using coercion and threats	Making and/or carrying out threats to hurt them, threatening to leave them, to commit suicide, to report them to welfare, making them drop charges, making them do illegal things.

Source: Domestic Violence Intervention Project, Duluth[125]

Why do victims stay with the abuser or return after to them they have left? There is a need to stop blaming victims for staying and start asking the question of why do men abuse their intimate partners. Supporting victims requires an understanding of the many barriers that stand in the way of a victim leaving. Researchers have studied the reasons women do not leave their abusers.[126] These reasons are complicated and can change over time. Some of the reasons include:

[125] http://www.ncdsv.org/images/powercontrolwheelnoshading.pdf

[126] See Anderson, M., et al 2003. "Why Doesn't She Just Leave?: A Descriptive Study of Victim Reported Impediments to Her Safety" Journal of Family Violence 18, no. 3, 151-155 and Yamawaki, N., et al. 2012. "Perceptions of Domestic Violence: The Effects of Domestic Violence Myths, Victim's Relationship with her Abuser, and the Decision to Return to her Abuser" Journal of Interpersonal Violence 27, iss. 16, 3195-3212.

- **Danger and fear.** Victims fear they will be subjected to far worse violence if they leave. Research corroborates this fear.[127] The risk of intimate partner violence is increased within the context of a separation, and that femicide may be triggered by an actual or even anticipated separation. One study found that 76% of women killed by their ex-partners or ex-spouses from 2009-2015 were killed within the firsts year following their separation.[128]
- **Shame, embarrassment or denial.** Abusers can be well respected in the community which prevents others recognizing or minimizing the violence. There are also family and social role expectations that create pressure for the victim to return.
- **Practical reasons.** Victims stay due to financial need, lack of another place to go, or concerned about supporting their children. Women may fear that her children will be taken away, or if she has an insecure immigration status, may fear being deported.
- **Other reasons.** Victims often love or care about the people who harm them. Keeping the family together may be important to the victim for numerous reasons, including for the sake of children, religious or cultural beliefs.
- **Lack of effective support from justice agencies.** Lack of help from the authorities, including the police.

Why do victims turn reluctant or even hostile in court? It is common for victims of intimate partner violence to refuse to testify or recant and testify that the incident did not happen. Past research believed that they recanted their stories out of fear of more violence. Recent research suggests that there is a sophisticated emotional appeal by the perpetrator designed to minimize their actions and gain sympathy of the victim.

- **Step one:** strong and resolved. Here the victims are almost resolved to see the abuser prosecuted for their actions in the first or second telephone call, but the calls continue.
- **Step two:** minimizing the abuse. The perpetrator tries to convince the victim that the incident was not that serious, tries to gain the victim's sympathy casting themselves as the victim: suffering in jail, depressed, perhaps suicidal, and missing them and the children.
- **Step three:** they don't understand us. Once the abuser has gained the victim's sympathy, they bond over their love and join together to fight the world that doesn't understand.
- **Step four:** Lie for me.
- **Step five:** developing a plan to change the victim's story.[129]

Stockholm syndrome and intimate partner violence.[130] Stockholm syndrome was coined in 1974 to describe a curious bond which developed between bank employee hostages and their captors. For judges, understanding Stockholm syndrome helps them understand the behaviour in victims of intimate partner violence that, in the absence of an understanding of its context, appears irrational and self-destructive and encourages victim-blaming. Stockholm syndrome explains why bonding to the abuser occurs. Victims have a desire to survive chronic, inescapable trauma and abuse and they should not be viewed as having weak or defective personalities. In these cases, the victim perceives the abuser as threatening their survival; the victim perceives the abuser as showing them some kindness, however small; the victim is isolated from outsiders; and the victim does not perceive a way to escape.

Battered woman syndrome. Battered woman syndrome is suffered by women who, because of repeated violent acts by an intimate partner, may suffer depression and are unable to take any independent action that would allow them to escape the abuse, including to press charges or to accept offers of support.[131]

[127] Petersson, J. et al. 2016. "Risk Factors for Intimate Partner Violence: A Comparison of Anti-social and Family-Only Perpetrators" Journal of Interpersonal Violence, 1.

[128] Women's Aid and Smith, K. 2016. "The Femicide Census: Redefining an Isolated Incident". Women's Aid.

[129] Bonomi, A.E. 2011. "'Meet me at the hill where we use to park': Interpersonal Processes Associate with Victim Recantation" Social Science and Medicine.

[130] Graham et al. 1999. Stockholm Syndrome in Batter Women.

[131] Walker LE. 2009. The Battered Woman Syndrome.3rd ed. New York: Springer Publishing Company.

Battered woman syndrome is a subcategory of PTSD. It involves a pattern of psychological dependency among women caught in long-term relationships with abusive male partners. Over time, abuse produces an irrational mental state of "learned helplessness" limiting free choice and placing victims of abuse in a spiral of conflict that occasionally results in a violent and sometimes fatal response over which they have no rational control. International standards provide that claims of self-defence by women who have been victims of violence, particularly in cases of battered woman syndrome, are taken into account in the trials and sentences against them.[132]

Expert evidence of the battered woman syndrome has been used as a defense by women who have murdered their abusive spouses. The expert evidence establishes that a battered woman, who is accused of murder or aggravated assault, suffers from the psychological sequelae of abuse and that this psychological distress contributed to her reasonable apprehension of danger and ultimately her apprehension of death during a particular battering episode. The expert evidence in these cases relates to the ability of the accused woman to perceive danger from her abusive husband, why she remained in a battering relationship, and the reasonableness of her belief that killing her batterer was the only way to save her own life. The success of the defence depends also on the quality of the evidence at trial of the intimate partner violence perpetrated by the abuser on the woman. The defence has also been used successfully as a mitigating factor in the sentencing of a woman who murdered her husband, even where no expert evidence had been called but where the Court of Appeal noted that the battered woman syndrome was a sufficiently well-established psychological condition that the judge could consider it in the appeal.[133] A pre-condition for accepting the syndrome as a mitigating factor at sentence is sufficient evidence at trial that the symptoms including "learned helplessness" were exhibited by the accused woman.

5.4 APPLYING A TRAUMA-INFORMED APPROACH IN THE JUDICIARY

There are a number of implications of science on brain trauma and understanding the dynamics of GBV for judges.

1. **Counter prevailing myths in the context of GBV.** Prevailing myths about GBV distort the way justice professionals and society in general, view victims. Judges have a legal and ethical duty to ensure that criminal processes, including trials, are fair to both the accused and the victim. If the truth-seeking function of any of these processes is distorted by myths and stereotypes, the entire criminal justice process will not be fair. Judges are well-placed to dispel prevailing rape myths that may influence, consciously or unconsciously, them in their role as criminal justice decision-makers by understanding well-established scientific evidence.
2. **Assessing the credibility and reliability of the complainant.** Because GBV often takes place in the absence of other witnesses, the victim's testimony often becomes the primary source of evidence. For this reason, it is important that it is understood in the context of the available medical science, not old myths that prevail in every society and affect judges' decision-making and assessment of a victim's credibility. Where, for example, there are inconsistencies in the recorded accounts of complainants (e.g. between the initial account provided to the first response officer, prosecutor and then at trial), judges lacking an understanding of the neurological impact of trauma and how it can account for differences in the way an incident is recalled, disclosed or developed by a complainant, may reach erroneous or unfair conclusions about the reliability and credibility of the complainant's evidence. Judges need to understand that lack of recall of these kinds of peripheral details does not impugn the veracity of the victim's account; instead it is consistent with the way in which traumatic memories are encoded. Moreover, if the initial victim's statement was taken shortly after an assault, or while still very stressed or traumatized, rather than two full sleep cycles after the incident, they will not be able to retrieve everything that's been encoded into their brain.

[132] UN General Assembly Resolution A/RES/65/228, March 31, 2011, Updated Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice, Art. 15(k)).

[133] In Canada, R v Naslund, Alberta Court of Appeal.

3. **Focus on what the victim is able to remember and how she can recall events.** Victims' encoding and storage of information that is not essential to survival at the time of an event are often impaired. The victim may not be able to provide information about the time of an event, details of the location and who else was present. Victims will not be able to provide a complete narrative with peripheral details in chronological order. Therefore, the judges' assessment of their testimony should be on the sensory and emotional memories that the victim has encoded and is able to recall.
4. **Be cautious of defence focus on asking victims to explain their post-traumatic event behaviour.** After a traumatic event, the average person would not necessarily be able to explain to the court, or even to themselves, why they acted in a counterintuitive way. A prosecutor or defence lawyer asking a seemingly innocent question about why a victim didn't fight harder or why they did not report the crime immediately could easily be construed as victim-blaming. More importantly, asking a victim to explain their behaviour may undermine their credibility as they may attempt to explain by speculating on (guessing) the reasons for their behaviour. This speculation opens the victim up to cross-examination by defence counsel on their speculation and raises the risk of inconsistent statements. This could also unfortunately lead to a process that focuses on the behaviour of the victim, rather than on the actions of the perpetrator.
5. **Evidence of victim's comportment after traumatic events.** There is a common misperception that a "real" victim will be extremely upset when talking about the violence. It is important for judges to understand that a victim's emotional response is the result of many factors including the way their brain responded to the trauma, their personal circumstances and their history of trauma. There is no one response to GBV:
    - Victims may appear calm, emotionally flat, distraught or overtly angry.
    - Victims may react by self-medicating with drugs or alcohol, by engaging in high-risk sexual behaviour, by withdrawing from those around them or by attempting to regain control.
    - Victims might turn to social media to deal with post-traumatic stress and in an attempt to regain control.
    - Victims might also stay friendly with the perpetrator, such as sending friendly text messages to the same person who assaulted them. Many perpetrators are known to the victims, and they have worked to gain trust and appear benevolent to the victim. This relationship, particularly if there are family ties, will not disappear, even after an episode of violence. Victims may have no choice but to stay in contact if the perpetrator is a boss, teacher or relative.
    - Victims may be susceptible to cultural myths that suggest the victim somehow caused the assault. Victims may feel shame because they did not fiercely fight off a perpetrator.
6. **Interpreting GBV offences.** Where, for example, GBV offences are interpreted to require the victim to take steps to resist unwanted sexual activity or intimate partner violence, this fails to account for the many victims who freeze from fear or anxiety and appear "passive" rather than fight back, resist or articulate a "no".
7. **Understanding GBV cases where there are no visible injuries or physical signs of resistance.** Where a victim's brain responds to a threat by freezing, rather than by fighting or fleeing, there may be no visible injuries consistent with physical resistance. A common rape myth is that a "real" rape victim will resist with all their might and particularly so if they are concerned about their virginity. In light of the scientific explanations for a victim's freezing behaviour (where they fear for their survival), the lack of evidence of resistance injury should not be determinative.

What is a trauma-informed approach? A trauma-informed approach understands and responds to the impact of trauma. It emphasizes the physical and psychological safety of the victim and creates opportunities for victims to gain a sense of control. It appreciates that many behaviors and responses expressed by victims are directly related to traumatic experiences. What might appear to be an inconsistency in the way a victim reacts or how they recount the incident can actually be a typical, predictable and normal way of responding to and coping with a traumatic event.

This has opened up opportunities for an enhanced response on the part of judges and the courts to the victims' responses to trauma that do not accord with the conventional expectations of what a rational or "ideal" victim would do or think. There is enormous potential for the development of trauma-informed practices that will assist in the effective adjudication of these cases.

A trauma-informed approach is based on the equality principle that both the accused and the victim have rights to fairness in the criminal justice system. It is also based on the international standard that professionals must avoid causing secondary trauma to a victim as a result of their contact with the criminal justice system. Judges need to keep in mind victims' rights to make decisions that affect their lives as they are often more aware of the risks they face by reporting than are justice officials.

Tips for judges in applying a trauma-informed approach

- ✓ Check to see if the victim's statement was taken immediately, or too soon, after an event.
- ✓ Remember that it can take two full sleep cycles for the memory circuitry to consolidate information that was encoded at the time of a trauma.
- ✓ Focus attention on what the victim is able to remember and how they can recall events.
- ✓ Remember that the focus should be on the sensory and emotional memories that the victim has encoded and is able to recall.
- ✓ Remember that there is a danger in asking the victim to explain their post-traumatic event behaviour. Asking a victim to explain their behaviour may undermine their credibility as they may attempt to explain by guessing the reasons for their behaviour which can open the victim up to cross-examination by defence counsel on their speculation and raises the risk of inconsistent statements.
- ✓ Ensure an enabling court room environment for the victim as this can help to mitigate the reluctance of these victims to engage in the criminal justice process and their fear that they will be blamed or not believed.
- ✓ Maintain an open mind when assessing victims' credibility. Recognize that certain victim behaviors, often associated with victimization (e.g., substance abuse, self-harm, future victimization) can be the consequences of trauma.
- ✓ Be alert to the need for avoiding prevailing myths that may influence, consciously or unconsciously, analyzes of the facts.

Tips for the courts as an institution to support a trauma-informed approach

- ✓ Fast-track cases through the court process and discourage unnecessary adjournments.
- ✓ Cases are designated to GBV trained judges who maintain responsibility throughout.
- ✓ Judges' caseloads are monitored to avoid burnout. Formal and informal debriefing sessions are encouraged.
- ✓ Information packages explain the court process in simple language and provide a list of victim-serving agencies.
- ✓ GBV files are securely stored/filed out of sight when not being actively reviewed. Monitor the application of privacy policies to ensure a limited number of personnel have access to GBV files.

5.5 OPTIONS FOR EXERCISES

Below are a number of possible options for delivering the material in this Module.

EXERCISE: Short video clip – trauma and the brain
Show a shop video clip explaining the effects of trauma on the brain. Or consider inviting an expert on this subject matter to provide more detailed information on victimization. This video was made by developed by mediaco-op: http://mediaco-op.net/. Link: https://www.youtube.com/watch?v=4-tcKYx24aA
Instructions:
Show the video and ask the plenary to share their reactions to the film and how this relates to their own work.
Facilitators notes regarding points to cover and to explain what this animation illustrates:
• How someone who has experienced rape or sexual assault might react in a police interview • How a professional might respond to a service user if they do not know the effects of trauma • How this can affect information and evidence gathering, and attitudes to victims • How "secondary" trauma can affect workers • The three main parts of the brain and what each part does • How the brain responds to danger – the survival instinct • How instinctive "fight", "flight" and "freeze" responses protect us • Indicators of trauma • New trauma-informed techniques for professionals to use, and a demonstration **The main takeaways** • Trauma response is the brain in survival mode • Repeated abuse can make trauma symptoms worse • In response to trauma, people can react in unexpected ways • Trauma is a normal human response to abnormal events • When working with service users, start from memories and move to the present; start from feelings and then move to the facts

MODULE 6.

Free of myths and gender stereotypes

ESSENTIALS ABOUT MYTHS AND GENDER STEREOTYPES

1. International law instruct judges to make every effort to recognize, demonstrate sensitivity to, and correct attitudes based on gender stereotype, myth or prejudice.
2. Essential for judges to be able to identify common myths and gender stereotypes in order to avoid them.
3. Understanding how myths and gender stereotyping can influence the work of the judiciary.
4. Examples of how to use an understanding of myths and gender stereotyping in writing of judgments.

The pervasiveness of GBV suggests that it is deeply grounded in attitudes and behaviours. Many of the continuing problems faced by victims in accessing criminal justice are deeply rooted in underlying misogynistic views that have plagued women, girls and people with diverse gender identities for centuries. These views can lurk subconsciously in the minds of everyone and often emerge when confronted with notions of women's rights, autonomy and sexuality. Even after numerous reports and judicial training on myths and harmful gender stereotypes, judicial responses continue to be "hampered by persistent resistances to and inadequacies in understanding how gender power relations and deeply rooted attitudes and perceptions of women and men operate to subordinate and discriminate women."[134] Myths and misconceptions are, in simple terms, beliefs which, although genuinely and sincerely held, are factually incorrect and may be derived from stereotypes. They may be present in well-intentioned and fair-minded people. Myths and misconceptions about GBV serve to deny, downplay or justify violent and aggressive behavior that men commit against women. They can also unconsciously influence a judge's assessment of a victim's credibility or reliability.

6.1 REQUIRED BY INTERNATIONAL LAW

International law requires States to 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 idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women".[135] The Judiciary have a responsibility in the performance of their judicial duties not rely on harmful gender stereotypes. Their responsibility to respect and protect asks judges to actively expose and eliminate harmful gender stereotypes.

[134] ASEAN Committee on Women (ACW) Work Plan 2011-2015. <http://www.asean.org/storage/images/2012/publications/ACW%20Work%20Plan%202011-2015.pdf>

[135] CEDAW, Article 5(a).

The Bangalore Principles. The Bangalore Principles instruct judges to make every effort to recognize, demonstrate sensitivity to, and correct attitudes based on stereotype, myth or prejudice by considering the following[136]:

- To continually be examining how these deeply embedded myths continue to have a profound influence on the legal response to GBV despite the changes to the criminal law framework, not only in the application of the law but also in their decision making.
- To continually be ensuring that those in their courtroom, both prosecutors and defence lawyers, do not perpetuate these myths in their examinations in chief and cross of witnesses.
- To continually be aware that these myths and stereotypes continue to surface at all levels of the criminal justice system, serving to discredit victims and filtering cases out of the system. So when such cases actually reach the court, after making it past so many other points of attrition, judges should not so easily dismiss the case, basing their decisions on law and relevant facts in evidence, rather than myths and stereotypes.
- To strive to ensure that their conduct is such that any reasonable observer would have justifiable confidence in the impartiality of the judge. This includes a call to judges: not to, in the performance of judicial duties, by word or conduct, manifest bias or prejudice towards any person or group on irrelevant grounds, which sex is one;[137] and not make improper and insulting remarks about victims.
- In addition, to be aware of, and understand, diversity in society and difference arising from various sources, including but not limited to race, colour, sex, religion, national origin, caste, disability, age, marital status, sexual orientation, social and economic status and other like causes ("irrelevant grounds").[138]
- It is the duty of a judge not only to recognize, and be familiar with, cultural, racial and religious diversity in society, but also to be free of bias or prejudice on any irrelevant grounds. A judge should attempt by appropriate means to remain informed about changing attitudes and values in society.[139]

6.2 COMMON MYTHS AND GENDER STEREOTYPES

Rape myths and stereotypes may arise in rape cases in relation to the complainant, the offender, consent issues and/or circumstances of the alleged offending.[140]

Rape. Rape remains one of the complex criminal offences dealt with by the criminal justice system, yet the crime of rape is commonly misunderstood. In reality:

- In many cases, there will be no visible sign of injury
- Rape is most commonly perpetrated by someone known to the victim
- The body's response to the trauma of rape can impair a victim's ability to give a clear and coherent account of the event
- Some victims may return to the suspect after the event and/or contact them with friendly messages to reduce the risk of being raped again by the perpetrator, or because they want to block out the abuse in order to return to a sense of normality.

[136] Bangalore Principles Explanatory Note para 184.
[137] Bangalore Principles 5.2
[138] Bangalore Principles 5.2
[139] Bangalore Principles Explanatory Note para 186.
[140] England Crown Prosecutor's Legal Guidelines, Sexual Offences, May 21, 2021

Common misconceptions

- Rape is always violence, or involves physical force – False
- Rape most commonly occurs between strangers in dark alleys – False
- Sex workers cannot be raped – False
- You cannot be raped by your husband or intimate partner – False
- The victim had previously consented to sex with the accused a number of times so they must have consented – False
- Sexual abuse at the hands of a perpetrator which took place when the victim was a child has no bearing on the issue of consent if the same parties engage in sexual activity as adults - False

Perpetrators of rape. Perpetrators of rape can come from any walk of life. In reality:

- Only a perpetrator is responsible for rape and the law applies equally to all – irrespective of age, background or their future prospects,
- There is no typical perpetrator – they can come from all backgrounds, all walks of life and can be in long term relationships.
- Perpetrators may use a range of techniques to target, intimidate and coerce their victim.
- Sexual violence can be perpetrated on people of a different sex, same sex or on people who do not identify with a particular sex regardless of their relationship history.

Common misconceptions

- Rape is only a crime of passion – False
- When it comes to sex, men have a point of no return – False
- Young men do not deserve to be convicted as they have their whole lives ahead of them / have good character references – False

ADDRESSING MYTHS HEAD ON IN SOUTH AFRICAN CASE LAW: TSHABALALA CASE [141]

"The notion that rape is committed by sexually deviant monsters with no self-control is misplaced. Law databases are replete with cases that contradict this notion. Often, those who rape are fathers, brothers, uncles, husbands, lovers, mentors, bosses and colleagues. We commune with them. We share stories and coffee with them. We jog with them. We work with them. They are ordinary people, who lead normal lives. Terming rapists as monsters and degenerates tends to normalize the incidents of rape committed by men we know, because they are not "monsters" - they are rational and well-respected men in the community. Yes, the abominable behaviour of these men is abhorrent and grotesque and the recognition that they are human does not seek to evoke sympathy – it serves to signify a switch from characterizing rapists as out-of-control monsters, and centres the notion that rapists are humans who choose to abuse their power. The idea that rape is committed by monsters and animals may have adverse effects, in that it may lead to the reinforcement of rape myths and stereotypes. For instance, labelling of this nature may lead to a cognitive dissonance when the actual rapist does not match the description of rapists. It has been said that this cognitive dissonance leads to the problematic questions like, "person X is a good man, what happened to cause him to rape?" These questions have the effect of then centering the actions of the victims and not those of the actual rapist. This in turn reinforces the prevalent rape culture in South Africa and safeguards the patriarchal norms which normalize incidents of rape" (para 74).

[141] S v Tshabalala 2020 (2) SACR 38 (CC) para 74).

Victims of rape. In general, rape can have a devastating impact on a victim, their family and the wider community. A victim coming forward to report rape and support a prosecution is incredibly brave. There is no typical person that is raped; people of all ages, races, sexualities, religion, background and appearance can be raped. There is no typical response to rape. People react in a variety of ways. The realities are that:

- Meeting people via dating apps and social media and sending sexual images is increasingly common. Consent cannot be implied from just the method of meeting or messages.
- Consent cannot be implied from what might be interpreted as flirtatious behaviour or from the way a person is dressed or simply by the act of going back to someone's house.
- Consent cannot automatically be implied simply because the victim shows signs of sexual arousal or stimulation.
- Just because a person is drunk or has taken drugs does not mean that they must be looking for, or willing to have, sex.
- If someone is unable to give consent because they are drunk, drugged or unconscious, it is rape.
- Just because someone is intoxicated at the time of the incident doesn't means their recollection of events is unreliable. Studies have shown intoxication to impact upon the level of detail that can be recalled by the witness rather than on the accuracy of memory. It is therefore essential in making case decision, investigators and prosecutors do not assume that a witness who was intoxicated at the time of the sexual assault is less reliable than a witness who was sober.
- Sex is not confined to people who are married / co-habiting / in long-term relationships, etc.
- People have a right to have consensual sex with however many people they want and whenever they like. This does not negate their right or ability to consent.
- Consent cannot be implied by the number of people someone has slept with prior to, or after, an incident.
- Consent for sex in the future cannot be implied just because people have had consensual sex in the past. Each occasion is specific and consent needs to be given for each occasion.
- There is no typical response to rape – the traumatic nature of the offence means that victims can behave in a huge range of ways some of which might seem counter-intuitive.
- A victim's perception of threat influences their behaviour. They can legitimately be afraid of being killed or seriously injured so co-operate with the rapist to save their life. They may also fear for the safety of others including their family members. Consent and submission are different.
- When under threat, the brain will implement instinctual survival responses that the victim will not necessarily have control over. The response may not appear logical to others, or even the victim, but in the moment the brain might choose to react based on basic instincts: not just fight or flight, but flop, freeze or befriend.
- Many people experience a form of shock during or after a rape that leaves them emotionally numb or flat – and apparently calm.
- A person with a disability can become more symptomatic after trauma or during recall of trauma.
- People can response to any stimulation and display signs similar to sexual arousal – even those which are non-consensual / traumatic / painful. This can lead to huge amounts of shame, self-blame and guilt on the part of the victim.
- Many victims of rape do not report the attack to the police. The trauma of rape can cause feelings of shame and guilt which might inhibit a victim from making a complaint. The process of reporting rape itself can be traumatic, as well as prosecution process, and can deter victims from reporting the rape.
- Some victims may tell a friend, doctor or other individual. Many others will not tell anyone perhaps owning to feelings of shame, guilt and fear of the perpetrator and/or fear of being disbelieved.
- A delayed allegation is not equivalent to a false allegation.

- The time taken to make an allegation is no indicative of the level of upset.
- Inconsistencies in accounts can happen where a person is telling the truth or not.
- Avoid an either/or argument that allows a complainant's evidence to be wholly dismissed because of a peripheral inconsistency. Don't pit it as either you believe the accused OR you believe the complainant for this reason.
- Rape can be very traumatic and memory can be affected in a number of ways. Understanding the effects of fear and the psychological mechanisms that may occur during a sexual assault is vital when considering recall and memory. Some, understandably, may try to avoid thinking about being raped or try to avoid recalling it all – this can impact upon recall.
- Victims can face very difficult decisions when deciding to report rape and supporting a prosecution. Some may decide not to report, or withdraw support for an investigation or prosecution for a number of reasons including intimidation by the accused.
- A decision to stop a case on evidential grounds does not mean that an allegation is false. It means that the case does not meet the evidential test required to put an allegation before the court.
- When the court returns a not guilty verdict it means that they were not satisfied 'beyond reasonable doubt' that the offence was committed.

Common myths

- The victim provoked rape and automatically implied consent by their dress / flirtatious behaviour – False.
- If you send sexual images or messages prior to meeting someone, then having sex is inevitable – False.
- If you voluntarily attend someone's house after a date or night out, you obviously want sex and consented to it by going there – False.
- If you meet men online or through hook-up apps you are consenting to sex and should be ready to offer sex – False.
- If you drink alcohol or use drugs then you have made yourself vulnerable to being raped and you bear the responsibility – False.
- If you have lots of sex, including with different people, then you are promiscuous / 'deserve what you get' / are not harmed by rape – False.
- If someone has truly been raped then they would never seek, or want, sex soon afterwards – False.
- You can tell if someone has 'really' been raped by how they act afterwards – False.
- A real rape victim is always visibly distressed when describing what happened to them – False.
- A real rape victim would never freeze when attacked, they would fight back – False.
- A real victim of rape would never be able to carry on with their normal life – go to work, take children to school, etc – False.
- If the victim didn't scream, fight, or get injured then it wasn't rape – False.
- If the victim didn't complain to the police immediately it can't have been rape – False.
- If you don't say 'no', it wasn't rape – False.
- Only young / attractive people get raped – False.
- Strong / independent / powerful / older people don't get raped – False.
- The victim's race / religion / background is responsible for rape – False.
- A real victim would always be able to provide a clear and coherent account of being raped – False.

- Inconsistencies in accounts provided by a victim always mean they lack credibility as a witness – False.
- Where a victim has consumed alcohol or drugs prior to an incident they will always be an unreliable witness as their evidence won't be accurate – False.
- False allegations are common and women always cry rape when they regret having sex or want to seek revenge – False.
- Other complaints of rape which have not resulted in successful prosecution outcomes always mean the victim lacks all credibility as a witness – False.
- Previous withdrawals of complaints or previous reluctance to cooperate with a prosecution, always means the victim lacks credibility as a witness – False.
- Where the victim has previous convictions they always lack credibility as a witness – False.
- The victim has previous convictions or has told untruths about other matters and therefore can never be relied upon to tell the truth about rape – False.
- Where the victim has a learning disability or mental health condition they always lack credibility as a witness – False.
- If someone displayed signs of sexual arousal during abuse, the only conclusions is that they wanted and / or enjoyed it - False.

6.3 WHY IT IS IMPORTANT TO UNDERSTAND THE INFLUENCES OF MYTHS AND GENDER STEREOTYPES

Myths and gender stereotypes about GBV can have serious negative impact on the protection and justice provided to victims. When myths are formally or informally embraced by the criminal justice institutions, this can lead to: secondary victimization; the justification of unique case treatment such as corroboration requirements and the admissibility of victim character evidence; the downplaying of the perpetrator's responsibility and criminality; the denial or trivialization of violence perpetrated by men against women; and victim blaming.

Myths and gender stereotypes disable the safeguards in the criminal justice system, influence the discriminatory application of criminal procedures and evidentiary rules that have developed traditionally out of beliefs about women and girls, and distort the conduct of judges, prosecutors and defence counsel. Consider the wide-ranging impact of prosecutorial and judicial stereotyping:

- Distort their perceptions of what occurred in a particular situation of violence or the issues to be determined at trial.
- Focuses their attention on the victim's behaviour and personal characteristics rather than the perpetrator's actions which generally results in suspicion of the victim's claim of GBV.
- Affect their vision of who is a "real" victim of GBV.
- Influence their perceptions of the culpability of persons accused of GBV.
- Influence their views about the credibility of witnesses.
- Lead judges to permit the admission of irrelevant or highly prejudicial evidence to court and/or affect the weight judges attach to certain evidence.
- Influence the assessment of evidence.
- Cause them to misinterpret or misapply laws.
- Shape the ultimate legal result.

It is therefore important for judges to be aware of these myths and gender stereotypes; constantly ask themselves whether their conduct and decision-making in cases involving GBV is grounded in gender

stereotypes; and actively play a role in dispelling these myths and counteracting the ways in which myths promote victim blaming in their day to day tasks. It is essential that judges focus on assessing the credibility of the incident and the perpetrator's actions and not solely on the credibility of the victim.

Broad categories[142]	Related myths / gender stereotypes	Examples of how this is reflected in law and/or practice
She asked for it	In sexual violence cases, a woman or girl's manner of dress or behaviour implies consent to sexual violence	• Common defence tactic to focus the court on behaviour viewed as "morally suspicious" to cast doubt on credibility of complainant. • Judge allows questioning of the victim on irrelevant issues such as walking alone late at night; dressing provocatively, flirting, wearing make-up, going to bars alone, drinking alcohol, leaving a drink unattended. • -Judges shifts their focus to the victim's behaviour not the perpetrator' actions or the alleged incident. • Irish defence lawyer instructing the jury to consider the type of underwear worn by the complainant "you have to look at the way she was dressed. She was wearing a thong with a lace front". (The defendant was acquitted).[143]
	In intimate partner violence cases, a woman's action implies she provoked her partner to violence	• Some countries have defence of provocation which allows perpetrators to escape criminal responsibility. • Judges shift their focus to the victim's behaviour and engage in victim-blaming. • Judges minimize or excuse the violence as being disciplinary to correct wife's "bad" behaviour.
	In intimate partner violence cases, belief that women should be submissive and obedient.	• Negative credibility assessment where victims who do not fit this belief. • Feeds into the previous myth, that if the victim had been submissive and obedient she would not have to be "corrected".
It wasn't really GBV	"Real" rape is committed by a stranger with force or weapon	• Judges narrowly define what counts as sexual violence and interprets certain criminal elements as requiring force or resistance. • Judges require victims to resist and therefore sustain visible injuries. • Corroboration rule provisions translate for judges that if no physical evidence, sexual violence has not been proven. • Raise reasonable doubt – if the incident does not fit this myth, and most rapes do not, there is a belief this is not rape.

[142] These categories were developed by Payne, D. et al. 1999. "Rape Myth Acceptance: Exploration of its Structure and its Measurements Using the Illinois Rape Myth Scale" 33 Journal of Research in Personality 27.

[143] Heylin, Liam. 2018. "Counsel for man acquitted of rape suggested jurors should reflect on underwear worn by teen complaint. Irish Examiner. November 6, 2018.

Broad categories	Related myths / gender stereotypes	Examples of how this is reflected in law and/or practice
It wasn't really GBV	"Real" domestic violence is serious physical violence resulting in serious injuries or death	• Judges narrowly define offences of "assault" or "intimidation" or "coercion" requiring victim to sustain visible injuries. • Judges do not consider psychological violence as "real" intimate partner violence. • General criminal code offences in many countries deal with single incidents of physical violence rather than the pattern of coercion and control involving various forms of violence.
He didn't mean to	Sexual violence is the result of uncontrolled lust by men	• Denies and trivializes violence. • Removes blame from the perpetrator and places the blame on the victim's behaviour for causing the lust. • Defence tactic in arguing that this was all miscommunicated romantic signals; that men are only guilty of incompetent message-decoding rather than rape. • Canadian court found the defendant guilty but he was given no jail time because according to the judge the 26 year old victim and her friend wore "tube tops with no bra, high heels and plenty of makeup. … they made their intentions publicly known that they wanted to party …. This is a different case than one where there is no perceived invitation. This is a case of misunderstood signals and inconsiderate behaviour".[144]
	Women's "no" really means "yes"	• Misinterpretation of consent to include implied consent and misapplication of defence of honest but mistaken belief.
	Drugs, alcohol or mental illness are the main causes of intimate partner violence	• Expert reports are submitted to prove the innocence of the defendant. • Removes the responsibility of the violence from the perpetrator.
She wanted it	No women would allow herself to be raped if she does not want to be.	• Judge's focus to the victim's behaviour not the perpetrator' actions. • In judicial fact determination, the absence of vaginal injury is often found as a fact that rape could not have occurred, as it assumes that if she was able to self-lubricate, she must have enjoyed the forced sexual act.

[144] McIntyre, Mike. February 24, 2011. "Rape victim 'inviting' so no jail: Judge rules woman's clothes, conduct ease blame on attacker" Winnipeg Free Press.

Broad categories	Related myths / gender stereotypes	Examples of how this is reflected in law and/or practice
She wanted it	No women would allow herself to be raped if she does not want to be.	• The "denim defence" - Italian courts' rulings have suggested a woman cannot be raped if she is wearing jeans because they are impossible to remove unless she helps. Another court case held "jeans cannot be removed easily and certainly it is impossible to pull them off if the victim is fighting against her attacker with all her force".[145] • Defence lawyer in a Canadian case in arguing implied consent, that it was not possible to force a woman to perform.[146]
	Good women are sexual chaste	• Judges view women's testimony as suspect when assessing "consent" in sexual offence cases. • This myth is reflected in evidentiary rules or practices allowing for past sexual history; third party records; cautionary rules
	"Real" victims would raise a hue and cry and fight back	• Judge's focus to the victim's behaviour not the perpetrator' actions and view that lack of physical harm in sexual offence cases means consent was given • Judicial assessment of the victim influenced by what they believe is "rational" behaviour.
She lied	Women who have previously had sex are not trustworthy	• Judge's focus to the victim's behaviour not the perpetrator' actions • Judicial allowance of past sexual history in cases where it is not relevant to the incident • In assessing credibility of the victim, judges can make sweeping statements based on stereotyping "The girls are morally and socially bound not to indulge in sexual intercourse before a proper marriage and if they do so, it would be to their peril and they cannot be heard to cry later on that it was rape"[147]
	Victims make false allegations to avenge themselves or extort money	• Judge's focus is on the victim not perpetrator and his actions. • Judicial assessment of victims: women are fickle and spiteful, women are not particular credible, women lie to protect their honor, women are vengeful and lie to avenge a perceived wrong.
	"Real" victim would promptly seek help and report	• Judges focus is on delayed disclosure as a relevant fact. • This myth is behind the rules of adverse inferences and prompt complaint requirements.

[145] Stanley, Alessandra. Feb 16, 1999 "Ruling on Tight Jeans and Rape Sets Off Anger in Italy". The New York Times.
[146] R v Finney, SCC.
[147] W.P. (C) 8066/2013. (High Court of Delhi).

Broad categories	Related myths / gender stereotypes	Examples of how this is reflected in law and/or practice
She lied	In domestic violence cases, wife is lying in order to get an advantage in family law case, such as custody of the children	• Judge focuses on irrelevant issues rather than on credibility of the incident. • Judicial assessment of the victim influenced by what judge's view as motives to fabricate.
GBV is a trivial event	If a women is willing to make out with a guy, then it is no big deal if he goes a little further	• Judge's trivializing sexual violence reinforces the idea that women's bodies are perpetually available to men. • Defence tactic is that victims have just had sex and changed their minds. If a woman is not a virgin, then it should not be a big deal if her date forces her to have sex. • It's just sex; rape is not as big a problem as some feminists would like people to believe; being raped is not as bad as being mugged and beaten. • Women tend to exaggerate how much rape affects them. • Violence against women by men is normalized to the point that it is mundane.
	Women are emotional and often overact or dramatize	• Judges' require corroborating evidence. • Corroboration rules reflect that women are mistrusted.
	In domestic violence cases, a husband is entitled to have sex with his wife at any time as that is what she agreed in the marriage contract.	• Judge's trivializing marital rape. • Misinterpretation of consent in marriage or existing partners.
GBV is a deviant event	Sexual violence is not a common occurrence	• Judge focuses on irrelevant issues such as perpetrators relationship with the victim. • Views rape as misunderstanding as to whether or not a sexual assault actually occurred.
	Sexual perpetrators are perverted, ugly, seedy or insane strangers or what is seen as "the other" such as visible minorities.	• Judges views perpetrator to determine if he looks "normal".

Source: UNODC 2019. Handbook for the Judiciary on Effective Criminal Justice Responses to Gender-based Violence against Women and Girls

EXAMPLES OF HOW TO USE AN UNDERSTANDING OF MYTHS AND GENDER STEREOTYPING IN WRITING OF JUDGMENTS

The High Court of Malawi[148] allowed for a retrial in a rape case where the trial magistrate, after asking the accused about whether he was able to get an erection, allowed for the magistrate, prosecutor, court interpreter, accused, complainant, and the woman who had volunteered in court to touch the man to meet in his chambers to witness whether the woman could touch the defendant sexually until he obtained an erection. The High Court noted that "this illegal show seemed to come out of the blue" and found that the manner of investigation into the accused's ability to obtain an erection was "raised by the magistrate, thereby making the [High] Court conclude that there were extra judicial discussions" between the accused and the magistrate. The Court also expressed serious concern about secondary victimization, given that the sexual act occurred in the presence of the complainant. The Court highlighted the significant dangers associated with gender stereotyping on the part of the judiciary. The Court emphasized that judges should be alive to the concerns of victims of sexual offences, specifically that gender stereotypes harm such victims and contribute to further violations of their rights. A judicial officer has to be aware of the negative results of displaying condescension toward women in court. The Court highlighted that the judiciary could not condone the perpetuation of "structural gender-based violence, where courts instill fear in women and girls who are victims of sexual offences, using the criminal justice system." Therefore, in order to create a discrimination-free judicial system that victims can rely on, it is incumbent on the judiciary to remain cognizant of its own biases and stereotypes, especially in the context of victims of sexual offences, and conduct cases in a manner which counteracts such biases and stereotypes.

The Court of Appeal of Kenya challenged the stereotype that women are untruthful and therefore likely to fabricate allegations of sexual assault. "It is noteworthy that the same caution is not required of the evidence of women and girls in other offences. Besides there is neither scientific proof nor research finding that we know of to show that women and girls will, as a general rule, give false testimony or fabricate cases against men in sexual offences. And yet courts have hitherto consistently held that in sexual offences testimony of women and girls should be treated differently."[149]

The Supreme Court of Canada ruled that "[a]n appreciation of myths and stereotypes in the context of sexual violence is essential to delineate properly the boundaries of full answer and defence. ... [T]he right to make full answer and defence does not include the right to information that would only distort the truth-seeking goal of the trial process".[150]

[148] R. v. Yusuf Willy (Criminal Review No. 6 of 2021/Criminal Case No. 183 of 2021) High Court of Malawi 2022.
[149] Mukungu v. Republic [2003] 2 EA 482, paras. 11-14 (Kenya, Court of Appeal).
[150] R v Mills [1999] 3 Supreme Court Reports. 668.

6.4 OPTIONS FOR EXERCISES

Below are a number of possible options for delivering the material in this Module.

EXERCISE: Large group exercise – using flash cards
Instructions:
Trainers could choose eight to ten myths/realities and write them on separate flashcards. Ask for volunteers to pick one flashcard and read it aloud. Ask them for their opinion as to whether true or false, myth or reality. Then ask the rest of the participants if the agree or disagree in order to lead to a discussion. An option for conducting the exercise more actively and if there is space: have the group stand up and move to one side of the room. You will read out a statement, and those who think the statement is a myth will move across the room. Those who think it is a fact will stay where they are. Afterwards, one person from each group will explain why they chose the way they did.

EXERCISE: Large group brainstorming
Instructions:
Trainers prompt a group brainstorming session about the prevailing myths surrounding violence against women and domestic violence by asking the following questions: • Q1: Are there common myths about GBV that you know of? • Q2: What do these myths assume about the causes of GBV? • Q3: How do these myths impact the work of judges? Use the material in Module 4 to assist you in this discussion.

EXERCISE: Video clip "What were you wearing" video Tracy Ullman on BBC 1
Instructions
Show a short video clip "What were you wearing" created by Tracey Ullman on BBC 1 Link: https://www.refinery29.com/en-us/2017/03/144819/sexual-assault-mugging-video-parody-viral Instructions: Show the video and seek participants reactions
Facilitator's notes
• The obvious parallel is every accusation that a woman has somehow invited sexual assault upon herself by wearing, say, a short skirt. • When the man becomes upset by the detective's incessant victim-blaming, she calls in a counselor to assist. Except the counselor is just as bad as the detective. "Oh dear. Had you been drinking?" the counselor asks. • "Yes, because if you'd had a drink it could send out confusing signals," Ullman's character adds in an accusing tone. "Lead somebody on with the nice suit and the phone, and then at the last minute, say 'I don't want to be mugged!'" • It's a spot-on parody that highlights just how absurd the double standard is when it comes to sexual assault versus practically any other crime. • You get the picture. The frustrating, stressful, often traumatic results of a dead-end police process are precisely why **63% of sexual assaults go unreported**. That's the issue that Ullman nails right on the head. • The satire followed one of Britain's most senior female judges warning drunken women that they will be a target for rapists as she retired from the bench (in 2017).

EXERCISE: Video clip with plenary discussion

Show a short video clip "James is Dead" produced by Blue Seat Studios.
Link: https://www.youtube.com/watch?v=Op14XhETfBw

Instructions:

Show the video and using the following questions, have a discussion about common myths about rape.

Facilitators notes regarding points to cover:

- Do you think society questions the validity of victims of non-gender-based violence the same way as female victims of gender-based violence?
- Do you think we are still living in a time when we question the validity of sexual assault victims like this?
- What are some of the myths or gender stereotypes that this video raises?
    - Was he there alone? This is a common belief in rape cases. Blame the victim for putting themselves in a vulnerable position. The reality is that the majority of rape happens inside the victim's own home usually by someone known and trusted in the victim's life.
    - Was he drinking? Drinking is not asking to be victimized nor does drinking excuse someone who chooses to victimize another person. That is often the case in rape cases, if the victim is drinking she is blamed for the assault but if the perpetrator is drinking, they're not to blame.
    - What were they wearing? Puts the blame of women and assumes she is asking for it, deserved it or had it coming because of what she is wearing.
    - He was so friendly.
    - Maybe he really wanted this to happen? In this question, we are not wondering what the victim did to encourage their rape but rather questioning that it was even rape to begin with. So moved from victim blaming to denying that they were assaulted in the first place.
    - The perpetrator is such a nice guy. Reflects the myth that perpetrators of violence are perverts and monsters rather than understanding that any individual has the capacity to commit a crime. It doesn't matter how nice they are or how good looking.
    - Poor guy who was accused. How often do perpetrators of rape receive sympathy, his life might now be ruined, he might go to jail, his reputation is tarnished. He's the real victim here.
- All of these questions rear their heads with a shocking degree of frequency, by society, by the police, by prosecutors and judges.
- What is a result of these myths?
    - Victim blaming – shifts the blame from the perpetrator into the victim. This video tries to capture the absurdity of victim blaming in sexual assault cases.
    - Imagine that: a horrendous act is committed against an innocent person, but in response, people express doubt. Focus on the victim's characteristics (too friendly) or behaviour (drinking, going to a party alone, not wearing appropriate clothing…). Did his behaviour somehow encourage his own murder? He could have prevented it if he just done X, Y and Z, right?
- This video emphasis how ridiculous these questions sound when heard in this context.
- Why do the rules that apply to one type of violence so greatly differ from the rules applied to another?

EXERCISE: Video clip "What were you wearing?" Mugging sketch from Revolting Women (1981)

Instructions

Show a short video clip "What were you wearing" Mugging sketch from Revolting Women (dated from 1981).

Link: What were you wearing? Mugging sketch from Revolting Women (1981) (youtube.com)

Show the video and seek participants reactions

EXERCISE: Self-reflection exercise: Survivor-Centred Attitude Scale

Instructions

Handout the Attitude Statements (without the scores) at the end of the training day and ask the participants to fill in the survey. Explain the purpose: this is an assessment to better understand their personal beliefs and feelings about GBV and those who experience it. All answers should be honest and self-reflective.

Discuss the next day without requiring them to share their responses.

Attitude Statements

Attitude statement	Strongly agree	Agree	Disagree	Strongly disagree
If women or girls who behave inappropriately are raped, it is their fault.	1	2	3	4
Survivors of GBV have the right to get help for what has happened to them	4	3	2	1
If a survivor can't answer the questions asked during an interview, they are making up the incident.	1	2	3	4
Acts of GBV are always the fault of the perpetrator.	4	3	2	1
Women often say they have been raped or abused so that they can get attention or money.	1	2	3	4
A woman causes her husband's violence because of her own behavior.	1	2	3	4
There are times when a husband is justified in beating his wife.	1	2	3	4
A person who forces another person to have sex is just someone who cannot control their sexual desire.	1	2	3	4
A survivor should have the right to make a decision about what actions are best for her/him.	4	3	2	1
Most men beat their wives only after they have been drinking or using drugs.	1	2	3	4
A GBV survivor should always report their case to the police or other justice authorities.	1	2	3	4
Intimate partner violence is a family matter and should be handled within the family.	1	2	3	4
Women should be allowed to communicate to their sexual partners when they do and do not want to have sex.	4	3	2	1
It is my job as a prosecutor to determine whether a survivor is telling the truth	1	2	3	4

Facilitators notes

Go over the questions and the scoring (as above)

Guidelines for interpreting the scores are below.

