



ABC

for

Gender Sensitive Legislation



EuroMed Feminist Initiative
المبادرة النسوية الأورومتوسطية
Initiative Féministe EuroMed



SWEDEN

ABC for a Gender Sensitive Legislation

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EuroMed Feminist Initiative IFE-EFI provides expertise in the field of gender equality and advocates for women's universal human rights as inseparable from democracy building and citizenship, for political solutions to all conflicts, and for the right of peoples to self-determination.

ABC for a Gender Sensitive Legislation

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For a decade EuroMed Feminist Initiative has strived to provide the space for women's rights activists and gender experts to build and share gender-sensitive tools and contribute to the building of democratic societies. At the beginning of 2016 as a result of collaborative work in the Euro-Mediterranean region we published an *ABC for a Gender-Sensitive Constitution*, which opened with the following preface: "Indeed, all societies and political systems are framed and shaped by discriminatory patriarchal values and structures, as well as social and cultural attitudes, which pose significant barriers to women's acquisition and enjoyment of their fundamental human rights." These same words are still relevant to describe the situation today.

In the past years, the link between constitution and legislation has been on the agenda of many of our meetings. A democratic constitutional system does not in itself guarantee women's equal participation in public affairs, unless this system specifically incorporates gender-sensitive measures to include women as full citizens. Thus, gender-sensitive laws are required based on five principles: *constitutional democracy, human dignity, autonomy, secularism, equality and non-discrimination*. These principles play a vital role in transforming constitutional objectives into practical goals and outcomes.

All political processes are framed by patriarchal traditions that threaten the ideals of a truly representative and inclusive system. In other words, the active contribution of women in relation to social change in peaceful times or the protection of the general interest of the community during conflicts have been given no place in political processes. The present context highlights with greater acuity the crucial role played by women's rights activists in political transformation processes and the major force they represent for democratic change.

Raising public awareness on women's rights and gender equality must go together with addressing discriminative legislation. The *ABC for a Gender-Sensitive Legislation* aims to bring insight, raise awareness, and stimulate debate on the concept of democracy alongside gender mainstreaming. It strives to become a mechanism of change and a reference for legislators and constitution drafters, lawyers, practitioners, students, as well as human rights activists, grassroots organizations, and local communities. Furthermore, the *ABC* intends to be a useful tool for journalists, teachers, students, and indeed any member of the broader public who takes an interest in legislation making.

We hope that this handbook as well becomes a valuable reference in educational and institutional curricula in all countries in the Euro- Mediterranean region and a resource for students of law and politics.

Paris, November 2020

Lilian Halls-French

Co -President

EuroMed Feminist Initiative

Affirmative Action:	Deliberate measures and actions adopted to improve the rights, opportunities and access to resources and responsibilities of people socially structurally disadvantaged in order to compensate for those disadvantages. They are notably used to compensate for structural gender imbalances, to improve women's social position and role and overcome their marginalisation or even exclusion in public and political spaces.
Autonomy:	A person's capacity for self-determination or self-rule, for managing or exercising authority over themselves. This translates, at a personal level, into the capacity to decide over their own body, life course and lifestyle without anyone's guardianship or command. At a public level, it translates into their capacity to decide on their social, political, and legal contexts. Guaranteeing this capacity requires the recognition of a person's right to do all the above. It is, in combination with equality, the touchstone of democracy.
Civil State:	This has two meanings: 1. State in which military forces do not interfere with State affairs and are accountable to civilian control. 2. Secular State or State in which religion is clearly separated from public affairs.
Confessional State:	A State where one religion stands as official and has its place within legal and political structures and institutions.
Constitution:	Set of fundamental norms of a State, typically contained in a single document, where the normative framework for the legal system is established. This includes the institutional structure (organic part) and the principles that sustain that State (dogmatic part), including the rights, freedoms and obligations that pertain to individuals within it.
Culture and traditions:	Set of values and practices characteristic of a given community. Culture and traditions characterise every community differently. They often serve as justification for violations of women's rights or for not addressing women's discrimination and violence against them. The Beijing Platform for Action, 1995 affirms that: "No State may refer to national custom as an excuse for not guaranteeing all individuals human rights and fundamental freedoms."

Democracy:	Political system, or system of decision making, in which the people governed exercise political power directly or through elected representatives, who are accountable to them for their performance when in office. Democracy involves periodic elections and a plural party system, in which all individuals have equal access to power, duties and responsibilities. This requires the recognition of rights that guarantee individuals' dignity, autonomy, physical and psychological integrity, and equality, including equal access to resources and opportunities, health, education, and decision making. Democracy implies the elimination of any discrimination based on gender, ethnic origin, belief, or other characteristic, as well as a comprehensive approach to women's rights as universal human rights.
Democratic constitution:	A constitution based on democratic principles which combine the rule of law with people's self-rule, respect for human dignity and human rights based on gender equality and non-discrimination. A democratic constitution sets out the principles, including fundamental rights and duties, and the political and legal institutions necessary for democracy.
Discrimination against women:	"Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of women and men, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field." (CEDAW, Article 1)
Formal equality:	Equality as equal treatment, both within the text of norms and in their application. Formal equality endorses equal treatment as a goal in itself, regardless of its consequences and the differences in circumstances among the individuals involved.
Gender:	Gender refers to the different social roles attached to women and men. "Gender is used to describe those characteristics of women and men that are socially constructed, while sex refers to those which are biologically determined. People are born female or male but learn to be girls and boys who grow into women and men. This learned behaviour makes up gender identity and determines gender roles" (World Health Organization, 2002). Gender also refers to the set of discourses and practices that have been articulated to deconstruct the notion that those roles are based on essential differences between women and men.

- Gender-based violence:** Violence that targets people because of their gender and that stems from gender inequality. The expression recognises gender inequality as a cause of violence, without specifying the gender of the victim or the perpetrator.
- Gender equality:** The principle of gender equality refers to women and men enjoying the same opportunities, rights, and responsibilities in all areas of life. Everyone, regardless of gender, has the right to work and support themselves, to balance career and family life, to participate in political and public life on equal footing and to live without the fear of abuse or violence. Gender equality also means that women and men are of equal worth and are equally protected both within the law and in the application of the law.
- Gender mainstreaming:** Gender mainstreaming is a political and legal strategy to tackle formal and informal barriers to achieving gender equality by integrating the gender equality and gender power perspective in all areas and at all levels of society. “The process of assessing the implications for women and men of any planned action, including legislation, policies or programs, in all areas and at all levels. It is a strategy for making women’s as well as men’s concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programs in all political, economic and societal spheres so that women and men benefit equally and inequality is not perpetrated.” (ECOSOC, 1997)
- Gender power relations:** A system of socially created relations that reflect the way in which power is shaped by gender, providing men with privileged access to power and material resources as well as status in society. Gender power relations cross all social categories such as class, ethnicity, colour, age etc., and contribute to other forms of inequality.
- Gender power structures:** Prevailing patriarchal order of power as entrenched in society. Gender power structures determine how power is held on the basis of gender roles and expectations, generally placing men above women, and sustain and reproduce barriers to gender equality. Understanding these structures is a point of departure for approaching legislation and exploring fair treatment.

Gender-sensitive legislation:

Legislation that aims for substantive equality between women and men. It confronts the different roles attached to women and men, as defined by legal, social, religious or customary norms, and women's subsequent subordination to men's, including all forms of coercion and violence to which women are subject because they are women. To redress this situation, it adopts specific provisions geared towards substantive equality, including gender sensitive language

Although social, political, and cultural contexts differ, gender sensitive legislation relies on norms and standards that are grounded in the universality and indivisibility of the human rights of women and men

Human dignity:

A universal indivisible humanity common to all individuals regardless of their sex, gender, ethnicity, religion, class, or any other personal and social feature, as it relies on the inherent value all human beings share as such.