- **56-46 points:** Scores in this range indicate that the person has a survivor-friendly attitude – they have positive beliefs and values for working with survivors.
- **45-35 points:** Scores in this range indicate some troubling attitudes that may be harmful to survivors.
- **34 points and below:** Scores in this range indicate that an individual is not ready to work with survivors.

Further discussion questions can include:

1. Is this really what I think, or is this what my society, my family, my friends, or the media are telling me?
2. Is it possible that my biases, and the biases of the people and organizations around me (such as my workplace, my church/mosque), influence me in how I work on a daily basis?
3. Is it possible that my assumptions may cause me to forget to ask certain questions? Is it possible that I do not always understand the answers because I have a totally different experience compared with the survivors I work with?
4. Why is learning about unconscious bias important in the work we do with survivors who don't look like me, sound like me, or have the same identities as me?
5. What do I need to learn more about when it comes to bias when working with diverse GBV survivors?

Source: GBVIMS Survivor-Centred Attitude Scale

EXERCISE: Video: Unconscious bias

Instructions

Watch a short YouTube video as an introduction to the world of unconscious bias and how to counter it.

www.youtube.com/watch?v=dVp9Z5k0dEE.

At the end of the video, the speaker listed the advice that the Royal Society gives to the members of its selection and appointment panel in order to reduce the risks of unconscious bias in their decision-making. Review with the plenary to see who can remember the four tips.

Then facilitate a discussion asking them to consider how they might also assist you in reducing your risk of unconscious bias in your work as a judge.

Facilitation notes

The 4 tips:

1. Deliberately slow down the decision-making process.
2. Reconsider the reasons for your decisions.
3. Question cultural stereotypes
4. Monitor each other for unconscious bias.

PART 2.

GOOD PRACTICE GUIDELINES FOR THE ADJUDICATION OF GENDER-BASED VIOLENCE CASES IN THE CRIMINAL COURTS

United Nations
Office on Drugs and Crime

MODULE 7.

The role of judges in protecting victims during the criminal process

SUMMARY

This module:

- Underscore the importance of understanding protection needs in GBV cases, highlighting judges' obligations under international law as well as the key risk factors in risk assessment based on evidence-informed practices.
- Discusses the role of judges in addressing victim's immediate protection needs and considerations they can take in pre-trial release (bail) hearings and options for protection measures at that stage of the criminal justice system.
- Identifies steps for consideration in order to ensure victim's protection during court proceedings.
- Looks at the criminal consequences of breaching protection orders.

7.1 THE IMPORTANCE OF UNDERSTANDING PROTECTION NEEDS

Effective protection can empower victims to access criminal justice and enable them to stay safely engaged with the criminal justice process. Judges have a responsibility to provide protection for victims that come before them during the criminal proceedings. They must take appropriate measures to address the victim's fear of retaliation or fear of further violence or an escalation of violence. It is vital to secure the victim's immediate safety through whatever criminal justice measures might be available to the judiciary in the jurisdiction. In addition to ensuring the safety of the victim, adequate protection outside of court procedures can contribute to the effectiveness of the criminal trial. While understanding that the protection of victims of GBV is critical in its own right irrespective of a criminal case, and many jurisdictions have comprehensive civil protection regimes that are independent of initiation of any criminal case, a full discussion of these civil law protection regimes is beyond the scope of this handbook. However, civil protection order regimes will be referred to in the light of role criminal court judges play in ensuring harmonization of non-criminal protection measures when determining criminal protection measures.

JUDGES' INTERNATIONAL OBLIGATIONS

The state has an obligation to ensure the safety of the victim as part of and during criminal proceedings. The failure to do so can cause a violation of the victim's fundamental human rights, including fair trial rights. Moreover, assessing risk and ensuring for the safety of victim is an essential component to a victim-centred approach as required by international standards. Attention to victim safety is at the heart of all interventions. A victim-centred response requires appropriate measures to address the victim's fear of retaliation or fear of further violence or an escalation of violence and to assist them in managing risk and ensuring victim safety.

Relevant international standards regarding the duty to protect. The Updated Model Strategies and Practical Measures provide guidance to states on how to ensure their due diligence obligation which includes protection. States are urged to:

- Provide the police and courts authority with the power to issue and enforce protection and restraining or barring orders, including removal of the perpetrator from the domicile, prohibiting further contact, issuing child support and custody orders and to impose penalties for breaches of those orders. If such powers cannot be granted to the police, there is a need to ensure timely access to corresponding decisions by the court. Such protection measures should not be dependent on the initiation of a criminal case (Article 15).
- Provide comprehensive services and protection measures that ensure the safety, privacy and dignity of victims and their families, without prejudice to the victim's ability or willingness to participate in the criminal case (Article 15)
- Protect victims from intimidation and retaliation during the criminal justice process, including by establishing comprehensive witness and victim protection programmes (Article 15).
- Conduct risk assessments that indicate the level or extent of harm that victims may be subjected to base on their vulnerability, the threats to which they are exposed, the presence of weapons and other determining factors (Article 16).
- Provide efficient and easily accessible procedures for issuing restraining or barring orders and ensuring that victims are not held accountable for breaches of such orders (Article 18).
- Ensure children who witness violence in the family are seen as victims of violence and provided with protection, care and support (Article 18).

Checklist for ensuring protection measures complies with the broad principles under international law:

- ✓ Based on a gendered understanding of GBV.
- ✓ Focused on the human rights and safety of the victim.
- ✓ Based on an integrated approach which takes into account the relationship between victims, perpetrators, children and their wider social environment.
- ✓ Aim at avoiding secondary victimization.
- ✓ Aim at the empowerment and economic independence of women victims of violence.
- ✓ Allow for a range of protection and support services.
- ✓ Address the specific needs of vulnerable persons.

PROTECTION NEEDS - WHAT THE RESEARCH TELLS US

One of the reasons victims engage with the criminal justice system is to stop the violence and prevent violence from re-occurring and escalating, as well as prevent threats of violence, intimidation and harassment. Their protection needs can be urgent and long term as well as situational. Protection needs correspond to an understanding of what safety is for victims of GBV. Safety can mean "living free from violence, having autonomy to negotiate daily life decisions, having confidence that children's routines will be maintained, and living without constant fear and denigration".[151] Fear is cited as among the leading reasons expressed by victims for opposing prosecutions. Victims may experience specific threats and/or pressure from the perpetrator against prosecution, while others fear that the perpetrators will become more violent if they report and participate in the criminal justice process.

[151] Hart, 1998, cited in Johnson, H. and Fraser, J. 2011. "Specialized Domestic Violence Courts: Do They Make Women Safer? Community Report: Phase I" Department of Criminology, University of Ottawa.

Research indicates that fear of victims of intimate violence are accurate. Victims cite fear for their safety and the safety of their family as among the leading reasons for them to drop out of the criminal justice process.[152] Studies show the following:

- Intimate partner violence typically escalates in both frequency and severity after separation. Victims who are separating from their abusive partners are at much higher risk of such violence and those who leave their abusers are as or more likely to be re-abused as those who remain.[153]
- The most dangerous time period is the days and months after the alleged perpetrator discovers that the victim might attempt to separate from them or terminate the relationship or disclose the abuse to others, especially the legal system.[154]
- A significant spike in serious and deadly violence risk during the period of separation, identifying the perpetrators loss of control over their partner as a trigger.[155]
- This means that judges should be aware that separation is not a protective factor.

Research shows a heightened concern of femicide. The act of approaching the justice system, such as reporting a crime dramatically increases the victim's risk of serious injury or death at the hands of their intimate partner.

- In a review of intimate partner violence deaths, almost two-thirds of victims had a known history of intimate partner violence and approximately 33% had previously made at least one report to the police before the homicide occurred. Over 10% of the homicide victims had a protection order.[156]
- There are predictors of lethality which include: history of domestic violence (69% of cases reviewed); actual or pending separation (72% of cases reviewed); obsessive behavior; depressed perpetrator; prior threats or attempts to commit suicide; escalation of violence; prior threats to kill the victim; prior attempts to isolate the victim; victims who had an intuitive sense of fear; and a perpetrator who was unemployed. In 80% of intimate partner femicide cases reviewed, there were 7 or more risk factors identified; in 12% of the cases there were 4-6 risk factors. In only 1% of cases in this study had no risk factors been identified.[157]

Research shows a close relationship between stalking and femicide. This is concerning when studies also find that reports of stalking are often not taken seriously by law enforcement; many investigations are poorly run and did not give victims legal protection.[158] Such violence was trivialized, the consequences for the victims were minimalized and the victims felt blamed for receiving abusive messages on social media because they were on social media.

- One study found that 54% of female intimate partner murder victims had reported stalking to police prior to their murders by stalkers.[159]

Research shows that abusers routinely violate protection orders, often with serious consequences for the victim but with little or weak legal consequences for the perpetrators.[160] Breaches need to be treated seriously. Prosecutors ought to recognize the patterned nature of the coercive and abusive nature of the violence.

[152] Klein, A. 2008. "Practical Implications of Current Domestic Violence Research, Part II, Prosecution". National Institute of Justice: United States of America.

[153] UNODC 2014. Handbook on Effective Prosecution to Responses to Violence against Women and Girls.

[154] Long, J. et al. 2010. "Model Policy for Prosecutors and Judges on Imposing, Modifying and Lifting No Contact Orders". The Battered Women's Justice Project.

[155] Petersson, J. et al. 2016. "Risk Factors for Intimate Partner Violence: A Comparison of Anti-social and Family-Only Perpetrators"

[156] BC Coroners Services Death Review Panel. 2016. "A Review of Intimate Partner Violence Deaths 2010-2015".

[157] Byrne, M. 2016. "1990-2015: 25 years of femicide". Ontario Association of Interval and Transition Houses.

[158] Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services. 2017. "Living in Fear – the police and CPS response to harassment and stalking."

[159] Klein, A. 2008. "Practical Implications of Current Domestic Violence Research".

[160] Skinnider, E. 2014. "Justice Sector's Response to Violence against Women and Girls: Background Paper". For the Global Technical Consultation on essential policing and justice sector services to respond to violence against women and girls.

RISK FACTORS BASED ON EVIDENCE-BASED PRACTICES

In order to ensure the safety, privacy and dignity of victims and their families at all stages of the criminal justice process, judges must be fully informed with respect to the potential risks and threats. Risk assessment refers to the process of determining the level of risk for escalated violence and managing the risk to the victim. Often jurisdictions have developed a risk assessment tool to be used by criminal justice actors to assist them in identifying particularly dangerous perpetrators that need close supervision. Judges need to know whether a risk assessment has already been done by the police or prosecutors and if not, they need to know how to conduct a risk assessment.

The information and analysis from the risk assessment tool can be used in various ways, including setting pre-trial release (bail) and considering diversion and sentencing. However, it should be noted that the criteria for conviction should not be confused with the criteria for determining future risk. Perpetrators charged with minor offences are as likely to be as dangerous as those charged with more serious offences.

There are many risk and danger assessment methods, which assess lethality risk and/or risk of repeated violence. The majority consist of checklists of markers for risk, sometimes referred to as red flags. Here is an example below of the key risk factors[161]:

Category 1 risk factors:

- Frequency
- Pregnancy
- Previous incidents / contraventions
- Separation
- Severity
- Sexual violence
- Significant changes of circumstance
- Strangulation
- Threats to kill
- Use of weapons

Category 2 risk factors:

- Alcohol / drug misuse
- Animal cruelty
- Child abuse
- Controlling behaviour
- Cultural considerations
- Mental health issues
- Defendant history of violence
- Ongoing conflict
- Significant damage / destruction of property
- Stalking
- Suicidal
- Violent threats

[161] Queensland Protective Assessment Framework, information from the UNODC Expert Group Meeting in Vienna, November 2018.

Risk and danger assessment tools should be used by justice professionals to foster a conversation with the victim, rather than as a checklist or a collection of discrete data. Victims know far more about what they need and the risks they face. However, it is critical to remember that, while victims are accurate reporters of risk factors for lethality, they consistently underestimate their own risk for future assaults. Effective immediate protection can empower victims to access criminal justice and enable them to stay safely engaged with the criminal justice process. In discussing with the victim the potential risks they face, judges can learn more about the context in which the particular abuse occurred. For judges, when determining the appropriate protection measure, they need to take into account the victim's views on protection and safety concerns. Protection should not be offered in a paternalistic manner but should be viewed as a means to afford the victim's safety so that they can develop their own strengths and strategies for coping with violence. For example, judges can ask the victim directly about are their fears of future violence and the basis for that fear, as well as their opinion on the likelihood that the defendant will obey the terms of release.

7.2 DECIDING ON EFFECTIVE PROTECTION MEASURES – SOME CONSIDERATIONS FOR JUDGES

SOME CONSIDERATION FOR CRIMINAL COURT JUDGES DURING PRE-TRIAL HEARINGS

Judges in criminal courts may be able to impose different protection measures depending on the criminal legal framework existing in their countries. Pre-trial detention, interim judicial release with conditions for release and criminal protection orders are three measures judges can apply to increase the safety of the victim.

Range of protection measures from least to most restrictive (may not be available in all jurisdictions)

Criminal protection orders / peace bonds	Interim judicial release / bail	Pre-trial detention
• Orders that are initiated in a criminal court, but the standard of proof for issuing them is lower than in a criminal trial. • Judge must be satisfied that the victim has reasonable grounds to fear personal injury or damage to property. • The order generally lasts a certain period of time (e.g. 12 months) during which the perpetrator is required to keep the peace and be of good behaviour. • The order may carry a range of conditions that take into account the victim's safety concerns (discussed below). • If the perpetrator does not agree with the order, criminal proceedings will ensue, or if they fail to comply with the order during the time period, they may be imprisoned.	• Interim judicial release order is where a person who has been charged with a crime and is in custody is brought before a judge who determines on release pending trial. • The onus is often on the prosecutor to show cause why the defendant should be detained pending trial. The judge must be convinced that there are grounds that the defendant will not show up to trial or there are concerns that the defendant will commit further violence or intimidate a witness. • Judges have a duty to be aware of and consider all relevant facts concerning the defendant's risk of violence to the victim. • The order may carry a range of conditions that take into account the victim's safety concerns.	• Where a person who has been charged with a crime and remains in custody pending trial. • Pre-trial detention may be required according to legislation depending on the type of criminal offence charged. • Pre-trial detention may be based on the decision of a judge at an interim judicial release/bail hearing who determines there is sufficient risk of violence or concerns that the defendant will not obey imposed release conditions

Source: UNODC. 2019. Handbook for the Judiciary on Effective Criminal Justice Responses t Gender-based Violence against Women and Girls

Some considerations for judges during pre-trial hearings. When balancing between the right of the perpetrator to release on bail and the victim's right to safety, judges should balance the competing interests in favour of the victim's safety.

- Judges need to have as much information as possible regarding the situation and the individuals involved when deciding on which protection measure is appropriate in each case.
- Courts should seek any risk and lethality assessments done. Crucially, the court must be able to access all relevant information from the diverse agencies involved in order to make decisions concerning victim protection. If no risk assessment is done, judges should ensure that they seek such information during the hearing that allows them to make a risk assessment themselves. In some jurisdictions it might be possible to call an expert witness to advice on risk factors.
- The onus is often on the prosecutor to show cause why the defendant should be detained pending trial and the judge must be convince that there are ground that the defendant will not show up to trial or there are concerns that he will commit further violence or intimidate a witness.
- Judges have a duty to be aware of and consider all relevant facts concerning the defendant's risk of violence to the victim. They should always take into consideration any concerns that are raised by the victim relating to her safety.
- Judges should be aware that defendants charged with minor offences are as likely to be as dangerous as those charged with more serious offences, especially in intimate partner violence and stalking cases.
- Judges should be aware that separation is not a protective factor, rather research shows a significant spike in serious and deadly violence risk during the period of separation, identifying the perpetrators loss of control over their partner as a trigger.
- Pre-trial detention should be imposed when the judge determines there is sufficient risk of violence or concerns that the defendant will not obey imposed release conditions.
- Criminal judges should ensure harmonization with other non-criminal justice proceedings to allow for effective protection.

Conditions judges can impose to reduce the risk to the victim if the defendant is released pending trial:

- Judges should take into account the victim's views regarding the appropriate conditions. Protection should not be offered in a paternalistic manner but should be viewed as a means to afford victim safety so that they can develop their own strengths and strategies for coping with violence.
- Judges may want to ask the victim directly about are their fears of future violence and the basis for that fear, as well as their opinion on the likelihood that the defendant will obey the terms of release.
- Range of conditions include:
    - Prohibiting further violence or threats of violence, personally or through another (third party communications).
    - Prohibiting harassing, annoying, telephoning, contacting or any other communication with the victim, directly or indirectly.
    - Barring from the victim's residence, regardless of ownership, and having a police escort when the perpetrator is gathering their personal belongings.
    - Prohibiting further contact with the victim and other affected parties, inside or outside the domicile; stay away from residence, school, place of employment or any other place.
    - Prohibiting possession of firearms or deadly weapon.
    - Requiring perpetrators to undergo intervention programmes (programmes designed to take responsibility for their actions not alcohol or drug abuse programmes).

- Judges could consider monitoring of protection orders through the use of electronic ankle bracelets or requiring defendant to regularly report to law authorities or to attend civil society organization programmes, where available.

SOME CONSIDERATION FOR PROTECTION ISSUES DURING COURT PROCEEDINGS

Safety at court in criminal proceedings is critical. If the victim does not feel safe, likely they will become unwilling to continue their participation, as well as having negatively impacting their ability to recount facts and their experience.

Some considerations for judges regarding protection issues during the criminal trial:

- Identification of victims who will be vulnerable to secondary and repeat victimization by the criminal justice system itself, to intimidation and to retaliation during the court procedures, whether this is during the investigative judge's interview, a committal hearing or during the criminal trial.
- Once victims are identified, judges have a duty to provide appropriate measures to protect them.
    - Victims themselves might not be aware of the availability of such protective measures so the onus is on the judges to raise this issue.
    - The exact nature of such measures will be determined through individual assessment, taking into account the wishes of the victim, as well as the availability of measures in the jurisdiction.

Range of protection options that may be available. Judges can consider a range of options that may be available to enhance protection. For example this might include:

- Requiring physical separation of complainant witnesses from defendants.
- Use of court volunteers to provide information on arrival to victims giving evidence about safe rooms.
- Permitting victim to testify via remote close circuit television.
- Ensure for the presence of security (e.g. bailiff) in courtroom.
- Allow for a support persons could assists victims of violence with heightened levels of fear.
- Distortion of victim's voice.
- Protection from disclosure of victim's identity (e.g. media ban and ensuring redacted names when uploading court case online).

Protection concerns in cases involving technology-facilitated GBV. Many forms of online and technology-facilitated GBV contain the potential to escalate to life-threatening situations.

- Whenever an online violence-type of offence is reported, determine the possibility of stalking and the future risk of physical violence and ensure appropriate protection measures are in place.
- Ensure that the protection measures are responsive to forms of domestic violence perpetrated via new technologies and online. Be clear that "no contact" conditions includes social media features about watching (watching someone's content passively without interacting), or even sometimes stalking, for example watching someone's "stories" online or the "orbiting" behaviour which consists of not responding to someone's messages but continuing to visibly watch their content online.
- Matters of geolocation, coercion and control exerted online through social media or with the help of stalkerware installed on the victim's phone, tablet or computer or via technological tools, such as smart locks or other IoT tools, should enable the victim to access immediate protection and support.
- Assist the victim in having the social media platforms remove offensive content.

CRIMINAL CONSEQUENCES OF BREACHING PROTECTION ORDERS (CIVIL AND CRIMINAL ORDERS)

Protection orders can increase victim's safety, particularly when there are swift consequences for any violations. However, research shows that abusers routinely violate such orders, often with serious consequences for the victim but with little or weak legal consequences for the perpetrators.[162] In a number of countries, the trend has been to criminalize the breaches of civil protection orders, usually with proposed punishments ranging from fines to short term imprisonment. In some countries, where there has been a breach of the civil protection order, in addition to a criminal sentence, the criminal courts can vary the protection order which then becomes a criminal protection measure.

Criminal consequences of breaching criminal and civil protection orders:

- Research shows that abusers routinely violate such orders, often with serious consequences for the victim but with little or weak legal consequences for the perpetrators.[163]
- Breaches need to be treated seriously. Judges ought to recognize the patterned nature of the coercive and abusive nature of the violence. Remember, breaching a protection order is considered a lethality assessment factor as well as the fact that shows that the perpetrator has failed to comply with a court order.
- Judges ought to consider that the defendant has not only committed a criminal offence of breaching a court protection order, they have also likely committed other criminal offences in doing so, such as committing further violence or uttering threats.
- Be cautious of condoning stereotypes. Judges should question whether they are engaging in victim blaming, believing that the victims themselves are responsible for breaching the civil protection order or enticing the defendant to do so. Protection orders can only be breached by the defendant as they are the one obligated by the order. The victims should not be held responsible for any breaches.

PROTECTION CONSIDERATIONS: DOES THE VICTIM IN THE CRIMINAL CASE REQUIRE PROTECTION?

FACT DETERMINATION AND INTERPRETATION OF EVIDENCE

What was the context in which the facts took place?

- Look at the dynamics of the form of violence : intimate partner violence; sexual violence; stalking; honor-related violence
- Determine the risk level to the victim – using risk assessment tools

Does the behaviour that judges expect by the victim or defendant conform to myths or harmful gender stereotypes?

APPLICABLE LAW

- What protection measures are available to the judge under national law?
- Do the legal provisions reflect any myths or stereotypes about gender-based violence?
- What is the relevant international law?
- Prioritize safety concerns in all court decisions relating to the release of suspect or defendant
- Look at case law (national as well as comparative from other countries if possible) that promotes substantive equality on this issue, without condoning myths and harmful gender stereotypes.

[162] Skinnider, E. 2014. "Justice Sector's Response to Violence against Women and Girls: Background Paper". For the Global Technical Consultation on essential policing and justice sector services to respond to violence against women and girls.

[163] Skinnider, E. 2014. "Justice Sector's Response to Violence against Women and Girls: Background Paper". For the Global Technical Consultation on essential policing and justice sector services to respond to violence against women and girls.

JUDICIAL REASONING

- Apply an interpretation of the law that promotes substantive equality and is not based on myths or harmful gender stereotypes.
- Balance between the victim's rights to protection and the defendant's rights to full answer and defence.
- Be guided by victim-centred and promoting offender accountability.
- A victim-centred criminal justice response requires judges to place victims at the centre of consideration when performing their judicial tasks, emphasizing practices that effectively address the protection of the victims from further harm. Not only is the victim's safety and well-being a stand-alone objective, but by putting victim safety and dignity at the core of any criminal justice intervention, this will likely increase her willingness to cooperate with the criminal justice system.[164]

Source: UNODC. 2019. Handbook for the Judiciary on Effective Criminal Justice Responses to Gender-based Violence against Women and Girls

7.3 OPTIONS FOR EXERCISES

Below are a number of possible options for delivering the material in this Module.

EXERCISE: Small group exercise – case study
Instructions
Divide the group into small groups. Based on the case study, ask the judges to prepare their decision from a pre-trial release hearing. Questions: What would be your decision – detention or pre-trial release? If pre-trial release what conditions would you order?
Case study
P is charged with unlawful confinement, assault and threatening his four children and his wife, V. P was arrested just before midnight on 23 October, at the family home by police responding to an incomplete emergency call. He was seen by a psychiatrist within 36 hours of his arrest and the psychiatrist's report was sent to the prosecutor. The report notes that Mr. P acknowledged a lengthy history of alcohol abuse and admits to drinking the evening of 23 October. The report also noted that it appeared Mr. P was suspicious of his wife. He had read some of her emails to a friend in London, who had been a classmate of hers at London School of Economics where she had studies for her master's many years ago. Mr P was deemed fit to stand trial and was not mentally ill. The victim, V, has been married to the accused for 10 years. During this time he would drink to excess and physically and verbally abuse his wife. The situation got worse in early 2010 when the accused's drinking increased and he started using drugs. His wife and daughters noticed that he was more ill- tempered and angered very quickly and his aggression towards his family was described as "scary". For several months before the offences, the victim was communicating via email with an old friend (male). She has been asking the accused for a separation for months before but he had refused to discuss it with her, getting angry when she broached the subject.

[164] UNODC. 2014. "Blueprint for Action".

Approximately a week before the offence, the accused went onto the computer and found the emails between his wife and this man, who they had both known since university. He became withdrawn, angry and confrontational with the entire family and his alcohol and drug consumption increased. On the evening of the incident, P was shouting at V and throwing things around in the living room of the house. He told her that he had deleted the man from her account and had sent a message to the man's wife. He hit the wall in the living room with his belt, threw a framed picture of his oldest daughter on the floor and kicked things on the floor around. V was frightened by his behaviour and went into one of the two bedrooms to avoid him. He came to the room and continued yelling at her. He hit her at least twice on the head with an open hand. He pushed her.

All the children came into the room and the accused was out in the living room. He was still drinking and they heard him screaming. He went into the kitchen and then came into the room where she and the four children were located carrying a drill, a screw, a propane blow torch and a lighter. He said "we'll all just die" or "I'm gonna lock you in and you can all die" or "we can all die in this room together". He was pointing the lighter at the children and victim. V tried to grab the door but the accused was too strong. He slapped his eldest daughter. Then he started screwing the door to the room shut. V and her children were terrified and scared for their lives. One child managed to get a cell phone and dial 911. The accused saw this and tried to grab the phone which allowed V to get out the door. V went to a second bedroom to gather some clothes so that they could leave the house. The accused followed her trying to keep her in that room telling her that nobody's getting out. It was at this point that the police responded to the hang up 911 call. The accused was arrested and taken to jail. During the search of the residence, police found a propane blow torch, a butane lighter, an electric drill and a 10 cm screw on the dresser in the bedroom. They located a gun in a holster in the closet.

P was interviewed by police and denied that he had any intention of wanting to hurt his children and wife. When asked what made him go into the room and say that he was going to kill them, he said "I don't know". When asked if he had any remorse for what had happened the night before, he said no.

Facilitation notes

In the discussion mention that this is an actual case in Canada and that the following is from the judge's decision:

- The judge characterized the events as very serious and stated that the material presented to him at the bail hearing satisfies that the accused appeared determined to cause harm or worse to himself and his family.
- The judge's decision to detain the accused on the secondary ground. Reflects the law's concern about the risks posed to victims of spousal assaults.
- Previous cases differentiated between types of spousal assaults. At one end of the spectrum is the offender who repeatedly assaults and causes bodily harm as an expression of rage, jealousy, cruelty or control. Some victims feel unable, for financial, psychological, religious or other reasons to end the relationship and opt instead to deal with and even accept continuation of abuse. Other victims respond by ending the relationship and turning to the law for justice and protection. Some offenders will not accept the loss of the relationship or the loss of the control over the victim and respond by stalking or continuing their assaultive behaviour. These situations are dangerous and require vigilance in considering whether to grant bail pending trial.
- The judge determining bail must understand the circumstances of the offence and the background of the offender in order to decide whether the offender is likely to resort to further violence or intimidation if released.
- The judge in this case considered all the past actions of the accused and considered the circumstances of the offences charged in measuring the risks to V and her children and determined that the risks were too great to warrant release before trial.
- Other cases referred to mention that domestic violence cases require the court to be especially vigilant in bail applications. This is because, unlike many other crimes, there is a continuing relationship and a greater likelihood of repetition. Moreover, at the time of separation or planning of separation or when court intervention causes a separation, the risk of further physical injury actually increases; some studies have indicated that the risk increases dramatically.

- Refers to the tools developed to do risk assessments: The Manual for the Spousal Assault Risk Assessment Guide (SARA), which is a clinical checklist of risk factors for spousal assault. Another one is B-SAFER (Brief Spousal Assault Form for evaluation of Risk).
- Consistent with research, the most common risk factors involved with a domestic homicide are a prior history of domestic violence and an actual or pending separation.

From UNODC 2017. "The Resource Book for Trainers on Effective Prosecution Responses to Violence against Women"; adapted from a Canadian case.

Exercise: Small group exercise – case study (potential follow-up exercise)

Instructions

Using the same case study from previous exercise, ask the following questions:

Q: Using the same case study, ask how judges should approach a request by a victim of intimate partner violence to modify or terminate the condition of no-contact?

Q: Using the same case study, ask how judges should approach a violation of the no-contact order?

Facilitator's notes

Q 1. Judges could consider certain factors in cases where the victim request modification or dropping of conditions.

- Judges need to understand that there could be a number of reasons for the victim to request dropping a no-contact order and be careful in agreeing to lift or modify the non-contact order.
- It is important for judges to speak to the victim and obtain accurate information to determine her motivation in seeking the termination or modification of a no-contact order.
- Judges, while empathizing with the victim, should shift the focus onto the perpetrator's responsibility to have done something to justify the lifting of the no contact order. If the perpetrator has done nothing to address his violence since the incident, the judge should not consider modification.

Q2. Judges could consider certain factors in cases where there has been a breach of a no-contact order.

- Be cautious of condoning stereotypes. Judges should question whether they are engaging in victim blaming, believing that the victims themselves are responsible for breaching the civil protection order or enticing the defendant to do so. Protection orders can only be breached by the defendant as he is the one obligated by the order. The victims should not be held responsible for any breaches.
- The judge could order pre-trial detention or order pre-trial release with greater restriction upon release.
- Research shows that men routinely violate such orders, often with serious consequences for the victim but with little or weak legal consequences for the perpetrators.[165]
- Breaches need to be treated seriously. Judges ought to recognize the patterned nature of the coercive and abusive nature of the violence. Remember, breaching a protection order is considered a lethality assessment factor as well as the fact that shows that the perpetrator has failed to comply with a court order.
- Violation of criminal no-contact orders, or conditions of release, can be prosecuted as contempt or as additional crimes. Judges ought to consider that the defendant has not only committed a criminal offence of breaching a court protection order, he has also likely committed other criminal offences in doing so, such as committing further violence or uttering threats.

[165] Skinnider, E. 2014. "Justice Sector's Response to Violence against Women and Girls: Background Paper". For the Global Technical Consultation on essential policing and justice sector services to respond to violence against women and girls.

MODULE 8.

Working with victims as witnesses: Techniques to ensure a victim-centred approach

SUMMARY

This module:

- Discusses the importance of ensuring a victim-centred, gender-responsive and perpetrator accountability approach.
- Reviews some strategies that promote a victim-centred approach.
- Examines the special considerations judges can consider when dealing with victims with multiple and intersecting issues.
- Considers how to ensuring the quality of the victim's evidence, such as through creating an enabling courtroom environment.
- Addresses some of the common challenges in GBV cases, such as dealing with reluctant witnesses and assessing inconsistent statements.

Most victims of GBV suffer devastating trauma caused by the violence itself, feelings of shame, humiliation and powerlessness. Unfortunately, many victims have also experienced their participation in criminal proceedings as a "second assault", leading to re-traumatization.[166] Applying a victim-centred approach in practice entails that during all interactions, victims are treated with courtesy, respect, sympathy and sensitivity to the fact that they have experienced violence. Judges should appreciate that very often victims are required to describe incidents of violence a number of times before finally appearing in court, and this process can cause them renewed trauma, embarrassment or frustration; they may forget details over time. Judges are crucial to the provision of a comprehensive and victim-centred response, one that works in tandem with a gender responsiveness and perpetrator accountability approach. In light of the historic ineffectualness of the criminal justice system to respond to GBV, this module highlights some techniques that judges can use to integrate these approaches in their everyday work. Judges play a critical role in minimizing the factors that contribute to secondary victimization and re-traumatization. This can be done by incorporating a victim-centred approach, gender responsive and perpetrator accountability approach in their interactions with victims.

8.1 HOW TO ENSURE A VICTIM-CENTRED, GENDER RESPONSIVE AND PERPETRATOR ACCOUNTABILITY APPROACH

Judges are called on to apply a victim-centred, gendered-responsive and perpetrator accountability approach, not only to fulfil international obligations, but first and foremost to make sure that victims seeking help feel truly supported by the justice system. Respecting victim's rights and having a gendered understanding when

[166] Mary P Koss. 2006. "Restoring Rape Survivors: Justice, Advocacy, and a Call to Action" 1087 Annals of the New York Academy of Science 206 at 218–22.

dealing GBV are guiding principles of international law, namely the Updated Model Strategies and Practical Measures, to be taken into consideration at all stages of the criminal justice process. Moreover, the Updated Model Strategies, Article 15 call on states to ensure that victims are enabled to testify in criminal proceedings through adequate measures that facilitate such testimony by protecting the privacy, identity and dignity of the victim and avoid secondary victimization in legal proceedings. Victims who feel safe, well supported and empowered are more likely to continue to participate and engage with the criminal justice process which contributes to a better likelihood that perpetrators will be held accountable and the impunity will be stopped.

A victim-centered response, one that treats the victim with dignity and respect, is not biased against the accused nor does it conflict with the principle of impartiality. While judges must act decisively and maintain control of the court process, at the same time they are to treat everyone before the court, including victims and accused, with appropriate courtesy. It is equally important that judges do not inadvertently reinforce stereotypes through their language or demeanor. It is important to remember a judiciary that is not compromised by biased myths and gender stereotyping is essential in ensuring impartiality.

KEY CONCEPTS

A victim-centred approach is defined as the systematic focus on the needs and concerns of a victim to ensure the compassionate and sensitive delivery of services in a non-judgmental manner. The victim's wishes, safety, and well-being take priority in all matters and procedures. In other words, victim safety and well-being are paramount goals of a criminal justice response. A victim-centred approach, as opposed to a system-centred one, puts the needs of the victims at the core of any criminal justice intervention and recognizes that they deserve timely, compassionate, respectful and appropriate treatment.

A gender-responsive approach refers to ensuring that the laws, the justice institutions, the justice processes and the justice outcomes do not discriminate against anyone on the basis of gender. It necessitates taking a gender perspective on the rights themselves, as well as an assessment of access and obstacles to the enjoyment of these rights by women, men and people with diverse gender identities and adopting gender-sensitive strategies for protecting and promoting them.

A perpetrator accountability approach refers to a criminal justice response that shifts the focus away from discrediting the victims to enhancing evidence-gathering and case-building and ensuring consistency in investigation, prosecution and punishment, while ensuring a fair trial. This means measures that encourage reporting and maximising the victim's cooperation with the criminal justice system; early case building and addressing potential evidential weakness; developing comprehensive prosecutorial strategy; creating an enabling courtroom environment.

The essential elements of a victim-centred approach are:

- Promoting communication with victims that is empowering and avoids secondary victimization.
- Informing the victim of their rights.
- Ensuring safety and protection for the victim and their family.
- Ensuring effective support and assistance to the victim.

COMMUNICATION WITH VICTIMS THAT IS EMPOWERING AND AVOIDS SECONDARY VICTIMIZATION

All communication with victims should be geared towards empowering them to overcome their traumatic experience with violence and threats of violence and enabling them to endure the legal proceedings. It is recommended that all communications should be respectful, not contribute to secondary victimization and be age appropriate.

Pointers to be considered when judges are communicating with victims[167]:

- Ensure all communications with victims are non-judgmental, empathetic and supportive.
- Validate what has happened to the victim throughout the process. It is important the victim feels that their report of violence is taken seriously and that they are treated with respect and as deserving of the best possible response.
- Exercise patience and give the victim time to tell their story in their own words.
- Victims need to have a sense that their voice is being heard. This means they have an opportunity to express their story; be listened to and have their story accurately recorded; have a positive experience with the criminal justice actors; and be able to tell how the violence has impacted them.
- It may be necessary to remind the victim that they are not being blamed for the violence.
- All communications should be done in plain language that is patiently explained.
- It may be necessary to explain why their participation as a witness is a critical element of the legal case.
- The victim's privacy must be maintained and all their information should be confidentially maintained as according to the law.

Communication tips for judges when interacting with victim. Judges' interactions with victims are generally limited to witness testimony in court (during pre-trial hearings or at trial). Judges may question witnesses, and they also have power to control the type of questioning that is posed. All judges should be keep in mind that the victim/witness may have had earlier interactions in court (e.g. at the indictment, bail hearing, or in concurrent civil cases) and so should be prepared to clearly explain the legal process that is happening at the moment, the possible outcomes, and the consequences for the victim. When engaging and interacting with victims, judges need to appreciate that most victims suffer devastating trauma caused by the violence itself, feelings of shame, humiliation and powerlessness. Unfortunately, many victims have also experienced their participation in criminal proceedings as a "second assault", leading to re-traumatization. All judges play a critical role in minimizing the factors that contribute to secondary victimization and re-traumatization. This can be done by incorporating a gender-sensitive and victim-centred approach in their engagement / interactions with victims.

POINTERS FOR JUDGES WHEN COMMUNICATING WITH VICTIMS

Encouraging the victims' voice

- ✓ Listen carefully to the victim.
- ✓ Be proactive in asking about specific details. A victim can act complacent in the courtroom, or accept responsibility for violence, even when they do not agree.
- ✓ Do not ask unjustly intrusive questions, embarrassing, or overtly repetitive questions.
- ✓ Understanding the feelings of shame. Shame can be a particularly debilitating emotion – one that diminishes an individual's sense of self-worth and increases feelings of powerlessness. Judges should not add to these feelings of shame.

Demeanour in the courtroom

- ✓ Treat victims with dignity and respect. It is the judge who sets the tone and creates the environment for a fair trial in their court.
- ✓ Do not express frustration or annoyance if the victim appears to be not cooperative. Keep in mind both what you say and what you communicate through body language.

[167] UN Inter-agency Essential Services Package for Women and Girls Subjected to Violence: Module 3 on Justice and Policing.

- ✓ Be sensitive to the language that you use and what it conveys to victims and the perpetrators, especially when making rulings.
- ✓ Ensure that statements made from the bench and courtroom demeanour (non-verbal communication) demonstrates that the court take GBV cases seriously.

Essential information to provide

- ✓ Explain the victim's rights and options.
- ✓ Explain the purpose of the particular hearing and the process.
- ✓ When concluding, inquire about whether the victim would like an escort to ensure safety when leaving the court.

Ensuring confidentiality

- Keep personal information about the victim completely confidential. Redact personal information (such as the address of the victim) from any court documents that will be filed and made public. Only share information about the offence when it is necessary to provide assistance and intervention (such as a referral), and even then, only with the written permission of the victim.

PERSONAL PRONOUNS

Pronouns are words we use to talk about ourselves ("I"), to someone ("you") or about other people ("she," "he," "they," etc.). In English, "he" and "she," called third-person pronouns, are gendered, while singular "they" is gender-neutral. In other languages, such as Arabic, Korana and Polish, second-person pronouns ("you") and first-person pronouns ("I") may also be gendered. Some languages don't require pronouns to indicate gender or have a gender-neutral option, including Japanese, Swahili, Swedish and Turkish. Sweden has added the gender-neutral pronoun "hen" to their language to complement "han" (he) and "hon" (she). Other languages don't mark gender at all, including Armenian, Finnish, Hungarian, Persian and Yoruba.

Source: IOM SOGIESC Full Glossary of Terms

INFORMING THE VICTIM OF THEIR RIGHTS

Victim's rights and empowerment should be at the centre of all measures adopted by judges. Judges should keep in mind that the victims may not have received any professional advice or information about the law or about the kinds of legal services that are available to them, and should, therefore, be prepared to provide relevant information about her rights, remedies and how to access legal assistance.

Information about victim's rights includes the following[168]:

- The right to be treated with compassion and respect for their dignity.
- The right to access the criminal justice system and have prompt redress.
- The right to fair restitution and compensation, including making a claim for compensation for damage in criminal cases.
- The right to express their views and concerns and to have them presented and considered at appropriate stages of the criminal case, including: making proposals concerning the evidence; reviewing records and becoming familiar with them and making proposals for further investigations; and to be heard in preliminary hearings, the main hearing and making a concluding speech.

[168] This includes the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, General Assembly resolution 40/34, annex; and the UN Updated Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice.

- The right to have proper assistance throughout the legal process, including legal aid if the victim meets the eligibility requirements.
- The right to information about their rights, their role and the scope, timing and progress of their case and the disposition of their case, including information about release of the accused/convicted person from custody or escape from custody; the status of their complaint, the progress of investigations or proceedings, their role in the proceedings and the outcome of the case.
- The right to safety, including the right to apply for protection measures.
- The right to support, including the necessary material, medical, psychological and social assistance through governmental, voluntary, community-based and indigenous means.

SOUTH AFRICA'S VICTIMS' CHARTER[169]

The Service Charter for Victims of Crime in South Africa (also referred to as the Victims' Charter) is an important instrument for promoting justice for victims of crime in South Africa. It provides details as to how to ensure the following rights:

- The right to be treated with fairness and with respect for dignity and privacy.
- The right to offer information.
- The right to receive information.
- The right to protection.
- The right to assistance.
- The right to compensation.
- The right to restitution.

ENSURING SAFETY AND PROTECTION FOR THE VICTIM AND FAMILY

Check previous module on protection.

ENSURING EFFECTIVE SUPPORT AND ASSISTANCE TO THE VICTIM

A victim-centred approach seeks to minimize re-traumatization associated with the criminal justice process by providing the support of victim advocates and service providers, and empowering victims as engaged participants in the process. GBV often deprives victims of their sense of control, autonomy, self-respect, and personal privacy. The criminal justice system should seek to restore and reinforce those qualities, while avoiding measures that re-victimize the victim. Support and assistance to victims should counter the climate of tolerance to GBV, social passivity and victim-blaming and acknowledge how these crimes, given their unique characteristics, have a traumatic and disempowering impact on victims.

Judges need to be aware that victims will have both immediate support needs as well as longer-term ones. They will need assistance in going through the criminal justice system, as well as assessing other services, which might include shelter, health care, social services, counselling, education and job care. A victim who feels well supported will likely be more engaged in the criminal case than a non-supported victim and this will improve outcomes in legal proceedings. However, it is important to remember that the provision of services should not be dependent upon the victim's willingness to press charges or to testify, and the services must be able to address the needs of vulnerable persons, including child victims.

[169] For details, see Department of Justice and Constitutional Development. Service Charter for Victims of Crime in South Africa.

Judges should consider:

- Never assume that the police have already informed victims about the support and assistance resources available to them in their community.
- Judges can arrange to make informational brochures from local service providers available in the court buildings. Ideally in safe locations, such as women's toilets.
- If possible, judges should participate in many forms of community outreach and education in order to increase public confidence in the legal system and encourage reporting.

STRATEGIES THAT PROMOTE A GENDER-SENSITIVE AND VICTIM-CENTRED APPROACH

- **Promoting the victim's voice.** For many victims of intimate partner violence who have long been silenced by their abusive partners or for victims of sexual violence who have been silenced by feelings of shame, the possibility of putting into words their own experiences can lead them to start leaving behind the subordination and violence they have been subjected. Giving victim's a voice and being believed can be transformative for the victim.
- **Treat victims with dignity and respect.** It is the judge who sets the tone and creates the environment for a fair trial in their court. All who appear in court are entitled to be dealt with in a way that respects their human dignity and fundamental human rights.
- **Understanding the feelings of shame.** Victims of GBV are more likely to experience feelings of embarrassment and shame than victims of other violent offences.[170] Shame can be a particularly debilitating emotion – one that diminishes an individual's sense of self-worth and increases feelings of powerlessness.[171] In undertaking a complete analysis of the evidence, judges ought to be aware of how the trauma can cause these intense feelings of shame. They should consider whether their inferences arising from the complainant's testimony of feelings of shame, self-blame and regret are based solely, or primarily, on myths about how an ideal victim responds to the experiences of violence. Judges should not add to these feelings of shame.
- **Understanding how court proceedings reinforce feelings of shame, powerlessness and anxiety.** For victims, engaging in a criminal process which requires that they give voice publicly, over and over again, to the most intimate details of their victimization in the presence of strangers, can causes them to re-live these feelings of shame and self-disgust. It is useful for judges to examine how the criminal procedures themselves require the victim to play a subordinate role, which can be disempowering as well as reinforcing the very social dynamics that cause them to experience shame as a result of the violence in the first instance.
- **Understanding emotionality**. Emotionality is often perceived as central to evaluating victims as witnesses. This ignores the fact that people react differently and express themselves in different ways. Myths and harmful gender stereotypes feeds into judges' understanding of how victims should behave. Visible distress is often portrayed as the "logical" reaction to GBV, which homogenizes victims and places normative judgments on certain ways of communicating. If victims are not visibly upset, they are considered at least partly culpable. Or at other times if they are visible upset they might be viewed with caution and having a bias against the defendant.
- **Be aware of, consider and use effectively available measures to facilitate victim's participation.** Many victims of GBV believe that special measures enabled them to give evidence they would not otherwise have been able to give and that their anxiety about the court experience fell significantly when special measures were used.[172] Explain protective measures. Victims and other witnesses often do not know that

[170] Marie Elena Vidal & Jenny Petrak. 2007. "Shame and Adult Sexual Assault: A Study with a Group of Female Survivors Recruited from an East London Population". 22 Sexual and Relationship Therapy 159.

[171] John P Wilson, Boris Drozdek, & Silvana Turkovic, 'Post-traumatic Shame and Guilt' (2006) 7 Trauma, Violence, & Abuse 122 at 124.

[172] Kelly, L. 2005. "Promising Practices Addressing Sexual Violence" UN Expert Group Meeting Violence against women: Good practices in combating and eliminating violence against women.

there are protective measures available, for example that they do not need to testify in open court. The judge needs to ensure protective measures are explained and used, such as testimony in camera, using CCTV or a remote audio-visual link, having a support person/intermediary[173].

8.2. ADDITIONAL CONSIDERATIONS FOR INTERACTING WITH WITNESSES WITH MULTIPLE AND INTERSECTING ISSUES

Many trials have not been successful because a witness with multiple and intersecting issues (such as being a child, disabled, refugee, etc) has been unable to give testimony at trial. One of the enduring erroneous myths about such witnesses is that they are not as credible or as reliable as witnesses not from these groups. Most criminal justice professionals lack the specialized training and knowledge to effectively obtain the best evidence from these witnesses. When communicating with victims with multiple and intersecting issues, it's important to remember that they are individuals who deserve the same respect and consideration as anyone else. Communication is a two-way process, so be sure to listen carefully and respond appropriately to ensure effective communication. Here are some general tips for communicating with different groups.

CHILD VICTIMS

When interacting with child victims of GBV, judges can consider a number of strategies that promote a gender- and child sensitive approach.

- In addition to common feelings of shame and powerlessness, child victims of GBV who are abused by a family member often experience feelings of guilt for breaking up the family, betrayal and fear or may have faced disbelief when they disclose to the non-offending partner or caretaker.
- Given their age, evolving capacities and the trauma they have experienced, child victims require great care and sensitivity when judges engage / interact with them. They experience events, think, speak and behave differently from adults. Judges need to be aware that children have a different vocabulary. When speaking with child victims judges should use short sentences, simple sentences, age appropriate language, questions with only one meaning.[174]
- Treat the child with dignity, respect and in a way that is appropriate to their age and competence. Judges can consider ways to reduce their anxiety in the criminal proceedings. For example, judges should take the time to build rapport with the child; could consider having on hand such toys, as teddy bears, to calm them during the trial.
- Consider additional special measures in order to facilitate the testimony of the child[175]. Depending on the jurisdiction, judges can consider allowing:
    - The child to testify via an intermediary. Judges should ensure that the intermediaries are qualified and understand their roles; and that the victim understands the questions being asked and that the judge, prosecutor and defence lawyer to understand victim's responses. For example, the intermediary can ask defence counsel to rephrase overly complicated questions.
    - The child to answer questions and describe what happened to them in a manner of their choice, including for example by writing, drawing or illustrating with models, such as anatomical dolls.
    - Use of a child psychologist or social worker to enable the court to better understand the circumstances of the child and later reactions.

[173] S v Lenting and Others (CC08/2018) [2023] ZAWCHC 241; 2024 (2) SACR 157 (WCC) (14 September 2023)

[174] For more guidance on how to deal with child victims, see UNODC's Handbook for Professionals and Policy Makers on Justice in Matters Involving Child Victims and Witnesses of Crime; United Nations Guidelines on Justice in Matters involving child victims and witnesses of crime Online Training.

[175] See Director of Public Prosecutions, Transvaal v. Minister for Justice and Constitutional Development and Others 2009 (2) SACR 130 (CC)

ADDITIONAL TIPS FOR DEALING WITH CHILD VICTIMS – USING CHILD-SENSITIVE COMMUNICATION[176]

- ✓ Judges need to allow children to express their opinions and concerns freely and to obtain information in the best possible way. It is important to remember that children are not miniature adults; so do not view their testimony as if they were adults.
- ✓ Adapt your language and attitude to the special needs, views and concerns of an individual child victim. Be sensitive to the child's stage of development (e.g. in terms of language, memory, knowledge, reasoning and emotional maturity).
- ✓ Remember that age alone is not a sufficient predictor of the reliability of a child's statement. Follow the child's lead rather than make assumptions on what the child can cope with and what they can recall.
- ✓ Be careful to maintain an objective neutral stance as biases can be inadvertently conveyed in tone of voice or facial expressions.
- ✓ Be emphatic, which can help reduce the child's anxiety and allow them to focus on remembering and reporting accurately.
- ✓ Start with building rapport. It takes time to develop trusts. Also by starting with talking about harmless topics such as favorite TV shows, you can take note of the child's language needs.
- ✓ Phrase the question so the child understands. Use language and provide instructions that are appropriate to the child's age and stage of development (e.g. to a child "court" is a place to play ball and "hearing" is something you do with your ears).
- ✓ Talk about what children understand. Gear your questions to the child's knowledge base and experience (e.g. rather than asking what time an event happened, ask what TV show was on). Use terms that are concrete and visual as these often elicit more accurate reports (e.g. rather than how many times were you abused, ask how many times did he hit you).
- ✓ Simplify your language. Avoid long complicated sentences; use short simple sentences. Avoid double negatives; use simple grammatical construction. Avoid questions with more than one meaning. Use an active rather than passive voice.
- ✓ Consider using dolls or other visuals such as drawings to assist communication.

VICTIMS LIVING WITH DISABILITIES

Given the range of different types of disabilities, such as physical disabilities (e.g. visual and hearing impairments); communication disabilities (e.g. speech or language impairment), intellectual disabilities (e.g. autism, Down syndrome, Fetal Alcohol Spectrum Disorders); and mental health disabilities (e.g. anxiety disorders, psychotic disorders, personality disorders), judges should be aware that many disabilities might not be previously identified.[177] Every person with a disability is unique and may have different needs and preferences when it comes to communication. The most important thing is to treat each person with respect and with genuine humility and ask how you can best communicate with them.

Additional tips for dealing with victims living with disabilities

- ✓ Don't make assumptions. Don't assume that you know what a person's disability is or what their limitations may be. Ask the person or their caregivers if you're not sure what they need or how to help.

[176] For more details on interviewing child victims, see UNODC. 2015. Training Programme on the Treatment of Child Victims and Child Witnesses of Crime for Prosecutors and Judges.

[177] See GBV Disability Inclusion Toolkit for guidance to help identify potential communication methods and strategies that promote participation of the individual with disabilities: https://www.womensrefugeecommission.org/wp-content/ uploads/2020/04/GBV-Disability-Toolkit-English.pdf. For more details on interviewing victims with disabilities, see Child Witness Institute. 2022. Access to Justice for Persons with Disabilities with a Special Focus on Women and Children – Benchbook for Judicial Officers.

- ✓ Be patient. People with disabilities may communicate in different ways, or it may take them longer to respond. Be patient and allow them time to express themselves.
- ✓ Ensure that the victim can access the courts. Consider how accessible the courthouses are, including physical barriers to access such as lack of suitable transportation and accommodation options. Make sure that the environment is accessible and free of obstacles that could impede their movement.
- ✓ Provide the opportunity for persons with disabilities to communicate with you without the presence of their caregiver if wished, and if this does not endanger or create tension in that relationship.
- ✓ Ask the victim to choose someone they feel comfortable with to translate for and/or support them if needed.
- ✓ Check communication requirements (interpreter/Braille/easy to read) and if a communication aid is needed.
- ✓ Always talk directly to the victim even when a caregiver is present. Speak in a clear and natural tone of voice, and don't shout or over-enunciate. If a person has a hearing impairment, speak facing them and at a reasonable volume.
- ✓ Treat adults with disabilities as you would other adults, paying particular attention to gender issues.
- ✓ Plan extra time and adapt your communication style with victims with communication or cognitive functional limitations.
- ✓ Do not assume that the victim has or does not have the capacity to provide informed consent; evaluate the best interests of the victim as needed.
- ✓ If a person with a disability appears to be struggling or in need of assistance, ask if they need help. Don't assume that they want or need assistance but offer it if they do.

ELDERLY VICTIMS

Tips for dealing with victims who are elderly[178]

- ✓ Do not hesitate to ask potential older victims about possible sexual assault or abuse. Do not assume that because a person is older, sexual abuse could not have occurred.
- ✓ Follow-up on coded disclosures. Some victims may wear many layers of clothing, talk about not wanting someone near them, or wonder if they could be pregnant. They may not talk directly about sexual abuse.
- ✓ Avoid the assumption that an older person with communication barriers or cognitive functional limitation cannot provide meaningful information about an assault they have experienced.
- ✓ Consider involving an older judge, as some older victims may have difficulty talking to younger judges who are similar in age to their grandchildren.

VICTIMS WHO ARE INDIGENOUS, ETHNIC AND RELIGIOUS MINORITIES

Tips for dealing with victims who are indigenous persons and ethnic and religious minorities

- ✓ Ensure that conditions are sufficiently secure for the victim to feel comfortable about identifying themselves as members of an ethnic or religious group.
- ✓ Ensure that language interpreters (trained on GBV principles) are available to support victims speaking different languages/IEC material available in different languages.
- ✓ Appreciate that victims may not be able to speak openly if interpreters are from a different community in the country of origin or country of refugee or asylum.

[178] These tips are from Handicap International Humanity & Inclusion. 2022. Intersectionality in Gender-Based Violence Programming A Toolkit for Humanitarian and Development Practitioners.

8.3 ENSURING THE QUALITY OF THE VICTIM'S EVIDENCE: CREATING AN ENABLING COURTROOM ENVIRONMENT

Trial and trial-related practices often discourage victims from testifying and re-traumatize those who choose to do so. Even for those victims who are motivated to testify, trials can be an emotionally difficult experience for them as well as putting them at further risk of violence. Criminal courts, procedures and trials can be seen as formal and traditional. Judges have a better chance at reducing the anxiety of the victims if they have an understanding of how this institutionalized setting and its practices can contribute to the inhospitable conditions faced by victims and expose them to re-victimization. Some of the factors that contribute to inhospitable conditions for victims are unavoidable. For instance, victims must, out of necessity, describe to people they do not know (the judge, prosecutors and defence counsel) the details of the violence and defence must have some opportunity to ask them questions. However, judges have a duty to consider what steps they can take to minimize the negative impact for the victim in having to go to court. Consider how the formality required by all participants in a trial impacts the victims who are expected to remain deferential to the judges and lawyers while often being subjected to intimate, humiliating and aggressive questioning. Judges should be allowing witnesses to seek clarification, express concern or contribute to the direction of the exchange and prevent cross examination that is needlessly repetitive or irrelevant. Even the physical space and courtroom aesthetic are designed to elevate the legal professionals from the laity. The physical design of some courtrooms could be reconsidered in order to make the victim feel more comfortable as a witness.

Creating an enabling courtroom environment will ensure that a victim feels safe and supported and this can contribute to the facilitating the victim's testimony at trial. Victims are more likely to testify and feel better about their experience with protective or "special" measures in place that can help create the conditions for safe and effective testimony. These measures can assist vulnerable and intimidated witnesses give their best evidence in court and help to relieve some of the stress associated with giving evidence. Stress can affect the quantity and quality of their testimony. Different jurisdictions have different ranges of special measures designed to ease victims' experiences of the trial and facilitate their testimony. Judges should be aware of the special measures available in their jurisdictions. For judges, they must satisfy themselves that the special measure or a combination of measures is likely to maximize the quality of the witness evidence.

JUDGES SHOULD CONSIDER THE FOLLOWING:[179]

Safe and friendly court room environment

- Permit a support person such as family member, friend or professional support person to be with the victim during the trial process. In the case of a child victim, measures should be taken to appoint specialists and family members to accompany the girl, and a guardian to protect the child's legal interests.
- Provide for user friendly and fit-for-purpose court environments, including waiting areas.
- Remove all unnecessary persons, including the alleged offender, whilst the victim gives their evidence.
- Take appropriate measures to ensure no direct contact between victim and accused, using court-ordered restraining orders or ordering pre-trial detention.
- Notify appropriate authorities in the case of or suspicion of the victim being harmed or at risk of being harmed during the trial or hearing process.

Protection of privacy, integrity and dignity

- Order any available measures that can protect the victim's privacy, integrity and dignity, including: limit or ban public present at the trial, for example, in-camera trials or closed trials and limit or restrict media publishing of personal information of victims.

[179] These points are summarized from the UN Essential Service Package for Women and Girls Subjected to Violence: Justice and Policing Module 3.

- Disallow any misstatements or attempts to intrude too far on the witnesses' safety (such as matters that could tend to reveal the witnesses' identity).
- Remove any identifying information such as names and addresses from court's public record or use a pseudonym for the victim.
- In the case of the child victim take appropriate measures to: maintain confidentiality and restrict disclosure of information relating to the victim's identity and involvement in the process; and exclude public and media from courtroom during the victim's testimony, where permitted by national law.

Opportunity for full participation

- Allow for available measures that can facilitate the victim's testimony in trial/hearing: measures that permit the victim to testify in a manner that allows them to avoid seeing the accused, for example screens, behind closed doors, closed circuit television (CCTV).
- Adopt case management approaches that ensure the victim has an opportunity to fully participate in the proceedings with the least amount of secondary victimization: reduce unnecessary delays; and promote practices that issues not in dispute are agreed upon and admitted at the start of the trial/hearing.
- Undertake approaches and ways to reduce the victim's stress: limit her evidence to relevant evidence; allow for short recess when she is too distressed to proceed; identify options to avoid or minimize direct examination of the victim by the defendant, where possible; if allowed, have the examination conducted through an intermediary; if allowed, use video-recorded interview as evidence in chief.
- In the case of the child victim, use child-sensitive procedures, including interview rooms, modified court environments and take measures to ensure hearings and interviews are limited and are scheduled at times of the day appropriate to the age of the child and separate from the accused.

Ensuring the quality of the victim's evidence. The reality in many criminal trials involving GBV is that the defendant decides not to provide testimony, as is their right, with their defence counsel leading the complainant through the defendant's version of events in a way to put an alternative story to the factfinders to create reasonable doubt. Defence questioning techniques are to present certain evidence in certain ways, rather than gathering all the available evidence in a balanced manner. They primarily manipulated evidence by asking closed questions to control what information becomes public. There are numerous factors that influence the quality and quantity of evidence provided by victims as witnesses.

Judges should consider the following pointers to enhance the victim's ability to tell their story in court:[180]

- ✓ Asking open questions and avoiding leading or suggestive questions.
- ✓ Controlling inappropriate questioning, as this reduces the quality of evidence heard.
- ✓ Being aware that the demeanour of the person asking the questions – a more authoritative demeanour makes vulnerable witnesses less able to recall accurate information and less willing to disclose information.
- ✓ Use of pre-recorded video evidence, while arguably more compatible with inquisitorial than adversarial approaches to testimony, is found in some adversarial jurisdictions.
- ✓ Makes trials more about conversations than battles and allows greater reliance on written evidence gained pretrial.
- ✓ Allowing the victim their own lawyer. The duties could range from acting as an intermediary during questioning to, at least partially, address manipulation to providing advocacy and representation throughout the whole legal process, including sentencing and compensation decisions.

[180] Taken from UNODC. 2019. Handbook for the Judiciary on effective criminal justice response to gender-based violence against women and girls.

The need to limit aggressive and improper questioning based on myths and gender stereotypes. Given that the direct confrontation between the defendants and their alleged victims involves a risk of further traumatization of the victim, judges play a significant role in ensuring that the victim's role as a witness is not undermined or ridiculed, and that the court provides a safe environment for their testimony. Questioning techniques by defence, such as extensive repetition, frequent interruption, closed questions, and demanding precise recollection of peripheral details, are common defence tactics in cases involving GBV. Judges should be mindful of defence tactics to intimidate or humiliate the victim, such as using unfair, unnecessary, repetitive, aggressive and discriminatory questioning. They have a role to play to decisively stop such behaviour, by issuing warnings or disallowing that line of questioning.

Strategies for limiting aggressive and improper questioning. Judges should consider the following:

- Understand how GBV is different from other offences, including appreciating the stereotypes surrounding these cases and the challenges victims face in accessing justice in these cases. Judges need to be aware of the violent impact on victims of requiring them to provide irrelevant, gender-biased information or to refute sexist-stereotype-infused cross-examination.
- Approach the issue of improper questioning by using the framework of balancing between the victim's right to equal protection before the law as well as their right to privacy with the defendant's right to full answer and defence. The defence has the right to cross examine witnesses as a fundamental aspect of the right to test the case against the accused, to allow the evidence presented in the courtroom to be tested for inaccuracies or inconsistencies that could render it unreliable. However, the accused's right of cross-examination is not absolute. The right to full answer and defence "does not give defence the right to "whack" the complainant, maligning her behaviour, her dress and her character – all is a sexualized way".[181] Judicial interventions to reduce repetitive and irrelevant cross-examination do not compromise trial fairness. The judge needs to ask how much does the defence need to know about any complainant in order for them to meet the test of credibility. What must a victim reveal about themselves in order to access justice, and how do these revelations subject them to further victimization?
- Judges have the inherent authority to manage their courtrooms. They can ensure that their courtrooms follow a normative framework that is grounded in legal and ethical norms including equality values, lawyer's duty to not discriminate, advocate in good faith and not mislead the court. Judges are often given significant deference with respect to trial management and should be able to properly intervene to avoid harassing and improper questioning of victims. Such questioning would fall under irrelevant or repetitive evidence. While lawyers have an ethical obligation to cross-examine in good faith, law societies have been reluctant to enter this regulatory sphere and have been criticized when they do discipline the courtroom conduct of lawyers.[182] However, judges and not law societies should be regulating courtroom conduct and judges should be familiar with the applicable national codes of conducts, such as bar council, to see how it covers the issue of improper questioning. When lawyers' codes of conduct are breached, judges should not permit the continuation of such line of questioning. They need to remind lawyers of their ethical standard – which includes a duty not to mislead the court. While not introducing false evidence, defence lawyers who uses harassing and improper questioning to put forward a defence grounded in stereotypes is misleading.
- Actively bar unethical defence tactics, relying on cases that specifically refer to the problem.

A note of caution when ordering publication bans to protect the victim's identity

Publication bans are often routinely ordered in cases of GBV, when allowed by national legislation. Publication bans prevent anyone from publishing, broadcasting or transmitting, such as sharing on social media, any information that could identify a victim, witness or other person who is subject of the order, and are aimed at encouraging a victim of GBV to participate in the criminal case. However, in certain circumstances, the perpetrator may use the victim's sharing of the case with friends, and support persons in making a complaint

[181] Cormack, E. and Balfour, G. 2004. "The Power to Criminalize: Violence, Inequality and the Law". Halifax: Fernwood Publishing at 112-113.

[182] Taddese, Yamri. 2012. "Trial Judges Better Suited to Regulating Civility" Law Times (17 December 2012) <http://www.lawtimesnews.com/201212172119/headline-news/trial-judges-better-suited-to-regulating-civility-panel>.

against the victim for violation of the publication order.[183] As such, these orders that are meant to assist and protect victims can allow perpetrators to "weaponize" the justice system against the victim. It is important to remember that victims should have agency in deciding whether the case, their name, and the accused name should be in the public realm and the courts should ensure that criminal procedures should not be abused by perpetrators to silence victims.[184]

Judges should consider:

- Having a more direct conversation with victims about whether a publication ban should be imposed.
- Provide victims with a clearer voice in the criminal justice process and to be treated with compassion, respect and dignity.
- Ensure for a clear and easy process in which the victim can modify and revoke publication bans.
- Allow for the victim who is the subject of a publication ban can share their own information in certain circumstances, including in private conversations and to seek support.
- Ensure that the opinion of the accused or offender is not a relevant factor in the revocation or modification of a publication ban.

8.4 TIPS FOR HANDLING COMMON CHALLENGES REGARDING VICTIM WITNESSES

MANAGING RELUCTANT VICTIMS

One of the challenges raised by judges in many countries is that victims of GBV can seem extremely reluctant to be witnesses during the criminal case and sometimes can become even hostile witnesses. Studies show, however, that a majority of intimate partner violence victims support the prosecution, even while they may express ambivalence about the prosecution publicly in court. Even in studies where the majority of victims opposed prosecution, after trial they had changed their minds, with some reporting that the court experience gave them a "sense of control" or made them "feel much safer".[185] Research has also found that victims' preference of how the case should be prosecuted is not good predictor of re-abuse. Victims who wanted charges dropped were just as likely as those who did not want them dropped to be re-abused (re-victimized). Victims who are supported and treated in a respectful and compassionate manner and empowered by skilled professionals are not only less likely to withdraw support from the process at a later date, but also more likely to feel able to tell what they know in a clear and coherent manner.

Tips for judges in managing reluctant victims

- ✓ Create a sense of safety for the victim during the trial.
- ✓ Allow the victim's testimony transcript taken in the presence of a judge and the defence counsel, in such a way as can be admitted as evidence later in the court even without the victim's trial testimony or against the victim's will.
- ✓ Allow for special measures that facilitate the victim's testimony in court.
- ✓ Recognize that there are powerful reasons why victims of intimate partner violence might provide a retraction statement containing untruths. In appropriate circumstances, dismiss as unreliable the contents of a retraction statement.
- ✓ Allow admission of original 'truthful' accounts from victims as evidence in the case.

[183] CBC News. April 18, 2021 "Case of sex assault victim fined for breaking publication ban divides legal community".

[184] For a good discussion on the use of civil orders being abused by alleged perpetrators to silence victims in South Africa, see Swemmer S. 2023. "S v P – The Abuse of Protection Orders to "Gag" Victims of Rape" PER / PELJ 2023(26).

[185] These studies are discussed in more detail in UNODC. 2014. Handbook on Effective Prosecution to Responses to Violence against Women and Girls.

- ✓ Consider evidence available from other sources to corroborate these original "truthful" accounts, including emergency call recordings; police body worn videos; comprehensive statements from all first response officers; accounts from witnesses.

The following checklist developed by Women Against Violence Europe is intended to assist the court in discovering the reasons why the victim is reluctant or refuses to testify and in finding out whether a victim has been coerced or intimidated into asking for the charges being dropped.[186]

- ✓ Why do you feel reluctant (or refuse to) testify?
- ✓ When did you become reluctant (or decide to refuse) to testify?
- ✓ Were you living with the defendant when the incident happened?
- ✓ Are you now living with the defendant?
- ✓ (If not) Does the defendant know where you are staying?
- ✓ Are you financially dependent on the defendant?
- ✓ Do you and the defendant have children together?
- ✓ Have you discussed the case with the defendant?
- ✓ Has the defendant promise to do something for you if you do not testify?
- ✓ Is that promise to do something the reason you do not wish to proceed/or testify?
- ✓ Has the defendant or anyone else threatened you, your children or your family and told you not to testify?
- ✓ Is there some other reason you are afraid of the defendant?
- ✓ (If possible) Are you aware that this court/the civil court can issue an order telling the defendant to stay away from you and have no contact with you and your family? (If possible) Are you aware that if the case is prosecuted, that the defendant can be required to get counselling, pay for your damages, and stay away from you and your family?
- ✓ (If injuries are visible) How did you receive the injuries (allude to police reports, medical reports, photos, injuries still visible in court, etc.)?
- ✓ Have you talked about your desire not to testify with the local women's shelter/counselling centre/a victim's services?
- ✓ If not, would you be willing to talk to them?

DEALING WITH INCONSISTENT STATEMENTS

As already discussed in Module 5 on trauma, there are a number of reasons why judges are faced with considering the issue of inconsistent statements of victims of GBV. Not only does the trauma impact on how victims recall and encode memories, the process of how the victim is interviewed if not conducted in a trauma-informed approach can result in numerous statements given at different times to different authorities. For example, being interviewed by male police officers, or in a space that does not allow for privacy, can affect the victim's ability to recount her experience. Moreover, a common defence tactic is the attempt to undermine the victim's allegations by suggesting that even the slightest deviation over a period of years, on any detail relevant or not, between any of their statements, indicates unreliability if not dishonesty.

[186] WAVE (2000). Training programme on combatting violence against women. Available at: http://www.wave-network.org/content/wave-training-programme-combating-violence-against-women-0.

Consideration for judges when making their assessments:

- A number of factors can have consequences on the coherence and comprehensiveness of the different statements, such as timing to the incident, being interviewed by a trained individual, whether they feel safe and supported at the time the statement is being given.
- Between the incident and the time the victim is before a judge, it is not uncommon for victims to attempt to manage their lives by not revisiting a trauma over and over again in their minds. Many victims make efforts to forget or not to think about the violence as a significant coping strategy.
- Inconsistencies are to be expected. It is difficult to imagine that anyone could maintain consistency with respect to insignificant details when retelling an incident that occurred months or more likely even years prior. It is sensible to assume that inconsistencies on minor details actually increase credibility; however, experience reveals how such inconsistencies are cited as a factor in raising concerns about the victim's credibility.
- In responding to defence tactics of repetition during cross-examination in attempts to raise inconsistencies in victim's statements, a judge must balance between allowing cross, ensuring the rights of the accused to full answer and defence and avoiding repetition, ensuring the rights of the victim to be treated with dignity and have the protection of the law from harassment. A judge can instruct defence counsel to move on from questions already asked and answered about details of the complainant's statements.
- Judges should also be aware that lengthy cross-examinations, while premised on demonstrating inconsistencies in the complainant's story, may actually be driven by problematic assumptions about gender-based violence. So for example, lengthy cross-examination on ambiguities or inconsistencies in a complainant's testimony as to whether they were wearing a bra or what kind and colour where their 'panties' is informed by problematic beliefs that suggest that the victim who dress a certain way are more likely to consent to sex or were asking for it.
- In assessing inconsistencies, judges should be cautious about placing too much weight and importance on the contradictions between what a witness says in court and previous statements.
- Judges could adopt a culture of believing the victims, unless the contrary is clearly indicated.

CONSIDERATIONS REGARDING THE JUDGES' ENGAGEMENT WITH VICTIMS

1. How does the court's engagement with the victim promote gender equality?
2. How does the court's engagement with the victim support their rights while balancing those of the defendants?
   - By balancing between allowing cross examination, ensuring the rights of the accused to full answer and defence and avoiding repetition, ensuring the rights of the victim to be treated with dignity and have the protection of the law from harassment.
3. How can the court avoid engaging with victims based on myths and harmful gender stereotypes?
   - By not making inferences from the victim's feelings of shame and regret and self-blame that are primarily based on beliefs around how an "ideal" victim would "rationally" behave.
   - By not assessing credibility of the victim by making inferences solely on how they reacted based on ideals of how "rational" victims would react.
4. How does the court promote a victim-centred approach/empowerment?
   - By being aware of how court proceedings themselves can reinforce feelings of shame and powerlessness of the victim.
   - By treating victims with dignity.
   - By provide special measures to facilitate victim's testimony so that they can give voice to their trauma.

5. How does a judge's understanding of trauma impact on fact determination, interpretation of the law, assessment of the evidence, determination of criminal liability and severity of sentence (where there is a conviction)?
   - Victims often have feelings of shame and self-blame.
   - Victims react differently and express themselves differently.
   - Trauma impacts on the victim's ability to coherently or fully recount their experiences.
   - Victims of trauma can make inconsistent statements for a number of reasons.
6. What steps can a judge take to make the trial more victim-friendly without threatening the rights of the defendant to a fair trial?
   - Prevent cross examination that is needlessly repetitive, irrelevant and humiliating.
   - Control defence tactics by focusing on the relevancy issue.
   - Allow for witnesses to seek clarification, express concerns, or contribute to the direction of the exchange.
   - Embrace a more affable style of interaction with complainants.
   - Ensure complainant is as comfortable as she can be in the circumstances.
   - Change the aesthetics of the courtroom.
   - Remove formal symbols.
   - Allow the witness to sit while providing testimony.
   - Look at ways to allow victim support during the testimony at trial without risking distortion of their testimony.
   - Consider measures that better prepare and support victims for and during the criminal process, e.g. legal representation for victim or adjourning the hearing where victims break down and need time to compose themselves.
7. How can judges enhance the quality of evidence of complainants?
   - Allowing or asking open questions and avoiding leading or suggestive questions.
   - Prohibiting inappropriate questioning as this reduces the quality of evidence heard.
   - Minimizing the authoritative demeanors as this can reduce the quality of evidence.
8. When do judges know they need to control defence tactics in their courtroom?
   - Consider whether the defence tactics in cases of truthful complainants cause irreparable harm to the victim and to the administration of justice.
   - Consider whether it will perpetuate disadvantage such as dissuading other complainants from seeking justice in the criminal justice system.
   - Consider whether it will bring the administration of justice into disrepute.
   - The judge has to ask, when the defence starts cross-examining the complainant on certain factors, the question whether the implicit purpose of the cross-examination is to suggest that the complainant "is the kind of person to lie" or "the kind of person to consent.

Source: UNODC. 2019. Handbook for the Judiciary on Effective Criminal Justice Response to Gender-based Violence against Women and Girls.

8.5 OPTIONS FOR EXERCISES

Below are a number of possible options for delivering the material in this Module.

EXERCISE: Video and discussion – Mock Trial
Instructions
Show the mock trial video, developed by UNODC in partnership with the Namibian judiciary and pause after each segment for discussion. Bad version: https://www.youtube.com/watch?v=J5Ye2VKEJl4&t=17s Good version: https://www.unodc.org/rosaf/en/stories/2023/May/ccpcj-side-event-on-survivor-centered-gender-based-violence.html Generate the discussion with the following questions: • What do you think of the judge's approach to this case? • What could they have improved? • Is there anything else you noticed?
Facilitators notes
The first part of the film provides a critical, insightful depiction of everything that can "go wrong" in a courtroom, which would further violate the survivors' rights. Even the judicial officers' attitudes, e.g. prejudices, body language, tone of voice, etc., could prompt factors to hinder the course of justice. The second part of the film presents the "correct way" judicial officers should manage the environment of the courtroom, thereby fostering a survivor-centred approach. Survivors should feel protected and supported to testify, and their agency and autonomy should be promoted. Ultimately, these factors impact the quality of evidence obtained.

EXERCISE: Video and discussion - U-TURN TO HOPE. FULL MOVIE. NAMIBIAN.DOCUMENTARY DRAMA
Instructions
Show parts of the video: https://www.youtube.com/watch?v=lgM4FpRR1-k and pause after each segment for discussion. Generate the discussion with the following questions: • What do you think of the investigator, prosecutor and judge's approach to this case? • What could they have improved? • Is there anything else you noticed?
Facilitators notes
Highlight when discussing the insensitive and ineffectual approach: • Use of myths • Victim-blaming attitudes. Insensitive and dismissive attitudes about the victim • Over-reliance on physical evidence • Lack of early and meaningful investigation • Minimizing GBV • Insensitive approaches empower the perpetrator • Traumatizing courts. Courts are formal and unfamiliar places for victims. • Difficulties in testifying in open court. Victims often feel overwhelmed and re-traumatized by having to testify in open court, in front of the accused who is someone they fear.

- Problems with evidentiary rules and criminal procedures. Judges who allow myths and stereotypes to sway their decisions regarding the admissibility of evidence and the defence cross examination contribute to the secondary victimization of victims as well as influence the weighing of evidence in the adjudication of the case.
- Victims fear perpetrator and not protected.
- No court support for victim.
- Lack of confidentiality.

Highlight when discussing the victim-centred and offender accountability approach

- Treating GBV, and in particularly marital rape, as a serious crime
- Ensuring comprehensive evidence gathering
- Understanding trauma and how trauma can impact the recollection of memories for victim's statement
- Assessing the evidence without the use of myths or stereotypes, and with an understanding of trauma, focusing on the credibility of the incident and not shifting all the focus onto the victim.
- Treating the victim in a sensitive manner, allowing her to speak her concerns, listening empathetically to her concerns and in a victim-friendly space.
- Victims who are supported and treated in a respectful and compassionate manner and empowered by skilled professionals are not only less likely to withdraw support from the process, but also more likely to feel able to tell what they know in a clear and coherent manner
- Friendly courtroom environment can facilitate a victim's testimony, protect her privacy, identify and dignity. This not only enables her cooperation and reduces her trauma but improves the quality of her testimony and contributes to a more successful outcome.
- In camera hearings/ closed hearings that limit the public and media can protect the identity of the victim and facilitate her testimony.
- Prohibit use of discriminatory evidentiary rules (e.g. victim's sexual history when it is unrelated to the case, adverse inference to be drawn solely from a delay in reporting and cautionary or corroboration rules and practices)
- Prevent unwarranted and /or humiliating questioning for the victims as these rely on myths and stereotyping.
- Permit support person for victims. This measure can ease the victim's experience during the trial, particularly during her testimony.

Source: UNODC. "U-Turn to Hope" Full Movie. Namibian documentary drama.

EXERCISE: Small groups on accommodating witnesses in the courtroom

Instructions

Distribute the following chart to all participants. Ask each of them to take 5 minutes to put an "X" in the boxes where they believe that the procedure meets the listed justice goals. No discussion with their colleagues. Then divide the large group into small groups and ask participants to share their ideas with their colleagues. Back in the plenary asks the groups to identify areas that they felt were controversial and where they were unable to find consensus. Explore their reasons for their opinions.

How do the following measures and procedures listed at the left fulfill the listed goals of the justice system?

Procedures	**Justice Goals**					
	Ensure Conviction where evidence is sufficient	Ensure that the best evidence is obtained from the witness	Protect the victim's dignity	Encourage victims to come forward and agree to testify	Protect the suspect's right to a fair trial	Enhance Public Confidence in the Justice System
Media ban on publication of victim's name or any information that might lead to her identification						
Support person in the courtroom						
Support person sitting near (behind) the victim when she testifies						
A screen in the courtroom that allows the suspect, the defence counsel and the judge to see the victim while preventing the victim from seeing the suspect during testimony						
Use of a separate room for the victim's testimony, linked to the courtroom by closed circuit TV. The judge, lawyers and suspect remain in the courtroom and view the victim on the courtroom TV screen						
Victim's name and personal information removed from the public court record (use of initials, or pseudonym)						
Courtroom closed to all members of the public for the entire trial						
Courtroom closed to all members of the public for the victim's (and the suspect's) testimony						
Use of victim's video-taped police interview filed as an exhibit at trial to reduce the need for the prosecution to examine the witness on these same facts in Examination in Chief. The victim is still required to testify that the police statement is truthful and accurate. She may be questioned on other matters by the prosecutor in Examination in Chief. She may also be cross-examined by defence counsel on the statement.						

Source: Gordon, F and Sayson, W. UNODC Training of Prosecutors in Palestine.

EXERCISE: Scenario discussion in small groups on accommodating witnesses in the courtroom

Instructions

Put the following scenario on a powerpoint or handout for distribution. Ask the small groups to discuss and answer the following questions:

Q1. What specific trauma-informed approaches ought to be considered by a judge in order to increase the potential for a full and candid account from the victim/witness?

Q2. What steps can the judge take to make the trial more victim-centred without threatening the rights of the defendant to a fair trial

Q3. In assessing overall reliability and credibility of the witness, what considerations should the judge take in assessing inconsistencies in the victim's testimony and statements

Scenario

During a criminal trial where the accused was charged with one count of rape that occurred three years ago, the judge heard from the three prosecution witnesses: the complainant, the police who received the complaint, and the criminal investigator. No other witnesses were called by the prosecution.

The courtroom was open to the public, media was present and the accused's family members and supporters occupied the majority of seats. During examination-in-chief of the complainant, Hanit, the judge heard that she had been drinking with her friends at a party where she met up with an acquaintance she knew from university, Garvesh and his friends who started drinking with them. After consuming a number of alcoholic drinks, Hanit went to the bathroom where she alleges Garvesh followed her and raped her. Her testimony at trial was she did not consent; she was scared and felt powerless to resist. She went straight home, did not say goodbye to her friends, showered, and went to bed. She told her mother what happened in the morning and her mother took her to the hospital and called the police.

At the trial, during a lengthy cross-examination where the complainant remained on the stand for over 2 days, the defence counsel asked numerous questions about the inconsistencies from her previous statements, specifically on the difference to the number of drinks she had during the party, her recollection of the times she arrived at the party, when she first met the accused, when she went to the bathroom, when she left and when she told her mother. The defence lawyer also raised numerous times the fact that her subsequent statements and testimony included additional details that had not been in the first statement. The defence counsel cut her off when Hanit tried to explain she was in shock after the incident and that the first male police officer who questioned her made her feel uncomfortable asking whether she went to the party looking for sex and making negative comments as to what she was wearing.

Facilitator's notes

Q1. Trauma-informed approaches

- Understanding that the victim, Hanit has experienced primary trauma experienced by the sexual violence as well as secondary victimization by how she is treated by the criminal justice system itself.
- Good approaches include: Judges recognizing the victim's trauma and speaks to victims in a manner that will put the victims at ease, as well as ensure measures to keep the victim safe from the defendant and his family during the court proceedings; Judges examine the facts of the case, not the victim's personal life or characteristics

Q2. Making the trial more victim-centred

- A victim-centred approach seeks to minimise re-traumatisation associated with the criminal justice process by providing support to the victim and empowering her as engaged participants in the process.
- The notion of testimony is associated with the possibility of granting a voice to those who have been harmed.
- Provide special measures to facilitate victim's testimony so that she can give voice to her trauma (enabling courtroom measures)

- Treat victims with dignity and respect, includes prevent cross examination that is needlessly repetitive, irrelevant and humiliating.
- Understanding feelings of shame. In undertaking a complete analysis of the evidence, judges ought to be aware of how the trauma can cause these intense feelings of shame. They should consider whether their inferences arising from the complainant's testimony of feelings of shame, self-blame and regret are based solely, or primarily, on myths about how an ideal victim responds to the experiences of violence.
- Be aware of, consider and use effectively available special measures to facilitate victims' participation.
- Creating an enabling courtroom environment

Q3. Assessing reliability and credibility of witness

- Realize that there might be a number of reasons why judges are faced with considering the issue of inconsistent statements of victims of gender-based violence (fractured memories, negative feelings or emotional numbness when questioned; providing multiple statements before trial; ask who questioned her, whether she needed interpreter, etc?
- Common defence tactics is to rely on myth.
- South African case law: In S v Mafaladiso, the Supreme Court of Appeal stated that the approach to dealing with the contradiction in versions by the same witness is not to determine which version is correct but to be satisfied by the reason for the contradictions, this could be because of the witness failing to recollect events or alternatively due to dishonesty. Not every error by a witness nor every contradiction affects the credibility of a witness and that contradictory versions should be assessed holistically.

Source: Prepared by E. Skinnider for UNODC Judges Webinar in Nepal.

MODULE 9.

Evidentiary issues

SUMMARY

This module:

- Discusses the importance of combatting discriminatory use of evidentiary rules and understanding the judges' role in ensuring non-discriminatory interpretation and application of evidentiary rules.
- Provides guidance to assist judges to understand why the application of evidentiary rules makes it challenging to get convictions in GBV cases.
- Sets out some considerations regarding relevancy; admissibility of sexual history evidence; prompt compliant requirements or practices; corroboration requirements or practices; propensity evidence of defendants; and the use of expert witnesses.
- Sets out some basic information regarding forensic evidence in GBV cases, including understanding some of the challenges.
- Sets out some basic information regarding electronic (digital) evidence in technology-related GBV cases.

9.1 COMBATTING THE DISCRIMINATORY USE OF EVIDENTIARY RULES

Cases involving GBV are, of course, subject to the rules of evidence and procedure laid down in the law. There are specific rules of admissibility of the different types of evidence (e.g. real, demonstrative, documentary and testimonial). Judges play an essential role in ensuring the non-discriminatory interpretation and application of evidentiary rules. This includes ensuring that all relevant evidence is brought before the courts, as well as disallowing irrelevant evidence being brought before the court.

International standards. The UN Updated Model Strategies and Practical Measures specifically urge states to ensure that:

- Evidentiary rules are non-discriminatory and allow for all relevant evidence to be before court. Evidence rules are non-discriminatory; all relevant evidence can be brought before the court; rules and principles of defence do not discriminate against women; and "honour" or "provocation" cannot be invoked by perpetrators of violence against women to escape criminal responsibility (Article 15(d)).
- Complainant's sexual history. The introduction of the complainant's sexual history in both civil and criminal proceedings is prohibited when it is unrelated to the case (Article 15(e))
- No adverse inference. No adverse inference is drawn solely from a delay of any length between the alleged commission of a sexual offence and the reporting thereof (Article 15(e)).

- Consider prior acts of violence. 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 law (Article 15(g)).

The paradox for cases involving GBV is that often there has been little meaningful case building done at the investigation stage or due to the nature of the crime there are no other witnesses or little physical evidence, resulting in over-reliance on the victim's statement while at the same time many of the evidentiary practices were traditionally developed out of society's beliefs about women and girls resulting in judges viewing the victim's testimony with at best, caution and at worse, suspicion. Given this reality, the discussion on evidentiary rules in this section predominantly covers the judicial role in handling the form of examination of the victim's testimony.

CONSIDERATIONS REGARDING RELEVANCY

For evidence to be admissible it must be relevant (i.e. when it has any tendency in reason to make the fact that it is offered to prove or disprove either more or less probable), material (i.e. if it is offered to prove a fact that is at issue in the case) and competent (i.e. if it meets requirements of reliability). Because a common defence tactic is to focus on irrelevant and peripheral details, relying on myths and gender stereotypes to attack the victim's credibility, judges need to:

- Recognize common myths and gender stereotyping in defence's line of questioning that attempt to cast doubt on the victim's credibility merely by focusing on behaviour that is viewed as "morally suspicious", such as walking along late at night; dressing provocatively, drinking alcohol.
- Understand the distorting effect of evidence grounded in myths and gender stereotypes. Examine the prejudicial effects of evidentiary rules and the ways in which this type of evidence reinforces gender inequalities. For instance, evidence introduce to prove that the complainant is sexual promiscuous in order to suggest that the victim is more likely to make a false allegation and is generally less trustworthy or evidence that they are dressed a certain way to suggest that they are more likely to consent to the sexual act.
- Query the relevancy of this line of questioning during the trial and stop prejudicial defence questioning. Determine if the evidence's probative value is substantially outweighed by a danger of unfair prejudice, confusing the issue, misleading the trier of fact, or wasting time.
- If the line of questioning has not been objected to, then assess whether the evidence is relevant and explicitly call out the use of myths and gender stereotypes. In doing so judges should consider the following:
    - Relevancy test: Do any of these kinds of behaviour have any tendency in reason to make the fact that the incident of violence occurred more or less probable?
    - Material test: How does proving any such behaviors such as walking alone at night or dressing provocatively go to the material issues of the case?
    - Competence test: What does information about a complainant's work, dress, motherhood or marital status, disability, attitude and demeanor or abuse history suggest about their credibility?
    - Probative versus prejudicial. Is the evidence's probative value substantially outweighed by a danger of unfair prejudice, confusing the issue, misleading the trier of fact, or wasting time?

CONSIDERATIONS REGARDING THE ADMISSIBILITY OF SEXUAL HISTORY EVIDENCE

Often in GBV cases, the focus shifts onto the victim away from the perpetrator and the actual violent incident. Another common strategy for defence counsel is to introduce evidence concerning the victim's sexual history. Defence lawyer's direct and indirect use of sexual history evidence remains a powerful tool to undermine the credibility of the prosecution's chief and often the only witness, the complainant. Allowing such evidence based on the myth that unchaste women are less worthy of belief (that they are less credible) and unchaste women are more likely than chaste women to consent (that they have consented to the sex).

Judges should consider:

- That the international standards prohibit the introduction of the complainant's sexual history when it is unrelated to the case.
- Intervening to prevent the introduction of inadmissible evidence on the victim's prior sexual conduct and consent.
- Hold closed hearings in the event that there are questions about the admissibility of sexual history evidence.
- Avoid the use of myths and gender stereotyping in arguing or determining admissibility.
- Stop analyzing whether the victim consented due to past sexual history in judgments.
- Provide detail legal reasoning as to why sexual history evidence is not relevant, connecting this issue with gendered inequality or the prejudicial effects of sexual history evidence.

CONSIDERATIONS REGARDING PROMPT COMPLAINT REQUIREMENTS OR PRACTICES

Prompt complaint requirements are procedural or evidentiary rules or practices that refer to the timeframe between the incident of violence and when the report is made. Sometimes statute of limitations provisions require the victim to report the crime within a set number of days, weeks or months or else prosecution will be barred by law. Other provisions may include a rule where an adverse inference can be made as a result of delay on the part of the victim in making a report. Even when there is no explicit rule, defence lawyers and even judges continue to make reference to the delay in reporting and how this is a factor for consideration of a complainant's credibility.

Judges should consider:

- That the international standards specifically require that no adverse inference is drawn solely from a delay of any length between the alleged commission of a sexual offence and the reporting thereof.
- That the practice of prompt complaint requirements is not supported by any evidence that delayed reports are less truthful. Statistics indicate that most cases of sexual violence are never reported at all and research indicates that it is not inherently 'natural' for the victim to confide in someone or to disclose immediately following the violence.[187]
- Intervening to prevent cross-examination about the victim's credibility based on the introduction of delayed reporting.
- Avoiding the use of myths and gender stereotyping in assessing the lack of physical evidence due to late reporting is fatal to the case.
- Stop analyzing whether the victim was not credible due to delayed reporting in judgments.
- Avoiding using language in judgments that implies the victim is blamed for delayed reporting.
- Providing detail legal reasoning as to why no adverse inference should be drawn solely from a delay in reporting.

CONSIDERATIONS REGARDING CORROBORATION REQUIREMENTS OR PRACTICES

Corroboration requirements are provisions or practices that prohibit convictions solely on the basis of a victim's testimony and require corroborating evidence such as physical, medical or forensic evidence or the testimony of additional witnesses that supports the victim's testimony. This is linked to the cautionary rule which requires courts to treat the evidence of a victim of sexual violence with special caution and to take special care if grounding a conviction on the basis of such evidence alone. In cases tried by juries, the court provides a cautionary instruction to the jury.

[187] International Commission of Jurists. 2015. Sexual Violence against Women: Eradicating Harmful Gender Stereotypes and Assumptions in Laws and Practice.

Traditionally corroboration requirements and cautionary rules where they existed only related to sexual violence offences. Even where a country has removed the rule regarding corroboration requirements, as required by international law, a common practice by defence is to frame the question of how to apply reasonable doubt in "he said/ she said" cases as weighing in favour of the defendant, no matter the assessment of the credibility of the incident based on the victim's testimony. Studies also show that courts remain reluctant to convict solely on the basis of the victim's testimony.[188]

Judges should consider:

- That the international standards require that the credibility of a complainant in a sexual violence case be understood to be the same as that of a complainant in any other criminal proceeding.
- Intervening to prevent cross-examination about the victim's credibility based on the lack of corroborating evidence.
- Avoiding the use of myths and gender stereotyping in assessing the lack of physical evidence.
- Appreciating that there is no need for corroborating evidence when objectively determining credibility issues. Medical evidence is not required as corroboration.
- Not dismissing victim's testimony as not credible unless the contrary is clearly indicated.
- Understanding that there is no need for a medical examination.
- Do not instruct the jury or yourself to treat the evidence of a victim of sexual violence with special caution and to take special care if grounding a conviction on the basis of such evidence alone.
- Stop analyzing whether the victim could have fought back in arguments or judgments.