Indirect discrimination:

Discrimination that takes place when a norm or practice is neutral in language but has a different impact on different collectives of individuals, putting some at a disadvantage with respect to others and doing so without objective justification. Because it is concealed behind neutral language, the discriminatory impact of such norms or practices is often hidden from view. Such disparate impact is often suffered by women.

Intersectional discrimination:

Discrimination that affects people at the intersection between two or more systems of oppression. It is, for example, the discrimination specifically suffered by women in as far as they also belong to some other vulnerable category in terms of ethnicity, religion, nationality, disability, etc. The intersection of two or more systems of oppression does not simply result in their co-existence and added consequences; it creates discrimination of a specific kind that affects only those at the said intersection: it only affects women of an ethnic minority, for example, not all women, nor men from that minority.

Multiple discrimination:

Discrimination that affects people who belong to more than one discriminated group and are thus subject to more than one system of oppression. It is, for example, the discrimination suffered by women who also belong to some other vulnerable category in terms of ethnicity, religion, nationality, disability, etc. These women are subject to the added consequences of being a woman and belonging to another disadvantaged category.

Political rights:

Political rights are participatory rights in a democratic system. They can be referred to both in narrow and in broad terms, which connects with the distinction between procedural democracy and substantive democracy, between the form of democracy and its content. Whilst procedural democracy is defined by a set of mechanisms that organise the political system, the content of democracy relates to the conditions that enable people's democratic self-rule and imbue it with meaning as a social project of coexistence. Procedural democracy thus rests on the right to vote and leads to political representation and the democratic relation between rulers and ruled, including the accountability of the former before the latter on election day. Substantive democracy rests in turn on a set of rights and principles that establish both the preconditions for procedural democracy and its final purpose, which is no other than the preservation of these rights. Ensuring that these rights are enjoyed by all without discrimination based on class, gender, sex, colour is thus of utmost democratic importance, as is guaranteeing equality and non-discrimination in democratic processes.

Prostitution:

International human rights law recognises prostitution as a violation of human rights and as a form of sexual exploitation and an obstacle for gender equality and human rights. Article 3, paragraph (a) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons underlines the link between prostitution and trafficking and refers to prostitution as exploitation: "Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal or organs".

Secularism:

The principle by which the public, political and legal spheres are separated from religion and political and legal decision making depends on civil institutions not controlled or influenced by religious institutions or positions. Secularism respects religious diversity and preserves the freedom of all beliefs.

Sexual and reproductive rights:	Indivisible and undeniable universal human rights to one's sexual and reproductive self-determination, grounded in the values of freedom, equality, and dignity of all human beings. They include the "right to health, to be free from discrimination, the right to determine the number of children, the right to be free from sexual violence, the right to prevention and violence against women, sexual health information, education and counselling, the right to personal relationships and quality of life". (ICPD Program of Action, Cairo, 1994)
Substantive equality:	Real or effective equality beyond the equal treatment of norms. It focuses, not on equal treatment, but on equal outcomes, on the aim of attaining equality in real life. To this end it takes difference into consideration and justifies the adoption of affirmative action measures to compensate for existing social disadvantages.
Survivor:	A victim of violence becomes "survivor" when they cease to suffer from the harm she endured or decides to refuse to put up with more violence. The term stresses the person's strength and ability to cope with and stop the abuse and thus implies resilience and empowerment (UNFPA). It is generally used to refer to the psychological and social support, rather than medical, granted to victims of violence (IASC).
Trafficking:	Article 3, paragraph (a) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons defines Trafficking in Persons as the "The recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power, or a position of vulnerability, or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery, or practices similar to slavery, servitude or the removal or organs".

Victim: According to the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power Adopted by General Assembly resolution 40/34 of 29 November 1985, a victim is a person who, individually or collectively, has suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within a State, including laws proscribing criminal abuse of power. Victims have the rights to access justice, to a fair treatment, restitution, compensation, and assistance. This is so regardless of whether the perpetrator is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim.

Depending on their degree of involvement in the traumatic event, victims can be direct or indirect. Direct victims have been subjected to, or have witnessed, the act of violence. Indirect victims are concerned by the act and/or affected by its consequences due to their emotional closeness with direct victims.

Violence against women: All forms of gender-based violence perpetrated against women. “Any act of gender-based violence that results in, or is likely to result in discrimination physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberties whether occurring in public or private spheres.” (UN Declaration on the Elimination of Violence against Women 1993) While the term violence against women puts the spotlight on the victims, the term “male violence against women” is also used to highlight the perpetrator, in acknowledgement of the fact that 90% of its perpetrators are men. (World Health Organization)

CEDAW	Convention on Elimination of All forms of Discrimination against Women
CESCR	Committee on Economic, Social and Cultural Rights
CSA	French Superior Council of Audio-Visual
CSO	Civil Society Organisation
ECOSOC	United Nations Economic and Social Council
FGM	Female Genital Mutilation
GAMAG	Global Alliance on Media and Gender
HIV	Human Immunodeficiency Viruses
IASC	Inter-Agency Standing Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICPD	International Conference on Population and Development
ILO	International Labour Organisation
IVF	In Vitro Fertilisation
MENA	Middle East and North Africa
NGO	Non-Governmental Organisation
OECD	Organisation for Economic Cooperation and Development
OSCE	Organization for Security and Cooperation in Europe
UAE	United Arab Emirates
UDHR	Universal Declaration of Human Rights
UK	United Kingdom (of Great Britain and Northern Ireland)
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNFPA	United Nations Population Fund
US	United States (of America)
WHO	World Health Organisation

PART I

FOUNDATIONS AND PRINCIPLES OF GENDER-SENSITIVE LEGISLATION

CHAPTER 1

WHY ADOPT GENDER-SENSITIVE LEGISLATION?

In a world where gender-based discrimination continues to permeate all aspects of society, the need to advocate for gender-sensitive legislation may seem self-evident.¹ Yet it seems nonetheless important to stop and spell out the added benefit attached to laws specifically designed to combat discrimination based on gender and to advance gender equality. It is important to understand that national legislation can not only complement and expand States' international and constitutional commitments on the subject. It can also provide the necessary framework and conditions for the implementation of those commitments and help articulate the development of policies specific to every country. Ultimately, legislation can play an active role in creating a gender-friendly society by defining the rights and duties of all. What follows is a more detailed account of the arguments that support the work of legislators, but also decisionmakers, experts and activists, towards engendering their country's legislation.

1. Gender-sensitive legislation redresses and corrects historic and ongoing discrimination against women

Modern States have systematically excluded women from public and political life, defined and framed as male. This has translated into women's subjection to gender-based discrimination in all public spheres, including political power, financial power, employment, access to services and, more generally, the equal protection of the law. Patriarchal norms have operated across societies and across time systematically to disenfranchise women, exclude them from decision-making positions and access to opportunities and resources. Women's exclusion from public life does not only operate as a division of social roles; it also creates a hierarchy, signalling to society at large that a woman's role, not being public, is inferior to a man's. More often than not, the law is complicit in this situation. Laws tend to be either silent on women's plight to end discrimination, not providing explicit protection against it, or overtly discriminatory. We can find legislation that excludes women from certain official positions (such as Head of State or Government) or from employment (by banning them from jobs and professions regarded as 'masculine', or by subjecting the employment of married women to spousal's consent), or we can find legislation that restricts women's free movement (by requiring them to travel accompanied by a man). Laws, moreover, often establish procedures that are unfair to women and undervalue them as public actors (such as criminal procedures that unduly burden the victim in cases of

[1] Michèle Riot-Sarcey, « Démocratie », in *Dictionnaire genre et science politique*, ed. Catherine Achin et Laure Bereni, Paris Presses de Science Po, 2013, p. 152-153.

gender-based crimes). Gender discrimination is thus often articulated by law, hence the law itself must also be used as a tool to end it.