CONSIDERATIONS REGARDING PROPENSITY EVIDENCE OF DEFENDANT

Propensity evidence, sometimes referred to as evidence of the defendant's bad character or similar fact evidence, is usually only admitted if determined to be relevant. It might be excluded if its probative value is outweighed by its prejudicial risk.

Judges should consider:

- Admitting propensity evidence where it has sufficiently high probative value to outweigh its prejudicial risk.
- Balancing between the risk that the fact finder, hearing that the defendant has committed other misconduct, will be unduly influenced by the propensity evidence, will give it too much weight, and be too ready to convict versus the relevancy and probative evidence that if kept out might risk the perpetrator going free.
- Think about whether the defendant's other behaviour says little about how the defendant behaved on a particular occasion in the absence of striking similarities versus whether the defendant's other behaviour says something about how the defendant behaved on a particular occasion. This first position would require the various alleged sexual assaults be virtually identical before considering that the defendant may have behaved the same way in the different situations. The second position holds that despite the lack of a signature, if there was considerable similarity between situations, this individual has a strong tendency to behave in this way in this kind of situation.

CONSIDERATIONS REGARDING THE USE OF EXPERT WITNESSES

Expert evidence can assist judges in providing context for a better understanding of the dynamics of GBV, why the victims behaved in certain ways, and the myths and gender stereotypes around these cases. The general rule regarding expert witnesses is that they can only be called to give evidence of issues that are outside

[188] International Commission of Jurists. 2015. "Sexual Violence against Women: Eradicating Harmful Gender Stereotypes and Assumptions in Laws and Practice".

the expertise of the court. They cannot be used to bolster a case that is already weak. Each case must be taken on its own merits and an expert should only be called where they can legally assist the court. Types of expert witnesses include: medical professionals; law enforcement experts; victim advocates; psychologists, psychiatrists, clinical social workers and other counsellors. Different types of information to which experts can provide testimony regarding the mental health, behaviour and demeanor of victims of GBV include: on victim behaviour that is described by the defence as "unusual" such as failing to fight or resist, experiencing freezing or flopping, having a lack of injury, delayed reporting, minimizing the violence, showing flat affect, not being able to remember, providing inconsistent statements, blaming oneself for the violence; on common victim reactions and general criteria for PTSD; on whether the victim's behaviour or symptoms are consistent with PTSD diagnosis; how rape and intimate partner violence myths acceptance and belief that bad things happen to bad people have an impact on perceptions of victim's credibility.

Judges should consider whether the use of an expert witness[189]:

- Will inform the court of commonly known characteristics of abuse victims so that they can compare the behaviour of the victim to that profile.
- Will reduce the likelihood that the court will develop negative feelings against the victim based on myths and gender stereotyping.
- Will enable the court to examine the facts without interference of bias or emotion.
- Challenge the plausibility of the victim's account at trial, not to bolster the victim's own personal qualities of truth-telling or falsehood.
- Explain why victims retract and give the court reason to assess in-court retractions.
- Assist the court in evaluating credibility, not enhancing that credibility.

9.2 ISSUES RELATED TO FORENSIC EVIDENCE

FORENSIC EVIDENCE – BENEFITS AND CHALLENGES SPECIFIC TO GBV CASES

Understanding the benefits as well as challenges with forensic evidence in GBV cases is important for judges who are evaluating the evidence at GBV trials.[190]

The benefits. For judges, adjudicating cases of GBV can be very complex, especially where it involves intimate partners. Forensic evidence can assist in establishing what happened in an alleged incident, who is (are) involved, when and where the incident took place, and how the incident occurred. While forensic evidence cannot directly address the motive behind an alleged incident, it can provide intelligence that could inform reasonable inferences in a case.

- In cases involving alleged sexual violence, including rape, the biological material, such as semen and saliva, can assist in addressing whether sexual contact has occurred or not irrespective of consent. Subsequent DNA analysis can then assist in establishing the possible source of any semen or saliva, and therefore, the identification of the potential offender in an alleged incident.
- Because sexual violence usually occurs without any witnesses, the recovery of body fluids, DNA and trace evidence can provide a crucial link between the victims and the defendants.
- There is important value of forensic evidence in a number of specific GBV cases, including the biological material in statutory rape cases where the victim is below the legal age of consent; drug/toxin analysis in cases of drug-facilitated sexual violence; and blood stain pattern analysis to assist reconstruct events at violence scenes to assist in corroborating accounts.

[189] UNODC. 2014. Handbook on Effective Prosecution Response to Violence against Women and Girls. P. 112.

[190] This section provides a summary of key points relating to forensic evidence from a recent UNODC handbook on the issue. For more detail please review: UNODC. 2024. "Handbook for Criminal Justice Practitioners: Forensic Evidence Processing in Gender-Based Violence Cases".

- In cases where the perpetrator is unknown, biological material, fingermarks, footwear marks or trace material can assist in identifying the individual.
- Forensic evidence such as analyzing the persistence of acid phosphatase (AP), an enzyme found in semen, and sperm cells can provide intelligence as to the alleged time since intercourse (TSI). Generally, a TSI greater than 72 hours minimizes the chances of detecting AP and sperm cells on intimate samples.

The challenges. Judges need to keep in mind that forensic evidence is only one aspect of GBV cases. Several factors can impact whether there will be forensic evidence submitted at trial and how strong it might be, as this will be dependent on the case circumstances, available resources, treatment of the victims, etc. Judges need to be mindful that the absence of forensic evidence does not automatically mean that the incident did not occur. Judges should be guided by the UN minimum standards set out in the Essential Services Package to ensure that any decision not to proceed is not based solely on the fact that there is no medico-legal report or that the report is inconclusive.[191] Judges should keep in mind the challenges to appreciate why forensic evidence might not be available in a GBV case.

- In rape cases, one major challenge encountered is whether the perpetrator ejaculated during the incident or used a condom or if the individual has any underlying medical conditions, such as azoospermia. The lack of presence of sperm cells on intimate samples makes it challenging to provide scientific evidence to corroborate what happened, although it may be possible to generate a DNA profile from skin cell deposited in contact.
- Another challenge is the timeliness of the collection of any intimate samples and exhibits from the victim or defendant(s). Given that the forensic window (i.e. the chance of recovering semen and DNA from intimate samples) is 72 hours after the alleged incident, delayed reporting and delayed assistance by police and investigators in seeking forensic examinations with the consent of the victim can risk loss of forensic evidence.
- Another challenge is any post-incident activities of the victims, such as washing, taking a shower, washing any clothing, rinsing the mouth, or defecating can all result in the loss of crucial forensic evidence.
- The deconvolution of mixed profiles, where an intimate swab can contain biological material from the victim, and potentially the defendant and any recent previous partners, is complex and it may be challenging to detect the DNA of any suspect involved in the case. This can be particularly challenging in alleged gang rape cases.
- In cases where the alleged perpetrator is the intimate partner of the victim, the biological material may play no significant role and the main issue in contention is consent, which is beyond the role of the forensic scientist.
- The presence of forensic evidence in GBV cases (e.g., semen, saliva, blood, trace material and DNA) does not directly address the mens rea element of an alleged offence.
- Other forensic evidence, such as the presence of blood, detection of drugs, injuries and damage to clothing may be required to make inferences about the issue of consent in an incident. However, this does not assist in cases where the victim froze and did not resist.

As noted in UNODC's recent handbook on forensic issues in the SADC region[192]:

> In summary, the resolution of GBVAW cases, such as rape, physical assaults, femicides and other sexual offences, can be improved using forensic evidence to address specific inceptive and corroborative questions. The presence of semen and sperm DNA, for example, can assist the court in establishing whether sexual intercourse has taken place or not. Forensic DNA evidence and fingerprints can be crucial in cold cases using a NDNAD or NFD, which can assist the police in identifying unknown

[191] UN Essential Services Package for Women and Girls Subjected to Violence: Module 3: Justice and Policing.
[192] UNODC. 2024. "Handbook for Criminal Justice Practitioners: Forensic Evidence Processing in Gender-Based Violence Cases".

offenders or linking multiple crimes to identify serial offenders. Nonetheless, there are several challenges in the forensic investigation of GBVAW cases. Semen or sperm DNA may not be detected in some investigations due to no ejaculation; condom use or medical reasons. Delays in the reporting of incidents and post-incident activities can also lead to evidence loss. Further, forensic evidence can only directly assist in addressing the actus reus issues of an alleged incident (e.g., penetrator on or sexual contact). Whether an alleged incident was consensual or not is beyond the role of the scientist.

Other challenges also include:

- **Tendency for overreliance.** The overreliance on forensic evidence is based on the assumption that there was a single "truth" to be uncovered and that scientific evidence is the most legitimate method of finding it. This does not fit well if the form of violence is psychological violence which may not produce forensic evidence. Moreover, if sexual assault victims were treated in the same way as victims of other offenses such as theft and robbery, their testimony would not necessarily require corroboration. Sexual assault victims should not be held to a higher standard of proof than other victims. Unfortunately, the lack of forensic (or other types of) evidence can prompt investigators, defense counsel, and judges to take the position that the case cannot be proven beyond a reasonable doubt.
- **Wrong interpretation in the absence of forensic evidence.** There are numerous reasons why there has been no forensic evidence. This includes both the situation where the forensic exam was done (e.g. delayed reporting; untimely exam; victim might have washed or gone to toilet, compromising the evidence; insensitive or non-age appropriate exam; state does not have the capacity to collect and/or analyze) and where there was no forensic exam done (e.g. difficulties in accessing; refusal of the victim to undergo an intrusive forensic exam).
- **Lack of certainty.** There is a spectrum of physical findings produced by violence. Some physical findings are quite specific for abuse, while other findings are nonspecific and can vary due to so many factors, such as type of object or body part used, amount of force, use of lubricants, time elapsed before the exam, etc. The forensic examiners might not be trained to perform GBV exams; the collection of evidence might not be done correctly or completely.
- **Interpreting forensic evidence based on myths and gender stereotypes.** Placing reliance on some types of forensic evidence (e.g., bruises, cuts) is based on the presumption that victims will fight back when faced with any form of violence, and as a result, there will be evidence of physical force or a struggle. Forensic evidence that shows that the victim was previously sexually active can undermine their credibility and be used to argue that the violence did not occur or that the victim consented.

Judges should be aware that the forensic reports should not conclude whether the violence such as rape has occurred, but rather describe the examination. Remember rape is not a medical condition, it is a legal definition. They need to know how to interpret the forensic report. Some considerations:

- Be sensitive to the many reasons why victims might not undergo forensic examination.
- A lack of physical injuries does not mean that no violence has occurred.
- Not to see forensic evidence as indispensable to conviction.

FORENSICS – THE BASICS

Objectives of forensic evidence. The objectives of evidence collection can include seeking evidence to answer the following questions:

- What crime, if any, has been committed?
- Who is (are) the perpetrator(s) of the crime? Who is (are) the victim(s)?
- When did the crime/ incident occur? What was the sequence of events?
- Where did the crime/ incident take place?

- How did the crime/ incident happen?
- Indirectly, seeks to answer the question of why was the crime committed? What was the motive behind the alleged incident?

Whilst the victim's statement is crucial and eyewitness accounts are important in GBV cases, forensic evidence provides an effective means to independently corroborate accounts or answer the most important questions.

Sources of forensic evidence

1. **Biological material**, such as semen, blood and saliva. Such material can provide inceptive intelligence / evidence, associative evidence, or evidence to assist in identifying individuals. The presence of semen and saliva from intimate samples plays a crucial role in addressing whether sexual contact has occurred or not irrespective of consent. Subsequent DNA analysis can then assist in establishing the possible source of any semen or saliva, and therefore, the identification of the potential perpetrator. Bloodstain pattern analysis (BPA), which involves the examination of the shape, size, and distribution of bloodstains, can help with reconstruction of events at violent scenes to assist in corroborating accounts. For example, BPA can be used to establish whether an alleged incident was a suicide, accident or deliberate
2. **Trace evidence**, such as fibres, hair, paint, and glass fragments. These materials are characterized by their minute size and ease of transfer from one location to another unknowingly. Trace materials can provide associative/ corroborative evidence, linking victims, suspects, items and/or scenes.
3. **Environmental traces**, such as soil, pollen, and diatoms in drowning cases
4. **Drugs/ toxins**, and a toxicology analysis can assist in making inferences of consent and whether the victim had the capacity to consent.
5. **Fingerprints/ marks,** can be used to assist in identifying or verifying the identity of individuals in a case and provide associative evidence linking individuals, places and/ or items involved in an alleged incident.
6. **Impression evidence**, such as tool marks, footwear marks / impressions, tire tracks, bite marks and marks on fired bullets (ballistics), can assist in identifying questioned/ suspected objects or items used in an alleged criminal activity. Marks or pattern evidence can assist in determining whether a suspected weapon or item had been used in an assault and indirectly link individuals who may be in possession of the item or may have handled the item via DNA or fingerprint evidence.
7. **Digital evidence** (discussed in next section).

Forensic Evidence-Sources	
Type	**Evidentiary value**
Hair (head and pubic)	Identification of perpetrator May indicate covert drug administration
Semen, saliva, hair, fibers, debris	Links perpetrator to victim Links victim to crime scene
Blood for drug (e.g., Rohypnol/Flunitrazepam) and alcohol analysis	May indicate an inability to consent
Urine for drug and alcohol analysis	May indicate an inability to consent
Mouth, vagina, and anus swab	May indicate recent sexual contact May indicate penetration
Extra-genital injuries (injuries other than those to the genital area) include bruises, lacerations, abrasions, swellings, bites, scratches *Genital injuries may be external and/or internal	May indicate the use of force *Old injuries may indicate a history of incidents

Forensic Evidence-Sources	
Type	**Evidentiary value**
Fingernail scrapings	May indicate resistance May identify perpetrator
Ano-genital injuries include swellings, redness, tenderness, lacerations, contusions, abrasions, tears, bruises, and bleeding in the genital area including bleeding of the hymen, vagina, cervix, or anus.	May indicate the use of force May indicate penetration
Clothing including rips, crumpling, semen, fibers, soil	May indicate the use of force May identify perpetrator May link victim to the crime scene
Foreign debris on the victim's body and clothes	May link the victim to crime scene
Body examination of the perpetrator including penile swabs, and clothes	May link the perpetrator to the crime scene May link perpetrator to the victim

Source: UNODC 2014. Handbook on effective prosecution responses to violence against women and girls.

TERMS RELATED TO FORENSIC EVIDENCE

DNA analysis: Could come from samples of hair, traces of blood, semen or saliva, oral and anogenital swabs and smears. The most common form of DNA analysis used for identification is called polymerase chain reaction (PCR). PCR allows the analysis of evidence samples of limited quality and quantity by making millions of copies of very small amounts of DNA. Using PCR can generate a DNA profile.

Urinalysis evidence: Evidence of victim sedation or other poisoning.

Anoscope (also called proctoscope): A small lighted optical instrument (speculum) that is inserted into the anus for examination and photography of the anal canal and lower rectum

Colposcope: A non-invasive, lighted magnifying instrument (speculum) used for examining the ano-genital area for the detection of micro-lacerations, bruises and other injuries. A camera is attached to document the injuries (tissues within the cervix and vagina, as well as the external genitalia.

Toluidine blue: A nuclear staining solution (dye) used to detect genital and peri-anal injuries.

Wood's lamp: An instrument that shines ultraviolent light from a black light source for purposes of illuminating trace materials (i.e. blood, semen) on skin by causing visible fluorescence.

Timeframe for forensic specimens

The account of the assault will dictate whether and what specimens are collected. Persistence of biological material is variable. It will be affected by time, activities (washing) and contamination from other sources. The maximum agreed time interval (time of assault to time of collection) for routine collection is:[193]

- Skin including bite marks – 72 hours
- Mouth – 12 hours
- Vagina – up to 5 days
- Anus – 48 hours

[193] WHO and UNODC. 2015. Strengthening the Medico-Legal Response to Sexual Violence.

- Foreign material on objects (condom/clothing) – no time limit
- Urine (toxicology) 50 mL – up to 5 days
- Blood (toxicology) 2 × 5 mL samples – up to 48 hours in tubes containing sodium fluoride and potassium oxalate.

UNDERSTANDING THE FORENSIC EVIDENCE: SOME COMMON SITUATIONS

A forensic report may contain a number of different scenarios as follows:[194]

1. **Where the forensic report indicates a lack of evidence of injury:** The absence of physical injury can be a common finding and does not, in itself, disprove a sexual assault. The absence of observable injuries alone should never preclude a finding of guilt. Although most genital injury noted following sexual assault is external, internal genital injury is also possible and is more likely in cases with digital or foreign object penetration.
    - **Sometimes no injury is noted.** This can be a common finding and does not in itself disprove sexual assault. Penetrative sexual activity of the vagina, anus or mouth rarely produces any objective signs of injury. The hymen may not appear injured even after penetration has occurred. Hence, the absence of injury does not exclude penetration. The forensic examiner cannot make any comment on whether the activity was consensual or otherwise. Judges should consider if the examination was limited by what could be assessed by the naked eye due to lack of specialty tools and techniques.
    - **Limitations to the significance of genital injury.** A finding of limited genital injury or non-specific injuries does not in itself prove sexual assault. These types of injuries could be from non-consensual sexual contact, either with or without force, as well as consensual sexual contact. Judges should take a more expansive clinical picture in trial than just the injury findings. Such evidence could include external body injury, patient statement, patient appearance and demeanor, as appropriate.
    - **Most (but not all) genital injury is external.** The vast majority of genital injury noted following sexual assault is external. These injuries are seen by speculum examinations that can fully visualize the vagina vault and cervix. The evidence collected from the cervix may yield the best DNA evidence, even in cases where the victim delayed reporting.
    - **Most (but not all) genital injury is internal.** Internal injury is more likely in cases with digital or foreign object penetration.

There are several reasons for a lack of evidence of injury including:

- In some cases, medical examiners do not use special tools or techniques for a physical examination. Therefore, they may not observe existing evidence that is not obvious and easily observable to the unassisted naked eye.
- The perpetrator may have used lubricants.
- Because of a neurobiological trauma response to the rape, the victim may have responded in a way that minimized potential injury e.g., freeze.
- The report may be flawed due to the inexperience of the examiner.

2. **Where the forensic report indicates a lack of evidence of semen:** In some jurisdictions, this is used as a justification for not convicting. However, the failure to recover semen is not an indication that a sexual assault did not occur. There are several reasons why semen might not be recovered including:
    - Perpetrators might have used condoms, ejaculated somewhere else, or not ejaculate at all.
    - Semen production might be suppressed by alcohol or drug use, chemotherapy, congenital abnormalities, or frequent ejaculation prior to the assault.

[194] Aequitas. 2010. "The Prosecutors' Resources on Violence Against Women: A Prosecutor's Reference: Medical Evidence and the Role of Sexual Assault Nurse Examiner in Cases Involving Adult Victims".

- There may have been a time delay between the assault and the collection of evidence.
- Even if the victim attends the police station promptly, evidence may be lost because they washed, bathed, or even went to the bathroom before the examination.
- The evidence may have been improperly collected or stored by an untrained or inexperienced examiner.

3. **Where the report indicates physical injury and the defense of 'rough sex' is raised:** Even where evidence of injury is found, the defense of consensual "rough sex" has been raised to justify these injuries as part of a consensual sexual experience.

9.3 ISSUES RELATED TO ELECTRONIC (DIGITAL) EVIDENCE

Digital evidence is relevant in cases of GBV where electronic devices are recovered. This can be useful in a number of circumstances, such as:[195]

- Cell site analysis can assist in locating the vicinity or tracing the movement of a mobile phone, thereby corroborating, or refuting an alibi or statements made by victims, witnesses, or suspects.
- Intelligence from the web browsing history of suspects or data (such as pornographic images/ videos) held on electronic devices can provide incriminating evidence in GBV cases.
- Photos or videos taken of the crime scene and the victim can be of assistance to the court and strengthen the testimony of victims regarding where it happened as well as the state of their clothing and/or injuries. Taking photos or videos of the place where the physical or sexual violence took place and the surroundings during the investigation and handed in as exhibits in court can make it much easier for victims who have to testify and describe the scene years later.

There are a number of challenges in the adjudication of GBV cases that involve technology-facilitated violence (TFGBV).

- **Anonymity.** The anonymity that the web allows perpetrators to violate laws prohibiting GBV with impunity.
- **Criminal conduct done from a distance.** Such violence can be perpetrated at a distance, from anywhere in the world and without personal or physical contact with the victim. Obtaining crucial evidence from another country or from a service provider is often very difficult, if not impossible. This evidence can also be stored in the cloud, causing problems with jurisdiction.
- **Automation.** The criminal conduct can be automatic and easy to perpetrate, and allows perpetrators to control victim's movements, monitor their online activity and distribute images or information with limited time and effort.
- **Collectivity.** The criminal conduct can be collectively organized and perpetrated by a large number of individuals.
- **Perpetuity.** The GBV can be committed in perpetuity, as images and digital materials used to perpetrate abuse are likely to exist indefinitely or for long periods of time.
- **Volatility.** With the volatility of computer data, the data can be easily subject to manipulation or change. Thus, valuable evidence of a crime can be easily lost through careless handling and storage practices, intentional manipulation or deletion designed to destroy evidence or routine deletion of data that is no longer required to be retained. Can causes challenges of admissibility of electronic evidence in court.
- **Accessibility and affordability.** It is accessible and affordable to perpetrators, since information and communications technology have reduced the cost and difficulty of producing and distributing information at scale.

[195] UNODC. 2024. Handbook for Criminal Justice Professionals: Forensic Evidence Processing in Gender-Based Violence Cases.

- **Propagation.** It is constant and easily propagated through the Internet, re-traumatizing victims. The ease, efficiency and affordability of automating and multiplying instances of abuse against a particular group or individual means that it is an effective form of violence in wielding harm.

ELECTRONIC (DIGITAL) EVIDENCE – THE BASICS

There are a number of devices which can be used in the perpetration of TFGBV. It is important to know the extent of these devices and whether the messages/images are still available on the devices. This can include:

- Locally end-user device (e.g. personal computers, cloud storage, USB thumb drives, external hard drives, etc;
- Mobile devices (e.g. smartphones, tablets, digital cameras, satellite navigation systems, smart watches, fitness trackers, etc.);
- Network devices (e.g. routers, wireless access points, smart sensors/actors/controls, etc);
- Internet of Things (IoT) (e.g. smartwatches, Smart TV);
- Automotive vehicles;
- Virtual assets devices: e.g. involving cryptocurrencies;
- Unmanned aerial vehicles: e.g. Drones;
- Video surveillance devices: e.g. CCTV;
- Remotely on a public resource e.g. social networking sites, discussion forums;
- Remotely on a private resource e.g. an ISP user's activity logs, a user's webmail account, etc;
- In transit e.g. mobile phone text messages, or voice calls, emails, or internet chats.

TERMINOLOGY

Electronic (digital) evidence is information and data of investigative value that is stored on or transmitted by an electronic device.

Digital forensics refers to the recovery and investigation of material found in digital devices, often concerning computer crime. It covers the investigation of all devices capable of storing digital data. Several sub-branches are computer forensics, network forensics, mobile forensics and forensic data analysis.

Judges may have to review whether the search and seizure warrant was conducted legally. Judges will need to ensure that the collected evidence and the recorded chain of evidence have been done according to the legal procedures. Some considerations:

- Determine whether the search for and seizure of all electronic evidence was authorized by law.
- Ensure that no action was taken by authorities that could change electronic evidence which may subsequently be relied upon in a court of law.
- Review the record (audit trail) of all actions which are undertaken when handling electronic evidence.
- Ensure that the person seizing electronic evidence was competent to do so.

Some considerations at trial:

- When considering whether the conduct meets the definition of criminal offences, where criminal legislation does not have dedicated TFGBV offences (such as non-consensual distribution of intimate images), consider how to apply general offences to such conduct. Many acts of TFGBV could meet the definitions of such crimes as: criminal harassment; defamation, extortion, hate speech, harassing communications, identity fraud, intimidation, uttering threats, mischief in relation to computer data, stalking, or voyeurism.
- Ensure that when giving evidence, digital forensic examiners introduce themselves and gives an outline of their qualifications, experience and training. The digital forensic investigator must satisfy the court that they are sufficiently qualified to give evidence regarding the subject matter.
- The evidence presented by the prosecutor must prove that the integrity of the data or digital evidence presented in court is intact. This would imply proving that the evidence remained unaltered between the time of its seizure by law enforcement and its examination up to the moment it is being presented in court.
- If for some reason the data has been altered, the examiner will need to explain exactly how and why.
- The witness should be able to discuss the type(s) of evidence examined, how it was analyzed, and the results.

CONSIDERATIONS REGARDING EVIDENTIARY RULES FOR JUDGES:

VICTIM'S TESTIMONY

How can the judge ensure non-discriminatory application of evidentiary rules?

- What are the existing evidentiary rules?
- Judges ought to examine the prejudicial effects of evidentiary rules and the ways in which this type of evidence reinforces gender inequalities.
- Judges should review the domestic criminal legislation regarding: rape shield laws; any prompt complaint requirements or specific provisions regarding drawing an adverse inference; corroboration requirement; cautionary rules.

Interpretation evidentiary rules in a way that is compliant with international standards.

- How can the judge control and avoid aggressive irrelevant cross-examination?
- Control improper questioning by defence regarding delay reporting, balancing the rights of defendant with victim's rights.

How can the judge avoid admitting evidence that is based on myths and harmful gender stereotypes?

- Judges should ask whether the defence is trying to introduce kinds of behaviour (such as walking alone at night or dressing provocatively) or information about the victim (such as their work, dress, motherhood or marital status, disability, attitude and demeanor or abuse history) that is grounded in harmful stereotypes to discredit the victim.
- Judges ought to consider how to assess whether the evidence is being used to support the inference arising from the twin myths respecting credibility (unchaste women are less worthy of belief) and consent unchaste women are more likely than chaste women to consent).

Is the evidence's probative value substantially outweighed by a danger of unfair prejudice, confusing the issue, misleading the trier of fact, or wasting time?

- The accused's right to make full answer and defence
- Encouraging the reporting of GBV offences

- Determining whether the evidence will assist in a just determination of the case
- Removing discriminatory beliefs and biases from the fact-finding process and prejudice to the complainant's dignity and right of privacy.

Consider how to formulate the court's decision on admissibility of evidence to ensure debunking of these myths.

- Can refer to the history of the rule and note that it performs no just function.
- There is no need for credibility to be resolved only with physical corroborating evidence.
- Judges need to be careful with reasoning that in "he said/ she said" case as weighing in favor of the defendant.

FORENSIC EVIDENCE

Before reviewing the contents of the forensic report, judges should know who has conducted the examination and who has analyzed the findings, as this may result in different outcomes.

- For instance, if the examining doctor lacks specific training or is reluctant to perform rape exams the collection of evidence may have been incorrectly done or incomplete.

Keep in mind the following when reviewing the issue of forensic evidence:

- Need to ensure that any decision not to convict is not based solely on the fact that there is no forensic (medico-legal) report or that the report is inconclusive.
- Be sensitive to the many reasons why victims might not undergo forensic examinations.
- Remember that a lack of injuries does not mean that no violence has occurred.
- Not to see forensic evidence as indispensable for a conviction.

ELECTRONIC (DIGITAL) EVIDENCE

Keep in mind the following when reviewing the issue of electronic (digital) evidence:

- Review whether the search and seizure warrant was conducted legally
- Consider how to apply general offences to such conduct where there are no specific TFGBV offences in the criminal code.

9.4 OPTIONS FOR EXERCISES

Below are a number of possible options for delivering the material in this Module.

EXERCISE: Case study "friends with benefits" evidence

Instructions

Divide the group into smaller groups. Each group are members of an appeal panel asked to review a lower court's decision on allowing evidence of a previous sexual relationship at trial. Please review the scenario below and discuss whether your panel would allow the prosecutor's appeal on the basis that the evidence was not properly admitted. Provide your reasons.

SCENARIO

At the trial, the accused, charged with rape, sought to introduce evidence that he and the complainant were "friends with benefits", meaning involved in a sexual relationship. The trial judge allowed the application and held that the complainant could be cross-examined on the prior sexual relationship with the accused, on the grounds that the "relatively benign" evidence was relevant for the fact finder's understanding the context of their relationship. During the trial, the complainant was cross-examined about her previous sexual relationship with the accused, including the frequency and timing with which they had slept together after they broke up. The accused also testified about their past sexual history, characterizing the evening in question as routine, noting that sex was "expected" when they were together.

Facilitator's notes

This scenario is based on a recent Supreme Court of Canada case, R v Goldfinch, 2019 SCC 38. The Supreme Court of Canada's majority decision allowed the appeal and found that the "friends with benefits" evidence was not relevant to any proper issue at trial. As the majority explained, the evidence was relevant only to the twin myths – that because a woman has consented to sex in the past, she is more likely to have consented to the sexual activity in issue; and that a women's sexual history makes her less worthy of belief. In this case, the evidence only suggested that the complainant was more likely to have consented because she had done so in the past.

As the judge writing for the majority noted:

"The mischief Parliament sought to address in enacting s. 276 [the rape shield law] remains with us today. Sexual assault is still among the most highly gendered and underreported crimes. Even hard fought battles to stop sexual assault in the workplace remain ongoing. As time passes, our understanding of the profound impact sexual violence can have on a victim's physical and mental health only deepens. Parliament enacted s. 276 to address concrete social prejudices that affect trial fairness as well as the concrete harms caused to the victims of sexual assault….The harm causes by sexual assault, and society's biased reactions to that harm, are not relics of a bygone Victoria era".

EXERCISE: Plenary discussion on inconsistent statements

Instructions

Ask the plenary whether the following pairs of statements truly inconsistent (therefore problematic) or are they different for possibly valid reasons that need to be explored with the victim? Discuss.

SITUATION 1:

Statement 1: (Police took statement within an hour of the rape.) The victim said that the accused first put a blindfold on her and tape on her mouth. He then told her he would kill her if she screamed. Later he tied her ankles together with her shoelaces.

Statement 2: (police took statement three days later.) The victim said that the accused first told her to be quiet or he would kill her. He then put a blindfold on her and tape on her mouth. Later he tied her ankles together with a belt.

SITUATION 2

Statement 1: In her initial statement, the victim told the police that a week before the incident, she had been at the accused's house with 2 friends for coffee.

Statement 2: The victim said she had been at his house a week before for a party.

SITUATION 3

Statement 1: The victim told the police that at his house, the accused had pushed her down on the floor and she had hurt her hand. He then took her into the kitchen where he grabbed a knife. He then threw her down onto the carpet in the bedroom.

Statement 2: The victim said the accused had pushed her down on the floor. He then took her into the kitchen where he grabbed an item that looked like a knife. When he pushed her into the bedroom, she slipped on the slippery floor surface, and she felt her hand hurting.

Source: Gordon, F and Sayson, W. UNODC Training of Prosecutors in Palestine.

EXERCISE: Plenary discussion on forensic evidence

In the plenary discuss the following:

Q1: What are the benefits of forensic evidence?

Q2: What are the challenges that are specific to gender-based violence cases?

Q3: What are the rules that cover medico-legal examinations in your country?

Q4: Are these medical examinations mandatory?

Q5: Are they conducted by trained medical personnel? If not, what are some of the challenges that can arise in adjudication?

Q6: You see a comment in the forensic report stating that the victim was "previously sexually active" or "sexually experienced". Is this relevant? If so, why? If not, why?

EXERCISE: Scenario to discuss evidentiary issues

In small groups, ask each group to review scenario (powerpoint or handout) and to consider the following questions.

Q1. If the central issue is whether the victim consented to sexual touching, do you consider the factors raised by defence counsel during cross examination (e.g. attending a party intending to drink alcohol, dressing up for a party, wearing make-up and engaging in lively friendly and animated manner with males and females at the party) relevant to assessing her credibility or reliability as a witness? If you consider these factors relevant or not relevant, how would you explain this in your written judgment?

Q2. How relevant to the essential issues at trial (consent, credibility and reliability) is evidence of the victim's past sexual history, delayed reporting or requiring corroboration?

Q3. What, if any obligation do judges have to identify and control the use of improper and/or discriminatory defence tactics in their courts?

SCENARIO

During a lengthy cross-examination where the complainant remained on the stand for over 2 days, the defence counsel suggested that the sexual intercourse was consensual and his questioning techniques included extensive repetition, frequent interruption, closed questions and demanding precise recollection of peripheral details, such as the color of her underwear which he called "panties". In his cross examination of the victim/witness, the defence counsel suggested to her that she went to the party intending to get drunk and have sex; that she dressed "provocatively", wore make-up and "flirted".

The defence counsel also asked numerous questions concerning Hanit's sexual history; and raised concern that Hanit did not immediately cry out for help at the party but waited until she returned home to tell someone what happened; and that there was no conclusive forensic report as she had showered between the incident and the forensic exam.

Facilitator's Notes

Some points to cover

Q1. Discuss factors that rely on myth - Which myths and stereotypes is the lawyer relying on?

- e.g. attending a party intending to drink alcohol, dressing up for a party, wearing make-up and engaging in lively friendly and animated manner with males and females at the party.
- Questions still commonly focus on the victim's clothing and behaviour, motivation to lie, their emotionality, delayed reporting and sexual history.
- Review such myths around "she asked for it"; "it wasn't really GBV"; he didn't mean to", "she wanted it", "she lied; :GBV is a trivial event"
- Review the distorting effect of evidence grounded in myth and gender stereotyping.
- If the line of questioning has been allowed, then judges need to assess whether this evidence is relevant and explicitly call out the use of myths. In doing so they should consider relevancy test; material test; competence test; probative versus prejudicial.

Q2. Any concerning interpretations or applications of evidentiary laws?

- Review admissibility of sexual history evidence
- Review the issue of the need for corroboration

Q3. How can judge control courtroom and avoid discriminatory defence tactics

- Judges should ask whether the defence is trying to introduce kinds of behaviour (such as walking alone at night or dressing provocatively) or information about the victim (such as her work, dress, motherhood or marital status, disability, attitude and demeanor or abuse history) that is grounded in harmful stereotypes to discredit the victim
- Judges ought to consider how to assess whether the evidence is being used to support the inference arising from the twin myths respecting credibility (unchaste women are less worthy of belief) and consent unchaste women are more likely than chaste women to consent).
- Is the evidence's probative value substantially outweighed by a danger of unfair prejudice, confusing the issue, misleading the trier of fact, or wasting time?
- Bangalore Principles: sets out a number of principles for judges to be guided by:
  - a judge shall not knowingly permit those subject to the judge's influence, direction or control to differentiate between persons concerned in a matter before the judge on any irrelevant ground
  - a judge shall require lawyers in proceedings before the court to refrain from manifesting, by words or conduct, bias or prejudice based on irrelevant grounds, except such as are legally relevant to an issue in proceedings and may be the subject of legitimate advocacy.

Source: Prepared by E. Skinnider for UNODC Judges webinar in Nepal.

MODULE 10.

Analyzing facts and crafting decisions

SUMMARY

This module:

- Discusses how to incorporate a gender perspective into judicial decision making.
- It provides pointers in assessing evidence.
- Reviews some considerations for judges in factual assessments / fact determinations in GBV cases.
- Interpreting the applicable law – understanding the essential criminal elements.
- The judicial decision – gender sensitive decision-making and crafting judicial decisions.

Incorporating a gender perspective in judicial decision making requires the judge's assessment of the facts in accordance with a careful understanding of the law, free from any gender biases and gender stereotyping influences. This not only applies to the decision itself but also to the process by which the decision is made, including when assessing the evidence.

10.1 FACT DETERMINATION AND INTERPRETING THE EVIDENCE

In assessing the evidence, judges, like most people, tend to think in terms of stories and experiences that they are familiar. This can lead to assumptions regarding what they consider is "rational" behaviour and assist them in determining which witness testimony they believe. Unfortunately, many of the stories that we learn since childhood tend to reflect existing power imbalances and gender roles in society. This has an impact on how judges assess evidence in decision making. Judges need to ensure in fact assessment that they reject any myth or gender stereotyping. Judge should be questioning whether the behaviour that they expect by the victim or defendant conforms to myths or gender stereotypes.

Judges need to examine the context in which the facts took place. They should:

- Consider the dynamics of the form of violence: intimate partner violence; sexual violence; stalking; honour-related violence.
- Identify situations of power between the parties and ask whether there is a power imbalance.
- Avoid shifting from a focus on the actions and state of mind of the accused to an interrogation of the victim's state of mind and what they did and did not do during the incident.
- In assessing the credibility of the victim, have an understanding of the victims of GBV, the effects of trauma and the power dynamics that characterize such violence.
- If possible, judges should assess the gaps in the evidence needed for a comprehensive fact assessment and if they have the power, order the prosecutor to produce further evidence.

Assessing the credibility of the victim. Myths continue to inform credibility assessments of the victim, from whether they behaved "rationally" at the time of the violence to how the victim comports themselves during the criminal trial.

- Judges often look at what they believe is rationality and "good choices" by complainants to inform assessments of credibility.[196] They ask questions which are based on a construction of the "ideal victim" at the time of the violence incident: did the victim make "good choices"? Were they drunk or otherwise leading a risky lifestyle? There is no recognition that behavior is often "irrational." Actions are thus compared with hypothetical "normal" situations based on logic. Often the "rational" norm by which actions were measured is a myth or harmful gender stereotype. Whether the victim had a motive to lie, their emotionality and any delayed reporting were routinely portrayed as important in assessing the victim's credibility.
- Judges also conduct an assessment of the complainant's attributes, decisions and comportment that occurs when they are on the stand and during the criminal justice process more broadly: does the victim appear in court unkempt and disorganized? Are they too emotional? Are the responsive? Are their responses rational?[197] There is a belief that a "good" witness, that is to say credible witness, must answer all questions in calm manner and not rage against the unnecessary humiliation of a defence lawyer who takes his role of interrogation beyond justifiable limits.

Focusing on the defendant's conduct and the violent incident. In cases involving GBV, often the focus shifts away from assessing the facts around the violent incident itself and the conduct of the perpetrator to assessing the conduct of the victim. The result is to downplay the defendant's conduct and responsibility while shifting the blame towards the victim. Judges should be aware that there are a number of common myths that have a negative impact when determining the facts and assessing the evidence around the violent incident itself and the conduct of the perpetrator.

- Myths that lead judges away from the reality that most perpetrators are known to the victims and most sexual assaults happen in a familiar place. The myth that GBV is a deviant event fuels the erroneous belief that it is not a common occurrence. This feeds into the belief that the perpetrators are perverted, ugly, seedy or insane stranger or what is seen as "the other". This leads to the belief that "the other" such as aboriginal, immigrants, some visible minority, or a religious minority. This myth is based upon the assumption that "normal" men do not assault women.
- Judges should also be aware of other myths, such as seeing GBV as a deviant, and therefore uncommon event, there must be a misunderstanding as to whether or not the violence actually occurred.
- If it is viewed that GBV is not really violence but rather miscommunicated romantic signals, then judges will view men as guilty of incompetent message-decoding, rather than GBV. This supports misconceptions such as a man to believe that a woman's "no" really means "yes", that it is difficult for men to decipher what women really want so if he gets it wrong, he didn't mean to, thus he is absolved of all guilt.

10.2 APPLYING AND INTERPRETING THE LAW

POINTERS IN INTERPRETING GBV LAWS

Part of assessing the evidence is that it is done in conjunction with applying and interpreting the law. Judges need to question whether the legal provisions reflect any myths or stereotypes about GBV. Judges ought to be aware that they should not apply existing legal provisions that discriminate against women, girls or people with diverse gender identities or provisions that allow, tolerate or condone forms of GBV. Judges need to appreciate the history and context of the reformed laws. Judges should not allow extreme interpretations of procedural rules without challenging this in their courtroom. In applying and interpreting the law, judges should question whether it is necessary to challenge the gender neutrality of the law. They should consider whether the law

[196] Gotell, Lise . 2002. "The Ideal Victim, the Hysterical Complainant, and the Disclosure of Confidential Records: The Implications of the Charter for Sexual Assault Law" 40 Osgoode Hall LJ 251.

[197] Craig, Elaine. 2015. "The Inhospitable Court". University of Toronto Law Journal 10.3138.

is biased against women or whether the differential impact of the neutral laws has a discriminatory effect on women as compared to men. Judges ought to be aware of international law obligations in order to contribute to making informed and human rights compliant decisions.

Written laws and judge-made laws (in countries that follow precedents) ought to be interpreted and applied by judges in such a way to:

- An interpretation that promotes, rather than harms, the values of gender equality, autonomy and security of the person.
- Discount myths and stereotypes about women, girls and people with diverse gender identities and GBV.
- Be guided by international law and national laws which domesticate international obligations.

INTERPRETING THE APPLICABLE LAW - UNDERSTANDING THE ESSENTIAL CRIMINAL ELEMENTS

While all forms of GBV are human rights violations, this does not necessarily mean that they have been made criminal offences. National judges are bound to apply their domestic legal frameworks as per their country's legal tradition and this means that the scope of crimes varies from State to State as well as the definition or elements of the crimes. This section focuses on ensuring judges do not use inflexible standards based on perceived notions of what constitutes elements of the legal definitions of GBV offences, however they are defined. When courts use myths and stereotypes they disconnect the law from contemporary knowledge. Some of the common concerns are discussed below but should not be considered exhaustive.

Regarding sexual violence offences

Many commonly accepted myths lead to narrow interpretations of what counts as sexual offences and elements of the crime, irrespective how the crime has been defined.

Forced-based definitions	No means no approach	Affirmative consent-based definitions
• Forced-based sexual offences require proof of the use of violence, coercion, compulsion, threat, or intimidation. • Based on the enduring myth that a "true" victim will fight back or scream and yell to protect their "honor". • Also based on the belief that rape more often involves a stranger, physical force and physical injury. • Believing in these myths mean requiring victims to sustain physical injury; and requiring them to behave in ways society deems "honorable".	• No means no approach requires proof that the sexual act happened against the will of a person. • Consent is presumed unless it is explicitly or implicitly withdrawn by the victim. • Based on the myth that a "true" victim will show some resistance or at the very least say or clearly indicate a "no". • Additionally, myths support the idea that "no" may not actually mean "no" believing that men are sexually aggressive and women are sexually passive.	• Affirmative consent-based definitions require proof that the victim did not consent to the sexual act. • They do not require proof of resistance or a "no" to demonstrate a lack of consent. • Passivity does not signify consent to a sexual act; and silence is not presumed to be consent. • Since consent must be ongoing through a sexual activity and can be revoked at any time, the existence of a relationship or the fact of past sexual relations should never by itself be assumed to be an indicator of consent.

Bear in mind:

- Some countries define sexual offences as requiring an element of force or coercion or against the will of the individual. Many judges interpret such terminology from the belief that "real rape" is perpetrator by a stranger involving force and causing physical injuries. This is based on myth that victims will always struggle to defend their honor. If these factors are not present, then there is often confusion as to whether this really was sexual violence.
- When the sexual violence offence is based on lack of consent, this provides the potential for a contextual analysis of the power relations within which sexual interactions unfold. Judges should look for agreement rather than relying upon acquiescence.
- Problems remain as to the ambiguity of the legal concepts and definitions of consent; what are the conditions or circumstances that are seen to negate consent; and the way in which a defendant's "honest belief" in consent is dealt with.
- Consent may be defined in the criminal legislation or in case law and often uses the following: free agreement; free and voluntary agreement; or consent freely and voluntarily given. The criminal legislation may also prescribe some circumstances where consent is defined not to exist or under certain circumstances, consent is deemed to be vitiated or the complainant is to be regarded as not consenting. This often includes: lack of capacity to consent, including asleep, unconscious or affected by drugs; the actual use of force, threatened use of force which need not involve physical violence or physical harm; unlawful detention; mistaken identity and mistakes to the nature of the act, including mistakes generated by fraud or deceit; and any position of authority or power, intimidation or coercive conduct.
- Be careful of how myths, such as the myth that women who have previous sexual experience are more likely to have consent, influence the judges' assessment of the evidence and the application of the law.

Regarding intimate partner violence cases

A number of countries do not have specific criminal offences for domestic violence, but rather use general criminal code provisions, such as physical assault, threats, defamation, and sexual offences, to cover violence that takes place in intimate partner relationships. The challenge for judges is that these offences generally focus on the latest single incident rather than encompassing the typical pattern of coercion and control.

Bear in mind:

- Regarding intimate partner violence, when there is no specific criminal offence for domestic violence, the general criminal code provisions such as physical assault, threats, or sexual offences are applied.
- The judge should focus on the full extent of the domestic violence.

10.3 INCORPORATING A GENDER PERSPECTIVE IN THE JUDICIAL REASONING AND CRAFTING OF THE JUDGMENT

LEGAL REASONING AND DECISION MAKING

Gender equality perspective should infuse judicial reasoning and fact determination in GBV cases. Such an approach should protect victims against the operation of myths and harmful gender stereotypes and should assist in achieving substantive gender equality in victims' access to justice. Judges can play a lead role in moving judicial reasoning towards a more egalitarian approach to fact determination.[198] The risk of stereotyping arises when a trier of fact moves from proven fact to an inference about consent or credibility by way of a generalization. Before inferences are drawn, the question should be whether the underlying generalization is misleading, discriminatory, and one that should be eliminated from the fact determination process.

[198] Cunliffe, Emma. 2012. "Sexual Assault Cases in the Supreme Court of Canada: Losing Sight of Substantive Equality?" 296 Supreme Court Law Review: 57.

Interpreting "beyond reasonable doubt" and "burden of proof". An issue for judges to be aware of when assessing factors in decision-making is the concern that in cases involving GBV there appears to be extreme interpretations of "beyond reasonable doubt" and burden of proof.

"Beyond reasonable doubt". Although a high standard of proof is needed to protect innocent defendants, "beyond reasonable doubt" only requires the absence of "reasonable" doubt, not any doubt at all. Often in cases involving GBV, certainty was presented as having no doubt at all, and therefore as impossible.

- One study found that such a position - not to convict unless they were sure of the truth; needing to be 100% certain - was frequently put forth by defence lawyers with no challenges from prosecutor or judge. As defence counsel has been known to say: "If you think there is any possibility, not probably lying or must be lying, but do you think there is ANY possibility … it's not saying to her that she's lying, it's just saying I'm not sure".
- Judges need to reiterate that beyond reasonable doubt requires the absence of "reasonable" doubt, not any doubt at all.

"Burden of proof" on the prosecutor. It is often argued that due to the burden of proof being on the prosecution, doubt about the defendant was irrelevant and any doubt about the victim should result in acquittal.

- There is the tendency to focus on the victim, putting their actions and evidence on trial rather than the defendant and this is encouraged by defence counsel, e.g. "You have to assess the central witness in the case".
- However the focus should be on assessing the credibility of the alleged act, with some judges instructing the fact finders, "while the defence don't have to prove anything, you have to look at the whole situation".

Judges should consider:

- Understanding that although "beyond reasonable doubt" is a high standard of proof, it only requires the absence of "reasonable" doubt and does not mean the absence of any doubt at all, and the presumption of innocence does not mean that doubt about the defendant should be ignored. Studies have found in cases of violence against women there appears to be extreme interpretations of "beyond a reasonable doubt" and burden of proof.[199]
- Identifying and avoiding judicial reasoning which is based on stereotypes.
- Focusing on proven facts rather than inferences by way of a generalization.
- Before inferences are drawn, the question should be whether the underlying generalization is misleading, discriminatory, and one that should be eliminated from the fact determination process.

CRAFTING GENDER-SENSITIVE JUDICIAL DECISIONS

Gender-sensitive judicial decisions are those framed in terms of gender equality, security interests and affirming everyone's autonomy and dignity.

The judge should approach judicial decision making:

- By analyzing how to protect and or at least balances all of these interests.[200]
- Some courts have developed the practice of citing feminist literature in cases involving GBV.
- The judge should clearly provide legal reasoning as to how the laws have been interpreted, discussing how the international standards and norms as well as the myths, stereotypes and discredited assumptions are addressed.

[199] Horowitz, I. & Kirkpatrick, L. 1996. "A concept in search of a definition: The effects of reasonable doubt instructions on certainty of guilt standards and jury verdicts. Law and Human Behaviour, 20, 655-670.)

[200] Koshan, J. 2016. "Marriage and Advance Consent to Sex: A Feminist Judgment in R v JA". Oñati Socio-legal Series [online], 6 (6), 1377-1404.

- The criminal laws cannot be applied in abstract. Judges need to set the context in their judicial decisions. This could include the history of biases written in the laws and procedures and the concerns raised by the advocacy which might have led to the reform of the laws, the current realities for women, girls and people with diverse gender identities through the statistics and research, and the need to interpret the laws in light of all of that and the interests the law is seeking to protect.
- Avoid language that use or rely on stereotypes when crafting the judgment and use inclusive language.

10.4 DEALING WITH WOMEN VICTIMS AS DEFENDANTS

The international standards urge states to provide the courts with power to take into account during the prosecution and sentencing, claims of self-defence by women who have been victims of violence, particularly in cases of battered woman syndrome. [201] Given the complex nature of GBV, particularly with intimate partner violence, female victims may find themselves in the criminal justice system as the person charged with assault or murder as a result of hitting back in retaliation or in self-defence. These victims can suffer underserved consequences, including jail time and possible loss of custody of their children. Victims who are arrested and charged after a domestic violence incident are far less likely to report violence again and more likely to remain in a dangerous situation. Victims who report to the police may also trigger a criminal investigation into their own behaviour in some countries that have criminalized prostitution or adultery.

A full discussion of how to deal with women in conflict with the law and how violence against women can be a pathway to offending and imprisonment is beyond the scope of this handbook. However two common issues will be highlights: (1) the situation of battered women syndrome; and (2) determining predominant aggressor when there appears to have been mutual violence. For more information on women in conflict with the law, please see UNODC. 2020. Toolkit on Gender-Responsive Non-Custodial Measures; and UNODC. 2014. Handbook on Women and Imprisonment.

BATTERED WOMEN SYNDROME

Battered women syndrome is a psychological condition and describes a pattern of behaviour that develops in victims of intimate partner violence as a result of a serious, long-term abuse. Victims become so depressed, defeated and passive that she believes she is incapable of leaving the abuser.

- The Updated Model Strategies provides that "battered women syndrome" is suffered by women who, because of repeated violent acts by an intimate partner, may suffer depression and are unable to take any independent action that would allow them to escape the abuse, including refusing to press charges or to accept offers of support.
- The theory of "learned helplessness" was originally developed in the 1970s and adopted by Lenore Walker to explain why women find it difficult to leave a violent relationship.
- Studies of battered women have found rates of PTSD ranging from 31 to 84%.[202] This syndrome has been recognized by some courts and in some countries' legislation.
- Judges may consider that battered women syndrome is an indication of the defendant's state of mind in assessing the defence of self-defence (e.g. the syndrome meant that she was acting as she had a reasonable fear of imminent danger) or may consider it a mitigating circumstance.
- There has been some controversy about court's using the term "battered women syndrome" and that such a term can be imprecise and misleading and that the knowledge pertaining to battering and its effects does not rest on a singular construct, as the term implies.

[201] Updated Model Strategies and Practical Measures. Art 15(k).

[202] US State Department. 1996. "The validity and Use of Evidence Concerning Battering and Its Effects in Criminal Trials: Report responding to Section 40507 of the Violence against Women Act".

VICTIM RESISTANCE VIOLENCE AND THE PREDOMINANT AGGRESSOR ANALYSIS

Victims targeted repeatedly by intimate partner violence can and do become violent as a result. This is referred to as the phenomenon of "victim" resistance violence. There can be cases where although the victim resisted the continuation of the violent relationship with their own violence, the dominance, control and timing of the onset of the pattern of violence in the relationship resided with the abusive partner. In addition, some perpetrators are highly manipulated and learn how to set up their partners to engage in violent action. The judge needs to consider patterns and effects over time rather than on the last incident as this can produce erroneous conclusions about responsibility. They might use violence to respond to a perception of imminent threat of physical violence; to respond to psychological harm; violence that is associated with the inability to withstand the growing tension in the relationship and a desire to "just get it over with"'; violence that resists the dominant aggressor; or violence that is associated with attempting to escape the relationship.

In cases where the defendant has been a victim of GBV, judges need to ensure that they have all relevant information, including the social context in which the defendant experienced the GBV.

- Judges should require the prosecutor provide evidence that one party is the predominant aggressor in cases of dual arrest.
- Assess all the evidence to fully understand each person's use of violence within the context of their relationship.
- The evidence judges should be looking for to determine which party was the predominate aggressor and who was the victim or whether the violence by the defendant in this case was coercive or resistance violence:
    - Look beyond the current case and get information about the complainant's and defendant's entire relationship.
    - What has been the pattern of abuse and violence throughout the relationship?
    - Is the defendant the one who holds the balance of power in the relationship? For example, who is in control of the finances? Who has dominated the relationship?
    - Who controls decision making, such as choice of friends, decisions about clothing and appearances, decisions about types and frequency of sex, etc.
    - Who initiated the violence at the outset?
    - Is there evidence of coercion and control in the relationship?
    - Was the violence out of fear, anger, controlled?

Guide to judges:

- Appreciate that the limitations of reviewing the evidence in intimate partner violence cases to the singular or recent incident, acts of resistance violence can appear to be mutual violence or even coercive violence, when the same violence, more thoroughly assessed in social context and in the context of the pattern of power and control over the course of relationship, is clearly a form of resistance violence.
- Use the dominant aggressor analysis to determine if the violence was resistance violence.
    - Determine if the resistance violence was used in self defence.
    - Resistance violence which includes initiating violence will often fall outside the criminal defence of self-defence. In these cases, consider the defendant's situation as a mitigating factor during sentencing considerations.

CONSIDERATION FOR JUDGES

Fact determination and interpretation of evidence

1. What was the context in which the facts took place?

- Look at the dynamics of the form of violence: intimate partner violence; sexual violence; stalking; honor-related violence.
- Need to identify situations of power between the parties. Is there a power imbalance?
- Judges ought to avoid shifting from a focus on the actions and state of mind of the accused to an interrogation of the victim's state of mind and what the victim did and did not do during the incident.
- In assessing the credibility of victim, judges need to have an understanding of the victims of GBV, the effects of trauma and the power dynamics that characterize such violence.

2. Does the behaviour that judges expect by the victim or defendant conform to myths or harmful gender stereotypes?

- Ensure in fact assessment that judge rejects any myth or harmful gender stereotyping. Judge needs to make visible the power imbalance.

3. Can the judge assess the gaps in the evidence needed for a comprehensive fact assessment?

- If evidence is not enough, in some jurisdictions, the judge has the power to order the prosecutor to produce further evidence.

APPLICABLE LAW

4. Do the legal provisions reflect any myths or stereotypes about GBV?

- Judges ought to be aware that they should not apply existing legal provisions that discriminate against women, girls or people with diverse gender identities. In particular, provisions that allow, tolerate or condone forms of GBV, including forced marriages, laws that criminalize being lesbian, bisexual or transgender, women in prostitution or adultery.
- Judges need to appreciate the history and context of the reformed laws.
- Judges should not allow extreme interpretations of procedural rules without challenging this in their courtroom.

5. In applying and interpreting the law, is it necessary to challenge the gender neutrality of the law?

- Consider whether the law is bias against women, girls or people with diverse gender identities.
- Judges need to determine the differentiated impact of the law on women and men.

6. What is the relevant international law that can be applied?

- Judges ought to be aware of international law obligations in order to contribute to making informed and human rights compliant decisions.
- International law calls on States to ensure that all forms of GBV in all spheres, which amount to a violation of their physical, sexual or psychological integrity, are criminalized and introduced, without delay, or strengthened legal sanctions commensurate with the gravity of the offence as well as civil remedies.[203]
- International law further calls on states to characterize sexual assault, including rape as a crime against a person's right to personal security and integrity; criminalize marital and acquaintance/date rape; be based on lack of freely given consent and take into account coercive circumstances. Any time limitation, where they exist, should prioritize the interests of the victims and give consideration to circumstances hindering their capacity to report the violence suffered to competent services/ authorities.[204]

[203] CEDAW Committee General Recommendation No. 35, para 29.
[204] CEDAW Committee General Recommendation No. 35, para 33.

7. Look at case law (national as well as comparative from other countries if possible) that promotes substantive equality on this issue, without condoning myths and harmful gender stereotypes.

JUDICIAL REASONING

8. Apply an interpretation of the law that promotes substantive equality and is not based on myths or harmful gender stereotypes.

- Reasonable doubt does not mean the absence of any doubt, and the presumption of innocence does not mean that doubt about the defendant should be ignored.
- Judges need to identify and avoid judicial reasoning which is based on stereotype.
- Focusing on proven facts rather than inferences by way of a generalization.
- Before inferences are drawn, the question should be whether the underlying generalization is misleading, discriminatory, and one that should be eliminated from the fact determination process.

9. Crafting the judgment

- Avoid language in judgments that use or rely on stereotypes.
- Use inclusive language.

10.5 OPTIONS FOR EXERCISES

Below are a number of possible options for delivering the material in this Module. The first 2 case studies provide ideas as to how a trainer might want to use a domestic case (this one is from South Africa) in a variety of ways. Another possibility would be to focus on the kinds of stereotypes to be guarded against, as done by the trial court and which was ultimately confirmed the appropriate approach by the High Court.

EXERCISE: Case study regarding adjudicating rape
Instructions
Divide the plenary into smaller groups each with flip charts. Provide each group with a copy of the case study. Include the following questions on a flip chart visible to all smaller groups: Q1. In analyzing the facts of the case, what do you see as the weaknesses and strengths of the evidence in this case? Q2. As the first instance judge what would be your decision? Please provide details.
Case Facts (based on S v Coko (2022 (1) SACR 24 (ECG)) The complainant was a 23¬year-old postgraduate student at Rhodes University, Grahamstown. She met the accused in 2017 and they started a relationship in June 2018. He was also 23 years old and employed as a paramedic. The couple discussed the question of sexual intercourse during their relationship and the complainant indicated that she was a virgin and not ready for sexual intercourse. The accused indicated to the complainant that he would not pressure her to have sex if she was not ready. They did meet often at the complainant's house where they would kiss, cuddle and touch each other intimately. After initially meeting earlier in the day on 1 July 2018 the couple planned to meet again later that evening and for the complainant to sleep over at the accused's residence. As agreed, he later fetched her from the student village and upon arrival at his residence they got into bed and watched a movie. The complainant was wearing pyjamas, a track suit, big coat and shoes. When the movie ended they started kissing and the accused started to remove the complainant's pyjama pants. As he did this, she closed her legs. He however indicated that he did not want to have sexual intercourse with her and she then allowed him to remove her pants. The complainant was not wearing underwear. The accused proceeded to have oral sex with her, to which she did not object. He then climbed on top of her and penetrated her.

The complainant made a statement that during the intercourse she kept telling the accused to stop as he was hurting her and she tried to push him off. He would, however, not stop and kept saying sorry. After he ejaculated the complainant asked why the accused did not keep his promise that there would be no sex. His answer was that he got caught up in the heat of the moment. No condom was used during the intercourse. The complainant thereafter spent the night with the accused and went home the next morning.

The complainant lodged a criminal complaint of rape with the police on 2 September 2018. Several text messages were exchanged between them during July. The complainant informed the accused on 10 July 2018 that she was not pregnant. On 16 July 2018 the appellant apologized to the complainant for "going back on his word. And having unprotected sex with you". The complainant responded with the following message: "... going back on your word. That's what you call inserting your penis in my vagina without my permission. And continuing even when I told you "you hurting me". The complainant informed the accused three days later that she was ending the relationship.

Facilitation notes

This is based on the facts of the S v Coko (2022 (1) SACR 24 (ECG)) as discussed in Murdoch Watney "Intimate partner rape: Myths, reality and the law" Journal of South African Law 2022 768.

- The trial court accepted the evidence of the complainant in total and commented that the accused was an honest witness in many respects. The court, however, rejected the accused's evidence that the complainant gave mixed messages which led him to believe that she gave consent to sexual intercourse, as false beyond reasonable doubt. The court based this conclusion on the fact that from the onset of their relationship as well as at the time of the oral sex the complainant indicated that there should be no penetration. The court further inferred from the facts that the accused in all probability planned to have sexual intercourse with the complainant when he invited her to his residence. The accused was convicted and sentenced to seven years imprisonment.
- On appeal, the conviction was overturned. The court emphasized the burden of proof was on the prosecution. It accepted the defence of the appellant that he did not want to have sexual intercourse without the consent of the complainant and that he genuinely believed that such consent had been given by the conduct of the complainant. The court of appeal concluded that the state failed to prove beyond reasonable doubt that the appellant knew there was no consent and that he therefore acted with intent to rape the complainant.
- Murdoch Watney, in his article argued that the appellant could have been under no illusion that the complainant did not consent to sexual intercourse. Not only was that the agreement which formed part of their relationship, but she reiterated it to him minutes before he decided to have intercourse with her. The appellant's explanation that their specific agreement was retracted by the body language of the complainant is insufficient to justify an inference that he bona fide, but mistakenly, believed that the complainant changed her mind.
- Onappeal from the Eastern Cape Division of the High Court, Makhanda (Ngcukaitobi AJ, Gqamana J concurring, sitting as court of appeal), the Supreme Court of Appeal held : 1 The appeal by the State against the acquittal of the respondent is upheld. 2 The acquittal of the respondent by the high court is set aside. 3 The conviction of the respondent by the regional court is reinstated.
- Excerpts from the judgment:
  - it must be stressed that this in no way means that consent by one party to a specific form of sexual act should be taken to be a licence to every other sexual act [para 13].
  - The concept of 'proof beyond reasonable doubt' has been a subject of judicial discussion in countless decisions of our courts. Therefore, it is not necessary to rehash the principles appertaining thereto in this judgment. It suffices to reiterate that proof beyond reasonable doubt does not equate to proof 'beyond all shadow of doubt' or 'absolute certainty' as to the guilt of the accused [para 37].

- Bearing the basic principles of statutory interpretation discussed above in mind, we now proceed to a consideration of what is at the heart of this appeal. Turning to s 3 of the Sexual Offences Act, we first deal with the concept of 'consent' as defined in s 1(2) with special reference to the word 'agreement'. To our mind, such a word entails the meeting of the minds of the willing participants to engage in penetrative sexual intercourse. The Sexual Offences Act explicitly requires that consent must be 'given consciously and voluntarily, either expressly or tacitly by persons who have the mental capacity to appreciate the nature of the act consented to. Moreover, for the consent to avail a person who commits a penetrative sexual act, such consent must be based on true knowledge of the material facts relating to the act in question [para 55].
- As this Court made plain in Mugridge v S, 45 mere submission, or acquiescence, or lack of resistance does not convey a willingness to engage in a penetrative sexual act. Thus, none of these would constitute consent. The court had this to say: 'The law requires further that consent be active, and therefore mere submission is not sufficient [para 56].
- These factors, considered cumulatively, impel the conclusion that the respondent, in breach of his assurances to TS, intentionally had penetrative sexual intercourse with her, well knowing that she had not consented thereto. Counsel further argued that there could hardly be a clearer example of 'proceeded recklessly' than this. The high court's acceptance of this evidence, so it was argued, clearly played into the myth that a man can take consent to one sexual act as an invitation to perform all other sexual acts; and that 'going with the moment' is an acceptable defence – which it is not. It was further submitted that '[t]he fact that the complainant gives no outward indication that she is consenting would be strong evidence that the accused['s] belief is not honestly entertained' [para 64].

EXERCISE: Excerpt from judgment illustrating the use of gender stereotypes

Instructions

Divide the plenary into smaller groups each with flip charts. Provide each group with a copy of a summary of facts and an excerpt from a judgment (n S v Coko (2022 (1) SACR 24 (ECG)).

Ask the groups to highlight how the judged used gender stereotyping in the decision.

Summary of facts

The complainant's version of events was that they went to a place to spend the evening together. It had been common cause that they would usually kiss while watching a movie in bed. On this day, the accused removed the complainant's pyjamas during kissing and performed oral sex on her, which she stated was acceptable. She informed the accused that she did not want penetrative sex as she wanted to remain a virgin. However, the accused allegedly disregarded her wish to refrain from penetrative sex, as he removed her pants and inserted his penis in and out of her vagina while whispering the word "sorry" in her ears. She tried to close her legs as she told him that she did not want to have penetrative sex with him. She added that she cried during the whole event and tried to push the accused off her, but all in vain.

The accused's version of events differed from that of the complainant. He stated that after the movie they started kissing and he performed oral sex on the complainant. The complainant did not show any signs of discomfort. He then started kissing her again and inserted himself into her. The complainant did not stop him from having penetrative sex with her. The only objection from the complainant's side was that the penetration hurt her, after which he said he stopped and then continued to penetrate her sexually. The complainant did not object; nor did she push him off of her. The accused testified that the body language of the complainant was sufficiently relaxed for him to genuinely believe that she had consented to penetrative sex.

The lower Court accepted both the complainant's and the accused's evidence in full. However, according to the lower Court, the accused's claim that the complainant's mixed body language put him under the impression that consent had been given could not reasonably be true. The Court added that the accused should have known from the outset that there was no consent from the complainant. The Court based this conclusion on the fact that at the time of oral sex, the complainant had explicitly told the accused that she did not want penetrative sex. The case was appealed to High court.

83 The main defence of the Appellant was that he genuinely believed that consent had been given. If he knew that consent had been withheld, he would not have proceeded with the intercourse. I cannot approach the matter through an ex post facto assessment, however. I should consider the facts as they unfolded at the time to decide if the state discharged the onus to prove that the Appellant acted with intention to commit an offence beyond reasonable doubt.

The factual misdirections

84 The main finding of the Magistrate in regard to the issue of consent and intention is that the Appellant "conceded" that the Complainant did not give consent for penetration by way of a penis into the vagina of the Complainant, but he nevertheless decided to proceed anyway.

85 The Magistrate held "as they became engulfed in smooching and the oral sex, she made it plain once more that you cannot penetrate her vagina with your penis." The Magistrate then concluded that the Appellant conceded this part of the evidence. However, this is a factual misdirection, which manifestly played a crucial role in the overall assessment of the evidence and influence the findings of the Magistrate in finding the Appellant guilty.

86 These findings including the "concession" by the Magistrate rely on the answers given by the Appellant in an exchange with the Appellant. It is necessary to consider the actual exchange which forms the substratum of the findings. The record shows that the Magistrate said:

"Yes, whilst we are on that I just wanted to get clarity from you sir, it was her evidence and I do not recall it being disputed that around about the point where there was this oral sex, she did make it plain to you that there would not be any penetration and then you assured her that you will not penetrate her and all of a sudden you did exactly that."

87 The Magistrate then asked whether the evidence is true, which the Appellant accepted. Thereafter, the Appellant referred to the Complainant's "body language" which he claimed suggested the opposite. In argument, the matter was approached from the perspective of "tacit consent".

88 An accused cannot solely rely on the "body language" of a rape victim to override his or her express words. But the record does not suggest that this is what happened here.

89 How should consent be established? The SCA has endorsed the views of the author CR Snyman, in the following manner in relation to the issue of consent:

"[8] The author Snyman, states:

'For consent to succeed as a defence, it must have been given consciously and voluntarily, either expressly or tacitly, by a person who has the mental ability to understand what he or she is consenting to, and the consent must be based on a true knowledge of the material facts relating to the intercourse.'"

(S v Nitito (123/11) [2011] ZASCA 198 (23 November 2011))

90 The state bears the onus to prove absence of consent. Where there was no express rejection of the sexual act, in Mugridge v S (657/12) [2013] ZASCA 43; 2013 (2) SACR 111 (SCA) the SCA commented as follows:

"[37] In law, consent has the following requirements:

(a) the consent itself must be recognised by law;

(b) it must be real consent; and

(c) it must be given by a person capable of consent.

[38] The question of whether consent in the context of sexual offences will be 'recognised in law' is determined with reference to considerations of public policy, with the following factors relevant in the making of such a determination:

[T]he nature and extent of the harm, both physical and psychological; and the age and relationship of the parties, especially if the conduct involves the exploitation or abuse of children.'

[39] The first and last of the aforementioned requirements need no further discussion for the purposes of the instant matter. Rather, as noted earlier, it must be assessed whether, on the facts of this matter, the apparent submission and acquiescence of the complainant amounted to consent in the legal sense.

[40] The law requires further that consent be active, and therefore mere submission is not sufficient. In Rex v Swiggelaar, Murray AJA commented as follows:

'The authorities are clear upon the point that though the consent of a woman may be gathered from her conduct, apart from her words, it is fallacious to take the absence of resistance as per se proof of consent. Submission by itself is no grant of consent, and if a man so intimidates a woman as to induce her to abandon resistance and submit to intercourse to which she is unwilling, he commits the crime of rape. All the circumstances must be taken into account to determine whether passivity is proof of implied consent or whether it is merely the abandonment of outward resistance which the woman, while persisting in her objection to intercourse, is afraid to display or realises is useless.'"

91 It was the evidence of the Appellant that throughout the encounter, the Complainant was an equally active participant, she was not merely passive – she kissed the Appellant back, she held him, she had no problem with the removal of her clothes, she watched him take off his clothes without raising an objection, she knew he was erect, she did not object to the oral sex. The only area where there was a dispute was after the penetration. It is in this area where the Complainant says she objected and said the penetration was hurting. The Appellant's evidence was that when the Complainant said the penetration was hurting, he "would stop and then continue". This aspect was not taken up in cross examination, nor was it weighed in the assessment of the probabilities by the Magistrate. It was not the evidence that the Appellant simply continued with the intercourse in disregard of the wishes of the Complainant, as held by the Magistrate. In these circumstances, I cannot uphold the findings of fact of the Magistrate which are unjustified when one has regard to the record. I cannot hold that the state proved that the version of the Appellant that he genuinely believed there was at least tacit consent was false beyond reasonable doubt.

92 The Magistrate considered it decisive that the Appellant conceded that he agreed with the Complainant that there would be no sexual intercourse, but went against his word, holding "the accused even conceded to this material aspect". Further, the Magistrate held "the accused acknowledged all of this and assured her that he will resist the temptation of not doing so, only to do just that".

93 I consider this finding to be erroneous. It is necessary to consider the evidence upon which the "concession" is based. The first part is the evidence of the Complainant. She explained that the assurance of the Appellant was given when the Appellant first tried to undress her. But her version was "then we carried on kissing and then he proceeded to take them off".

94 The finding by the Magistrate that the Complainant made it clear to the Appellant that she did not consent during the kissing and the oral sex is not correct and not borne out by the record. The correct sequence of the evidence, as given by the Complainant, is that she mentioned that she closed her legs and mentioned that she not want to have sex with the Appellant as he was undressing her. What happened next was that there was no indication expressly or otherwise of any lack of consent to being undressed. After she was being undressed, they continued kissing. Then the Appellant took off his clothes. No force or threats were used to coerce the Complainant (who is the same age as the Appellant). After he had taken his clothes off, he returned to place his head in between her thighs, again with no force. He then performed oral sex on her, which she testified she had no objection to. On the complainant's version, there was no manifestation of any refusal of consent between the kissing, the oral sex and the penetration. The evidence was that it was only after the penetration that the Complainant experienced pain and told the Appellant to stop as he was hurting her. The Appellant accepted this but said he would stop and then continue.

95 The state had the duty to prove that the Appellant was aware that there was lack of consent. On this aspect, the Magistrate erroneously held that after the oral sex the Complainant told the Appellant that she did not consent to the sexual penetration, which was not the evidence. This was a misdirection and in conflict with evidence given.

96 The misdirection seems to have emanated from the manner in which the question was posed by the Magistrate namely that "about the point where there was this oral sex, she did make it plain to you that there would not be any penetration and then you assured her that you will not penetrate and all of a sudden you did exactly that."

97 This was not the evidence of the Complainant. The Complainant did not say that an assurance was given "at about the point of oral sex". Her testimony was that when the Appellant was undressing her he told her that he was not going to have sex with her. But just as he. Was saying that, they were kissing. Three further things happened, with the clear consent of the Appellant – the kissing, the Appellant's taking off his clothes, the oral sex. The manner in which the evidence has been evaluated by the Magistrate, which glosses over and overlooks crucial details has resulted in a misdirection.

Facilitator's notes

This decision caused much controversy and angered many people – as summarized in Stal SJ "Does Mistaken Belief in Consent Constitute a Defence in South African Rape Cases?" PER / PELJ 2023(26).

- Mistaken belief defence essentially denigrates women as this tends to make men's beliefs about women's consent decisive as to whether women have been raped or not.
- Narratives of blaming the victim and implied consent are founded on such beliefs, which undermines the safety and autonomy of women and exacerbates gender inequality.
- Some are of the opinion that the judges made a flawed application of the law applicable to the crime of rape when they stated that the crime of rape is constituted only when it involves force and coercion.
- The judges should have been aware when they delivered the judgment that rape is not always a forced act, an act of brutal violence by a stranger, and that many important facts in the final judgment were left out.
- Also troubling and legally dangerous to have a judgment that posits that consensual foreplay implies consent to penetration and sex, and therefore that rape did not occur. The International Commission of Jurists-Africa tweeted that they were shocked to see that the judges ruled in favour of the appellant where the appellant argued that the foreplay he had with his ex-girlfriend indicated that she was tacitly engaging in agreed sex
- Lawyers for Human Rights responded that they were disappointed by this ruling and that consent to one sexual act can never imply consent to all sexual acts.

On appeal from: Eastern Cape Division of the High Court, Makhanda (Ngcukaitobi AJ, Gqamana J concurring, sitting as court of appeal): 1 The appeal by the State against the acquittal of the respondent is upheld. 2 The acquittal of the respondent by the high court is set aside. 3 The conviction of the respondent by the regional court is reinstated.

Exercise: Case study regarding analyzing victim witness testimony

Instructions

Divide the plenary into smaller groups each with flip charts. Provide each group with a copy of the following transcript

Q1. From the part you have read, discuss the relevancy of the evidence being presented?

Q2. How does this impact your assessment of the credibility of the victim witness?

Q3. Why?

Please provide details.

Case study

Defence: Now you said that after you left the – uh – Kennedy home that you felt dirty. Is that correct?

Victim: I felt dirty before I left the home.

Defence: When you drove home you still had the same panties on.

Victim: Yes sir.

Defence: When you got to your house, you stayed there for several hours without removing those panties.

Victim: I-I'm not quite sure how long I was at my house, but I, but I – the underwear was still on me.

Defence: It was at least a couple of hours, wasn't it?

Victim: I'm not sure.

Defence: And when you went to your mother's house, you kept those same panties on, didn't you?

Victim: Yes.

Defence: And when you went from your mother's house to go pick up Johnny Butler, you still wore the same panties.

Victim: I was pretty terrorized, I – I – I'd never, I just, it's like you're – you're just functioning, and – and to be at the sheriff's office? And I was just, just...

Defence: Even though you – you – felt dirty, you felt awful, and what have you, you kept those same panties –on is that what you said, Miss Bowman?

Victim: I-I couldn't think to, I, I didn't know what to think

Facilitator's notes

Important to realize that whether the victim left her underwear on after the assault has nothing to do with consent. However the defence cleverly manipulates the cross-examination to imply that how long the victim left her underwear on was relevant to whether she consented. The implication is that, had she not consented, she would have removed her underwear at the first possible opportunity to rid herself of the source of the 'pollution'. The use of the word 'panties', rather than the more gender neutral 'underwear' is also significant. The word 'panties' suggests an item of clothing that is specifically female, personal and intimate – an item of clothing that guards the female genitalia. Defence also insinuates that because she did not remove her 'panties' as soon as possible after that assault, her source of 'dirtiness' did not come from being raped, but rather from her own shame at having casual sex with a stranger. Defence's control over how long a victim may speak means that the lawyer does most of the talking. The lawyer's domination of linguistic space aids his credibility and allows him to construct vivid detailed images of what he wants the judge/jury to believe. Additionally, the use of leading questions and insistence on particularly answers, a common practice for defence counsel, allows the lawyer to exert significant control over a sexual assault complainant's testimony ... there is very little opportunity for her to seek clarification, express concerns or contribute to the direction of the exchange. Furthermore, forced choice questions – those that require a yes or no answer – limit the victim's independent voice. As one scholar points out, the legal processes and courtroom practices used to respond to sexual violence, may in fact "reify the very social dynamics that produce both sexual violence itself and the impact of this gendered harm on it subjects."

[adopted from transcript from the William Kennedy rape trial (USA) - use of language by defence to imply consent and the analysis from Ubel, R. 2018. "Myths and Misogyny: The Legal Response to Sexual Assault". Master of Studies in Law Research Papers Repository. 4.]

EXERCISE: Plenary discussion – short role plays

Instructions

Develop short scenario role plays or videos in which defence counsel tries to apply evidentiary rules in a discriminatory manner.

Then facilitate discussion as to how the application is discriminatory and what steps judges can take in response.

Ideas for scenarios (to be formulated based on your experience in court)

1. Questions about the complainant's drinking or use of drugs

2. Questions about the complainant's underwear, whether she was wearing any, and if so, what type and colour

Facilitator's notes:

The probative function of clothing or drinking or using drugs is highly indeterminate in sexual violence cases and should not pass the relevance test for admissible evidence.

1. Questions about the complainant's drinking or use of drugs

   - Australian studies show that the complainant's drinking in the period preceding the incident is frequently a major component of the defence case, used to impugn the character of the victim and to imply consent.[206]
   - Research in the UK found tendency to attribute responsibility for the ensuing sexual intercourse to the complainant when she had consumed alcohol.[207] The belief that alcohol is equated with having a "good time" and that a woman who consumes alcohol is perceived as a "good time girl".
   - Research also found the existence of a double standard in the attribution of responsibility in contested sexual consent scenarios whereby intoxicated defendants tend to be held less responsible for subsequent sexual events than their sober counterparts while intoxicated complainants tent to be held more responsible.[208]

2. Questions about the complainant's underwear, whether she was wearing any, and if so, what type and colour

   - One scholar's review of transcripts of sexual assault trials revealed that most complainants were required to testify in detail about her underwear.[209]
   - In some contexts, a complainant's undergarments will be relevant. However, whether the complainant was wearing underwear and what type of underwear she was wearing appear to be such salient aspects of a sexual assault case that some trial judges continue to include discussion of this in their decisions without any explanation as to relevance. The defendant's undergarments are seldom presented as an independently relevant factor in sexual assault cases.

[206] Young, Alison . 1998. "The Wasteland of the Law, The Wordless Song of the Rape Victim" Melbourne University Law Review 442 at 448.

[207] Finch, E. & Munro, V. 2005. "Juror Stereotypes and Blame Attribution in Rape Cases Involving Intoxicants" 45 British Journal of Criminology 25.

[208] Finch, E & Munro, V. 2007. "The Demon Drink and the Demonized Woman: Socio-Sexual Stereotypes and Responsibility Attribution in Rape Trials Involving Intoxicants" 16:4 Social and Legal Studies 592.

[209] Elaine Craig. 2015. "The Inhospitable Court". University of Toronto Law Journal 10.3138.

EXERCISE: Plenary discussion – scenarios to discuss

Instructions

In the plenary, read out a short scenario regarding the type of evidence that the defence is arguing to be admitted and ask the group what their decision regarding whether they would allow such a line of inquiry and why.

SCENARIO 1.
Evidence that sexual acts were performed by the complainant at some other time to prove that the accused believed complainant was consenting to the sexual act pertaining to the case.

SCENARIO 2.
Evidence that the complainant is sexually promiscuous to prove bias or motive to fabricate.

SCENARIO 3.
Arguing that because the defendant and the complainant are separated and involved in custody application to prove bias or motive to fabricate.

SCENARIO 4.
Evidence that the complainant was wearing a low cut dress to prove that the accused believed complainant was consenting to the sexual act pertaining to the case

SCENARIO 5.
Arguing that whether a victim was flirtatious earlier in the evening to prove that the accused believed complainant was consenting to the sexual act pertaining to the case.

SCENARIO 6.
Evidence that the complainant took was drunk or took drugs to argue that she is to blame for the violence.

SCENARIO 7.
Evidence of lack of resistance or delayed reporting proves consent.

Facilitators notes – highlights problems with defence arguments

1. Irrelevant and prejudicial. Relies on the myth that if a woman says "yes" at one time, she is automatically implying consent to future sexual acts. It also implicitly gives credence to the myths that unchaste women are less worthy of belief and more likely than chaste women to consent to the acts giving rise to the charge.
2. Irrelevant and prejudicial. The assumption that women with more sexual experience are more likely to make a false allegation, despite research indicting evidence to the contrary.
3. Prejudicial. Relies on the discredited belief that women complainants are generally less trustworthy.
4. Irrelevant. This is informed by problematic beliefs that suggest that women who dress a certain way are more likely to consent.
5. Irrelevant. Whether this complainant was flirting earlier in the evening is not relevant to the issue of whether she consented to the sexual touching at issue. Consent to sexual touching must be contemporaneous.
6. Irrelevant. Whether the complainant was vulnerable does not imply consent.
7. Prejudicial. Relies on the myth that "real" rape victims would fight back and raise a hue and cry at the first opportunity.

MODULE 11.

Sentencing and remedies

SUMMARY

This module:

- Discusses the importance of ensuring proportionate and dissuasive sentences in cases involving GBV, including a review of how to take into account aggravating factors.
- Reviews some steps to take to ensure sentences and remedies meet international standards
- Looks at the need to put the victim and their needs at the centre of the reparation process.
- Identifies good practices when conducting sentencing hearings.

11.1 SENTENCING CONSIDERATIONS

INTERNATIONAL STANDARDS

International standards provide for the right to an effective remedy for persons whose human rights have been violated. The right to a remedy, which encompasses both the imposition of effective, proportionate and dissuasive sanctions and the availability of compensation, also constitute elements of the due diligence standard. In cases of GBV, judges should ensure that the sentence reflects the serious nature of GBV and the gravity of the crimes committed. Sentencing in such cases should be fair, non-discriminatory, proportionate and consistent. The primary goals of sentencing must be to prevent the reoccurrence of violence, to protect the victim and to hold the perpetrator accountable.

Judges should be mindful of the obligations under international law. The UN Updated Model Strategies and Practical Measures provides for a clear articulation of the obligation for judges in ensuring the due diligent pillar of effective punishment.

- **Sanctions.** Article 17 (a) ensure sentencing policies:
  - hold offenders accountable for their acts related to violence against women;
  - denounce and deter such violence;
  - stop violent behaviour;
  - promote victim and community safety, including by separating the offender from the victim, as well as from society where necessary;

  - take into account the impact on victims and their family members of sentences imposed on perpetrators;
  - provide sanctions that ensure that the perpetrators are sentenced in a manner commensurate with the severity of the offence;
  - provide reparations for harms caused as a result of the violence; and
  - promote the rehabilitation of the perpetrator, including a sense of responsibility in offenders and where appropriate, reintegration of the perpetrator into the community.
- **Aggravating factors.** Article 17(b) To ensure that their national laws take into account specific circumstances as aggravating factors for sentencing purposes, include for example,
  - repeated violent acts;
  - abuse of a position of trust or authority;
  - perpetration of violence against a spouse or a person in a close relationship with the perpetrator;
  - perpetration of violence against a person under 18 years of age.
- **Notification.** Article 17(c): ensure the right of a victim of violence to be notified of the offender's release from detention or imprisonment.
- **Taking into account victimization.** Article 17(d): take into account, in the sentencing process, the severity of the physical and psychological harm and the impact of victimization, including through victim impact statements.
- **Full range of sentencing.** Article 17(e): make available to the courts, through legislation, a full range of sentencing dispositions to protect the victim, other affected persons and society from further violence, and to rehabilitate the perpetrator, as appropriate.
- **Perpetrator treatment programmes.** Article 17(f and g): develop and evaluate treatment and reintegration / rehabilitation programmes for perpetrators of different types of violence against women that prioritize the safety of the victims; and ensure that judicial and correctional authorities, as appropriate, monitor perpetrators' compliance with any treatment ordered.
- **Compensation.** Article 17(a) provide reparations for harms caused as a result of the violence

SOME CONSIDERATIONS FOR JUDGES WHEN DECIDING ON SANCTIONS

While it is up to the government to decide on the range of sentences for each offence in the criminal laws, such as which offences merits a prison sentence, it is the responsibility of judges to determine the appropriate sentencing for criminal cases, including those involving GBV. They play a key role in holding perpetrators accountable and the judgments and sentences they issue reflect the tolerance / intolerance of such violence in the society.

Judges should consider the following when dealing with GBV cases[210]:

- In determining the offence category, consider which categories of harm and culpability the offence falls into – and the category range of sentences prescribed. This includes considering the harm (e.g. severity of the psychological or physical harm; additional degradation; vulnerable victim) and the culpability (e.g. previous violence against the victim, abuse of trust, recording of the offence, offence motivated by the gender of the victim).
- Recognizing biases when considering aggravating factors and mitigating factors. For example, practices show existing bias behind the practice of considering violent crimes committed by strangers as being more reprehensible than violence crimes committed by persons known to the victim or where repeated incidents of intimate partner violence are seen as common and the court applies the same penalty for each assault

[210] These points are adapted from UNODC. 2019. Handbook for the judiciary on effective criminal justice responses to gender-based violence against women and girls.

without considering the deterrent effect in applying increased sanctions for repeated incidents. In terms of mitigating factors, judges should be careful to consider the usual factors such as no previous conviction or previous good character as this does not reflect the reality of GBV.

- In determining a sentence in respect of the offence of rape, the judge should not consider the following to justify a lesser sentence: the complainant's previous sexual history; an apparent lack of physical injury to the complainant; or any relationship between the accused person and the complainant prior to the offence being committed.
- Determining if there is a need to consider making additional orders, such as orders for rehabilitation or intervention treatment programmes. Such treatment or rehabilitation programmes may be part of sentencing, and be in addition to other penalties, including imprisonment or probation. Such orders recognize that simply removing a perpetrator from a situation does not ameliorate the real issue of re-victimization, whether it is victimizing the same victim or finding someone new to victimize. These types of orders as part of sentences focus on the changing of the behaviour of the perpetrator through rehabilitation which seeks to prevent them from repeating violent behaviour.
- In considering whether a rehabilitation or intervention treatment programme is appropriate, judges should consider such an order be part of a conviction rather than an alternative to a sentence that would be entered into the criminal record; require court supervision and court sanction if offenders do not satisfactorily complete the programme; programmes commit to working within a gendered structural analysis of GBV as opposed to a simplistic or individualized anger management or alcohol/drug abuse paradigm, and accredited with an organization that supports victim feedback as to whether the violence continues; such programme must prioritize victim safety.
- In ordering the sentence, judges should formulate clear reasons as to why such a sentence is effective, proportionate and dissuasive.

SOUTH AFRICA'S LEGISLATIVE PROVISION REGARDING SENTENCING IN RAPE CASES

In response to the situation where the Supreme Court was deviating from the mandatory minimum sentences for rape, the legislature passed a provision that provides: "when imposing a sentence in respect of the offence of rape the following shall not constitute substantial and compelling circumstance justifying the imposition of a lesser sentence:

- The complainant's previous sexual history;
- An apparent lack of physical injury to the complainant;
- An accused person's cultural or religious beliefs about rape; or
- Any relationship between the accused person and the complainant prior to the offence being committed."[211]

Some additional considerations for judges when considering effective, proportionate and dissuasive sanctions [212]

- **Favour more intrusive dispositions.** Research shows that more intrusive sentences (such as incarceration, work release, electronic monitoring and conditioned probation) significantly reduced re-arrest for domestic violence over the less intrusive sentences of fines or suspended sentences without probation.
- **Take into account the whole prior criminal record.** When considering the appropriate sentence, consider both the history of GBV and the entire criminal history, as both indicate risk of re-abuse as well as general criminality. Some disposition studies reflect that domestic violence dispositions differ from standard

[211] Section 51(3) Act 105/97 (aA) included in Sexual Offences Act 2013.

[212] The research noted in this section is discussed in further detail in UNODC. 2014. Handbook on Effective Prosecution Responses to Violence against Women.

sentencing patterns in that they often only focus on whether there is an abusive history and tend to disregard prior criminal history that are not domestic violence related. However, research suggests that both the domestic violence history and non-related criminal histories indicate risk of re-abuse as well as general criminality.

- **Take into account "failure to appear".** Studies indicate that perpetrators who do not show up for court appearance are more at risk for re-abuse than those who do show.
- **Exercise caution in recommending conditional discharges for "first" offenders**[213]. There are some studies that show that a minimum of a quarter of "first" offenders who are diverted or given dispositions without guilty findings will re-abuse or violate the terms of their conditional release.
- **Register sex offenders**, where available registry meets human rights standards and provides for individualized assessments.
- **Consider the negative impact of fines on the victim.** Imposing fines on a convicted perpetrator may interfere with their obligation to pay child support to the victim.
- **Consider whether there are aggravating factors.** Aggravating factors should enhance sentences.
- **Any perpetrator treatment/rehabilitation programmes that is part of a sentence needs to be closely monitored and enforced.** Convicted perpetrators ordered to treatment should be subject to court supervision and court sanctions if they do not satisfactorily complete treatment programmes. These programmes need to therefore have adequate funding and resources to ensure timely monitoring and immediate enforcement. To increase programme participation, consider post-dispositional compliance hearings as well as the placement of offenders on supervised probation.
- **Consider the effectiveness of perpetrator treatment/rehabilitation programmes.** Research indicates programmes that incorporate alcohol and/or drug treatment adds to the likelihood of reduction in re-abuse as many perpetrators abuse alcohol and drugs. According to some studies, there is no evidence that anger management or couples counselling programmes effectively prevent court mandated offenders from re-abusing or committing new offences after treatment. Longer programmes are considered more effective than shorter programmes. However, some research suggests that treatment programmes as such are not likely to protect most victims from further harm from higher risk abusers.
- **Restitution and reparations.** Where the internal legal system permits the victims can file an application for reparations within a trial procedure on criminal matters, include an order of restitution to the victim who suffered loss as a proximate result of the perpetrator's criminal conduct.

11.2 REPARATIONS CONSIDERATIONS: THE NEED TO PUT THE VICTIM AND THEIR NEEDS AT THE CENTRE OF THE REPARATION PROCESS

An aspect of sentencing which often is not fully utilized is the possibility of requiring the perpetrator to make reparations, including compensation and restitution to the victim. However, an increasing number of countries are enacting legislation that allows for such awards in criminal cases. Where this is not yet the case in some countries, judges can be creative and consider making orders that can encourage civil suits where their findings can be used to determine reparations.

[213] The term 'offender' is used here rather than the broad term 'perpetrator', as this point refers to those perpetrators who have been convicted of the crime. It is important to note that a first time offender may not be a first time perpetrator of violence against women or domestic violence.

TERMINOLOGY AROUND REPARATIONS

Reparations means to wipe out, as far as possible, all the consequences of an illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Reparations cover two aspects: procedural and substantive.[214] Procedurally, the process by which arguable claims of wrongdoing are heard and decided by the judiciary need to be victim-centred, available, accessible and adaptable to the specific needs and priorities of different women and girls. Substantively, remedies consist of the outcomes of the proceedings and, more broadly, the measures of redress granted to victims. This includes reflecting upon effective ways to compensate victims for harms suffered. There are many forms of reparations, including: restitution; compensation; public acknowledgement of the facts and acceptance of responsibility; prosecution of perpetrators; restoration of the dignity of the victim through various efforts; and guarantees of non-repetition. Reparations measures should ensure that remedies are holistic and not mutually exclusive.

Restitution is defined as those measures to restore the victim to her original situation before the violence.

Compensation means quantifiable damages resulting from the violence and includes both pecuniary and non-pecuniary remedies.

In making an order for reparations, including restitution and compensation, judges could consider:

- Reparations should be proportional to the damage caused by the violence.
- Compensation should never be a substitute for other penalties, such as imprisonment or community service.
- Restitution and financial compensation for harms done to the victim should be prioritized ahead of fines and penalties and should not preclude the victim from pursuing civil or other remedies.
- The calculation of the harm to the victim and the costs incurred as a result of the violence should be defined as expansively as possible and aim to be transformative rather than simply returning the victim to the position in which she was prior to the violence, but also redressing inequalities that made them vulnerable to violence.