Although the last century saw important advances in this area, there remain countless examples of gender discriminatory legislation in force in countries around the world, even instances of regression. A 2019 study of 187 world economies carried out by the World Bank found that only 6 countries fully implemented gender equality in the area of employment law.² The rest included some form of legal barrier to women in employment, such as limits on freedom of movement or access to the job market, negative impact on career progress attached to pregnancy, or discriminatory rules for access to pension funds. Similarly, the Global Campaign for Equal Nationality Laws has found that over 60 countries maintain nationality laws that discriminate on the basis of gender, while 27 countries deny women the equal right to confer their nationality to their own children.³ Although both reports mention progress in recent years, they also emphasise that much more needs to be done to achieve full equality, and indicate the need for further progress to be more evenly distributed across all regions of the world.

It would also be a mistake to believe that laws can only be overtly discriminatory. While explicit discriminatory language in legislation persists, legal discrimination is often implicit, taking the form of indirect discrimination, i.e. discrimination hidden behind apparently neutral norms which yet have a different impact on different collectives of individuals. Indirect discrimination particularly affects women. Austerity measures offer a good example of this: despite their neutral appearance, their negative impact disproportionately affects women, as they are on average lower and more precarious earners, often also sole family earners as single mothers.

CEDAW Article 1:

"For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise of women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."

Indirect discrimination is clearly prohibited under international human rights law. The Convention on Elimination of all Forms of Discrimination Against Women (CEDAW) adopted in 1979, for example, defines discrimination as gender-based distinctions, exclusions or restrictions that have the purpose or the effect of disadvantaging women. Thus, the Convention envisions the possibility of policies, laws and other practices that may not appear to discriminate but nevertheless do so in practice. The CEDAW Committee has further clarified that such indirect discrimination occurs because laws do not operate in a neutral context, but in one affected by pre-existing inequalities. The Committee has also warned that "indirect discrimination can exacerbate existing inequalities owing to a failure to recognise structural and historical patterns of discrimination

[2] *Women, Business and the Law 2019: A Decade of Reform*, World Bank, 2019, <https://openknowledge.worldbank.org/bitstream/handle/10986/31327/WBL2019.pdf?sequence=4&isAllowed=y>.

[3] The Global Campaign for Equal Nationality Laws, <https://equalnationalityrights.org/>.

and unequal power relationships between women and men.”⁴ For example, the regulation of certain work practices (such as late shifts or hours) may be general and applicable to all, but they disproportionately affect women, who tend to have more caring responsibilities. Even criteria for accessing certain professions may be set so as to discriminate against women indirectly. Height requirements, for instance, are often preconditions for entering the police force and, while they are neutral in theory, in practice they are likely to disproportionately exclude women from the profession. Several countries around the world have since recognised that there is no objective justification for such requirements and have removed them as indirectly discriminatory against women.⁵

Gender-sensitive legislation is the only means to redress pre-existing *de jure* (legal) discrimination, insofar as it provides legal tools for preventing discriminatory treatment and promoting gender equality. It is often also the best means to address *de facto* discrimination (discrimination in practice). Gender-sensitive laws can play an important role in addressing discriminatory customs rooted in culture, religion, or tradition. Such customary practices may have a strong pull on the population and appear immutable. Law, however, can and should act as a tool for progress and push the equality agenda forward, even where this agenda might clash with pre-established customs. If carefully drafted, gender-sensitive legislation can strike the right balance in this area. South Africa, for example, now partially recognises customary marriages through the Recognition of Customary Marriages Act (1998). While this afforded such marriages a certain degree of legal protection, it also placed them under the authority of the law. It is now not custom, but statutory law that governs ‘customary’ marriages in South Africa. This includes women’s status within them, as entrenched in their financial implications or the rules for their dissolution. The State thus used its authority both to recognise customary marriages and to protect women’s equality within them. In this way it designed a careful balance between custom and gender equality, acknowledging the former while ensuring that women would not be placed at a disadvantage by it.

The law, in brief, can be a very powerful tool to address women’s historic and ongoing discrimination, whichever form it might take: whether explicitly couched in legal norms, hidden behind neutral ones as indirect discriminatory impact, or entrenched in customary norms.

[4] Committee on the Elimination of Discrimination Against Women, *General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, CEDAW/C/GC/28, 16 December 2010, para. 16.

[5] Starting in the early 1990s, the UK gradually removed minimum height requirements for police recruitment in a spirit of inclusivity. In 2017, the European Court of Justice found that the Greek law imposing such a blanket minimum height requirement for police officers did not accommodate the variety of roles police officers can play once recruited, hence was discriminatory against women (*Esoterikon v Kalliri*, 18 October 2017).

2. Gender-sensitive legislation addresses women's different interests from men's

As a direct consequence of the gender division of social roles and the construction of women's as inferior, women's needs and interests are different from men's. Women's subordinate role is often determined by pregnancy and caring responsibilities. Constructed as managers of other people's dependency, women themselves have paradoxically been identified with dependency, while their social role is constructed as instrumental to men's needs. Women may thus be denied recognition of their entitlements simply because they do not suit men's interests. Gender-sensitive legislation identifies, takes seriously and addresses women's specific needs.

That women's different interests need legal recognition is most obvious in the area of reproductive rights. On the one hand, only women experience pregnancy and childbirth, hence they should have specific legal protection that takes account of this fact, such as access to adequate health facilities, protection from unfair dismissal or other employment discrimination on the basis of pregnancy or motherhood, or State child support. On the other hand, the law should not perpetuate gendered stereotypes and bias based on women's assumed social roles as mothers and carers. Women should not be assumed to be "naturally" in need to bear children and discriminated against when they do not. Nor should women be assumed to be weaker or otherwise lesser citizens on account of pregnancy (by being reassigned to less qualified tasks, for example, on the assumption that pregnant women underperform as workers). The law, moreover, should not remain blind to, or perpetuate, women's indirect discrimination by allowing health providers to exclude or overcharge for services from which only or mostly women benefit, or by imposing higher taxes to basic goods only women need, such as menstrual products.

Beyond their specific needs related to pregnancy and childbirth, women are disproportionately expected to act as caregivers, whether to their children, parents, or other family members. This is a reality that has solidified in many societies over time. The construction of women and the women's role as inferior has also resulted in women's care work being undervalued. Because their labour is confined to the private sphere, they are often seen as unproductive members of society, with negative consequences on their entitlement to social benefits, including pensions. Gender-sensitive legislation can help correct this by recognising women's social contributions, often in the form of care duties usually performed within the domestic sphere. As with reproductive rights, however, this must be done carefully, so as to avoid further entrenching women in the domestic sphere and deepening, rather than alleviating, their exclusion from the public domain. In this line, Chapters 4 and 7 discuss how legislation can ensure that women are not disadvantaged by maternity leave or by part-time or flexible working arrangements, which they often embrace to make time to care for others.

It is therefore the task of legislators to identify and protect women's specific interests, while being careful not to essentialise women's roles when recognising rights and introducing policies that are likely primarily to benefit them. The risk of essentialising gender differences – portraying them as inherent, intrinsic to different genders – is real and must be averted. As later chapters of this handbook will show, gender sensitive legislation aims for a society that is, both in theory and

in practice, gender equal. The final aim is therefore substantive gender equality. This will often require the law to embrace formal equality, demanding equal treatment of women and men (as equal pay for equal work or equal parental leave for women and men). Substantive equality, however, may also require the State to adopt laws that specifically target women and their needs (as in the area of reproduction) or that are neutral on their face but will likely disproportionately benefit women (as laws against gender-based violence or sexual harassment). Occasionally, the disparities may be so pronounced and long-standing that affirmative action measures may be required to rebalance the playing field (by introducing gender quotas in politics or on company boards, for example, to increase female representation in finance and the economy, political institutions and the public sphere more generally). Legislators, in brief, face the task of identifying and meeting women's specific needs and interests, derived from the gendered division of roles on which societies rest, while avoiding the essentialisation of these needs, interests and roles. Bearing substantive equality in mind as the final aim, and approaching it in such nuanced, differentiated terms, is essential to bring about gender equal societies.

3. Gender-sensitive legislation implements and may even surpass constitutional commitments to equality and non-discrimination

As explained in the *ABC for a Gender Sensitive Constitution*, constitutional guarantees can anchor equality claims and shield them from ordinary politics.⁶ This makes them harder to amend and discard. Since normative written constitutions are above legislation in the hierarchy of legal norms, and since laws must therefore comply with the values and principles enshrined in their constitutional text, developing a guide on gender-sensitive legislation could appear to be a redundant task. In practice, however, legal systems do not function in such a straightforward fashion. Laws can, and sometimes do violate the constitution that presides over their legal system, a situation addressed through systems of constitutional review (see Chapter 11). Constitutions, moreover, are typically written in abstract terms, as they enshrine a State's core commitments, including commitments to gender equality, non-discrimination, and individual rights more generally. While there are some exceptions (the Constitutions of India or Brazil are far more detailed than the Constitution of the US, for example), the details of State policies in these areas will be stipulated primarily at the legislative rather than at the constitutional level.

Beyond their commitment to the principles of gender equality and non-discrimination, therefore, State constitutions still need to rely on legislation for the practical implementation of those principles. South Africa's Constitution, for example, was adopted in 1996 with the explicit aim of redressing past inequalities, including those based on gender. Its very first article contains strong commitments to the principles of equality and non-discrimination and embraces non-sexism along with non-racialism (Articles 1). Its Bill of Rights then bans both direct and indirect discrimination when incurred by either public authorities or private persons, with explicit

[6] Silvia Suteu and Ibrahim Draji, *ABC for a Gender Sensitive Constitution, a guide for gender mainstreaming of the constitution*, EuroMed Feminist Initiative, Paris 2016.

reference to gender, sex, pregnancy, marital status, and sexual orientation. It also refers to public power's duty to adopt legislative and other affirmative action measures to achieve substantive equality (Article 9). These measures, and the detailed Bill of Rights, were meant to ensure the country could overcome the legacy of apartheid and move towards a more equal future. Importantly, the Bill of Rights explicitly bounds all public bodies, including the legislature, so that even Parliament must abide by the rights enshrined therein (Article 8). Nevertheless, while the South African Constitution provides normative guidelines and draws important red lines for law and policy making, legislation is needed to develop and implement those guidelines. In light of the fraught history of housing policy under the apartheid regime, for example, the constitutional right to housing subjects evictions and demolitions of homes to a court order and bans arbitrary evictions, yet legislation and other measures are relied on to implement this right progressively within the framework of available resources (Article 26).

Furthermore, States could rely on constitutions that do not adequately enshrine the principles of equality and non-discrimination, that might even be entirely silent on both. This is often the case with older constitutions, adopted at a time when gender equality and women's rights were not on the agenda, when women did not even have the right to vote. The Constitution of the US is an enlightening example: dating back to 1787, it does not mention women or the principles of equality and non-discrimination; the only reference to equality is indirect, as constructed from the Due Process clauses in the Fifth and Fourteenth Amendments (which together prevent the arbitrary deprivation of life, liberty and property and have been interpreted by courts in terms that ensure a certain degree of procedural and substantive fairness). Given that slavery was legal at the time of its adoption, the American Constitution's silence on matters of equality can hardly be surprising. US policies on equality and non-discrimination have thus been developed through legislation. This has meant piecemeal progress through individual pieces of legislation, including: the Fair Labour Standards Act of 1938 (setting a minimum wage, a norm that disproportionately benefitted women); the Equal Pay Act of 1963 (banning employers from paying women less than men based on their gender); the Civil Rights Act of 1964, Title VII (protecting women from workplace discrimination); the Pregnancy Discrimination Action of 1978 (making discrimination based on pregnancy or pregnancy-related conditions illegal), etc. On the other hand, the Violence Against Women Act of 1994 (VAWA), which committed federal funds to the fight against gender-based violence, has as of 2019 been left to expire.⁷

Constitutional silence on gender equality can hinder rather than promote it. In such cases, a State could arguably first embark on a constitutional reform, then examine the gender sensitivity of existing laws and introduce the necessary legal reforms. Yet this does not seem to be an advisable course of action. Constitutional amendments are never easy to implement, as they are subject to complex procedures and their ratification requires a qualified majority⁸ in parliament, even sometimes a popular referendum on the matter. The US offers again a telling example.

[7] Because it requires federal spending, VAWA needed to be periodically re-authorised by Congress. The Act expired in 2019 and, as of the time of writing, the US Senate has failed to re-authorise it.

[8] A qualified majority is higher than a simple majority (more votes in favour than against). An example is absolute majority (50% of the votes plus one). The qualified majority required for constitutional amendments is generally higher than this and could be set at three fifths (60%), two thirds, or even three quarters (75%).

Here the Equal Rights Amendment (ERA) to the Constitution was proposed to prohibit legal distinctions between women and men in the fields of divorce, property, employment, and other matters. It was introduced before the US Congress in 1972 and would have required ratification by 38 US states in order to be passed. As of 2020, that ratification threshold has not yet been met and it is unclear whether it will be in the foreseeable future. The US Constitution thus stands as an example of an older, rigid constitution that has stood in the way of advancing the fight against gender-based discrimination. In such cases, legislative action becomes particularly important.

Some constitutions are only partially silent on matters of gender equality, thus partially endorsing advancements in gender equality and non-discrimination. The Constitution of Sweden, for example, dating back to 1974, only has a limited number of references to gender equality. It does explicitly ban discrimination based on gender (Articles 2 and 13), but it does not, in any way, match the rich and detailed array of gender equality policies adopted by the country. Sweden has consistently been ranked in the top-three positions of the Gender Inequality Index, the UN's tool to measure State progress in combatting gender inequalities in key aspects of human development.⁹ This in part reflects the comparatively less important role played by the Constitution in Sweden and in other Scandinavian countries. It also shows how a country's advancements on gender equality and non-discrimination may surpass its constitutional guarantees and rely on a more progressive corpus of legal protection for women's rights than the constitution itself. Insofar as constitutional amendments tend to be more difficult to pass than legislation, this is an important point for gender equality advocates to bear in mind: they should mobilise and direct their energies towards engendering legislation even beyond constitutional provisions and attempts at constitutional reform. Ideally, however, both the Constitution and legislation should be gender sensitive and reinforce each other in this regard.

Finally, legislation can be and has been used to curtail apparent constitutional advances on gender equality. This can happen where constitutions contain rights protections and equality and non-discrimination guarantees, while simultaneously indicating that these provisions are to be implemented and/or limited "in accordance with the law". The 2012 Syrian Constitution, for example, guarantees the freedom of assembly and association, the right to inheritance, and the freedom of belief "in accordance with the law". In practice, this means leaving the door open for legislation to undermine these constitutional protections. Gender equality and non-discrimination should thus be guaranteed both within the constitution and through legislation, both of which should work together in coordination towards this goal.

[9] Gender Inequality Index (GII), United Nations Development Programme, http://hdr.undp.org/en/content/gender-inequality-index-gii?wpisrc=nl_lily&wpmm=1.