Additional considerations when assessing physical and psychological harm or damage[215] Judges should consider the following when assessing damages:

- The loss of reputation or dignity, pain and suffering and emotional distress, loss of enjoyment of life.
- The lost opportunities including employment, pension, education and social benefits, including loss of earning potential.
- Damages that take full account of the victim's unremunerated domestic and caring activities.
- Damages that take full account of the situation of the victim, including costs of social and educational recovery/reintegration.
- Expenses for legal, medical, psychological and social services.
- Actual costs of seeking justice and other services as a result of or related to the experiences of violence, including transportation.

[214] Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, A/HRC/14/22, 19 April 2010.

[215] UN Women, UNFPA, WHO, UNDP and UNODC. 2015. "Essential Services Package for Women and Girls Subjected to Violence: Core Elements and Quality Guidelines, Module 3 Justice and Policing".

11.3 SENTENCING HEARING PRACTICES

Conducting sentencing hearings can ensure that all relevant information is before the court, which contributes to consistent and commensurate sentencing.

Sentencing hearing checklist. It is useful for the judiciary to have checklists for the types of relevant information that should be considered for a sentencing hearing. There are some common considerations in GBV cases that could be contained in sentencing checklists, such as the appropriateness of considering fines, since they may negatively impact victims, as well as the issues of restitution, reparations and compensation. Relevant information to have at a sentencing hearing:

- Victim impact statements.
- Risk assessment of offender dangerousness at the time of sentencing.
- Information on the nature and gravity of offence.
- History of abuse, both towards the victim and others.
- Previous efforts at rehabilitation.
- Defendant's character.
- Current rehabilitation needs.
- Any aggravating factors.

Enable the participation of victims at sentencing hearings. Providing the opportunity for victims to tell the court about the physical and psychological harm and the impact of victimization at the sentencing hearing allows for the victim to explain to the court the harm they have suffered.[216] The victim's participation could be through a broad range of methods that suit the individual needs of the victims: For example, the victim could provide a written or oral victim impact statement, or the victim impact reports could be done by experts such as social workers.

GOOD EXAMPLE FROM THE SOUTH AFRICAN COURT HIGHLIGHTING VICTIM-CENTREDNESS OF SENTENCING HEARINGS[217]

An enlightened and just penal policy requires consideration of a broad range of sentencing options, from which an appropriate option can be selected that best fits the unique circumstances of the case before court. To that should be added, it also needs to be victim-centred. Internationally the concerns of victims have been recognized and sought to be addressed through a number of declarations, the most important of which is the UN Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power. The declaration is based on the philosophy that adequate recognition should be given to victims, and that they should be treated with respect in the criminal justice system. In South Africa victim empowerment is based on restorative justice. Restorative justice seeks to emphasize that a crime is more than the breaking of the law or offending against the State - it is an injury or wrong done to another person. The Service Charter for Victims of Crime in South Africa seeks to accommodate victims more effectively in the criminal justice system. As in any true participatory democracy its underlying philosophy is to give meaningful content to the rights of all citizens, particularly victims of sexual abuse, by reaffirming one of our founding democratic values, namely human dignity. It enables us, as well, to vindicate our collective sense of humanity and humanness. The charter seeks to give to victims the right to participate in and proffer information during the sentencing phase. The victim is thus afforded a more prominent role in the sentencing process by providing the court with a description of the physical and psychological harm suffered, as also the social and economic effect that the crime had and, in future, is likely to have. By giving the victim a voice the court will have an opportunity to truly recognize the wrong done to the individual victim.

[216] Updated Model Strategies and Practical Measures, Article 17.
[217] S v Matyityi 2011 (1) SACR 40 (SCA), para 16 and 17.

By accommodating the victim during the sentencing process the court will be better informed before sentencing about the after-effects of the crime. The court will thus have at its disposal information pertaining to both the accused and victim, and in that way hopefully a more balanced approach to sentencing can be achieved. Absent evidence from the victim, the court will only have half of the information necessary to properly exercise its sentencing discretion. It is thus important that information pertaining not just to the objective gravity of the offence, but also the impact of the crime on the victim, be placed before the court. That in turn will contribute to the achievement of the right sense of balance and in the ultimate analysis will enhance proportionality, rather than harshness. Furthermore, courts generally do not have the necessary experience to generalize or draw conclusions about the effects and consequences of a rape for a rape victim. As Muller & Van der Merwe put it:

It is extremely difficult for any individual, even a highly trained person such as a magistrate or a judge, to comprehend fully the range of emotions and suffering a particular victim of sexual violence may have experienced. Each individual brings with himself or herself a different background, a different support system and, therefore, a different manner of coping with the trauma flowing from the abuse.'

11.4 OPTIONS FOR EXERCISES

Below are a number of possible options for delivering the material in this Module.

EXERCISE: Small group exercise
Instructions
Divide the group into small groups. Ask each group to develop sentencing guidelines for the courts for cases involving GBV. You may want to choose one form of violence, such as intimate partner violence or rape.

EXERCISE: Case study
Instructions
Divide the group into small groups. Ask each group to review the case study and answer the following questions.
You have convicted Nick for the crimes he was charged with. You have adjourned the case for sentencing. • Q1. What information would you need from the prosecutor to help you issue an appropriate sentence? • Q2. What factors would you take into account in sentencing Nick? • Q3. What other measures are available in addition to sentencing Nick?
Case study
Sara and Nick had been in a relationship for 3 years at the time of this incident. There had been past incidents of violence during the relationship but Sara had never reported any of them to the police. She didn't report them because Nick always seemed very remorseful after each incident. He blamed the violence on the stress of his job and the fact that Sara was always "nagging" him about his drinking and drug consumption. On the day of the incident, Sara was treating Nick to a night out because it had been his birthday during the week. They decided to go away to a hotel for the weekend. On the way up, Sara gave Nick her bank card and pin number to withdraw some cash for the weekend. When they arrived at the hotel, Nick started smoking cannabis. When Sara complained, he started shouting at her that it was his birthday and he could do what he wanted. Sara continued to argue with him and Nick punched her in the face, breaking her nose in the process. The manager of the hotel came to their room because of the noise. He saw that Sara was upset and he saw that her nose was bleeding. He asked her what had happened and she told him that Nick had punched her in the face and had broken her nose. The manager told Nick that he was going to call the police and Nick punched the manager in the face as well, breaking his glasses and cutting him above his left eye. Nick ran out of the room, whilst the manager was calling the police.

When the police arrived, they searched the hotel for Nick and found him at the cash machine in the hotel lobby. He had Sara's bank card and had withdrawn some money from her account. The police informed Nick of Sara's and the manager's statements. He admitted hitting Sara and the manager. He also admitted to taking the money out of Sara's bank account. Nick was arrested by the police and charged with causing bodily harm to Sara and the manager.

During the criminal trial, evidence for the prosecution included oral evidence from witnesses, Sara, the hotel manager, the police who attended the scene and a doctor. The defence did not call any evidence. Nick was convicted of causing bodily harm to Sara and the manager.

EXERCISE: Short scenarios for discussion of appropriate sentencing

Instructions

Ask the plenary to provide opinion as to the sentences for some short scenarios to generate a discussion of appropriate sentences in GBV cases.

SCENARIOS

An Italian businessman gunned down his wife in Cape Town, South Africa. The husband flew to South Africa from London, followed his wife to her home and proceeded to gun her down in the street. He plead guilty to murder. He told the court it was an "act of mercy" and that he did not feel any guilt, adding: "the guilt was hers alone". The husband even boasted in court about how he had killed her: "She tried to run away across the road. I chased her and shot her in the back while she was still running. She fell to the ground. I walked to her and pointed the gun at her head because I was determined to kill her. I shot three times. I closed my eyes. I believe I missed once. She died of the injuries I caused her".

Facilitators notes

These facts are based on the killing of Italian artist Francesca Gobbi by her ex-husband Guiseppe di Blasi in Cape Town in 1992. The judge presiding over the trial made the finding that Di Blasi had not been full in control of himself at the time of the shooting, and sentenced him to just four years in prison, describing Gobbi's murder as "a story of heartache and obsessive love which evokes much compassion". The Western Cape Attorney General took the judge's decision on appeal and four years later the Supreme Court overturned the original judgement and sentenced Di Blasi to fifteen years in prison instead.

SCENARIO

Inside the premises of the Johannesburg Maintenance Court, a woman had gone in an attempt to get her husband, a prison warder to pay maintenance for the couple's child. On the day of her maintenance hearing, the victim had gone to Johannesburg Central police station and asked for protection against her husband. She had previously reported to the police that her husband had fired shots at her and threatened to kill her. Because of the husband's job as a prison warder, however, his gun was never taken away from him. At some point during the maintenance hearing the prosecutor left the room, leaving the couple alone, at which stage the husband pulled out his firearm and shot his wife in the back of the head while she was kneeling.

Facilitators notes

This scenario is based on the case of Yvonne Ramontoedi who was shot by her husband, prison warder, Sandy Ramontoedi. The offender was sentenced to just three years correctional supervision, to be served in 20-hour instalments over weekends. During sentencing, the court noted that the lighter sentence was because of its view that the guilty party had been 'provoked over a long period of time', by which it was understood that Sandy had suspected his wife of having an affair, and that he was not the father of the child. What made Sandy Ramontoedi's sentence even more shocking was that, in two other cases where women had been found guilty of murdering their abusive husbands, the female perpetrators had received much harsher sentences, including one of the women being sentenced to death.

Source: cases cited in Nechama Brodie. 2020. Femicide in South Africa.

EXERCISE: Case study – reviewing a sentencing decision

Instructions

Divide the participants into small groups and ask them to put themselves in the situation of Court of Appeal judges reviewing a sentencing decision that deviates from the mandatory minimum sentences for a conviction of rape. Please provide reasons for their decision and present to the plenary.

Case study

On the day of the incident in Thabethe in 2004, the complainant, who was sharing a house with the accused and the complainant's mother, was fifteen years and ten months old. The accused blackmailed the complainant into having sexual intercourse with him. The probation officer's report adduced during the sentencing trial emphasized that the complainant had unequivocally stated that she did not wish the accused to be jailed. The Pretoria High Court subsequently imposed ten years imprisonment, wholly suspended for five years, ruling as follows:

"After establishing the accused's disposable monthly income and the fact that the victim was still at school in grade 10, the court found that there were a number of substantial and compelling circumstances that, individually and collectively, justified the imposition of a lesser sentence than the minimum sentence of life imprisonment prescribed by Act 105 of 1997 in Part I of Schedule 2 thereto read with section 51 of the Act . . ."

In appealing this lenient sentence, the state submitted that "a sentence based on restorative justice was inappropriate for the offence, as failed to reflect the gravity and seriousness of rape".

Facilitator's Notes

This case study is based on the South African case of Director of Public Prosecutions v Thabethe.[218]

This case study is based on the South African case of Director of Public Prosecutions v Thabethe.

The Supreme Court of Appeal held as follows: "I [Bosielo JA] have no doubt about the advantages of restorative justice as a viable alternative sentencing option provided it is applied in appropriate cases. Without attempting to lay down a general rule I feel obliged to caution seriously against the use of restorative justice as a sentence for serious offences which evoke profound feelings of outrage and revulsion amongst law-abiding and right-thinking members of society. An ill-considered application of restorative justice to an inappropriate case is likely to debase it and make it lose its credibility, as a viable sentencing option. . . [O]ne of the essential ingredients of a balanced sentence is that it must reflect the seriousness of the offence and the natural indignation and outrage of the public."

Having weighed all the circumstances of the case, the court relied on s 51(2) of the Criminal Law Amendment Act in expressing the opinion that ten years imprisonment was an appropriate sentence. While the Supreme Court of Appeal ultimately did follow the law regarding minimum sentencing (at the time), it could not follow s 51(1) of the Criminal Law Amendment Act, which required life imprisonment where the victim was younger than sixteen, as the accused was not charged as such. The substantial and compelling circumstances accepted by the court included that the accused was a first offender, showed remorse and pleaded guilty. It was also taken into account that the victim turned sixteen a few days after the incident. Moreover, the accused and the victim's mother stayed together after the incident. The accused continued to support the victim and her family, who were financially entirely reliant on the accused. The court further considered that the victim suffered no physical injury and did not want the accused to go to prison; that it was not in the interest of society to create secondary victims; that the accused posed no threat to the community and waited 4 years on bail for the trial to commence.

Source: Case study as described by Janine Peens. 2023. "The adequacy of rape criminalisation in modern South Africa: A comparative study". South African Journal of Criminal Justice. Vol 36. Part 1.

[218] [2011] ZASCA 186; 2011 (2) SACR 567 (SCA).

PART 3.

GOOD PRACTICES FOR ENHANCING THE INSTITUTIONAL RESPONSE BY THE COURTS IN GBV CASES

This Part frames the discussion of effective judicial institutional approaches to GBV through the use of good examples from the SADC region. This Part provides a regional focus in order to brainstorm how to enhance the institutional response in South Africa in managing GBV cases. It is not meant to be a thorough assessment of what the judiciary should do, but rather provides some ideas as to possibilities.

United Nations
Office on Drugs and Crime

MODULE 12.

Specialization and capacity building

SUMMARY

This module:

- Introduces the benefits of creating specialization within the judiciary and identifies the different forms of specialization and some considerations to take when developing specialization in the judiciary.
- Provides some tips for institutional measures that contribute to safe and victim-friendly courtroom environments.
- Provides considerations when planning for effective professional development courses.

Building the capacity of the judges to apply the laws of their state in an appropriate and gender-responsive manner and using specialized expertise in the judiciary have been recognized as good practices towards an effective criminal justice response to GBV cases.[219] As such these practices respond to the long history of inadequate response to GBV cases by the criminal justice system. To counter negative gender stereotyping that causes secondary victimization, having victims in contact with judges who appreciate the dynamics of GBV and their multiple needs can contribute to developing a victim-centred criminal justice system that can hold perpetrators to account.

12.1 GENDER AND VICTIM-RESPONSIVE COURTS

International law calls on states to promote specialized courts or dedicated court times.[220] International law also provides details as to how courts should prevent further hardships and trauma to the victim that may result from attending the trial itself and to ensure that trial processes maximize the victim's cooperation, promote their capacity to exert agency during the trial stage while ensuring that the burden or onus of seeking justice is on the state. Specifically the international standards urge states to adopt criminal procedural and evidentiary laws that provide a friendly and enabling courtroom environment for victims to feel safe and comfortable recounting what they have experienced and that minimizes re-victimization.[221] There are a number of ways to introduce specialization within the judiciary, including establishing specialized courts on GBV; designating specialized judges and dedicated court times in the regular courts; and introducing special measures in regular courts to respond to the needs of victims of GBV. Such specialization measures have been evaluated as being effective in many instances as they provide a stronger possibility that the judiciary and court staff will be gender-sensitive; provide for efficient case management of GBV cases; and ensure that the courtroom environment is more hospitable to victims.[222]

[219] Updated Model Strategies and Practical Measures; CEDAW General Recommendation No. 33.

[220] UN Update Model Strategies and Practical Measures.

[221] UN Update Model Strategies and Practical Measures.

[222] UN Women. 2012. Handbook for National Action Plans on Violence against Women. < http://www.un.org/womenwatch/daw/vaw/handbook-for-nap-on-vaw.pdf>

Effectiveness of these good measures is aided by adequate funding, proper human resources and capacity building measures; and provision of tools, such as guidelines, protocols, and bench books.

CREATING SPECIALIZED COURTS

There are a number of examples of specialized courts ranging from broad GBV courts, to more specialized courts that focus on a specific form of GBV, such as domestic violence or sexual violence. Some of these courts, such as sexual offence courts typically are criminal courts that deal with sexual violence offences. In the case of domestic violence courts, the courts may be focused on the criminal aspects or some courts have taken a unified approach where the specialized court has jurisdiction over both criminal and family law matters in cases of domestic violence. These courts address the unique nature of such violence which involves not only criminal behaviour but also complex social relationships and often requires different legal actions (e.g. protection orders, divorce and child custody proceedings, and compensation applications). Having one judge deal with all matters is efficient and can speed up proceedings as well as free up other courts dealing with the same parties but different legal aspects. It also increases victim safety and offender accountability.

Common elements of specialized courts on GBV. Irrespective of the specific structure of the specialized court, a number of common elements have been identified from a review of specialized courts.

- **Specialized staff:** specially trained judges, court staff and non-court professionals (e.g. victim advocates, social workers, counsellors, female interpreters) who understand the emotional and material needs of victims.
- **Assigned single permanent judge** for specific cases: this helps to ensure consistency and quick disposal of the case.
- **Infrastructure that promotes safety.** The court setting is able to provide a sense of safety to the victim, e.g. by providing private spaces, equipped to reduce victim's contact with the defendant (e.g. separate waiting rooms and entrances, private rooms to conduct interviews), and infrastructure to ensure facilitation of victim's testimony (e.g. screens or CCTV)
- **Enhanced legal assistance and psycho-social support** to the victim: victims have access to legal counsel, victim advocacy services; counselling, safety planning services, information and other services to assist them throughout the court process and after the trial has ended.
- **Gender-sensitive guidelines or protocols** are often issued focusing on ensuring the protection of the rights and safety of victims. By streamlining and centralizing court processes, such courts can eliminate contradictory orders, improve victim safety and reduce the need for the victim to testify repeatedly.
- **Targeted tools** (e.g. model bench books) which provide relevant case law within a social context analysis of GBV.
- **Immediacy:** rapid case management so that the defendant can be brought to trial in the shortest possible period of time.
- **Monitoring:** the court establishes a network with law enforcement agency and other courtroom officers in order to conduct rigorous monitoring of defendants and victims.
- **Effective communication:** network or linkages between the court, law enforcement agency and other courtroom officers.

NAMIBIA GBV VICTIM FRIENDLY COURT

The Namibian National Action Plan on Women Peace and Security noted the aim to "increase and strengthen specialized courts to deal with violence against women and children; train and capacitate justice sector officials to ensure higher prosecution rates for SGBV; ensure that perpetrators are tried by courts of competent jurisdiction and handed appropriate sentences; and provide adequate legal aid services for women and children".[223] In 2022, the Ministry of Justice opened a GBV victim-friendly court at Katutura's Magistrate Court.[224] This involves a renovated specialized courtroom, the ability to conducting parts of the trial in an alternative venue which will be less formal and less intimidating than a courtroom, re-arranging the furniture to accommodate special circumstances; having systems in place to allow a witness to testify behind a one-way screen or by means of a virtual testimony; and allowing a support persons to accompany the witnesses during their testimony.

SOUTH AFRICA SEXUAL OFFENCES COURTS[225]

South Africa has developed a blueprint that sets out the essential requirements for Sexual Offences Courts and covers personnel, equipment and location requirements. These courts were designed to tackle low rates of convictions for sexual offences and to mitigate the hardships encountered by complainants in the ordinary courts. The South African Department of Justice and Constitutional Development published a detailed report on the establishment of sexual offence courts which notes these courts being successful in increasing conviction rates and mitigating secondary trauma for the victim (see box below). However, it should be noted that on the ground, due to increasing backlogs of these specialized courts which resulted in increasing hardships for the victims, the elements of good practice from the Blueprint, such as protective measures, facilitating of testimony measures (e.g. CCTV or virtual testifying via MS Teams or other platforms), are more and more available in the regular court structure, which has also resulted in an increase in conviction rates. [226]

ZAMBIA GENDER-BASED VIOLENCE FAST TRACK COURTS[227]

Zambia has established Gender-based Violence Fast Track Courts to increase access to justice for GBV victims and ensure timely disposal of cases. As of 2018, six GBV Fast Tack Courts have been established.

ZIMBABWE VICTIM-FRIENDLY COURTS[228]

Zimbabwe has established Victim-Friendly Courts to empower GBV victims. These Courts have been designed to protect vulnerable witnesses, who often testify in cases of sexual violence. The Courts have separation rooms where victims give their testimonies and are protected from re-traumatization. Their key features include a closed-circuit television for capturing the victim's statement and an intermediary who guides and supports the victim throughout the court process. According to UNICEF website, by July 2023, there were 22 regional Victim-Friendly Courts across Zimbabwe.

[223] Republic of Namibia. 2019. National Actin Plan on Women Peace and Security, page 24.

[224] George Sanzila. July 2022. "Deputy Speaker happy with GBV victim friendly court". Parliamentarian website. https://www.parliament.na/deputy-speaker-happy-with-gbv-victim-friendly-court/

[225] Ministerial Advisory Task Team on the Adjudication of Sexual Offence Matters. 2013 "Report on the Re- Establishment of Sexual Offences Courts". Department of Justice and Constitutional Development: Republic of South Africa. http://www.justice.gov.za/reportfiles/other/2013-sxo-courts-report- aug2013.pdf.

[226] Information from the consultation workshop August 7-8, 2024.

[227] UN Women Global database on violence against women.

[228] These courts were mentioned in the UNODC. 2021. "Report on Criminal Justice Reponses to Gender-based Violence in the SADC Region". P. 24. See also UNICEF. 05 July 2023. "Victim Friendly Courts empower Sexual and Gender Based Violence victims". https://www.unicef.org/zimbabwe/stories/victim-friendly-courts-empower-sexual-and-gender-based-violence-victims#:~:text=Victim%20Friendly%20Courts%20have%20separation,are%20protected%20from%20re%2Dtraumatisation&text=Senior%20magistrate%20Fadzai%20Mthombeni%20has,over%20the%20past%2015%20years.

BENEFITS OF SPECIALIZED COURTS

Some of the benefits of specialized courts include:

- Assigned specialized judges, prosecutors and court personnel usually receive specialized training and gain experience in dealing with GBV cases, potentially making them more likely to act with sensitivity and reject harmful gender stereotypes.
- Experienced judges, prosecutors and court personnel are able to concentrate on similar cases and become more knowledgeable about the relevant laws and procedures regarding GBV, such as criminal element of consent, patterns of coercion, femicide motivation, third party disclosure applications, use of experts, etc.
- Legal and judicial expertise in dealing with the unique characteristics of GBV and the intricacies of the law through specialization can be developed. This can contribute to increasing convictions and enhancing procedural justice.
- The reliability and consistency can conceivably be increased by ensuring that judges and prosecutors have sufficient training and broad experience.
- Allows for a focus on marginalized or problematic types of cases.
- Allows for continuity of court personnel and greater administrative efficiency and processing of cases.
- Frees up other courts and so speeds up court proceedings.
- Promotes greater coordination with support services.
- Victims have better legal support in specialized courts to help guide and support them through the trial process. This is important because often the victims, once they are in court, are very much on their own unless they have their own lawyer.
- The needs of victims are better addressed by ensuring easily accessible psychosocial support to avoid re-traumatization; infrastructure such as creating separate waiting space for victims and defendants and using video-linked equipment to avoid or reduce contact with the defendant.
- Information-sharing and advocacy are usually improved, which may raise victims' participation and satisfaction.

EVALUATIONS OF SPECIALIZED COURTS: SOUTH AFRICA'S EVALUATION OF THE SEXUAL OFFENCES COURTS

A 2018 study looked at how to improve the functioning of the Sexual Offence Courts in South Africa, such as how to improve case-flow management and the knowledge and skills of the justice sector officials in the courts.[229]

Findings include:

- Simply streamlining case-flow systems will not guarantee improved conviction rates. Other capacity and knowledge-building exercises must be employed to enhance service provision and survivor outcomes.
- Traditional indicators of success in the criminal justice system in the form of conviction rates and finalization rates do not give a true reflection of the work involved in sexual offences cases; more information is needed of victim satisfaction with overall outcome.
- Bottlenecks in the justice system still occur for various reasons, including lack of buy-in from other stakeholders, lack of dedicated budget, human resource challenges, and restricted space capacity in courts.

https://www.unicef.org/zimbabwe/stories/victim-friendly-courts-empower-sexual-and-gender-based-violence-victims#:~:text=Victim%20Friendly%20Courts%20have%20separation,are%20protected%20from%20re%2Dtraumatisation&text=Senior%20magistrate%20Fadzai%20Mthombeni%20has,over%20the%20past%2015%20years.

[229] Heath, A., Artz, L. Odayan, M. and Gihwala, H. 2018. "Improving Case Outcomes for Sexual Offences Cases Project: Pilot Study on Sexual Offences Courts". Cape Town, South Africa. Gender Health and Justice Research Unit.

- Additional training is needed to deal with vulnerable groups such as LGBTI, children, people with disabilities, and older persons.
- Training needs to be more practical (e.g. increase the use of case law and examples).
- Inter-sectoral collaboration needs to be enhanced.
- Case-flow management practice through practice guidelines still had challenges in implementation, including multiple postponement requests, incomplete investigations, unavailability of legal counsel of trial dates, limited human capacity to deal with large number of backlog cases.

Recommendations include:

- Improve the turnaround time of finalized sexual offence cases from reporting to sentencing by enhancing case-flow management.
- Improve specialized services for victims by increasing specialized staff, and the urgent establishment of a Sexual Offence Ombudsperson to provide oversight across all departments.
- Address human resource challenges and enhance specialization of staff through training.
- Improve the emotional and mental well-being of specialized staff.

SOME CHALLENGES WITH ESTABLISHING SPECIALIZED COURTS

There are some challenges with establishing specialized courts:

- These courts are usually established in urban areas where the case load is high enough to justify the costs and specialization.
- This means that specialized courts are not available to all victims and therefore there is concern that this might limit gender-responsiveness to only one part of the judiciary.
- This could also mean that victims living in rural areas or far away from the specialized court may have to travel long distances if their case must be heard by the specialised court and not in their local court.
- Due to the often high volume of GBV cases, the capacity of the specialized courts, which often are limited in numbers and locations, might not be enough to ensure fast tracking of these cases.
- These courts might not be sustainable, particularly in cases where courts are funded through development aid, which may not be long term.

LESSONS FROM SOUTH AFRICA: INCORPORATING GOOD PRACTICES FROM SPECIALIZED COURTS INTO THE REGULAR COURT SYSTEM

Responding to the concern that the specialized Sexual Offences Courts were becoming bogged down with heavy backlogs of cases resulting in access to justice concerns (e.g. increasing delays for the victims, long travel times, etc), there was a move to incorporate protective victim-centered measures into the regular court system. This has included setting up CCTV systems or using platforms like MS Teams, ZOOM or WhatsApp video call to allow for witnesses to testify virtually. This has meant that not only victim's testimony can be facilitated outside the courtroom, but also that experts can testify virtually, which saves time and money as well as contributes to lack of delays due to logistically arranging for expert witnesses. Lessons learned from specialization can assist in incorporating certain elements into the regular courts, including protective measures and broader training of all judicial officers.

DESIGNATING JUDGES AND COURT TIMES

Where specialized courts are not feasible due to costs, location (rural versus urban) or any other reason, some countries have created specialized dockets as a less costly way to prioritize cases of GBV. Specialized dockets dedicate a timeframe and a judge or judges to handle these kinds of cases. Cases can be put directly on the specialized docket rather than the often more congested regular docket.

Certain elements listed above can be established within the regular court administration to obtain some of the same benefits, such as efficient court services, better support services for victims; increased victim participation and satisfaction; and efficient and better information sharing. This includes:[230]

- **Designating trained and experienced judges.** Judges should be identified based on legal knowledge, skills and commitment to respond to GBV, as well as possess certain attitudes and personal and psychological skills to deal with these crimes. They should be sensitive, passionate and empathetic regarding gender-based violence. Designated judges need to be exposed to regular training so that their decisions on the specialized docket are reliable and consistent.
- **Designated court times.** Appreciating that waiting in overcrowded courtrooms increases secondary victimization, designated court times can reduced the uncertainty of delays for the victim. Often there are clear procedural guidelines for court staff for these designated court times in order to promote consistent and reliable service. The courtrooms chosen should have sufficient space so that preferably there can be separate and secure waiting rooms.
- **Case management issues** such as prioritizing GBV cases in the docket or having a specialized docket can reduce long delays that can increase secondary victimization. Expedited measures (fast tracking) can improve the general efficiency in case management and reduces the uncertainty of delays for the victim.

12.2 INSTITUTIONAL MEASURES THAT CONTRIBUTE TO SAFE AND VICTIM-FRIENDLY COURTROOM ENVIRONMENTS

Victim-friendly measures. Many countries have introduced various measures to promote victim-friendly courtrooms. The courts have the inherent ability to protect the safety, physical and psychological well-being, dignity and privacy of witnesses and should have regard to all relevant factors including age, gender, health and the nature of the crime. Often, the court can on its own motion or on application by the prosecutor make a wide range of orders in this regard.[231]

- Permitting the victim to testify in a manner that allows them to avoid seeing the defendant, e.g. using screens or CCTV.
- Limiting the frequency, manner and length of questioning.
- Allowing a video-recorded interview as evidence in chief.
- Giving evidence via an intermediary.
- Permitting a support person such as family member or friend to attend trial with the victim.
- Removing of formal legal dress by judge and lawyers.
- Emptying the public gallery (closed hearings or in-camera hearings).
- Allowing for in-camera proceedings.
- Protecting the identity of the victim from the media and the public, e.g. ban on publication, removing any identifying information such as names and addresses from the public records of the court, using a pseudonym for the victim.

[230] UNODC. 2014. "Blueprint for Action: An Implementation Plan for Criminal Justice Systems to Prevent and Respond to Violence against Women" found in UNODC. 2014. "Strengthening Crime Prevention and Criminal Justice Responses to Violence against Women". <https://www.unodc.org/documents/justice-and-prison-reform/Strengthening_Crime_Prevention_and_Criminal_Justice_Responses_to_Violence_against_Women.pdf>

[231] These examples are taken from a variety of sources which are listed in the UNODC. 2014. "Handbook on effective prosecution responses to violence against women and girls".

SADC GBV MODEL LAW

The SADC GBV Model Law calls on states to incorporate procedures throughout the justice proceedings that are victim-centred, reflecting international and regional standards.

- The right to safety and privacy and to be free from hardship during the detection, investigation and prosecution process, which requires legal provisions to ensure the safety, privacy and dignity of victims and their families at all stages of the criminal justice process, such as witness and victim protection programmes, measures to exclude the public from the courtroom, use of testimonial aids like screens or CCTV and support persons, the prohibition to publish the victim's name or other intimate details (Article 28(1)(d).
- Where, in gender-based violence proceedings, before a judicial institution or quasi-judicial body, the institution or body is satisfied that there are special circumstances that make it desirable in the interests of the proper administration of justice, that the proceedings or any part of the proceedings should not be heard in open court, order that any persons, not being parties to the proceedings or their legal representatives, be excluded during the hearing of the proceedings or any part of the proceedings. (Article 29(1)).
- A judicial institution or quasi-judicial body may order that that a victim or offender testifies away from the other, in different rooms, by use of a separating screen or virtually (Article 29(2)).
- All proceedings on sexual-related and gender-based violence cases affecting children shall be held in-camera (Article 29(3)).

SEXUAL OFFENCES COURTS REGULATIONS SOUTH AFRICA

The 2020 regulations for sexual offences recognize the need to limit secondary trauma of the victim. One method of implementing this is by changing the architecture of the court, which aims to reduce the stress and trauma related to testifying.

1. Specialist infrastructure:

Victims of rape and other sexual offences often find it very difficult to navigate the court building. There are therefore now specifications for the rooms and layouts within the courts that need to be adhered to. The waiting area needs to be comfortable and safe and all rooms need to be accessible to adults, people with disabilities and children.

From the regulations:

"Required facilities:

A designated court must have, at least, the following facilities:

(a) A waiting area for complainants as provided for in regulation 8;

(b) a testifying room as provided for in regulation 9;

(c) a court preparation room as provided for in regulation 10; and

(d) a consultation room, for the prosecutor to consult with a complainant, as provided for in reg 10."

All sexual offences courts must have a set of anatomical dolls. It is the court manager's role to ensure that there is at least one full set of six anatomical dolls ranging from a male and female of a child, an adult and an aged person.

The court room must also have specialist equipment that enables the survivor to give evidence without having to be face to face or in the same room as the accused. This means that CCTV or similar equipment must be available in a testifying room for giving evidence. The testifying room needs to be a space that makes the complainants and witnesses (both adults and children) feel at ease. It needs to be well lit and conducive to giving evidence.

"The devices and equipment found in the court room must be of such quality so as to enable the efficient and effective giving of evidence by complainants and witnesses and to avoid secondary traumatisation of such complainants and witnesses.

The court room must have closed circuit television (CCTV) or similar electronic media for giving evidence and the witness must be able to testify (through electronic devices or directly) and be seen and heard from somewhere other than the court.

The court manager must ensure that there is at least one set of anatomical dolls available at the designated court for use by the prosecutor and intermediary: Often children and vulnerable adults are required to testify in sexual offences matters. Children, especially very young children, have a limited ability to verbalize their experiences and this hampers their ability to disclose the details of sexual abuse. There was a need for reliable investigative tools to assist with interviewing children in cases of sexual abuse, and anatomical drawings and anatomical dolls are therefore used."

NAMIBIA'S CRIMINAL PROCEDURE ACT

The Criminal Procedure Act (s. 153) makes provisions for witnesses to testify behind closed doors where it appears that harm might occur to the witness if they testify at such proceedings. Moreover, complainants of sexual and domestic violence offences are categorized as vulnerable witnesses which entitles them to special protection during the trial. This includes: the court can relocate for their evidence; the furniture in the courtroom can be rearranged for their testimony; permission can be granted for a support person to sit with the complainant during their testimony; permission can be granted for the complainant to give evidence behind a screen or in another room which is connected to the courtroom by means of CCTV; exclusion of the public from court; prohibition of publication of the identity of the complainant.

Infrastructure measures to enhance victim safety. Studies show that infrastructure can improve the safety of victims as well as make the courtroom environment more hospitable.[232] A number of strategies could be adopted to minimize the negative impact that participating at a criminal trial has on victims and allow courts to better manage risk within the court setting.

- Courtroom infrastructure should ensure at least two entrances and exists on opposite sides of the building so that victims may safely enter or leave the building.
- Courthouses should have separate waiting rooms and safe and easily accessible restrooms for females.
- Clear signage and documents in all relevant languages should be available so victims know where they have to be.
- Metal detectors and/or security measures such as security guards should be available as the public enters the court house.
- Escorts for the victims and witnesses should be provided as they enter and leave the building.
- Courtroom should have adequate space between parties, multiple exists and security on duty.
- Guidelines for an immediate response to violence or threats of violence in court known by court staff.

[232] Mossman, E. 2009. "Responding to sexual violence: A review of literature on good practices. New Zealand Ministry of Women's Affairs.

- There should be space for private videotaping or closed circuit television testimony.
- Court staff should ensure increased communication with the victim throughout the process and coordination of risk assessment and support.

COURT SUPPORT PROGRAMMES

In jurisdictions that allow for the preparation of witnesses, one goal is to help them testify with full comprehension of court proceedings. A lack of familiarity with the trial process can undermine their ability to testify to the best of their ability. It should be noted that practices that familiarize witnesses with the courtroom, court personnel and trial procedures are well-accepted and common practices in many states. However, preparing witnesses with their substantive testimony is not as accepted in all states and may be viewed as witness coaching and strictly prohibited.

Some states have developed a position of court preparation officers. According to a UNODC handbook, court preparation:[233]

- Is a life-skills approach to empower witnesses to testify effectively through acquiring relevant skills and knowledge.
- Empowers victims/witnesses to understand their role and cope with their participation in the legal system.
- Helps witnesses have a better grasp of the full spectrum of the legal process.
- Significantly enhances the ability of a witness to provide the best possible quality and quantity of information while testifying.
- Encourages survivors to discuss and work through their fears about court.

NAMIBIA COURT SUPPORT AND PREPARATION OFFICERS

Recognizing that preparation of victims for court and supporting them throughout the process are critical for the successful prosecution, Namibia has a pool of Court Support and Preparation Officers whose support is contributing positively to the criminal justice system. UNODC assisted in developing a "Handbook for Court Support and Preparation Officers (CSPOs) Supporting Court Witnesses of Gender-Based Violence". The components of Namibia's court preparation programme include:

- Addressing the fears and expectations of the witness
- Educating and providing information on court procedures, the trial process and the role of the witness
- Familiarizing the witness with the courtroom and the roles of court personnel
- Giving evidence-in-Chief (which entails victims/witnesses having to relate the details of what happened to them in Court)
- Handling cross-examination
- Using relaxation techniques
- Providing support in Court
- Post-trial support

[233] UNODC. 2020. "Handbook for Court Support and Preparation Officers (CSPOs) Supporting Court Witnesses of Gender-Based Violence".

12.3 IMPROVING JUDICIAL CAPACITY: PROFESSIONAL DEVELOPMENT

Professional development courses can equip judges and court staff with the skills, knowledge and abilities to manage GBV and to inspire a critical thinking frame of mind that is open to the spirit of inquiry on effective gender-responsive ways to handle each case of GBV. Professional development can also greatly contribute to shaping institutional cultures and practices that have proved ineffective in the past and can also support these professionals to instil a sense of trust in victims regarding the justice system. Studies have shown how capacity development can change practice. For example, the International Association of Women Judges found that training for judges on instruments that protect women's human rights has resulted in the citation of those human rights documents in judicial opinions among trainees.[234]

FEATURES FOR EFFECTIVE PROFESSIONAL DEVELOPMENT OF JUDGES AND COURT STAFF

All materials and courses should be reviewed to ensure that it challenges the attitudes and behaviours within criminal justice agencies that foster GBV and does not contribute to the myth-making cycle. Features of effective training:[235]

- Mandate specific, regular and relevant training by law.
- Training is integrated institutionally, supported by protocols and guidelines.
- Promote multidisciplinary training amongst criminal justice providers. This kind of training can contribute to building trust amongst the different criminal justice agencies and enhance coordination.
- Develop training in close cooperation with women's rights organizations and civil society. This kind of training can contribute to building trust between the community and the criminal justice system.
- Establish an evaluation mechanism to measure the impact of training.
- Have specialized training for specialized units and general training for all criminal justice providers.
- Training should cover a broad range of topics on GBV.
- Gender issues should be mainstreamed into all relevant training areas and training should also include in-depth modules on gender-related issues.
- Training should draw on the expertise and specialist knowledge of academic researchers, medical practitioners, probation and parole officers and victim support agencies.

The issue of mandated training for judges is controversial in some jurisdictions. Some argue that the imposition of specific course on sitting judges would infringe judicial independence. Some have gotten around this argument by imposing an obligation on all lawyers who apply for a judicial appointment to show that they have taken such training. However, others take the view that trainings and capacity-building programs are most effective when they are mandated in law and provided regularly and systematically.

UNODC ROSAF E-LEARNING COURSE FOR JUDICIAL OFFICERS IN THE SADC REGION

UNODC, in partnership with the University of Cape Town, has developed an online e-learning course for judicial officers in the SADC region. It is a self-paced 16 hour course. For more information and how to apply to the course, visit UNODC ROSAF website: www.unodc.org/GBV.

[234] As cited in Cheryl Thomas et al. 2011. "Working with the Justice Sector to End Violence against Women and Girls". The Advocates for Human Rights and UN Women.

[235] UNODC. 2014. Blueprint for Action.

INTERNATIONAL ASSOCIATION OF WOMEN JUDGES (IAWJ) JURISPRUDENCE OF EQUALITY PROGRAM (JEP) TRAINING

All JEP trainings share the following features:

- Judge-centred and judicially-owned at both the international and national level: IAWJ works with and through its chapters to provide training that is responsive to local needs and whose content is guided and shaped by in-country judges. IAWJ trains judges to become trainers themselves so they can pass this skill onto colleagues, since judges are best equipped to communicate and collaborate with their peers.
- Reliance on participatory learning methods: Judges are used to a high degree of professional autonomy, and consequently bring to trainings their specific and often unique knowledge and experience. JEP trainings draw on this expertise through the use of case studies, role plays, small group work and other participatory techniques.
- Encourage the application of international law in domestic courts to the extent permitted by national law: During JEP trainings, judges explore the meanings of international law texts, such as the CEDAW, in the context of their national laws.
- Practical and non-abstract: Through stakeholder consultations and outreach to women's groups, medical practitioners, police and prosecutors, JEP trainings work to address concrete problems identified by national chapters.

END GBV 100 DAY CHALLENGE IN SOUTH AFRICA[236]

100-Day Challenges are a pilot project in the GBV space aimed at fast-tracking the implementation of the National Strategic Plan on GBV at municipal level. The aim of the 100-Day Challenges was twofold: to localize the National Strategic Plan itself and also to challenge ourselves to see what teams can do within 100 days and then try and implement those skills moving forward.

One of the pillars in the challenge is Pillar 3 responsible for justice, safety & protection. Different teams plan for different activities. For example in Tzaneen, the team is using awareness campaigns to increase reporting of sexual offenses and domestic violence cases from the rural areas. The spinoff is that less rape cases, especially those which involve minor children, juvenile minors and minor victims have been withdrawn. In Bloemfontein, the team is focusing on reducing the backlog in maintenance cases by 75%. Part of the 100 Day Challenge includes short courses / modules on the skills needed to respond to GBV for all court staff.

CONSIDERATIONS WHEN DEVELOPING PROFESSIONAL DEVELOPMENT COURSES

Resources, such as this Handbook, may be fairly lengthy and broad, so facilitators of such professional development courses can pick up different modules to focus on for their different courses, depending on the needs of the participants. The following provide some considerations to take when developing one's own course for their judiciary.

- **Ensure for a good foundation.** Facilitators should recognize the importance of grounding every course within the understanding of GBV for a tailored and contextual response, the core concepts and fundamental international principles that frame a trauma-informed, gender-responsive justice approach. All courses should build upon the foundational knowledge contained in Part 1.
- **Professional development needs assessment.** Before a specific course is designed, the team should conduct a professional development needs assessment to determine the knowledge, skills and attitudes that should be the target of the particular course. For more information on conducting needs assessment, check out UNODC. 2023. SADC Handbook for prosecutors.

[236] For more information see: https://gbvf.org.za/nsp-100-day-challenges/

- **Facilitators' level of understanding.** It is essential that facilitators of these courses have a strong understanding of the dynamics and trauma of GBV, the importance of a victim-centred approach and previous experience facilitating discussion about the issue. When facilitating sessions about the gender dynamics underpinning such violence and the impact of trauma on victims, it might be helpful to collaborate with experts, such as non-governmental organizations (NGOs) or psychologists who work with survivors.
- **Consider different ways for conducting courses.**
  - E-learning. Development of on-line courses are cost effective and allow for broader dissemination.
  - Interactive learning. Allows for judges who are participating to put questions to facilitators, share problems among co-participants and obtain guidance from trainers.
  - Consider setting up an internet-based network forum, similar to the European Judicial Training Network, which can be a principal platform and promoter for the training and exchange of knowledge of the judiciary. The European Judicial Training Network has developed training standards and curricula, coordinates judicial training exchanges and programmes, disseminates training expertise and promotes cooperation between EU judicial training institutions.

SELECTED GLOBAL AND REGIONAL TRAINING RESOURCES

There are a number of global and regional tools for facilitators to review when developing their own national professional development courses for their judiciaries.

UN Resources

- UNODC. 2019. Handbook for the Judiciary on Effective Criminal Justice Responses to Gender-based Violence against Women and Girls. https://www.unodc.org/pdf/criminal_justice/HB_for_the_Judiciary_on_Effective_Criminal_Justice_Women_and_Girls_E_ebook.pdf
- UNODC. E-Learning course. 2021. "Implementing a Coordinated Criminal Justice Response to Gender-based Violence against Women.
- UNODC. 2014. Blueprint for Action: An Implementation Plan for Criminal Justice Systems to Prevent and Respond to Violence against Women. https://www.unodc.org/documents/justice-and-prison-reform/Strengthening_Crime_Prevention_and_Criminal_Justice_Responses_to_Violence_against_Women.pdf
- UN Women, UNFPA, WHO, UNDP and UNODC. 2015. Essential Services Package for Women and Girls Subjected to Violence: Core Elements and Quality Guidelines, Module 3 Justice and Policing. http://www.unwomen.org/en/digital-library/publications/2015/12/essential-services-package-for-women-and-girls-subject-to-violence
- UN Women, UNDP, UNODC and OHCHR. 2018. A Practitioners toolkit on women's access to justice programming. https://www.unwomen.org/sites/default/files/Headquarters/Attachments/Sections/Library/Publications/2018/WA2J-Complete-toolkit-en.pdf
- UNODC. 2018. "Issue Paper: Gender –Related Judicial Integrity Issues".

Regional resources

- UNODC. National Standard Operating Procedures for the Multi-disciplinary team relating to the Management of Gender-Based Violence and Violence against Children in Namibia
- UNODC Namibia. 2020. Court Support and Preparation training manual (Namibia).
- UNODC Namibia. 2020. Handbook for Court Support and Preparation Officers (CSPOs) on Preparing and Supporting Witnesses of Gender-Based Violence in Court (Namibia).
- UNICEF Zambia. Guidelines on Minimum Standards for Child Victims and Witnesses in the Justice Process in Zambia (Zambia).
- Child Witness Institute. 2022. Access to Justice for Persons with Disabilities with a Special Focus on Women and Children - Benchbook for Judicial Officers (South Africa).

Other resources

- Commonwealth Secretariat and UN Women. 2018. "Judicial Resource Book on Violence against Women for Asia: Combatting Violence against Women and Girls for Cambodia, India, Pakistan and Thailand".
- Commonwealth Secretariat. 2017. "Judicial Bench Book on Violence Against Women in Commonwealth East Africa".
- Council of Europe. 2016. "Preventing and Combating Domestic Violence Against Women- A learning resource for training law-enforcement and justice officers".
- Council of Europe. 2016. "Improving the Effectiveness of Law Enforcement and Justice Officers in combating Violence Against Women and Domestic Violence - Training of Trainers Manual".
- Council of Europe. 2015. "Effective Multi-Agency Co-operation for preventing and combating domestic violence- Training of trainers manual".
- European Union and Council of Europe. 2017. "Training Manual for Judges and Prosecutors on Ensuring Women's, Access to Justice, prepared under the project Improving Women's Access to Justice in the Eastern Partnership Countries".
- Judiciary Education Institute of Trinidad and Tobago. 2018. "Justice Through a Gender Lens – Gender Equality Protocol for Judicial Officers". Judiciary of the Republic of Trinidad and Tobago, the Judicial Education Institute of Trinidad and Tobago (JEITT), The JURIST Project, UN Women, the Caribbean Association of Judicial Officers, the Caribbean Court of Justice, and the Trinidad and Tobago Association of Women Judges.