4. Gender-sensitive legislation gives effect to States' international obligations on women's rights

International treaties tend to enshrine States' legal commitments at a more abstract level than even constitutions do, leaving it to national legislation to fill in the details. Several such treaties, in the area of both human rights in general and women's rights in particular, talk about States' duties to combat gender-based discrimination at all levels, including via their constitutions, laws and policies.

CEDAW, for example, creates an obligation for Member States to condemn discrimination against women in all its forms and pursue all appropriate measures to eradicate it, including constitutional and legislative reform where necessary (Article 2). Article 3 of CEDAW also requires States to take all appropriate measures, including passing legislation, "to ensure the full development and advancement of women." Throughout the Convention, references are made to the need for States to pass the necessary legislation to give effect to the Convention's provisions, as well as to review and adapt this legislation periodically in light of new evidence and emerging best practices.¹⁰ In some instances, CEDAW is even more precise. For example, Article 16(2)

explicitly requires Member States to ensure, by specific legislation if needed, that the betrothal or marriage of a child will have no legal effect in their domestic legal system.

In the context of the UN's Women, Peace and Security Agenda, legislation is called upon to

CEDAW Article 2:

"States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

- (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle,
- (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women,
- (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination,
- (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation,
- (e) To take all appropriate measures to eliminate discrimination against women by any person, organization, or enterprise,
- (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women,
- (g) To repeal all national penal provisions which constitute discrimination against women."

[10] See, for example, Article 11(3), which requires Member States periodically to "revise, repeal or extend as necessary" protective legislative measures in the area of employment, in light of advancements in scientific and technological knowledge.

acknowledge women's central role and requirements in the context of peace-making, peace-building and post-conflict reconstruction. UN Security Council Resolution 1325 (2000) calls on States to increase women's representation at all decision-making levels, to ensure their access to justice and protection from human rights violations. The Resolution has also encouraged the creation of national frameworks for the implementation of its objectives, including National Action Plans.¹¹ Other UN Security Council Resolutions complement the Women, Peace and Security Agenda: 1820 (2008), 1888 (2009), 1889 (2009), 1960 (2010), 2106 (2013), 2122 (2013), 2242 (2015) and 2467 (2019). They further specify States' international duties in this area, such as the need to recognise the use of rape as a weapon of war and to remove discriminatory legislation that impedes achieving the Agenda's aims.

Other international human rights treaties follow a similar pattern. The International Covenant on Civil and Political Rights (ICCPR), for example, stipulates that States have a duty "to adopt such laws or other measures as may be necessary to give effect to the rights recognised in the present Covenant." (Article 2(2)). The International Covenant on Economic, Social and Cultural Rights (ICESCR) similarly recognises the significance of legislation, stating that Member States have a duty progressively to realise the rights enshrined in the Covenant, "including particularly the adoption of legislative measures" (Article 2(1)). Moreover, while international human rights treaties accept these rights may, in some instances, be limited by law, they clearly stipulate that such limitations are only acceptable insofar as they "may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society." (Article 4 of the ICESCR)

The 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others recognises the harm caused by human trafficking leading to prostitution, stating it is "incompatible with the dignity and worth of the human person and endangers the welfare of the individual, the family and the community". The Convention requires State parties to punish those who procure, entice, or lead away another person for these purposes. Legislation that commits to persecuting human trafficking and punishes the procurers of forced prostitution, not its victims, is therefore needed, together with political activism, education, and the provision of economic alternatives and social services aimed at helping women out of prostitution (read more in Chapter 5). The UN Convention against Transnational Organized Crime, adopted by General Assembly Resolution 55/25 of 15 November 2000, is also the main international instrument in the fight against transnational organised crime, and is supplemented by three protocols: the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; the Protocol against the Smuggling of Migrants by Land, Sea and Air; and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition. The UN has also made it clear that, despite slavery being banned, including under the Universal Declaration of Human Rights (UDHR) and under the ICCPR, there are modern forms of slavery, such as the traffic and exploitation of human beings,

[11] For an example, see *Report on the Implementation of Iraq National Action Plan for United Nations Security Council Resolution 1325 on Women, Peace and Security*, EFI-IFE, 17 December 2018, <http://www.efi-ife.org/report-implementation-iraq-national-action-plan-united-nations-security-council-resolution-1325>

including women in the system of prostitution, all of which must be combatted.¹² Together, these international instruments recognise that States must combat human trafficking and exploitation, which disproportionately affects women and stands as an important barrier to gender equality.

In sum, far from undermining it, international law helps to define the role of national legislation as a tool to advance individual rights and protections. It prevents States from using legislation as a means to weaken gender equality and non-discrimination as set by international standards, an unacceptable practice under international law.

5. Gender-sensitive legislation plays a preventive and a symbolic role, attaching the force of law to a State's commitments to gender equality and non-discrimination

Legislation is a crucial instrument in the hands of States to steer social behaviour. In this sense, just as the law can act as a site of exclusion, it can and should act as a site for recognising women as equal citizens. Discriminatory legislation against women not only keeps them in a subordinate social position, it also sends a strong signal about the State's priorities, its appreciation (or lack thereof) of women's role in society, while gender-sensitive legislation sends society a strong signal about a State's commitment to the equal rights of women and men. The strong symbolic message is then that gender equality is a priority, that the State perceives the need to intervene in order to achieve it and that the force of the law is to be deployed to help correct historical injustices laid upon women and encourage social progress. Commitment to democracy, moreover, can only be real where no fraction of the population, let alone half of it, is victim of discriminatory legislation.

In this line, legislators should acknowledge the major impact laws have on their citizens' mindsets, hence on society's functioning and progress. By directly addressing women's long-standing exclusion and discrimination and law's silences about it, legislation can redirect societal conversations towards a more gender-equal future. Legislation on violence against women offers a telling example. Where violence against women is not adequately recognised in the law as a form of gender-based discrimination and a violation of women's rights, States send a message of passivity and disregard for women's rights, value, equality, safety, and well-being. The State, which should protect all citizens, thus signals women as second-class citizens deserving lesser protection. Conversely, when a State does adopt legislation on violence against women, as Tunisia did in 2017, citizens perceive it is taking a stance to acknowledge and redress the plight of victims—in the Tunisian case, estimated at 60% of the country's women.¹³ Moreover, having the law on their side empowers women to seek the protection of the police, who otherwise often fail to take victims of violence against women seriously.

Parental leave policies offer another, more subtle example. Many believe that generous maternity leave policies, even the exclusive allocation of such leaves to women, are positive steps States

[12] UN Office of the High Commissioner for Human Rights, "Fact Sheet No. 14, Contemporary Forms of Slavery", <https://www.ohchr.org/Documents/Publications/FactSheet14en.pdf>.

[13] Lilia Blaise, "'I Can Finally Dream': Tunisia Expands Protection for Battered Women", *The New York Times*, 12 May 2018.

can take to signal women's worth as mothers. By focusing on maternity leaves without legislating on paternity leaves, however, or by allowing for these only in their shortest version, States reinforce traditional gender roles within the family with regard to parenting and care duties. They strengthen the message that a woman's role is domestic and reproductive, that her place is at home with the new-born, while the father's role is productive, played out at work as the primary earner. Instead of this, gender-sensitive legislation requires States to rebalance gender roles within the family by making paternity leaves the norm and by making them equal to maternity leaves and non-transferable to mothers. Such measures would then normalise a more family-involved version of fatherhood, which would help alleviate the employment and career burdens motherhood carries for women, with repercussions on their payment and pension entitlements (read more in Chapters 4 and 7).