12.4 OPTIONS FOR EXERCISES

Given that Part 3 of the handbook explores innovative regional practices to enhance the judiciary's institutional response to GBV cases, often this involves more of a brainstorming exercise than training exercises. The options for exercises contained below are presented as one way to generate discussions at workshops or meetings to develop institutional policies and practices.

EXERCISE: Brainstorming in small groups – understanding good practices in justice service delivery				
Instructions				
Divide the larger group into smaller groups. Provide each group with a specific example of a good practice and ask them to prepare a presentation for the group as to how the example practice illustrates the guiding principles from international standards discussed in Module 2 (human rights approach, victim-centred and perpetrator accountability). You could also then ask them to list other good practices and conduct a similar analysis in the plenary. Provide a handout to assist the groups form their presentation				
Handout				
Example 1: Specialized GBV courts				
Human rights-based	Victim-centred	Offender accountability	Oversight and accountability	Resources and sustainability
Facilitators notes				
Points to make for example 1: – an example of specialization within the courts. Whatever the structure of specialization and enhanced professional development, the main purpose of specialization makes it a good practice. • **Human rights approach:** Appreciating that long delays in justice increases secondary victimization, specialization often includes expedited measures (fast tracking) which improves the general efficiency in case management and the victim's right to access justice. • **Victim-centred approach:** Specialized and trained judges working in victim-friendly courts usually mean continuity of the judge throughout the case which lessens the need for the victim to retell their statement. There is often increase communication with the victim throughout the process and coordination of risk assessment and support. All of this improves the experience for victims and better ensures the victim's safety. • **Offender accountability:** Specialization and enhanced capacity building usually involves continuity of the police, prosecutors and judges working on the file, focused on case building and evidence gathering and coordination with other criminal justice officials which increase the likelihood of successful apprehension, prosecution and conviction.				

Adopted from Skinnider, E. Training Manual on a Coordinated Criminal Justice Response to Gender-based Violence against Women and Girls: A Training Programme for the Police, Prosecutors and Judges in Nepal (UNODC)

EXERCISE: Case study on conducting training

Instructions

Divide the larger group into smaller groups. Provide each group with the case study and ask them to:

Q1. Identify what, if any gender-related issues need to be addressed in conducting this training?

CASE STUDY

Thirty judges are attending a three day residential seminar on human rights law. They are of mixed age and gender. The trainers are all experienced lawyers who frequently appear before many of the judges attending the seminar. Two trainers are male, two trainers are female.

The conference organizers have allocated bedrooms in the man building to the female judges and trainers and bedrooms in the more luxurious bungalow suites across the hotel grounds to the male judges and trainers. The reason given for this decision is that "women like to be closer to the training rooms and lounges" and also "women do not like walking across the hotel grounds at night, for security reasons".

The course is intense with much role play on case studies. In most of the cases, the victims are women and the perpetrators are men. In the role plays, the male judges are assigned to the role of the perpetrators, the women judges the role of victims.

In the course of the training event, one of the trainers makes humorous remarks that could be deemed sexist, but nobody challenges him. In fact, quite a few judges (male and female) find them rather amusing. One of the judge trainees takes an obvious fancy to one of his female judge colleagues and makes frequent reference to her "saucy dresses". At the coffee break, he puts his arm around her shoulders in an unsolicited and unwelcome manner.

Facilitators notes

Several gender-related topics are touched upon in the case study:

- **Sexual harassment:** The fact that one of the trainers make humorous remarks that could be deemed sexists, but nobody challenges him is an example of covert sexual harassment of an audience. The failure of any members of the audience to challenge the speaker either directly or in private thereafter raises the question, what has happened to the integrity principle (Bangalore Principles)?
- **The male judge who makes remark**s about, and offers unwanted physical conduct with a female judge is clearly guilty of sexual harassment as he is not conducting himself in a way that is consistent with the dignity of the judicial office (Propriety principle of the Bangalore Principles), nor with the equality principle.
- **Sexual discrimination:** There is direct sexual discrimination by the conference organizers in locating the sleeping arrangements for women and men attendees in different parts of the premises, without seeking their views.
- **Gender stereotyping:** There is gender stereotyping throughout the course, for example, choices of rooms, gender for role plays.

Source: UNODC. 2019. Judicial Conduct and Ethics: Self Directed Course.

EXERCISE: Brainstorming exercises on sensitizing your judicial colleagues on GBV
Instructions
Ask participants to remain at their tables and work together on a short brainstorming /reflective exercise. Q. How would you sensitize your judicial colleagues to the issue of gender equality and gender-based violence? Q. Develop a plan of action for a 100 Days Challenge.
Facilitator's Notes
Check out the "End GBV 100 Day Challenge in South Africa - https://gbvf.org.za/nsp-100-day-challenges/. 100-Day Challenges are a pilot project in the GBV space aimed at fast-tracking the implementation of the National Strategic Plan on GBV at municipal level. The aim of the 100-Day Challenges was twofold: to localize the National Strategic Plan itself and also to challenge ourselves to see what teams can do within 100 days and then try and implement those skills moving forward.

MODULE 13.

Improving justice service delivery: good practices in case and courtroom management

SUMMARY

This module

- • Considers how the courts could consider reviewing their work to ensure that they are responsive to GBV victims.
- Identifies good practices in developing court policies and practices to ensure consistency in justice delivery in GBV cases.
- Provides for an understanding of the benefits as well as some concerns regarding using E-justice in GBV cases and sets out tips for the courts when using E-justice measures.
- Discusses some considerations regarding enhancing justice delivery for GBV victims living in rural and remote areas.

13.1 ACCESSIBLE AND SENSITIVE COURT MECHANISMS TO ENSURE FAIR AND TIMELY PROCESSING OF CASES

It is important for the judiciary to take control and responsibility of the court case and limit the questionable tactics of the defence and prosecutors that can delay the case and contribute to the re-victimization of GBV victims. Court and case management include expedited procedures for cases involving GBV; limiting adjournments, and providing the victim with timely legal assistance and support, as appropriate with the national legal framework.

TIMELY AND EXPEDITED PROCEEDINGS

The practicalities of a trial are potentially very stressful for victims, especially in relation to delays while waiting to give evidence. Delays and cancellation of the criminal case, particularly at the start of trial have been identified as being traumatic for victims and increasing their secondary victimization.[237] The judiciary has taken different approaches to improving case management for GBV cases, whether through instigating policies, protocols, directives or practices. These include:

- Prioritizing cases of GBV on court rolls.
- Establishing specialized dockets for GBV cases.
- Designing court procedures to move cases through the system quickly (fast-tracking).
- Developing policies, protocols, directives, etc.

[237] Payne, S. 2009. "Redefining Justice: Addressing the Individual Needs of Victims and Witnesses". London: Home Office.

Prioritization of GBV cases[238]

Namibia, South Africa, Zimbabwe and Mauritius have case management systems which allow for prioritization of GBV cases, either automated or manually.

Criminal Court Practice Directives for the Regional Courts in South Africa, 2023. 7th Revision.

The Criminal Court Practice Directives in South Africa includes a number of provisions to addresses GBV cases and vulnerable witnesses:

- 3. Case allocations and appearances. 3.1.1 Gender-based violence cases, including sexual offences cases, must receive priority in allocation.
- 4.2 At the pre-trial hearing the issues enumerated below, but not limited thereto, are to be considered and addressed, where relevant: 4.2.18 Whether there are any child witnesses or witnesses with special needs. 4.2.19 Whether there are any technical requirements for the trial, such as the – 4.2.19.1 Use of an intermediary by any witness (see s 170A (1) categories), 4.2.19.2 Audio visual equipment, 4.2.19.3 Remote audio-visual testimony etc. and 4.2.19.4 Whether the necessary arrangements have been made.
- 4.3.4 Special attention must be given to ensure that the case is placed down in such a way that the testimony of child witnesses and witnesses with special needs can be dealt with as early as possible on that court day it is placed for the testimony of such witnesses and that it is placed such that it can be rolled to the next day for continuation should it not be finalized in one day.
- 4.13 Children and vulnerable witnesses with special needs should generally not be scheduled as back-up witnesses. Rolls involving child witnesses and vulnerable witnesses with special needs should be arranged in such a manner that would enable the rolling over of that case to the next day to facilitate finalization of the testimony of such child or vulnerable witness with special needs.
- 4.16 Gender-based violence cases, including sexual offences cases are all regarded as high priority cases but cases with child witnesses or witnesses with special needs must not be put on the roll with other high priority/preferential matters on the days scheduled for the testimony of children or witnesses with special needs.
- 5.1 Gender-based violence cases, including sexual offences cases must receive priority on the date of trial and care should be taken that such cases are not crowded out.
- 5.2. Cases involving child witnesses must be dealt with first. Where it is not possible to finalize the evidence of a child or rape victim on the same day, the case must be rolled over to the following day as far as possible. If not, it must be postponed to the earliest possible date for further hearing.

Zambia's Fast Track Courts[239]

Fast Track Courts have been established in six provincial districts. The Fast Track Courts aim at expediting GBV cases by reducing the time that cases take to reach the courts. During the COVID pandemic, these courts were supported in operating virtually through the provision of equipment such as computers, internet modems, and recorders to enhance data capture and recording. An assessment done by the World Bank notes that these courts are showing positive results in facilitating justice for GBV survivors, although this is still limited to district courts and there is need for scaling up.

[238] UNODC. 2021. Report on Criminal Justice System Response to Gender-Based Violence in the SADC region.
[239] The World Bank. 2022. "Gender-based Violence Assessment in Zambia".

Developing court policies (sometimes called directives or protocols, depending on the jurisdiction). Designated judges who specialize in GBV cases can develop formal, standardized, written policies on any aspect of these cases. This can ensure consistency in application of the laws state-wide. For example, in addition to prioritizing processing of GBV cases and dedicating time in the docket for these cases, additional elements of a policy or protocol regarding pre-trial release hearings in GBV cases could include:

- Obtain defendants' criminal histories and other background information.
- Compulsory pre-trial release conditions, if determine pre-trial release is appropriate.
- Automatic appointment of defense counsel, to avoid case delays.
- Early subpoenaing of witnesses.

Avoiding delays. Delays occurred for multiple reasons, such as problems with special measures; loss of jurors; and child care needs of both the victim and defendant. A common cause, though, is the overrunning of other cases that judges dealt with each morning before the trial. Rather than just accepting and allowing delays as a routine aspect of trails, here are some tips for setting court trial lists:

- Trial readiness certification before the trial judge sets trial dates. This allows the judges to manage their own court roll.
- List trials involving GBV to start in the afternoon so that the victim is not summoned on the first day of trial. This addresses the common practice of the defendant of seeing whether to enter a guilty plea the first day of trial waiting to see if the victim shows up.

COURT GOVERNANCE AND ADMINISTRATION ISSUES[240]

Some countries have focused on changing the internal organization of the courts to provide better services to victims of GBV. There needs to be internal accountability in order to monitor the extent to which gender-responsive services are being provided. This could include:

- Developing of court practice directives setting out court management of cases involving GBV.
- Creating of directives on criminal justice norms and standards from the Chief Justice.
- Requiring judges to regularly account for court hours, finalized matters, part heard cases, and outstanding judgments.
- Establishing national efficient enhancement meetings with relevant stakeholders.
- Establishing key performance indicators for judicial accountability.
- Creating specialized offices in the court administration on gender-based violence.

Practical internal court administrative changes to enhance women's access to justice:

- Additional shifts for judges in the afternoon and weekend.
- Extension of hours of the court registry for the reception of complaints.
- Enable the citation by instant messaging through Internet (WhatsApp Business) to the victims.
- The creation of a special form to receive complaints which can then be uploaded in a digital platform, which allows all the operators to access it.

[240] For more information, see Eugene Ntaganda. 2012. "Exploring the Special Judicial Responses to SGBV: Best Practices, Challenges and Guidelines in the Great Lakes Region". International Conference on the Great Lakes Region (ICGLR).

COURT PROGRAMMES THAT SUPPORT VICTIMS' RIGHTS

International standards provide that victims should have a number of supports in the criminal justice process, including legal aid where appropriate and not inconsistent with the rights of the accused and the right to quality interpretation. While it is recognized that not all countries provide the victim legal standing in criminal courts and the right to have counsel represent them during the criminal proceedings (this is generally seen in inquisitorial legal traditions as opposed to common law legal traditions), research highlights the importance for victims of having their own legal representative irrespective of which legal tradition.[241]

The judiciary has a role in ensuring access to counsel, and, where needed, access to legal aid, for victims. Court programmes should emphasize that legal aid to victims should be provided in close cooperation of justice agencies and other professionals including victim support workers to maximize the effectiveness of the legal aid system and that services should be provided in a manner that prevents repeat victimization and secondary victimization.

Good practice is where the courts ensure that the victim has their own lawyer. Benefits of the victim having her own lawyer, depending on the jurisdiction include:

- Protecting victims from harassing, humiliating and improper defence tactics.
- To familiarizing them with the court process.
- Preparing them for hearings and trial.
- Liaising with the courts in order to provide the victim with updates on the case.
- Assist in preparing victim impact statements.
- Explaining the developments in the case or at trial to the victim.
- Monitoring any use of myths or stereotypes.

Good practice regarding court assigned interpreters.[242] Interpreters should be trained on effective and gender sensitive interpretation in criminal justice proceedings involving gender-based violence. Cases can be lost through poor and inaccurate interpretation. Culturally and linguistically different victims have an increased vulnerability in reporting gender violence and continuing to cooperate with the criminal justice system. Many interpreters are known to their community which impedes reluctance to participate in the criminal proceedings. Courts should:

- Ensure that interpreters work to an interpreting code of conduct.
- Ensure that staff brief and de-brief interpreter prior to and following appointment.
- Provide opportunities for interpreters to fully explain their role and their duty of confidentiality.
- Be aware throughout an interpreting session of any difficulties or distress experienced by the victim.
- Terminate the session if a victim indicates that the interpreter is not suitable.
- Avoid leaving victims and interpreters alone together at any time before, during or after the session.

[241] Lovett, M. and Kelly, L. 2011. "Different systems, similar outcomes? Tracking attrition in reported rape cases in eleven countries".

[242] Glasgow Violence Against Women Partnership. Undated. "Good practice guidance on interpreting for women who have experienced gender based violence".

13.2 E-JUSTICE ISSUES

The introduction of ICTs mechanisms in criminal justice procedures can improve the quality and efficiency of justice services, as well as their openness, transparency and accessibility. E-justice measures were increasingly being introduced in response to the COVID-19 pandemic.[243] Such measures have the potential to facilitate victims' access to justice not only during lockdown or movement restrictions, but also in ordinary times, by addressing obstacles they usually face, such as corruption, high costs, delays, backlog of cases, as well as cultural and physical barriers to travelling outside their villages or communities. The use of ICTs has created an opportunity to increase effectiveness in the justice sector, beyond the COVID-19 pandemic.

E-justice measures include: reporting of violence through remote channels; recording of telephone or video call statements for victims, measures to take photographs that can be used as evidence in case of complaints made in police units; virtual working meetings with police personnel in order to define priority lines of investigation, identify problems and solutions; remote access to criminal records; online or electronic case management systems; using video conferencing tools for meetings; examination of expert witness through videoconferencing; and virtual hearings for pre-trial release and virtual trials.[244] Courts should also look at ways to use technology to improve the justice delivery to the victim.

Courts should consider a number of issues when introducing e-justice measures:[245]

- **What is the level of accessibility to technology?** Access to on-line platforms and ICT skills might be limited for victims, particularly economically deprived women and girls. Any e-justice measures should not aggravate the exclusion of wide groups of people experiencing gender discrimination.
- **Consider e-justice measures that have lower bandwidth requirements.** While mobile broadband subscriptions and mobile-cellular subscriptions have grown in the last years and almost the entire world population (97%) lives within reach of a mobile cellular signal, mobile phone ownership is correlated with income levels. There is also a gender gap in mobile phone ownership.
- **Be aware that technology is another aspect of abuser's control.** Courts should appreciate that technology is another aspect of the lives of victims that can be controlled by perpetrators of GBV. Phones or computers are often controlled by male relatives, leaving women without the opportunity to safely engage with the court process using their own phone any other form of digital communication.
- **Some e-justice mechanisms are not accessible to specific groups.** These may include women with disabilities, women without the needed ICTs skills, including elderly women, and women who are illiterate, or have no or limited knowledge of the official languages of the country.
- **There may be objections to the use of e-justice measures.** Defence lawyers may object to the use of e-justice measures. For example, some might object on the basis of the rights of the accused is being infringed. It is important to have dialogues with all actors in the criminal justice system. The implementation of technology facilitated procedures in relation to GBV cases must be carried out in full respect for the rights of victims and accused. Some judges expressed concern that videoconferencing prevented them from perceiving victims' and witnesses' body language and non-verbal communication making it harder to make credibility assessments.
- **The need for infrastructure and human resources.** The technology that is needed to support these e-justice measures as well as the skills needed by judges and court staff in using these measures.

[243] E- justice is the inclusion or the use of knowledge and information technologies in the administration of justice. E-justice supposes the use of a plurality of technological instruments and channels to delivering justice as cited in UNODC. 2021. "The Impact of COVID-19 on Criminal Justice System Responses to Gender-based Violence Against Women: A Global Review of Emerging Evidence".

[244] UNODC. 2021. "The Impact of COVID-19 on Criminal Justice System Responses to Gender-based Violence Against Women: A Global Review of Emerging Evidence".

[245] For more details see: UNODC. 2021. "The Impact of COVID-19 on Criminal Justice System Responses to Gender-based Violence Against Women: A Global Review of Emerging Evidence".

CONSIDERATIONS FOR EQUIPMENT REQUIRED FOR AN E-JUSTICE PROCESS[246]

UNODC has developed a checklist of the kinds of equipment that is required for an E-Justice process:

- Lap tops (would need laptops, one in court and one in testifying room per court). They should only have the function for email and MST so that it is not misused if multifunctional.
- HDMI cables
- Web cameras
- TVs
- TV brackets
- Blue Tooth Speakers
- 2-seater couches
- Telephone table
- Interview chairs
- Headphone with microphone
- Water cooler and replacement bottles
- Air conditioner
- External hard drive
- Printer and toner
- Dictaphone / court tape recorder
- Omnidirectional microphone
- MS teams License (for the laptops)

TIPS FOR USING E-JUSTICE MECHANISMS IN GBV CASES[247]

Allowable by law

- ✓ Check the legal framework to ensure that e-justice measures are allowable and regulated and to what extent (in terms of types of hearings or procedures; categories of people that can participate remotely; participation of local CSOs to assist victims).
- ✓ Review the law with respect to guarantees to ensure the respect of all human rights, the right to a fair trial and the right of access to justice in a gender-responsive manner.

Availability

- ✓ Check to ensure that infrastructure is available at the courts, as well as in any remote location where the victim is located.
- ✓ Check to ensure that the infrastructure in prisons and detention facilities are adequate to make videoconferencing available to the accused in a way that safeguards attorney-client privilege.
- ✓ Bearing in mind the importance for the victim of avoiding delays and adjournments, check to ensure the accused's access to legal aid and to adequate ICTs.

[246] Provided by UNODC ROSAF office.

[247] Adopted from the Guidelines in UNODC. 2021. "The Impact of COVID-19 on Criminal Justice System Responses to Gender-based Violence Against Women: A Global Review of Emerging Evidence".

- ✓ Check to ensure that the infrastructure allows the court, prosecution, defence, and witnesses to submit evidence and to fully examine that evidence during the hearing, when remote hearings involve the filing or review of evidence.
- ✓ Ensure the e-justice measures provide for security of communication and protection of confidential information and documents.

Appropriateness

- ✓ Assess the advisability of using e-justice measures bearing in mind the accessibility to ICTs for victims of GBV, especially those facing intersectional discrimination.
- ✓ Considering the situation of victims living in remote and rural areas, such as indigenous women or women belonging to marginalized communities, with limited access to ICTs, check whether local CSOs, in particular those providing legal aid services, could be used as remote witness facilities to enable such women to use e-justice measures (such as enable them to file online complaints and ensure their participation in remote proceedings, while providing community support).
- ✓ Assess whether all parties can meaningful participate in the remote hearing.
- ✓ In order to empower victims and ensure their agency and autonomy in making decisions, provide the victim with the choice of attending court proceedings in person or to participate using e-justice measures.

Reliability

- ✓ Check to ensure that the equipment and systems used for e-justice measures are reliable, in line with international human rights standards and norms and conform with adequate privacy protections.
- ✓ Confirm the availability of technical support to monitor and resolve connectivity problems, software and hardware compatibility issues and interruptions.

Victim-friendly measures

- ✓ Provide for adequate protective measures for victims who might fear retaliation from the accused or experience further violence, including abusive behaviour during remote hearings.
- ✓ Provide for support and counselling, including test sessions, to those who have no previous experiences with technology-facilitated procedures, as well as to those who are required to give accounts of traumatic experience.
- ✓ Allow for the victim to be accompanied by their legal representative, by a victim services professional or by another support person.
- ✓ Provide information to the victim about the progress of the case using new technologies.

Assign trained judges

- ✓ The judge assigned to cases involving e-justice measures should receive training in GBV, e-justice and ICTs.
- ✓ The assigned judge should be aware of how to mitigate the victim's vulnerabilities and concerns during online hearings or using other e-justice measures, reducing any risk or stereotyping or secondary victimization, as well as any risk of further violence from the perpetrator through the use of technology, while acknowledging victims as subjects of rights and promoting their agency and autonomy.

Monitor the effectiveness of e-justice measures

- Monitor the quality of the courtroom experience for the victim, the way the witness evidence is received in the courtroom, the nature of the interaction between the witness and other parties in the courtroom, and the ability of the court to maintain control of the courtroom environment and ensure the safety of the victim.

13.3 ISSUES REGARDING JUSTICE DELIVERY IN RURAL AND REMOTE AREAS

For many victims of GBV living in rural and remote areas, justice is far away. They face additional challenges due to isolation, lack of transportation, close ties with the community which effects privacy, and lack of accessible justice institutions. Countries that have vast regions of sparsely populated remote and rural areas have used a variety of strategies to ensure access to criminal courts. Strategies include:

- Staffing strategically –locate facilities with a judge and a court clerk on a regular or rotating basis.
- Providing the means for victims to participate in court hearings (transportation, hotels, food, and child care).
- Authorizing the use of telephone, fax, and internet technology to allow for victims to participate during the process, such as preliminary interviews or hearings, interim judicial release (bail) hearings.
- Establishing mobile courts which travel to the areas on a regular basis.

Judges who are assigned to rural and remote areas should consider:

- Liaising with local court staff to investigate the available resources and provide information to community legal service providers/probation and parole officers/community based charitable organizations/support agencies about accessing support (telephone counselling services offered by agencies) and about changes to the law that impact on advice to victims.
- Ensuring that information available on court websites provides accurate information about court proceedings and available resources (information videos that set out who is at court/roles/support services).
- Using offsite remote witness facilities such as police stations, legal aid offices or community services offices located in the community to address the concerns of victims' safety before, during and after the hearing, as well as ensure that victims are more comfortable giving evidence. This can be particularly beneficial for those living in rural and remote areas where courts are very small and there is high visibility in the community.
- The cost of the new technology required for such facilities is much lower than remodeling or building new courthouses; however, would require courts to have compatible technology and provide staff at the offsite facility during the hearings.[248]
- Look beyond justice services and consider whether the health clinics have the remote video facilities that could be made available for this purpose. A note of caution is raised that there is a need to ensure that the use of remote witness facilities does not add to the level of remoteness experienced by certain victims, such as Aboriginal women in their dealings with the non-Aboriginal justice system.[249]
- Rearranging existing court spaces to include a "protected persons' space". These spaces can keep parties separated in courts that are not deemed "specialist".

Good practices: the hub and spoke model for specialist courts.[250] A variety of approaches can be taken to address the issue of isolation and limited services to maximize GBV victims' access to justice. One approach found in Australia is the 'hub and spoke' service model wherein a central hub, either generalist or specialist services, located in a regional centre can provide services to rural and remote populations.[251] The central point service, the hub, can provide outreach where the justice service providers go to the service user, with justice providers often travelling long distances to visit people in their homes. Hubs can also be in-reach services where service users travel into the hub to access the services.

[248] Rowden, E., Wallace, A., Tait, D., Hanson, M. & Jones, D. 2013. "Gateways to Justice: design and operational guidelines for remote participation in court proceedings". University of Western Sydney: Sydney. <http://www.uws.edu.au/justice/justice/publications>

[249] Wallace, Anne. 2008. "Virtual Justice in the Bush: The Use of Court Technology in Remote and Regional Australia". Journal of Law, Information and Science. Vol 19. 1-21.

[250] Harris and George. 2015. "Submission by the Centre for Rural Regional Law and Justice to the Royal Commission into Family Violence"

[251] Campo, M. & Tayton, S. 2015. "Domestic and Family Violence in Regional, Rural and Remote Communities: An Overview of Key Issues." Australian Institute of Family Studies.

Courts could consider:

- In-reach services may be more appropriate to larger towns and regional centres in densely populated and less remote areas, while outreach services are more accessible to dispersed and remote populations.[252]
- Hub and spokes models that are attached to local, community-owned infrastructures increase the credibility and relevance of specialist services, which improves their use for local women.
- The hub and spoke model has the potential to strengthen coordination among justice providers as well as non-justice service providers.
- An important feature of specialist courts is the presence of funded applicant and respondent workers. They significantly reduced the amount of court hearing time involved and victims felt more equipped in understanding the court process and were linked into referrals.

Good practices: Design and operational guidelines for remote participation in court proceedings. Victims of GBV who live in isolated and remote regions are among the groups who might use remote facilities to be able to participate in court proceedings. Research has found that these existing remote participation facilities can often be substandard (e.g. cramped, uncomfortable, not conducive to providing an appropriate environment for the remote participant); the video technologies can be inadequate (e.g. restricted vision, poor sound quality, limited eye contact); and the court processes can be inadequate (e.g. inadequate preparation of witnesses and insufficient orientation for the remote interaction).[253] In developing a set of guidelines on how to use remote witness facilities more effectively in court processes, courts should consider:

- Making remote witness rooms more comfortable, with access to natural light and visual relief.
- Improving eye-contact between the remote participant and the person with whom they are speaking in the court.
- Providing different views of the court for vulnerable and expert witnesses.
- Providing a second channel for display technologies.

Mobile courts in the Democratic Republic of the Congo[254]

Mobile courts were introduced to the Congolese legal system in 1979 and have been implemented with the assistance of the international community since 2004. These courts act as collegiate bodies in criminal cases, so involve a significant number of judges: a minimum of three sitting judges for civilian courts and one judge and four locally recruited assessors for military courts. They also involve one prosecutor, one registrar, lawyers, interpreters and police officers. The mobile courts are supported by international donors. For example, the mobile courts supported by UNDP is under the framework of activities aimed at improving access to justice for women and prosecuting SGBV crimes; UNDP requires that a minimum number of SGBV cases are heard in order to fund a mobile court session. The mobile courts do not operate on a set schedule as per "circuit courts", but are implemented on an ad hoc basis according to needs periodically identified by the courts: some sessions aim at clearing backlogs, others hear serious criminal cases (such as mass rapes) in remote areas where justice services are absent.

[252] Wendt, S., Bryant, L., Chung, D., & Elder, A. 2015. "Seeking help for domestic violence: Exploring rural women's coping experiences: State of the Knowledge Paper". Landscapes: State of the Knowledge, 4. Alexandria, NSW: Australia's National Research Organization for Women's Safety.

[253] Rowden, E., et al. 2013. "Gateways to Justice: design and operational guidelines for remote participation in court proceedings".

[254] UNDP. 2014. Evaluation of UNDO's support to mobile courts to Sierra Leone, Democratic Republic of Congo and Somalia.

Malawi Mobile Courts[255]

The Malawi judiciary and the Malawi Police Service introduced Mobile Courts that are gender sensitive. All proceedings are held in camera, identification of witnesses is private and confidential. The Mobile Courts utilize the Referral Pathway which provides victims with psycho-social support and supportive documentary evidence prepared by Health Experts who treat the victim of injuries and recorded the extent of injury and consequence.

13.4 OPTIONS FOR EXERCISES

Given that this part of the Handbook explores innovative regional practices to enhance the judiciary's institutional response to GBV cases, often this involves more of a brainstorming exercise, than training exercises. The options for exercises contained in this annex are presented as one way to generate discussions at workshops or meetings to develop institutional policies and practices.

Below are a number of possible options for delivering the material in this Module.

EXERCISE: Mapping exercise – challenges and good practices

Instructions

Part 1. Challenges

Large group brainstorming exercise: ask the plenary to identify the challenges for them in handling cases involving GBV and the barriers for victims in accessing justice. Make notes on a flipchart or white board. Group the ideas in main categories.

If need to probe further to generate discussion, note that research reveals that there are high rates of attrition at the various criminal justice stages, including the pre-trial and trial stage, as well as high levels of victim dissatisfaction. Ask what they think are the main factors or reasons for the court case not resulting in a conviction? What are the main factors or reasons for low victim satisfaction at these stages?

Part 2. Good practices

Divide the class into five smaller groups. Assign each group a common task of the judge: (1) pre-trial issues such as bail hearings; (3) trial; (4) sentencing hearings. Ask them to brainstorm on good practices they can take to respond to the challenges previously discussed.

Facilitators notes

Challenges

There are different ways to group these challenges. The first division could be to separate the challenges faced by the judges from an institutional perspective with the barriers faced by the victims themselves. For challenges faced by judges, the groupings could be done by different tasks – (pre-trial issues such as bail hearings; trial; and sentencing stages).

Enabling environment	Institutional perspective	Victim perspective
• Problems with the laws (e.g. incident not criminalized; statute of limitation; weak protection order regime	• Poor capacity leads to lack of evidence or "weak" cases - over-reliance on corroborating physical evidence	• Victim often required to repeat their story multiple times, a process which can be humiliating, exacerbate their trauma and raise issues of credibility if their memory is affected (results in inconsistent statements)

[255] UN Women Global data base on violence against women.

Enabling environment	Institutional perspective	Victim perspective
• E.g. rape offence fails to include a comprehensive definition of consent resulting in not capturing all cases • Vagueness in terminology around the formulation of the different offences leads to legal uncertainty, which can result in inconsistent interpretations by judges • Lack of gender-responsive policies/protocols/directives in the courts • Lack of effective court management policies/ protocols/directives that make GBV a priority response • Insufficient budgets and resources allocated • Lack of political will • Social and cultural norms that tolerate GBV	• Decision not to convict based on gender bias, myths, victim blaming which impacts assessment of evidence • Lack of training, lack of understanding of trauma when assessing victim's credibility • Lack of specialization • Lack of female judges • Infrastructure challenges: lack of private and safe victim-friendly courts • Capacity issues, such as poor reception and treatment by judges; bias and belief in myths; victim blaming attitudes • Lack of training re: trauma-informed responses • Poor engagement and communication with the victim	• Feelings of shame, social stigma • Lack of protection, no risk assessment - fear of further violence by the perpetrator • Inadequate assistance and support to victims (e.g. emotional support, counselling) • Victims might be perceived as reluctant or even hostile, this could be due to lack of protection, support or being believed • Lengthy delays • Lack of legal assistance to victims • Contempt charges for the victim –sometimes victims get charged with contempt if they are reluctant to testify

Good practices

- Prioritize cases
- Victim-friendly premises
- Handled by specialized / designated judges
- Ensure victim protection (risk assessment, safety plan, bail hearing conditions)
- Provide or link with victim supports
- Case management issues such as fast track
- Ensure enabling courtroom environment and facilitation of victim's testimony
- Limiting discrimination-based defences
- Sentencing considerations (victim impact statement, issues of restitution and reparation for victim)

Adopted from Skinnider, E. Training Manual on a Coordinated Criminal Justice Response to Gender-based Violence against Women and Girls: A Training Programme for the Police, Prosecutors and Judges in Nepal (UNODC)

MODULE 14.

Mainstreaming gender equality within the judiciary

SUMMARY

This module:

- Provides for an understanding of how to incorporate a gender perspective into the work of the judiciary.
- Discusses the good practice of establishing Gender Offices within the judiciary.
- Underscores the importance of and identifies ways to confront and remove barriers to women's participation in the judiciary.

All judges have a role to play in addressing gender discrimination in courts - judges who are women, men and people with diverse gender identities. They have an obligation to ensure that the court offers equal access and equal protection to all. As the Bangalore Principles Explanatory Note provides "This obligation applies to a judge's own relationships with parties, lawyers and court staff, as well as the relationship of court staff and lawyers with others. Overt instances of gender bias by judges towards lawyers may not today occur frequently in court, although speech, gestures or other conduct may sometimes be perceived as sexual harassment; for example, using terms of condescension in addressing female lawyers ("sweetie", "honey", "little girl", "little sister") or commenting on such a lawyer's physical appearance or dress in a way that would not be ventured in relation to a male counterpart. Patronizing conduct by a judge ("this pleading must have been prepared by a woman") affects the effectiveness of women as lawyers by sometimes diminishing self-esteem or decreasing the level of confidence in their skills. Insensitive treatment of female litigants ("that stupid woman") may also directly affect their legal rights both in actuality and appearance. Sexual harassment of court staff, advocates, litigants or colleagues will often be illegal as well as unethical."[256]

14.1 INCORPORATING A GENDER PERSPECTIVE INTO THE WORK OF THE JUDICIARY

Judges have a duty to ensure that court staff conforms to prescribed standards. The first contact that a member of the public has with the judicial system is often with court staff. One way to ensure the conduct of the judge and court staff alike is for the judiciary to design policies, protocols or directives that mainstream gender or incorporate a gender perspective into the workings of criminal courts. No institution has neutral impacts, particularly if the position of certain actors, such as women, is not equal at the starting point. Mainstreaming a gender perspective into the work of the judiciary looks at not only how to achieve gender balanced representation in decision making positions in the judiciary by encouraging greater participation of women in the judiciary at all levels, but also to address structural inequalities that exist between women and men and gender non-conforming individuals to improve their access to, or control over, resources and improve their opportunities to participate in decision making processes.

[256] Bangalore Principles, Explanatory Notes para 185.

Such policies, protocols or directives could set guidelines for the conduct of court personnel, such as refraining from gender insensitive language, as well as behaviour which could be regarded as abusive, offensive, menacing, overly familiar, or otherwise inappropriate by reference to any prohibited ground. Judiciary policies, protocols or directives can also cover such institutional issues such as recruitment, retention, promotion, assignment of cases, codes of conduct and standard operating procedures. The judiciary should review their existing policies, protocols or directives to assess whether they reduce, maintain or increase the gender inequalities between women and men. Often institutional formal practices are articulated using a gender-neutral approach based on the assumption that the formulation of the judiciary benefits all judges equally as well as all users of the justice system. At first sight such practice documents seem gender-neutral and non-discriminatory. However, as previously discussed in the handbook, persistent gender stereotyping exists in all societies and unconscious gender bias leads to discriminatory treatment of women and gender non-conforming individuals in the justice system, including women judges. When gender inequalities are deeply embedded in the social and institutional structures and internalized by many women and men, provisions that appear gender neutral are in fact gender blind. This approach ignores the different socially determined roles and responsibilities of women, men and people with diverse gender identities and how this generates different experiences for women, men and gender non-conforming judges. This has the effect of maintaining gender inequalities.

USE OF PRONOUNS

The norm in many courts is to address persons as either "mister" referring to a male or "miss" or missus" referring to a female. As noted by Magistrate Noble, from Roodepoort Magistrates Court in South Africa, "Using an individual's preferred pronoun demonstrates apperception for the fact that people have diverse life perspectives and fosters a sense of respect and inclusivity in the functioning of courts. It is important not only during communication in court but also in writing judgments. The use of preferred pronouns is of significance to the person, in the same way as a name or title. An informed use of pronouns may save us embarrassment for offending a person due to stereotypical assumptions based on names or looks".[257]

One way of incorporating gender perspective in the work of the judiciary is issuing practice directives regarding the use of personal pronouns. When counsel or parties are introducing themselves, their clients, a witness, or any other person, they are asked to include the individual's pronouns to be used as well as their name and title. People's titles or pronouns should not be assumed based on name, appearance or voice. When others make assumptions about someone's gender, and assume which title / pronouns to use, they can unintentionally misgender that person. Such a practice directive shifts toward the normalization of asking people how they want to be addressed, rather than making potentially harmful assumptions.

COURT'S PRONOUNS PRACTICE DIRECTIVE[258]

"Forms of Address for Parties and Counsel in Proceedings"

SUMMARY

This Practice Directive clarifies how parties and/or counsel can advise the Court, other parties, and counsel of their pronouns and form of address.

DIRECTION

1. At the beginning of any in-person or virtual proceeding when parties or counsel are introducing themselves, their clients, a witness, or another person, they should provide the judge or justice with each person's name, title (e.g. "Mr/Ms/Mx/Counsel Jones") and the correct pronouns to be used in the proceeding.
2. If a party or counsel do not provide this information in their introduction, they will be prompted by a court clerk to provide this information.

[257] Chrisholm D. Noble. 2024. "Inclusive Justice Proper Pronoun Use in Courts". International Association of Women Judges.

[258] Excerpt from "Supreme Court of British Columbia. Practice Directive No. PD-59 (2020/12/16) "Forms of Address and Counsel in Proceedings".

UNDERTAKING A GENDER IMPACT ASSESSMENT

A vital entry point for mainstreaming gender equality considerations in the judiciary is to undertake a gender impact assessment of the legal framework and policies to ensure that the Judicial Codes, the rules of procedure for appointments, advancement, performance evaluation and internal disciplinary rules of judges are gender-responsive. Traditionally judicial codes and policies have been viewed as gender-neutral, based on the assumption that the formulation of the judiciary benefits all members of the judiciary equally. However, every law and policy has its impacts, intended or non-intended. No law has neutral impacts, particularly if the position of certain actors, such as women, is not equal at the starting point.

Judicial Codes are extremely relevant for a gender impact assessment for a number of reasons. There is an international legal obligation basis to mainstream a gender perspective into the judiciary laws and to ensure equal representation of women and men and diversity in the judiciary. It is imperative that the judiciary reflect the composition of the society in order to be perceived as legitimate and thereby safeguarding human rights, upholding democracy and preserving the rule of law. It contributes to the development of a gender-sensitive judicial system, one that does not rely on gender stereotyping and incorporating a gender perspective, enriching the ability of judicial reasoning and increasing women's access to justice. Gender equality is important in its own right. Women, men and people with diverse gender identities and expressions should have equal opportunities to become judges and to advance in these careers. The laws and policies need to recognize the differences between women and men's socio-cultural and economic conditions and the need for differential treatment to promote equal gains.

A gender impact assessment identifies the level and extent to which gender equality perspective has been mainstreamed in the legal acts, and highlight challenges and shortcomings.[259] The central question in a gender impact assessment is whether the law or policy maintains or increases the gender inequalities between women and men. Such assessments look at the expected impacts on the equality of women and men, not merely on the impacts related to a ban on discrimination and try to estimate different effects, positive, negative or neutral of the laws in terms of gender equality.

Laws and policies can only be optimal if governments and the judiciary are aware of the impacts of the law or policy. Furthermore, the judiciary can become more sensitive to gender with a better understanding how formal and informal legal provisions, policies, practices and procedures across the judiciary has reinforced gender inequalities and gender-based stereotypes, and what can be done to enable gender equality. Applying a gender lens to provisions that appear to be gender-neutral pays attention to the potentially different ways that women, men and people with diverse gender identities and expressions are or might be impacted. Provisions which may at first glance seem non-discriminatory may contain hidden aspects of gender inequality when a gender lens is used as a gender perspective can highlight real or potential differences between people. Gender inequalities are so deeply embedded in the social and institutional structures and internalized by many women and men, that a conscious process of deconstruction and active promotion of gender equality is needed in order to reveal the actual extent of gender inequalities.

Mainstreaming a gender perspective when formulating any law, including judicial codes, or policy is a strategy for making women's and people with diverse gender identities' as well as men's concerns and experiences an integral dimension of that law so that all benefit equally and inequality is not perpetrated.[260] This is necessary in order to eliminate any distinction, exclusion or restriction made on the basis of socially constructed gender roles and norms which prevents people from enjoying full human rights, resources, opportunities and the right to contribute and influence.[261]

[259] For details in undertaking gender impact assessments, see European Institute for Gender Equality. 2016. Gender Impact Assessment: Gender Mainstreaming Toolkit.

[260] Review of Economic and Social Council agreed conclusions 1997/2 on mainstreaming the gender perspective into all policies and programmes in the United Nations system. ECOSOC res 1997/2.

[261] Council of Europe Committee of Ministers Recommendation CM/Rec (2007) 17 on gender equality standards and mechanisms, Explanatory Memorandum, CM (2007)153 add, Paragraph 20.

A gender lens highlights both direct discrimination, where the legal provisions allows for differences in treatment based on sex and characteristic of women and men which cannot be justified objectively and indirect discrimination, where the legal provisions do not appear to be discriminatory but have a discriminatory effect when implemented.

Some considerations when conducting a gender impact assessment

For each provision or measure:

- Consider whether the provision or measure reduces, maintains or increases the gender inequalities between women, men and people with diverse gender identities or expressions.
- Look at the expected impacts on the equality of women, men, and people with diverse gender identities or expressions, not merely on the impacts related to ban on discrimination.
- Try to estimate different effects, positive, negative or neutral of the laws or policies in terms of gender equality.
- Compare and assess, according to gender relevant criteria (established by international standards) the current situation and trends.
- Consider what is needed to support the creation of a judiciary that is representative, accountable, rights-respecting and responsive to the specific security and justice needs of women, men, and people with diverse gender identities and expressions.

It helps to have a solid understanding of the situation of women, men and people with diverse gender identities or expressions in the judiciary, perceptions as to gender inequality, and attitudes regarding challenges and enabling factors for the different genders in the judiciary. For instance:

- What are the numbers of women and men in the judiciary? In all court levels?
- What is the division of labour – criminal courts, family courts, administrative courts, specialized courts?
- Who has access to processes of control and decision-making powers - what are the numbers of women and men in senior managerial positions and judicial councils that set standards?
- Does the discussion of work-life balance have a “gender hue” attached (e.g. the “life” component tends to be associated with the feminized role of caring for others, particularly children).
- Are there health and occupational safety concerns that impact women and men differently (e.g. sexual harassment).
- Are there provisions to accommodate pregnancy and parenthood (paternity leave, not just maternal leave)?

STRATEGIES TO TAKE TO MAINSTREAM GENDER IN THE JUDICIARY

Based on the gender impact assessment analysis, the judiciary might want to consider possible strategies on how gender mainstreaming could be enhanced.

Elevate gender equality as an institutional objective

When gender equality is a clear explicit objective of the institution, there is an impetus to consider developing institutional mechanisms to implement this objective. This supports a systematic and sustained effort for making women’s and people with diverse gender identities, as well as men’s concerns and experiences an integral dimension of the judiciary so that all benefit equally and inequality is not perpetrated. This is necessary in order to eliminate any distinction, exclusion or restriction made on the basis of socially constructed gender roles and norms which prevents people from enjoying full human rights, resources, opportunities and the right to contribute and influence.

When there is a clear explicit objective regarding gender equality, this can lead to consideration of developing institutional mechanisms to implement this objective, such as creating Gender Units in the judiciary, developing a Gender Equality Strategy for the judiciary, which could focus on gender mainstreaming in all of the work in the court services. It also could lead to creating gender-sensitive policies, protocols or directives that could set guidelines for the conduct of court personnel, such as refraining from gender insensitive language, as well as behaviour which could be regarded as abusive, offensive, menacing, overly familiar, or otherwise inappropriate by reference to any prohibited ground.

Possible elements of gender mainstreaming policies, protocols or directives

Policies, protocols or directives to mainstream gender in the judiciary could include the following components:

- Gender-sensitivity training for judges and other judiciary personnel.
- Incorporating gender issues into the curriculum at law schools and judicial colleges.
- Establishing committees intended to further the goal of a gender-responsive judiciary.
- Compulsory allocation of a certain percentage of the judiciary budget for gender programmes.
- Establish focal points that are responsible to identify, treat with and provide redress for power imbalances which hinder equality of treatment within the judiciary.
- Developing guidelines to assists the judiciary in adjudicating cases with greater gender sensitivity
- Recognize and eliminate individual biases which foster gender discrimination and provide signposts or markers to assist in identifying and treating with those issues which trigger individual gender biases.
- Providing judges with the tools to identify and provide redress for power imbalances which hinder equality of treatment before the courts, structural inequalities in society and equal access by the litigant to the remedies and redresses available from the court.

Malawi Judiciary Strategic Plan (2019-2024)[262]

The Judiciary Strategic Plan adopts a "gender equality approach" which entails developing a judiciary gender policy. Such a policy is envisioned to form part of the judiciary's commitment to making "intensive efforts to ensure" gender mainstreaming "at all levels of the institution" (p. 25).

Gender equality is a judicial institutional objective in Spain[263]

In Spain, gender equality has become a judicial institutional objective and this is seen throughout the legislation in provisions that are meant to improve the equality parameters within the judicial profession. The Preamble to the Spain's Organic Law on the Judiciary contains a reference to ensuring that equality of the individual and of groups are real and effective and to remove obstacles that impede or hinder their full expression and to facilitate the participation of all citizens in political, economic and social life, based on Article 1 of the Constitution. The principle of gender equality can be seen as a requirement for all examinations for induction into and promotion within a career as a judge (Article 310); for training (Articles 433 bis and 434); the establishment of the Committee for Equality as a body of the General Council of the Judiciary (Article 595); and the mandate and work of the Equality Committee (Chapter VI). Further details have been articulated in the General Council of the Judiciary Committee for Equality, Equality Plan for Careers within the Judiciary. The Organic Law on the Judiciary requires the General Council of the Judiciary to report to parliament on a yearly basis on the status, operation and activities of the General Council of the Judiciary itself and of the Courts. This Report is to include a chapter on the impact of gender within the judicial sphere.

[262] Malawi Judiciary Strategic Plan (2019-2024) p. 9 as cited in Democratic Governance and Rights Unit University of Cape Town. "The State of the Judiciary in Malawi, Namibia and South Africa: Gender and the Judiciary".

[263] Spain's Organic Law 6/1985, of 1 July, on the Judiciary, see the Preamble.

Action Plan to Mainstream Gender in the Judiciary in the Philippines[264]

In the Philippines, following a study on access to justice for women which found, in part, negative attitudes towards female victims, trivialization of sexual and domestic violence; gender-insensitive court procedures, and use of gender stereotypes, the Supreme Court developed an Action Plan to Mainstream Gender in the Judiciary. The plan included: gender sensitivity training for judges and other judiciary personnel; incorporating gender issues into the curriculum at law schools; establishing committees intended to further the goal of a gender-responsive judiciary; and compulsory allocation of a certain percentage of the judiciary budget for gender programmes.

ESTABLISHING GENDER OFFICES OR GENDER EQUALITY UNITS WITHIN THE JUDICIARY

Gender Offices within the courts can ensure that the judiciary itself is ready and able as an institution to ensure equality and equal access to justice. These offices design and establish policies that incorporate gender perspectives into the working of the court. This practice is seen in the Ibero-American states, where these offices conduct awareness and training to judicial officers in gender perspectives; create protocols on access to justice with a gendered perspective; and collect statistics on judicial composition, performance and cases. These offices can study the interaction between gender and the judiciary and court system, including the role gender plays in the appointment process, within all aspects of the judiciary as well as interactions and between and judges and lawyers.

CREATING GENDER BIAS TASK FORCES IN THE COURTS

Some courts have set up gender bias task forces to study the interaction between gender and the court systems, including the role gender plays in the appointment process, within all aspects of courtroom interactions and between and among judges and lawyers. The primary purposes of a Task Force are to document the existence of gender bias in the court system, specify its different manifestations and consequences, propose reforms and recommend mechanisms to implement, monitor and institutionalize those reforms. Depending on its resources, the Task Force can employ various methods of data collection to investigate the courts' treatment of women, men and people with diverse gender identities in relevant substantive law areas and to examine how gender affects the dynamics of courtroom interaction and the differential treatment in courtrooms.

Gender and Sexual Harassment Formulation Task Team, Malawi[265]

The Gender and Sexual Harassment Formulation Task Team, of the Malawi Judiciary and chaired by a Justice of the Court of Appeal, has formulated an Anti-Sexual Harassment Workplace Policy for the Judiciary. Their next activity is to develop a Gender Policy for the Judiciary.

The Foundation of Women Judges' Manual for how to operate a Gender Bias Task Force in the Courts[266]

The Foundation of Women Judges has published a Manual for how to operate a Gender Bias Task Force in the Courts which provides a comprehensive overview of the Task Force process and contains information on specific tasks as well as different models.

[264] Asian Development Bank. 2017. Philippines: Governance in Justice Sector Reform Program and UNDP. 2003. Promoting Gender Sensitivity in the Philippine Court System in the Philippines.

[265] Malawi Judiciary website. 05 Juen 2024. "Judiciary Develops Anti-Sexual Harassment Workplace Policy".

[266] The Foundation for Women Judges. Undated. "Manual: Operating a Gender Bias Task Force in the Courts". < http://womenlaw.stanford.edu/pdf/gender-bias.pdf>

14.2 REMOVING BARRIERS FOR FEMALE JUDGES

The UN Progress of the World's Women Report: In Pursuit of Justice provides for general statistics of female judges worldwide, noting that women are significantly underrepresented. In the judicial bench, women account for only 27% of judges worldwide.[267] Furthermore, even in countries that have a higher representation of women in the judiciary, the numbers of women decrease at higher levels. There are few women in the highest courts, including supreme courts, and rarely are the Presidents women. Men continue to hold disproportionate share of judicial seats compared with their share of the general population.

The international standards calls on states to confront and remove barriers to women's participation as professionals within all levels of judicial system; take steps, including temporary special measures, to ensure that women are equally represented in the judiciary; and gather and analyze data, which should include but need not be limited to: the number of men and women in judicial institutions at all levels[268] and urges states to ensure gender equitable representation in the judiciary particularly at the decision making and managerial levels as to be able to provide victims of violence, where possible, the right to speak to a female officer[269].

Reasons for promoting gender equality in the judiciary. There are a number of reasons why gender balance and a gender equitable work environment in the judiciary is beneficial and important:[270]

- Fairness.
- Diversity has a strong potential to improve quality.
- Women can bring a different voice and a different perspective to the bench.
- For the judiciary to be perceived as legitimate, it is important that victims appearing before the court feel that judges are, to a certain extent, a fair representation of society.
- Ensure a more balanced approach to enforcing the law.
- Enhancing gender diversity in the justice system can reduce barriers for women's access to justice, such as stigma associated with reporting GBV. However, merely the fact that the judge is a woman does not guarantee gender equality, gender-sensitivity or understanding on the complexity of GBV. All judges need to receive specific training on these issues.

Strategies for ensuring more women in the judiciary. There are a number of strategies to ensure that women can be retained and progress in the careers as judges ensuring equal opportunity with men.

- Redefining "merit" in the judicial appointment process to reflect skills, knowledge and behaviour necessary to perform the job rather than traditional criteria based on predominately male experiences.
- Systematic recruitment by judicial nominating committees and expanding the pool of applicants at the start of the judicial nomination process is key to effectively increasing diversity in the judiciary.
- Improve workplace structures that take into account men and women judges' needs. This could include flexible work strategies; maternity/paternity leave; and provision of child care. However, some scholars also add words of caution to a number of these strategies that unless they are implemented with an understanding of the systemic discrimination enmeshed within the legal culture and society, these strategies could maintain discriminatory practices against women.[271]

[267] UN Women. 2011. "In Pursuit of Justice: Progress of the World's Women 2011-2012".

[268] CEDAW Committee General Recommendation No. 33 on women's access to justice.

[269] UN Updated Model Strategies and Practical Measures, Article 16(k) and (l).

[270] OECD. "OECD Toolkit for Mainstreaming and Implementing Gender Equality: Implementing the 2015 OECD Recommendation on Gender Equality in Public Life". <https://www.oecd.org/gender/governance/toolkit/toolkit-for-mainstreaming-and-implementing-gender-equality.pdf>

[271] Porter, Nicole B. (2006) Re-Defining Superwomen: An Essay on Overcoming the Maternal Wall in the Legal Workplace, 13 Duke Journal of Gender Law & Policy 55. Easteal, P., Caligari, A., Bartels, L. and Fitch, E. (2015) "Flexible work practices and private law firm culture: A complex quagmire for Australian Women lawyers" QUT Law Review Vol 15, Issue 1, p 30.

- Avoid gender pay gaps and sexal division of labour or pigeon holing of female judges into what is seen as "women's areas of law" such as family law.
- Develop policies on sexual harassment and disparaging treatment in the workplace.
- Establish mentoring schemes.
- Create women judges' networks, such as associations of women judges.

Mozambique Chapter of International Association of Women Judges[272]

The Association of Women Judges of Mozambique (AMJuiza) was recently launched and aims empower women judges in Mozambique and ensure that their voices shape the course of justice.

South African Chapter of International Association of Women Judges

The South African Chapter has as one of its primary objectives to facilitate and encourage the exchange of information on issues of mutual interest, to look at challenges of women leadership in the judiciary, and to bridge the gap, being the lack of communication, between Lower and Higher Courts. Another objective of the SA Chapter is the recruitment of male Judicial Officers. It is, therefore, noteworthy that there are several male members in the Chapter, as well as attorneys and advocates who have joined as Friends of the Chapter

Tanzania branch of the International Association of Women Judges (TAWJA)

TAWJA specializes in disseminating human rights knowledge and skills to judicial officers as part of continued judicial education. For instance, the TAWA, in partnership with UN Women developed a Gender Bench Book on women's rights. TAWA also brought attention to sextortion in the public administration, universities and in the judicial system.

Malawi Judiciary Strategic Plan (2019-2024) includes a quota

The Malawi Judiciary Strategic Plan includes a provision that establishes a quota of "no less than 40% representation and not more than 60% of either sex in any department in the public service" (p. 9).[273] At the 2018 publication of the Strategic Plan, women judges made up 11% of the Supreme Court of Appeal and 18% of the High Courts. The plan acknowledges these statistics in noting that "efforts to ensure gender equality in the appointment process generally" have been "inadequate" (p. 13). The Strategic Plan cites the adoption of a "gender equality approach" which entails developing a judiciary gender policy that will progressively increase the ratio of women judges (p 44).

[272] Consultation with Mozambique judiciary arranged by UNODC on 3 October 2024.

[273] Malawi Judiciary Strategic Plan (2019-2024) p. 9 as cited in Democratic Governance and Rights Unit University of Cape Town. "The State of the Judiciary in Malawi, Namibia and South Africa: Gender and the Judiciary".

14.3 OPTIONS FOR EXERCISES

Below are a number of possible options for delivering the material in this Module.

EXERCISE: Group work on mainstreaming gender into policies, protocols or directives
Instructions
Divide the group into smaller groups. Ask each group to review their formal internal rules for their judiciary (whether these are called judicial policies, protocols, directives or codes of conduct will depend on the jurisdiction) and answer the following questions:
Q1. How were men's, women's and people's with diverse gender identities experiences taken into account when the policy was being designed or planned? Q2. How are their concerns being taken into account during implementation? Q3. Would you revise anything in order to enhance gender mainstreaming? Please provide details. OR Q. If there are no specific judicial policies, protocols, or directives, ask the small groups what they would do to advocate to ensure gender-responsive practices are consistently applied throughout the judiciary in their jurisdiction?

EXERCISE: Role play on advocating for mainstreaming gender into the office environment
Instructions
Role play: Making the Case to Managers You and your colleagues are increasingly faced with a variety of gender issues and problems in the office which you do not know how to address (for example, female colleagues being assigned minor cases or youth cases (pigeon holing based on gender; sexual harassment, maternal leave challenges or absences due to family carer issues, etc), and for which there is no mechanism. You have decided as a group to speak to your superior about this, with the knowledge that they have little knowledge or interest in gender issues, preferring to "treat everyone the same". In working groups of 4-5, one person should simulate the role of the superior/ manager. This person must leave the group so as not to overhear the group discussions. Meanwhile the rest of the group brainstorms on arguments to present to their manager during the upcoming meeting in order to convince them that it is a good idea to promote gender equality and establish a gender mainstreaming process within the office. The group has 25 minutes to prepare this simulation exercise. In plenary, each working group will have 15 minutes to make their case and address the questions or concerns of their manager.

MODULE 15.

Monitoring and accountability

SUMMARY

This module

- Identifies some ways to provide oversight and accountability that could be used by the judiciary.
- Provides for an understanding of the need for reliable, systematic and regular data collection.
- Discusses different mechanisms for monitoring and evaluation.

15.1 OVERSIGHT AND ACCOUNTABILITY

While judicial independence forms an important guarantee, it also has the potential to act as a shield behind which judges have the opportunity to conceal possible unethical behaviour. A UNODC Issues Paper on gender-related judicial integrity issues reviews research that shows a persistent and widespread problem in the courts with conduct that covers sextortion, sexual harassment, sex discrimination, gender bias, gender stereotyping and other inappropriate sexual conduct.[274] The paper examines all the ways in which judges interact with others and are responsible for promoting public confidence in the courts. This includes: presiding over a courtroom and ensuring that all parties to the proceedings (e.g. prosecutors, defence counsel, defendant, victims and witnesses) are treated with respect by the judge and all others in court; in hiring, supervising and working with court staff; in fulfilling administrative duties, making work assignments, providing professional opportunities and interacting with other judges; and in their private social conduct.

As a general rule, judges can only be removed for serious misconduct, disciplinary or criminal offence or incapacity that renders them unable to discharge their functions. This should only occur after the conduct of a fair procedure. Judges cannot be removed or punished for bona fide errors or for disagreeing with a particular interpretation of the law. Furthermore, judges enjoy personal immunity from civil suits for monetary damages arising from their rulings. States have a duty to establish clear grounds for removal and appropriate procedures to this end. The determination as to whether the particular behaviour or the ability of a judge constitutes a cause for removal must be taken by an independent and impartial body pursuant to a fair hearing.

OVERSIGHT TO ENSURE ACCOUNTABILITY

Judges, like any criminal justice professional, should be monitored and held accountable for their conduct and response to GBV. Attitudes of judges that foster, justify or tolerate GBV need to be held up to public scrutiny and sanctioned. In order to ensure that the exercise of powers is undertaken according to the rule of

[274] UNODC. 2018. Issue Paper: Gender –Related Judicial Integrity Issues.

law, oversight mechanisms encourages the development of enforceable standards of practice and behaviour that promote justice and gender equality. Oversight can take a number of forms, both formal and informal structures, as well as internal and external mechanisms. Oversight is often equated with supervision in the sense of being a general review of institutional performance with particular attention to failures to carry out mandates, to preserve the institutions integrity and credibility and counter inefficiency and poor productivity. It can be done by way of audits, evaluations, monitoring, inspection and investigations.

- Oversight can be carried out internally by a senior judge or chief judge. This can ensure that a case is properly assessed.
- Oversight carried out by the professional society. For example, national judges associations or judicial councils can impose disciplinary sanctions for unprofessional conduct or professional misconduct.
- Oversight carried out by civil society. For example, volunteers conduct a court watch project which observes legal proceedings in these cases and make a public report.
- Oversight carried out by a combination of the above, such as task forces to review the criminal justice response to GBV. Such task forces are usually funded by the state but include members that represent both state agencies (police, prosecutors, judiciary), as well as civil society (victim support groups, academics). Task forces make recommendations for law reform.
- Oversight carried out by media. The media can uncover and disseminate information and incidences of poor handling of GBV cases by the courts.

South Africa – CSO files complaint with the Commission of Gender Equality[275]

CSO, concerned about the slow gender transformation of the bench as well as the barriers to women's advancement in the judiciary filed a complaint with the Commission on gender Equality. In 2012, DGRU and Sonke Gender Justice's complaint instigated an investigation report released by the Commission in 2016 in which the Commission confirmed the "slow pace of gender transformation in the judiciary" and cited multiple of hindrances to women judges' appointment stemming from "institutional culture".[276] In following up on this matter, the Commission on Gender Equality published a "Discussion Document on Gender Transformation in the Judiciary and Legal Sector in 2018".

Zambia Auditor General's performance audit if the Anti-GBV Act[277]

Between 2017 and 2023, the Auditor General conducted a performance audit whose general objective was to assess the efficiency and effectiveness of the Zambia Police Service, Ministry of Heath, National prosecution Authority and the Judiciary on the disposing of reported GBV cases. This review feed into Zambia Law Development Commission's recommendations.

STANDARDS OF CONDUCT

In addressing the issue of accountability of the judiciary to ensure judicial integrity, some approaches to consider include:[278]

- Developing standards of conduct to regulate judicial behaviour, such as ethical rules or professional codes of conduct. These codes generally cover: an articulation of broad principles essential to maintaining public confidence in the integrity of the judiciary; how to apply these principles to rules of conduct that

[275] Democratic Governance and Rights Unit University of Cape Town. "The State of the Judiciary in Malawi, Namibia and South Africa: Gender and the Judiciary".

[276] Commission on Gender Equality. 2016. Lack of Gender Transformation in the Judiciary: Investigative Report. P. 60.

[277] UNDP. 6 Sept 2023. "Zambia prepares to fortify the Anti-Gender-Based Violence Act no. 1 of 2011".

[278] UNODC. 2018. Issue Paper: Gender –Related Judicial Integrity Issues.

guide judges in confronting particular situations; and provide additional guidance through associated commentary, definitions or advisory opinions.

- Establishing accountability mechanisms that provide procedures for investigation and correcting inappropriate behaviour.
- Judicial educational programmes include a discussion of judicial standards of conduct.

Benefits of Code of Conduct:

- Set standards of personal and professional conduct while on and off duty.
- Provide guidance that is clear so that there is no ambiguity about what is inappropriate conduct.
- Prohibit all forms of discrimination on the basis of sex and gender.
- Can clearly address the issue that judges have a duty to refrain from and prevent harassment and other gender-related misconduct and provide practical guidance on this issue.
- Codes of conduct have proven highly valuable in cases where legislation is lacking, for example on the issue of sexual harassment in the workplace.
- Although codes of conducts are not legally binding, they can have a significant influence on employers and improve workplace policies and procedures.

Judicial Codes of Conduct

A number of judiciaries in the SADC region have Judicial Codes of Conduct that reflect the Bangalore Principles of Judicial Conduct. For instance, the Judicial Code of Conduct of Botswana (Article 5); the Code of Ethics for Judicial Magistrates in Mozambique; the Code of Judicial Conduct of South Africa (Article 7); The Code of Conduct and Ethics for Judicial Officers of Tanzania (Rule 5); the Judicial (Code of Conduct) Act of Zambia (Article 4); and the Judicial Service (Code of Ethics) Regulations of Zimbabwe (Article 16). For an example, see the Ethical Judicial Conduct Code in Namibia below:

Ethical Judicial Conduct in Namibia

5. Equality

Judges shall treat all persons and litigants in legal proceedings equally and with dignity and consideration. Judges shall not, in the performance of their judicial duties. Discriminate or knowingly permit any member of the Court's staff or any legal practitioner to discriminate in their presence against any litigant or other person on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status except to such as are legally relevant to an issue in proceeding and may be the subject of legitimate advocacy.

SEXUAL HARASSMENT POLICIES

The judiciary is often a very hierarchical institution, and there is great potential for power imbalance.[279] There is need for clear and well-known policies for dealing with any allegations of sexual harassment. Such policies should deal with the processing of complaints by and against judicial officers. Sexual harassment policies should set out how complaints of sexual harassment are dealt with, who they must be reported to, and how complaints are to be protected.

[279] Democratic Governance and Rights Unit University of Cape Town. "The State of the Judiciary in Malawi, Namibia and South Africa: Gender and the Judiciary".

ANTI-SEXUAL HARASSMENT POLICIES FOR THE JUDICIARY

Anti-Sexual Harassment Workplace Policy for the judiciary, Malawi[280]

The Malawi Judiciary in June 2024 held a validation meeting for the Anti-Sexual Harassment Workplace Policy for the Judiciary. The policy was developed by the Gender and Sexual Harassment Formulation Task Team within the judiciary. The policy will provide mechanism for lodging complaints and protecting employees as well as outlines the steps that duty bearers in the judiciary will take to prevent and address sexual harassment.

Anti-sexual harassment policy for the judiciary, South Africa[281]

In September 2024, the now former Chief Justice signed an anti-sexual harassment policy on the eve of his retirement. The policy aims to ensure that all members of the judiciary have a safe and healthy working environment. Forms of sexual harassment prohibited by the policy include indecent exposure, unwelcome gestures and displaying explicit pictures, objects, leering and winking, innuendos, suggestions and hints, sexual advances, comments with sexual overtones, sexual related jokes or insults or unwelcome graphics or comments.

Elements of an effective accountability mechanism:

- Senior judicial leadership commitment.
- Wide dissemination of the code of conduct that is clearly written and easy to access.
- Clear reporting and complaint mechanisms, such as having an identifiable independent person of high statute assigned to receive reports of misconduct and providing for different avenues in which to make a complaint.
- Measures to ensure protection against retaliation, including issues of confidentiality.
- Prompt and impartial inquiry process.
- Prompt disciplinary action.
- Regularly monitoring the process to ensure effectiveness.

SOCIAL MEDIA AND DIGITAL SECURITY

The proliferation of social media can create new conduct and ethics issues for judges. How a judge handles social media can involve questions of ethics and conduct.

Tips for judges who use social media[282]

- Take care of your privacy. Check who can see what you post: friends, friends of friends, everyone? By default, social media accounts are often set as public so always check the settings to control your visibility. Don't announce online your holiday plans or your house move. Be careful of the photographs you share. Ask friends and family members not to "tag" you in photographs.
- Do not post anything that would damage public confidence in the impartiality of the judiciary, e.g. political views, matters of public debate. This includes "liking" or "sharing" other posts not written by you.
- Do not identify yourself on social media as a judge or a member of the judiciary. Do not discuss your cases on social media. Be very wary about accepting "friend requests" from lawyers or representatives who may appear before you.

[280] Malawi Judiciary website. 05 Juen 2024. "Judiciary Develops Anti-Sexual Harassment Workplace Policy".

[281] The source of this information is from a new item, the policy has not been reviewed. See Ray Hartle. 3 Sept 2024 "Zondo signs anti-sexual harassment policy for judiciary on eve of retirement". News24.

[282] These tips are taken from UNODC. 2019. Judicial Conduct and Ethics: Self-directed Course.

- If you don't use social media, protect yourself by speaking to those who do and find out how they protect themselves or don't.

Judges are not prohibited from participating in online social networks, such as Facebook, Instagram, Snapchat, etc.; however, they should exercise extreme caution in doing so. Suggestions for creating provisions for codes of conduct around the use of social media for judges:[283]

- Communications (posts, comments, photos, etc) must respect the dignity of judicial functions (e.g. impartiality and independence).
- Do not use social media to write a personal diary.
- Not to create relationships that would give the impression that they could affect a judge's decision-making.
- Not to add people to a conversation without introducing them.
- Not to comment on ongoing court proceedings.
- Not to provide legal advice.
- Avoid political comments (this includes "likes" for a political party).
- Be aware that they can never be certain as to where their communication might end up appearing, even if it was originally only intended for a limited group.
- Not to share posts of hatred or violence.
- Not to share posts of alcohol consumption or nudity.
- Avoid posts that show off ostentation.

15.2 MONITORING AND EVALUATION

In order to ensure that laws, policies and practices are effective in responding to GBV, the implementation must be monitored and evaluated. This begins with the collection of baseline data and continues with regular monitoring. Reliable, systematic and regular data collection is crucial for developing and maintaining effective policies and practices.

CRIMINAL ADMINISTRATIVE DATA

The courts have a duty to collect statistical data as well as to share this data with others. The criminal administration data being generated by the courts should be disaggregated by sex and age, as well as other factors such as ethnicity. Sex-disaggregated data can bring to the surface gender concerns that had previously been invisible. The data should also be disaggregated by type of violence as well as by the relationship of the perpetrator to the victim in all fields. The criminal groupings should allow for analysis of attrition rates of the various criminal forms of GBV. The groupings and approaches should be compatible to the collection methodology used by the police, prosecution services, judiciary, courts and others in order to further ease of analysis.

The statistical data collection should be carried out by the courts or in cooperation with the national statistics office or other bodies, such as national observatories on GBV or violence against women. It would be useful if states develop and use a methodology that allows for gender analysis and comparison with other member states. For example, the Council of Europe studied the collection of administrative data on domestic violence and made recommendations as to model approaches to the collection of administrative data.[284]

[283] These suggestions are a compilation of examples from USA, Brazil and the Czech Republic, as cited in UNODC. 2019. Judicial Conduct and Ethics: Self-directed Course.

[284] Ruuskanen, E. and Aromaa, K., The Administrative data collection on domestic violence in Council of Europe member states (2008), Council of Europe, Directorate General of Human Rights and Legal Affairs.

DRC's National system for collecting data on sexual and gender-based violence[285]

The DRC has set up a system for collecting data on GBV. The programme has led to the development of a manual of procedures for data collection, the training of more than 300 service providers in data collection, the creation of communication spaces to strengthen data entry and the provision of IT equipment to coordination structures in the provinces of North Kivu and Ituri to help make data and information on SGBV available. A database with an online application enables automatic management and access by all stakeholders, and helps to strengthen evidence-based advocacy and policy dialogue.

Mauritius Observatory on Gender-based Violence (GBVO)[286]

The Gender-based Violence Observatory has been set up at the seat of the Mauritius Research and Innovation Council on the 23rd of December 2021. The GBVO aims to be the coordinating body for the compilation, centralization, and analysis of data on all forms of GBV in the Republic of Mauritius. It also seeks to make evidence-based recommendations and proposals to improve the services and facilities offered by public institutions and civil society in the area of GBV. It will perform a pivotal role in understanding and combatting GBV by ensuring the following:

- Acting as the coordinating agency and focal point for the compilation and analysis of official data on all forms of GBV;
- Contributing to the digitalization of GBV information to facilitate Monitoring & Evaluation;
- Impact assessment exercises of on-going policies and initiatives to combat GBV;
- Developing partnerships, federate public policy and lobby resources and actions against GBV with an emphasis on socially innovative approaches;
- Identifying and researching emerging short-term priority themes on GBV;
- Scouting for and encouraging the adoption of Socially Innovative best practices (regional and international) in this area;
- Making evidence-based recommendations and proposals to improve the services and facilities offered by Government and civil society in the area of GBV.

National GBV Database System in Namibia[287]

Launched in 2006, with financial support from UNDP, the government launched the database which compiles national statistics every year on cases reported to the Women and Child Protection Units in all regions. It records incidents of rape, indecent assault attempted rape assault with attempt to do grievous bodily harm, and femicide.

QUALITATIVE AND QUANTITATIVE RESEARCH

While courts may not conduct dedicated surveys or specific research on GBV, they should cooperate with those agencies, academics or civil society organizations that carry out such surveys and research. They should participate in baseline studies which could include gathering and sharing data on the proportion of GBV cases that were prosecuted by law and the proportion of prosecuted cases that resulted in a conviction. Judges could participate in other research into the criminal justice response to GBV. The regular collection and analysis of court data can contribute to understanding of prevalence and incidences of criminal cases of GBV and attrition rates.

[285] UN Women Global database on Violence against Women.

[286] The Mauritius Observatory Gender-based Violence website: https://gbvo.mric.mu/about-us/.

[287] UNODC. 2021. Report on Criminal Justice System Response to Gender-Based Violence in the SADC region.

Creation of a Domestic Violence Portal Angola[288]

The Ministry of Social Action, Family and Women Promotion, in partnership with UNFPA, developed a Digital Information Platform on Gender-Based Domestic Violence. The platform is a digital tool with objectives and expected results to improve the recording and processing of statistical data on the situation of domestic violence, strengthening reporting mechanism of violence, harmonizing information on GBV, reinforce the implementation of the Law Against Domestic Violence, promote communication between institutions that deal with GBV, as well as better alignment of actions, programs and public policies for prevention. It is accessible at: http://violenciadomestica.ao/#/

Research of in South Africa – UNODC's A Pilot Project: Assessing Quality of Justice for GBV Cases in Limpopo's Magistrates Courts (2024)

This research assesses the quality of justice provided to GBV survivors, gathering insights from GBV survivors. It covers six themes: accessibility of services, responsiveness and efficiency, support and sensitivity, impartiality and fairness, safety and security, and confidentiality and privacy.

To enhance the quality of justice provided to GBV survivors and the services provided in handling GBV cases in Limpopo, the following recommendations are proposed:

Swift Justice:

- Streamline court processes to reduce delays and ensure timely resolutions.
- Implement measures to minimize postponements and expedite case handling.

Inclusivity for Persons with Disabilities:

- Ensure that court facilities and services are accessible to all survivors, regardless of physical or mental capabilities. This inclusivity upholds "Audi alteram partem," ensuring equal participation and opportunity for every survivor.

E-Justice:

- Integrate technology into court operations to improve efficiency and accessibility.
- E-justice systems can enhance transparency, reduce corruption, and ensure swift access to legal remedies.

Combat Corruption, Bias, and Prejudice:

- Implement strict regulations and laws to address corruption, bias, and prejudice within the judicial system.
- Ensure thorough and impartial investigations, and hold officials accountable for misconduct.

Comprehensive Training for All Stakeholders:

- Develop and implement training programs for all stakeholders involved in GBV cases, starting from law enforcement officers to prosecutors, court personnel, and magistrates.
- This training should cover the investigation of GBV cases, proper filing procedures, effective questioning of survivors, and the application of relevant laws.
- Emphasizing a trauma-informed, victim-centered approach will ensure that all stakeholders are equipped to handle these cases with the necessary sensitivity and professionalism.

[288] All information regarding the creation of the Domestic Violence Portal and other issues related to Gender Equality can be found on the Commission for Citizenship and Gender Equality website at https://www.cig.gov.pt/area-portal -da-violência/portal-violência-domestica/rnavvd/sistema-de-gestao-de-information .

Victim-Centered, Trauma-Informed Approach:

- Train legal personnel in trauma-informed practices to handle GBV cases with sensitivity and understanding.
- Prioritize the well-being of survivors throughout the judicial process, adhering to "Salus populi suprema lex esto."

Avoid Stigmatization:

- Create a judicial environment that respects and protects the dignity of survivors.
- Ensure confidentiality and privacy during legal proceedings to prevent societal judgment.

Zambia's data collection tool

Zambia has developed a data collection tool which encompasses data from all stake holders involved in the fight against GBV.

15.3 OPTIONS FOR EXERCISES

Below are a number of possible options for delivering the material in this Module.

EXERCISE: Brainstorming exercises on oversight mechanisms
Instructions
Ask participants to remain at their tables and work together on a short brainstorming /reflective exercise. Put yourselves in the position of the judge who is responsible for other magistrates (e.g. this might be the chief judge or an administrative judicial officer). You have become quite concerned with the number of complaints you have been hearing about how judges in your court have been handling GBV cases. Some you have heard from prosecutors, other lawyers and civil society organizations. Q1. What can you do to respond to these concerns? Q2. What if these concerns are informally made? What if these concerns are formal complaints? Q3. Review what mechanisms are already available to handle different types of complaints. Q4. What other mechanism could you consider creating? What steps would you have to take to do so?
Facilitation notes
After allowing the groups the time to discuss and reflect, mention that this was a reflective exercise and the next session will discuss the key elements of oversight mechanisms. Just to note: • The reality is that oversight can take many forms. Some oversight mechanisms are highly structured and formal (such as internal or external complaint mechanism); some might involve representatives from different agencies and groups (such as review bodies); and others may be less formal (such as assigning a supervising judge to oversee GBV cases). • From the victim's perspective, an oversight mechanism needs to be high quality, gender-responsive and victim-centred. Use the materials in the handbook to develop this further.

Exercise: Video and discuss

Instructions

Show a short video of a judge in the United States interacting with a domestic violence victim. (3:30). https://www.youtube.com/watch?v=t-9jhOajftc (note the first 10 seconds no sound but then it comes on).

Ask the plenary for their reactions to the video.

Ask how the judge might be disciplined in your jurisdiction for exhibiting this behaviour.

The show a second video of the US judge being disciplined:

https://www.washingtonpost.com/video/national/florida-judge-is-publicly-reprimanded-for-berating-a-domestic-violence-victim/2016/09/01/e79e1422-7054-11e6-993f-73c693a89820_video.html

Facilitator's notes

This video can provide an opportunity to discuss a number of different topics, from why victims in intimate partner violence cases are often reluctant to testify, why don't victims leave at the first instance of physical violence, why do victims stay with the abuser or return to them after they have left, why don't victims want justice to discussing tips for judges on how you could manage such situations. It provides an opportunity to discuss the dynamics of intimate partner violence, the power and control wheel and the cycle of violence.

It could also be used to discuss oversight mechanisms and what would the courts do if they received a complaint of the behaviour of this judge.

After the discussion, show the second video and provide the information that The judge seen in the first video was disciplined by the Florida Supreme Court which was publically broadcasted. This disciplinary action highlights the importance of accountability. The judge failed in exercising due diligence and using a victim-centred and gender-responsive approach. And has been held accountability and provided with capacity building opportunities.

EXERCISE: Case study on using social media

Instructions

In small groups, ask the participants to review the case study and answer the first questions:

Q1. Should she recuse herself?

If time, ask the small groups to draft key guidelines for judges on how to use social media.

Case study

Judge Botha of the Sexual Offences Court is a user of multiple social media platforms. She uses WhatsApp and has had Twitter, Facebook and LinkedIn accounts for several years.

On Facebook she keeps contact with more than 250 "friends", mostly consisting of members of her family, friends as well as acquaintances. There are a small number of colleagues, including fellow judges, prosecutors and private attorneys who are one point or other sent her "friend" requests. While in some cases these are genuine friendships, mostly these requests have followed encounters during conferences and workshops on GBV, appearances in her court and similar encounters of a professional nature. The judge accepted most of these requests as she felt it would be impolite not to do so. The judge is not particularly active on Facebook and uses it only occasionally to congratulate her "Facebook friends" on their birthdays or post pictures of holidays and gatherings with family and friends.

A prosecutor, one of the judge's "Facebook friends" prosecutes a case in her court.

Facilitation notes

A modern judge must understand how social media operate, both positively and negatively, and it could be argued that given their prevalence in the modern world, it is perfectly sensible for judges to make use of social media in their own lives. But discretion is the key issue here, and it is clearly arguable that by using Facebook so widely and freely, Judge Botha was asking for trouble. Her belief that by refusing a request from somebody to become her friend she would somehow be acting discourteously does not give confidence that she understands the importance of judicial independence in this context and the role it can play in avoiding embarrassment.

It may well be the case that rules of conduct are already in place in her jurisdiction regarding Facebook, and if so, she should have been aware of them. There is no absolute ethical rule that a judge either should, or should not, use Facebook. But this case illustrates how problems will arise if usage is not more restrained than in the case of Judge Botha. In deciding whether recusal is appropriate in this case, Judge Botha should ask herself whether a fair-minded and well-informed member of the public would consider there was a rea risk that she was biased, due to her "Facebook relationship" with the prosecutor.

Adapted from UNODC. 2019. Judicial Conduct and Ethics: Self-directed Course.

MODULE 16.

Dealing with secondary or vicarious trauma among the judiciary

This material may be triggering for some people.

SUMMARY

This module:

- Introduces the negative effects of long-term exposure to trauma in the workplace among judges.
- Identifies common signs of vicarious trauma.
- Sets out some strategies for recovery.

16.1 NEGATIVE EFFECTS OF VICARIOUS TRAUMA

In recent years, there has been a growing awareness of the negative effects of long-term exposure to trauma in the workplace. Traditionally vicarious trauma, also known as compassion fatigue, was studied among doctors, social workers and therapists who work with trauma victims. Lawyers are generally highly resistant to disclosing any personal feelings that would indicate to colleagues that they are not in control and successfully dealing with their workload. It is therefore not surprising that only recently vicarious trauma is being studied among judicial officers, particularly family and criminal judges.

WHY ARE JUDGES AT RISK OF SUFFERING FROM VICARIOUS TRAUMA?

The nature of the profession means that judges hear from victims and other witnesses in the darkest and most difficult times of their lives. The job requires delving deep into the specifics of troubling events in order to make decisions based on the evidence. Investigation, forensic, and medical reports and photographs of victims and crime scenes can contain distressing graphic details that are difficult to process emotionally. In particular, working closely with traumatized victims in a compassionate way and helping victims navigate through a criminal justice system that is not victim-friendly can cause significant stress to judges. This can be a daily occurrence for judges assigned to specialized courts. Trial judges can be quite isolated as they make rulings and decisions individually without the ability to discuss ongoing cases.

As a result of their work, judges and court staff are at high risk of experiencing negative psychological responses including vicarious trauma and burnout. How can working with disturbing material and traumatized victims change judges? It can change the way they think, feel, treat and relate to victims, view their role in their work and arrange their own value and belief systems. Although the nature of the work can produce positive change such as an increased awareness and understanding of humanity's complexity, some changes are undesirable and unhelpful. Judges are responsible for hearing and accommodating victims in their courts within a criminal justice system that generally have severe limitations as a result of cultural and societal values. Even where there are laws in place that support GBV cases, stereotypes, prejudice and discrimination often impact the manner in which the law is applied.

Bearing their responsibility, judges bear the weight of the system's deficiencies on their own shoulders. In one study, almost two thirds of judges experienced short or long-term symptoms of vicarious trauma. Some research estimates that the rates among American lawyers are almost five times higher than for other professions.[289] The prevalence rates within the legal profession suggest that the demanding nature of the legal context in which lawyers work may be a significant contributing factor in the likelihood of experiencing vicarious trauma. This is clearly not just an individual problem.

UNODC Global Judicial Integrity Network's "Exploring Linkages between Judicial Well-being and Judicial Integrity"[290]

Major research from UNODC's Global Judicial Integrity Network shows strong link worldwide between judicial well-being and judicial integrity. Some of the key findings include:

- 76% of judges and members of the judiciary do not have sufficient time to maintain optimal physical and mental well-being.
- 92% indicate that judicial work brings them stress sometimes, frequently or always. The most common contributing factor appears to be excessive workloads.
- 69% feel that talking about mental health or stress is a taboo when it comes to judges and members of the judiciary.
- 83% says that the level of support available in their judiciary is not sufficient.
- 97% think that more prominence should be given to promoting judicial well-being.

16.2 COMMON SIGNS OF VICARIOUS TRAUMA

When a judge suspects that that is a change in their attitudes, thinking styles and mannerisms for which there is no explanation or when they feel deep fatigue or burnout, it is wise to review the symptoms of vicarious trauma that include, but are not limited to irritability, fatigue, sleep disturbance, withdrawal or social isolation, hopelessness, anger, impatience, hypervigilance and paranoia.

What are the signs? The symptoms of vicarious trauma are similar to Post Traumatic Stress Disorder (PTSD):[291]

- Hypervigilance
- Hopelessness
- Inability to embrace complexity
- Inability to listen, avoidance
- Anger and cynicism
- Sleeplessness
- Fear
- Chronic exhaustion
- Physical aliments
- Minimizing
- Guilt

[289] https://www.cba.org/Publications-Resources/CBA-Practice-Link/Work-Life-Balance/Health-Wellness/Compassion-Fatigue-in-the-Legal-Profession

[290] UNODC and Global Judicial Integrity Network. 2022. "Exploring Linkages between Judicial Well-Being and Judicial Integrity: Report on the Global Survey Conducted by the Global Judicial Integrity Network".

[291] Chambers, A. 2017. "Judges and Compassion Fatigue: What is it and what to do about it". Missouri Lawyer's Assistance Program.

A shift in thinking style. Noticing a shift in thinking style when dealing with disturbing cases and victims is one way of identifying whether a judge may be experiencing vicarious trauma. The following are some examples of thinking styles that may indicate vicarious trauma[292]:

- **All or Nothing Thinking:** Or black and white thinking. When things/ people/relationships are either all good or all bad, all wrong or all right, all in or all out, with no in between or grey area.
- **Should-ing or Must-ing:** Putting unreasonable and inflexible demands and rules for yourself or others. For example, "I should never make a mistake", "I should not let anyone know I'm struggling".
- **Overgeneralization:** Taking one instance or experience in the past or present and drawing a conclusion for all present and future situations. For example, "None of my cases ever…", "I always/never…".
- **Jumping to Conclusion:** We do this by either assuming that we know what a person is thinking (mind reading), or we make predictions about how things are going to end (future reading or fortune telling).
- **Mental Filtering:** This involves a filtering, selective or tunnel vision- focusing on only one part of a situation and ignoring the rest. Usually meaning looking at the negative "evidence" and dismissing or ignoring the positive part and the "whole picture".
- **Catastrophizing:** This is when we start to "snowball", or "overthink" all the situations that could go wrong and how things are going to be awful, dreadful, or horrible, regardless of the significance of things.
- **Minimizing or Magnifying:** Selectively choosing + or - qualities in self or others and either magnifying them or minimizing them.
- **Personalization:** Basically, blaming yourself for things going wrong, even when you may be partially responsible or not responsible at all.

16.3 STRATEGIES FOR RECOVERY

Acknowledging that some factors, such as organizational or systemic challenges, may be beyond the individual judge's control, there are some strategies that can mitigate the effects of vicarious trauma including the following:

- Maintain an awareness of changes in your attitudes, thinking and feelings.
- Recognize that vicarious trauma is a normal human response to the situation you find yourself in.
- Recognize that the work on GBV is objectively difficult. Most people engaging in this work will be affected in some way. Your reaction is a commonly experienced one.
- Accept that you may never be able to achieve the perfect professional response or the perfectly planned case. Attempting to create a sense of order out a chaotic, dysfunctional situation or set of facts can be exhausting and deeply frustrating endeavour.
- Recognize that vicarious trauma does not mean that you are weak. Rather, you care deeply about your work.
- Reflect on how you can modify your caseload or change the type of cases you are dealing with.
- Seek informal support from a trusted colleague or peer who understands best what you are experiencing and who is capable of supporting you in a kind and honest way. Don't try to solve it on your own.
- Avoid becoming isolated and withdrawing from your normal social supports.
- Consider seeking organizational help. Bring some constructive suggestions to the discussion.
- Engage in activities that give you joy or a sense of peace and a sense of control.

[292] Taken directly from "Trauma Informed Legal Practice Tool Kit", Golden Rising Eagle Society and the Law Society of British Columbia, September 2020, https://www.goldeneaglerising.org/docuploads/Golden-Eagle-Rising-Society-Trauma-Informed-Toolkit-2021-02-14.pdf.

- Create a daily well-being plan that is realistic and achievable to build your physical and mental resilience.
- Filter out extra and unnecessary trauma in your life, such as conflictual personalities, violent TV or movies.
- Consider consulting with a medical professional or therapist. There is no shame in admitting that you are unable to deal with this alone. However, do not expect a "perfect solution" from professionals either.

SOME GOOD INSTITUTIONAL PRACTICES

Increase supervision and mentorship. For new judges who are dealing with GBV cases, increasing their access to structured contacts such as clinical experts can allow for new judges to ask questions, build skills and access to debriefing of exposure to trauma. It is also useful to assign a more experienced judge as a mentor or resource and to support them in being available to the new judges on a regular basis.

Incorporate staff self-care / resiliency plans. It is useful for judges and court staff in their annual reviews to ensure that there is a conversation about self-care and resiliency.

Designating a wellness budget. Such a budget could offer judges and court staff a stipend which can be allocated to an activity in their self-care plan, such as gym memberships, massages, sports equipment, yoga classes, etc.

Ongoing training to include information on vicarious trauma. Research demonstrates that vicarious trauma is mitigated when judges and court staff have access to regular relevant training.

Encourage peer support. Scheduling regular peer support is important for building and maintaining strong team connections. These gathering can provide mutual support and remind judges and court staff that they are not alone in dealing with vicarious trauma.

Counselling and workplace injury supports. Ensuring that the judiciary has sufficient post-trauma related workplace injury supports available is important.

UNODC's Facilitator's Manual: Strategies for the Development of Cognitive Skills and Stress Management[293]

In this Manual, the facilitators are provided with a variety of exercises for cognitive stimulation and stress management in a simple and orderly manner, so as to make the educational process more dynamic. It covers various relaxation techniques, including autogenic relaxation; creative potentiation techniques; mandalas; conscious body movements; breathing; conscious breathing techniques; conscious breathing training; and cognitive simulation.

South Africa judicial debriefing

In 2017, NACOSA, a network of civil society organizations in South Africa developed a debriefing training manual for Sexual Offences Court Officials. It responds to the need for senior staff to debrief more regularly, informally, amongst themselves and assist their junior colleagues. The training is to develop participant's coping and debriefing skills and ability to debrief others within their respective work environment.

[293] Trejo Velesco, J. et al. 2017. Facilitator's Manual: Strategies for the Development of Cognitive Skills and Stress Management. UNODC, SEGOB, CNS.

UNODC Global Judicial Integrity Network's "Exploring Linkages between Judicial Well-being and Judicial Integrity"[294]

This report lists possible actions and initiatives to be taken by the judiciary:

- Acknowledge and raise awareness about the problem – not only within the judiciary but also with the other branches of the state.
- Remove existing stereotypes and stigmatization
- Promote open dialogue and create a safe space for everyone to speak up and find a relief or remedy.
- Offer opportunities for peer support (such as mentoring and coaching), socializing and team building.
- Provide access to psychological support.
- Offer practical training, guidance and tips on how to maintain optimal well-being.
- Improve case management and workload distribution policies and systems, including if possible, through investing in modern technology and adequate working infrastructure.
- Explore ways to promote a better work-life balance and consider flexible approaches to doing judicial work.

The report also highlighted concrete activities and measures in place that many survey participants noted were useful:

- Sessions on emotional intelligence and well-being
- Motivational conferences
- Team building events
- Social clubs
- Gym subsidies and facilities
- Exercise classes
- Regular health checks
- Counselling sessions with psychologist or psychiatrists
- Information bulletins on various health-related issue

National Centre for State Courts "Judicial Wellness"[295]

This report provides a compendium of well-being strategies, all scientifically tested and evidence-based and was developed to provide judges and court personnel with straightforward information on how to better promote their individual resilience. In summaries the research for the following strategies: laughter is good medicine; standing at the bench (reduce time sitting); nutrition; sleep, rest and resiliency; behaviour health resources for judges; dealing with vicarious trauma; addressing problematic alcohol use; mindfulness practice; developing a growth mindset; and building resilience in an upside-down world.

[294] UNODC and Global Judicial Integrity Network. 2022. "Exploring Linkages between Judicial Well-Being and Judicial Integrity: Report on the Global Survey Conducted by the Global Judicial Integrity Network".

[295] National Judicial Task Force to Examine State Court's Response to Mental Illness. 2022. "Judicial Wellness".

16.4 OPTIONS FOR EXERCISES

Below are a number of possible options for delivering the material in this Module.

EXERCISE: Plenary brainstorming regarding professional 'taboos'
Instructions
Ask the plenary, what are the societal or professional taboos among judicial officers that discourage them from recognizing or discussing with others about suspected signs of vicarious trauma?

EXERCICE: Group discussion – questions re: vicarious trauma
Instructions
In plenary, generate a discussion through the use of the following questions: Q 1: If called upon by a colleague who disclosed that they are in distress, how would you respond? Q 2: What skills are required for an effective response? (e.g., impartiality, empathy, understanding) Q 3: What approaches would be the most helpful in the short and longer-term? Would you offer advice? Q 4: How would you respond if you, yourself, felt too emotionally fatigued to properly assist? Q 5: What assumptions would be implicit in agreeing to talk to your colleague? (e.g., complete confidentiality)

Source: Gordon, F. and Sayson, W. Training Module for Palestinian Prosecutors.

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