Countries that do not offer adequate health services addressing women's needs, such as family planning, access to contraception, abortion and adequate childcare facilities, send the message that women's specific needs in the area of reproductive rights, childbirth and childcare are secondary. While they are expected to act as mothers and domestic caretakers, giving birth to and caring for the next generation, women cannot expect much

governmental help when fulfilling these roles. At the other end, States that adopt pronatalist policies that exclusively see women as mothers and repositories of their nation's reproduction also send a dangerous message: that women are to be valued primarily for their reproductive function and should prioritise childbearing over any other productive contribution they could make to society. Women's identity is thus simply conflated with their identity as mothers. Examples can be found in societies currently under the populist spell, from Poland to the US, where populist leaders promote natalist policies, such as flat financial incentives for multiple births, higher State benefits for large families, even attempts to ban abortion outright under any circumstance. Under the cloak of family support, these policies effectively aim at entrapping women in their domestic roles and out of public concerns.

The reaction to the State's deprioritisation of women's lives and rights cannot be to essentialise women's roles as mothers and caretakers through legislation and policymaking. Nor can the answer be to give up on the law's ability to change women's lives for the better. It must instead be to learn to harness the law's potential and mobilise against attempts to roll back progress in the area of gender equality and non-discrimination. Gender equality activists are well-prepared and

"A century after Polish women got their right to vote, politicians and religious fundamentalists in our country refuse to give up power and control over our bodies, our sexualities and our lives. But feminists in Poland have never given up: we resist, we fight back, we're united."

Kasia Staszewska, Polish feminist activist, 2018

"This is why the new law is so important, because it also takes care of the preventive side of violence against women in general, not only the reform of the criminal side."

Monia Ben Jemia, president of the Tunisian Association of Democratic Women, on Tunisia's 2017 law against violence against women.

ready to use the law as a vehicle for resistance and access to power. Polish women offer a good example. In 2016 hundreds of thousands of women marched in what came to be known as “the Black Monday protests” against the government’s attempt to impose a total ban on abortion, thus forcing government to back down. In 2017, moreover, they collected more than two hundred thousand signatures under a pro-choice civic initiative project to challenge the current law and have returned to the streets countless times to oppose what they see as a war on their bodies.¹⁴ However, the ban of abortion remains a threat, particularly as, under the cover of the Covid-19 crisis, since April 2020 the Polish government has multiplied its efforts to tighten abortion rights.

The example of Tunisian women is also instructive, as they have mobilised to ensure that their constitutional gains, enshrined in the country’s 2014 Constitution, are matched by progressive gender equality legislation. They have for example successfully fought for a law on elimination of violence against women, adopted in 2017, and are seeking to reform the country’s personal status laws, in particular inheritance rules, that discriminate against women. These advances give hope not just to Tunisian women but are a beacon for women across the Middle East, as they provide models of good practice for legislators in other countries. As this comes to show, the symbolic role played by the law can expand beyond State borders.

Finally, the law can also play a deterrent role, as it can prevent some behaviour by threatening to punish it. This is especially important where long-standing behaviour that is detrimental to women is defended on grounds of tradition, custom, or religion. Examples include female genital mutilation (FGM), forced marriages or deprioritising girls’ education. Laws against such practices have important educational content, but can also include a warning of serious penalties, including imprisonment, for those who engage in them. Counting on the full force of the State, through legislation and public education campaigns, is crucial to eradicate such behaviour and push forward the gender equality agenda. To this end, States must not only adopt gender-sensitive legislation; they must also ensure it is properly implemented (for more on enforcement of legislation, see Chapter 11).

[14] Kasia Staszewska, “‘We Won’t Give up’: 25 Years of Feminist Resistance to the War on Women’s Bodies in Poland”, *Open Democracy*, 9 March 2018.

1. GENDER-SENSITIVE LEGISLATION REDRESSES AND CORRECTS HISTORIC AND ONGOING DISCRIMINATION AGAINST WOMEN.

- Women have been systematically excluded from public concerns and rendered subordinate in practice and by legislation. Legislation is thus required to correct the inferior social status imposed upon them.
- Even where advances have been made, there remain abundant instances of discriminatory legislation, which must then be rectified.
- Laws can be discriminatory both directly and indirectly. Addressing indirect discrimination will entail ensuring that, even where the letter of the law appears to be neutral, legislation does not have a negative effect on women, putting them at a disadvantage with respect to men.
- The law can and should be a powerful tool to correct long-standing discrimination against women based on tradition, custom, or religion.

2. GENDER-SENSITIVE LEGISLATION ADDRESSES WOMEN'S DIFFERENT INTERESTS FROM MEN'S

- Legislation must acknowledge women's needs and afford them adequate protection.
- Protecting women's different interests will include legal recognition of their reproductive rights and their needs related to pregnancy and childbirth. It will also include addressing the gendered social structures that lie behind different phenomena, from widespread violence against women and girls to the feminisation of care within the family and beyond.
- When protecting women, legislators must not perpetuate gendered stereotypes by expecting them to undertake the majority of caring responsibilities.

3. GENDER-SENSITIVE LEGISLATION IMPLEMENTS AND MAY EVEN SURPASS CONSTITUTIONAL COMMITMENTS TO EQUALITY AND NON-DISCRIMINATION

- Legislation will provide detail, whilst constitutions are typically written in more abstract terms. Legislation will thus often be necessary to implement general constitutional commitments to gender equality and non-discrimination.
- Legislation and constitutions must work in tandem towards gender equality and one should not be used to undermine the other.
- Where constitutions are silent on, or contain only skeletal commitments to, gender equality and non-discrimination, legislation can take these commitments further in the creation of a gender-sensitive normative framework.

4. GENDER-SENSITIVE LEGISLATION GIVES EFFECT TO STATES' INTERNATIONAL OBLIGATIONS ON WOMEN'S RIGHTS

- International law requires States to adopt gender-sensitive legislation.
- International treaties such as CEDAW, the UDHR, the ICCPR, and international conventions against trafficking and organised crime, all require States to take measures, including legislation, that protect women's rights, advance gender equality and guarantee women's full access to the public and political spheres as equal citizens with men.

5. GENDER-SENSITIVE LEGISLATION PLAYS A PREVENTIVE AND A SYMBOLIC ROLE, ATTACHING THE FORCE OF LAW TO A STATE'S COMMITMENT TO GENDER EQUALITY AND NON-DISCRIMINATION.

- Gender-sensitive legislation sends a strong symbolic message to society: that the State takes gender equality seriously, that it does so because it helps to enhance the well-being of society, where women amount to around 50%, that it is willing to put resources behind the gender equality agenda and that it is even prepared to punish those who discriminate against women only because they are women.
- The law also plays a preventive as well as an educational role, helping to change discriminatory attitudes and behaviours through education.

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CHAPTER 2

GENERAL PRINCIPLES FOR GENDER-SENSITIVE LEGISLATION

One of the earliest publications in the series on gender-sensitive systems of rights was a guide to gender-sensitive constitutions.¹⁵ Although the adoption of a gender-sensitive constitution is an important, even a necessary step to ensure that a legal system will adhere to the principles of gender equality and non-discrimination, for reasons that were spelt out in Chapter 1, ensuring such adherence does not appear to be sufficient. Necessary mechanisms must also be put in place to guarantee that gender equality and non-discrimination do not remain a subject of abstract rhetoric, that they become a reality permeating the lives of all citizens – both women and men. To this end, gender-sensitive legislation will require reforming existing laws and enacting new ones. To guarantee women's legal rights and citizenship status on an equal footing with men, new and reformed legislation must rely on five principles: the principles of *constitutional democracy*, of *human dignity*, of *autonomy*, of *secularism* and of *equality and non-discrimination*.

1. Gender-sensitive laws and constitutional democracy

As a system based on people's self-rule, both directly and through political representation, democracy rests on two basic elements: people's participation in political life and the accountability of those in public office. It is hence built entirely on the principle of autonomy, as people's right to participate in public affairs derives from every individual's right to self-determination. To this end, equality is crucial, a basic pillar of democracy and a condition for it to exist and thrive. Democracy, however, has not always recognised all members of society equal access to this right. It has rather been built on the exclusion of women.¹⁶

This misconception of democracy can not only be found in Ancient Greece. It presides over classical modern writings on democratic theory, still considered by most scholars to be most authoritative on the subject. One finds modern authors confidently asserting that the natural place for women is the home, that women's proper *modus vivendi* is confined to domestic affairs, and that government is by its very nature the domain of men. J. J. Rousseau, philosopher of the social contract and theoretical father of modern democracy, linked women's nature and role to domesticity and away from public affairs, to the provision of happiness for their husbands and care for their children at the expense of their own. Women who leave their homes, says Rousseau,

[15] Silvia Suteu and Ibrahim Draji, *ABC for a Gender Sensitive Constitution, a guide for gender mainstreaming of the constitution*, EuroMed Feminist Initiative, Paris, 2016

[16] See: Christine Fauré, *Democracy Without Women: Feminism and the Rise of Liberal Individualism in France*, Paris, 1985.

lose their splendour and commit an act of indecency.¹⁷ To prevent this, he advises, girls should be raised into submissiveness and tolerance of psychological abuse.¹⁸ Alexis de Tocqueville, who theorised American democracy and was mesmerised by it, adopted a similar approach, claiming that Americans had never considered the principles of democracy to undermine the authority of the husband within the home, as this would introduce chaos into the family structure. Instead, de Tocqueville argued, Americans considered that no partnership or association could succeed unless a single leader oversaw it, the man being the natural leader within the family and in the field political association.¹⁹

Most democracies are indebted to these ideas. Despite the constitutional proclamation of the principles of democracy, people's sovereignty and equality, laws have long limited women's access to the public sphere, both directly and indirectly.²⁰ Therefore, adopting a constitutional democratic system of government does not suffice to legitimise political power, as it does not in itself guarantee women's equal access to, or participation in, public affairs. It does not, unless this system is based on a revised approach to democracy that incorporates women as full citizens. Gender mainstreaming thus becomes the touchstone for democracy, the means to correct women's past exclusion from so-called "democratic" citizenship.²¹ To this end, gender-sensitive constitutions are required, but so are gender-sensitive laws. Only these can operate the transformation of constitutional principles into practical goals and outcomes and can develop mechanisms aimed to render gender equality a reality at all levels of social life.

Assessing the democratic quality of a political system thus implies assessing its commitment to women's political participation as expressed in both its constitution and legislation and as manifest in women's political involvement in practice. Data show, however, that women's political presence worldwide continues to be weak (see Chapter 3). This is problematic in democratic terms, as no democracy can exist without a fair representation of women. Moreover, women's underrepresentation in politics contributes to the perpetuation of patriarchal legal norms. Claiming that democratic law is an expression of public will²² remains meaningless for as long as this will continue to be based on the underrepresentation, if not the complete exclusion, of half of society. In this context, UN Secretary-General Ban Ki-moon has acknowledged, in a speech at an international roundtable on Gender Equality and Democracy, that "Gender equality must be

[17] Jean Jacques Rousseau, *Lettre à d'Alembert*, 1758.

[18] Jean Jacques Rousseau, *Emile ou de l'Éducation*, (1762, Collection complète des oeuvres, Genève, 1780-1789, vol. 5, in-4, p. 220), édition en ligne (version du 7 octobre 2012), <http://www.rousseauonline.ch/Text/volume-5-emile-ou-de-l-education-tome-ii.php>.

[19] Alexis de Tocqueville, *De la démocratie en Amérique*, ed 1991, p. 293.

[20] For example, women only obtained the right to vote in France in 1944, in Italy in 1945, in Belgium in 1948, in the Principality of Monaco in 1962 and in Switzerland in 1971. French women were unable to work without a license from their husbands until 1965 and women in the US were only able to practice professions related to the legal field, such as the judiciary or the legal profession, beginning in 1971.

[21] Several UN agencies, and the International Institute for Elections and Democracy, have organised a forum on democracy and gender equality, published by the International Institute for Elections and Democracy (IDEA) and can be found at the following link: <https://www.idea.int/sites/default/files/publications/democracy-and-gender-equality-the-role-of-the-united-nations.pdf>

[22] This is J. J. Rousseau's definition of law in *The Social Contract*.

treated as an explicit goal of democracy-building, not as an add on.”²³ In order for democracies to be consistent with their own tenets, the democratic principle needs to be deconstructed and reconstructed to embrace women’s full citizenship. To this end, gender-sensitive laws need to be enacted and enforced.

2. Gender-sensitive laws and human dignity

Human dignity makes for a universal indivisible humanity with no distinction between social groups, as it recognises the inherent value of all human beings. Gender equality relies on human dignity, as it is based on a shared humanity among women and men that goes beyond any other considerations.²⁴ This is why contemporary constitutions, especially those enacted after the Second World War, place human dignity as paramount among the rights and freedoms they recognise. This is the case of the German, Spanish, Hungarian and Austrian Constitutions, and of the Swiss Constitution since its amendment in 1999. The Charter of Fundamental Rights of the European Union (2000/C 364/01) also opens with a recognition of the right to human dignity (Article 1). Human dignity, moreover, is not just any constitutional right or principle. As stated by the German Federal Constitutional Court and repeated by others, like the Spanish Constitutional Court, it is a basic constitutional principle on which all fundamental rights rest.²⁵ Even where recognised at the constitutional level, human dignity must be enforced at the level of lived reality. To this end, legislation is needed.

3. Gender-sensitive laws and women’s autonomy

Autonomy, or self-determination, is the most important value the philosophy of emancipation brought about during the Enlightenment and the most important indicator of human dignity. It is linked to individual liberty, guaranteed through the freedom of thought, speech, demonstration, association and, more generally, political action. These freedoms, which have been part of democratic history since the Enlightenment, must be, and are being vindicated again, with force, by and for women, left on the side-lines by western emancipation revolutions.

Women’s dignity depends on their autonomy, on their capacity to rule themselves both in private and in public. This includes their capacity to determine their social image, meaning the prevailing social attitudes towards them, and their political representation and capacity for policy and law making. Women’s autonomy must thus be guaranteed in the public sphere, in all its complexity, as well as in the private space, i.e. the household. Yet women’s autonomy continues to be

[23] Ban Ki-Moon, “Gender equality must be treated as an explicit goal of democracy-building, not as an add on”, international roundtable on Democracy and Gender Equality: the Role of United Nations, New York, 4 May 2011, organised by UN Women, UNDP, UNDP and International IDEA.

[24] Veronique Champeil-Desplats, “Dignité de la personne humaine, peut-on parler d’une exception française”, <https://hal-univ-paris10.archives-ouvertes.fr/hal-01665264/document>.

[25] See the Constitutional Court decision from 10 October 1992.

undermined at all levels of public and private life. In public, women still lack adequate legal protection from discrimination, violence and harassment, in the workplace, politics and beyond; they also often lack financial independence, which erodes their equal opportunities in the labour market, access to public services and their place in the public sphere more generally. In the private sphere women's autonomy remains unrecognised and their capacity to make their own decisions unacknowledged. This includes decisions over marriage, choice of spouse, separation, divorce, and sexual and reproductive rights. All areas of the law have a pivotal role in resolving these issues: electoral law, family law, criminal law, labour and social security law, laws on health, including reproductive health, education, the media and tax law, among others. They will be addressed in Part II.²⁶

4. Gender-sensitive laws and secularism

Secularism refers to the principle of separation of the public, political and legal spheres from religion, as religious beliefs and affairs are viewed by the State as personal matters. Thus, political and legislative institutions are independent from religious institutions, which enables respect for religious diversity and preserves the freedom of all beliefs. This contrasts with confessional States, where a particular religion stands as official and has its place within legal and political structures and institutions. Secularism, moreover, paves the way for a gender-sensitive constitution and legislation.

The relationship between religion and State, or religion and politics, has been a recurrent issue in political theory since the seventeenth century. Many States have responded to it by embracing a total separation between religion and State. This is the case of the US since the 1787 Constitution (Article 6; First Amendment) and France since 1905. Other countries have followed suit and abandoned the notion of an official or State's religion in favour of the separation of church and State. This has recently been the case of Sweden, in 2000, and Norway, in its 2012 constitutional amendment. The issue resurfaced during the Arab Revolutions, the pivotal time of political and legal transformation, and of intellectual and cultural revision that many countries in the Arab region went through at the beginning of the century.²⁷

While democracy rests on the equality and autonomy of self-ruling people, in confessional States religion has a place in law-making and legal points of reference often transcend people and their will. This means that people often have but limited margin for law creation, discussion, and interpretation, as these tasks are generally deferred to religious authorities, which in most religions are reserved for the clergy, who, in most religions, are exclusively male.

Furthermore, this makes it difficult to address and combat social stereotypes and discrimination against specific groups, even if they involve stigmatisation and physical as well as symbolic

[26] See the index.

[27] Kamal Abdel Latif, "After the Arab Revolutions: Religious Reform and Secularism," *Tabayyena Magazine*, January 2012.

violence. This mostly affects women. A secular State is therefore a precondition for a gender-sensitive legal system that recognises women's right to full citizenship and acknowledges that their right to autonomy includes the right to mastery over their bodies beyond religious doctrine.

5. Gender-sensitive laws and equality and non-discrimination

The aim of equality between women and men is at the core of gender-sensitive legislation. To pursue it, laws must address the construction of gender and face the disparities that, to women's disadvantage, exist between women's and men's access to legal rights and their capacity to exercise them. These disparities exist even in systems where the constitution guarantees women and men the same political, social and economic rights, and even in fields presided by formal legal equality, i.e. by the formally equal treatment of women and men. Even where this is the case, substantive equality is far from achieved. Pursuing it requires taking into account the specific circumstances surrounding different categories of individuals, be these related to their sex, gender, ethnicity, religion, class, culture or other, and introducing differential treatment where necessary.²⁸ This particularly affects women, as being a woman cuts across all other differences and grounds for discrimination among individuals.

Gender-sensitive laws are the appropriate mechanism, first, for identifying women's and men's different starting points and constraints when exercising their rights or accessing resources and, second, for providing appropriate mechanisms to address these disparities and constraints in order to achieve substantive equality between women and men. As women's discrimination permeates every area of social life, gender-sensitive legislation is needed in all areas of the law, from family law to criminal law and laws regulating the public sphere, including the fields of politics, employment, health, education, media and taxes.

[28] See Jean Rivéro, "Les notions d'égalité et de discrimination en droit public français", in *Les notions d'égalité et de discrimination en droit interne et en droit international*, Travaux de l'association Henri Capitant, tome XIV, Dalloz, Paris, 1965, pp. 343-360.

1. GENDER-SENSITIVE LAWS AND CONSTITUTIONAL DEMOCRACY

- Contemporary democracies are built on the contradiction between the proclamation of people's sovereignty and women's exclusion from the public sphere, between the constitutional recognition of principles of equality and self-determination and the construction of women's subordination to men. Democracy must thus be reconceptualized to incorporate women as full citizens. To this end, gender-sensitive legislation must be introduced and enforced.
- Redesigning democracy in a gender-sensitive spirit requires legislation that guarantees women's fair representation in parliament.

2. GENDER-SENSITIVE LAWS AND HUMAN DIGNITY

- Women's human dignity must be respected in all areas of the law.

3. GENDER-SENSITIVE LAWS AND AUTONOMY

- Women's autonomy, or capacity for self-determination, is a central feature of women's human dignity and democratic citizenship and must as such be respected and enhanced by legislation

4. GENDER-SENSITIVE LAWS AND SECULARISM

- Gender-sensitive legislation requires a State that stays neutral in the face of religious doctrines and relies on people's sovereignty without room for discrimination based on religion.

5. GENDER-SENSITIVE LAWS AND EQUALITY AND NON-DISCRIMINATION

- Gender-sensitive legislation must move from formal equality to embrace substantive equality between women and men as the final aim of the State. To this end, it must take into account the different circumstances that condition the lives of different individuals, notably women and men, and compensate for those differences, so that equality is not formally presumed, but can become a reality.

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PART II

CONTENT OF GENDER-SENSITIVE LEGISLATION

CHAPTER 3

LAWS ON POLITICAL PARTICIPATION

Political rights, also known as participatory rights, are at the basis of democratic citizenship. They guarantee citizens the right to participate in political life,³⁰ as stated in the UDHR³¹ and the ICCPR.³² Narrowly understood, political rights articulate democratic decision-making processes; they thus revolve around elections, voting, accountability, running for office and acting as a representative when in office. Broadly understood, political rights imbue those processes with democratic substance. They respond to the fact that elections and voting rights can only be envisaged within an open public space where the freedoms of ideology, expression and association (i.e., the freedom to form political parties, associations and unions, and the freedom to join, be active in and withdraw from them) are guaranteed, as are other public freedoms such as freedom of assembly and peaceful protest. Ensuring that these rights are enjoyed by all without discrimination is of utmost democratic importance, as is guaranteeing equality and non-discrimination in democratic processes.

“Who can a woman rely on when the reality is she has no control over the laws that oppress her? On the man? But who put these laws into place? Was it not the same man? These laws do not impede him, but on the contrary, they give him all the facilitations that he uses to impede us. Instead of abolishing laws that exclude the woman, the man’s attention is turned towards reforms that men consider necessary that grant them privileges... Further laws that broaden his prospects.

As such, it is necessary that parliament be comprised of the same number of men and women, and it is also necessary that a woman’s voice and opinion be heard and receive the same level of regard.”²⁹

Hubertine Auclert

[29] Excerpt from the first issue of *La Citoyenne* dating 13 February 1881

[30] See L. Favoreu, P. Gaïa, R. Gheventan, J.L. Mestre, A. Pena Soler, O. Pfersmann, A. Roux, G. Scoffoni, et J. Tremau, *Droit des libertés fondamentales*, 4ème ed. Paris, Dalloz, 2015, p. 355.

[31] Article 21 of the UDHR of 10 December 1948:

- a. “Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.”
- b. “Everyone has the right of equal access to public service in his country.”
- c. “The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

[32] Article 25 of the International Covenant on Civil and Political Rights of 16 December 1966:

“Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- a. To take part in the conduct of public affairs, directly or through freely chosen representatives,
- b. To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors,
- c. To have access, on general terms of equality, to public service in his country.”

It is essential for democracy that women exercise their political rights, both narrow and broad, free from any form of discrimination. Freedom of opinion, expression, association within parties and unions, etc. are all essential to exert democratic influence on political decision-making processes. Of particular democratic importance is that women enjoy their narrow political rights in equal terms with men, that they enjoy the right to elect political actors and hold them accountable, along with the right to run for office and act as makers of the laws and policies that govern society.³³ Only so can women gain power to shape those laws and policies so that they can respond to their specific needs and preferences, thus paving the way towards women's emancipation and empowerment in all fields. Patriarchal societies, however, strive to preserve political power as a male domain.

In this, as in other fields, the constitutional recognition of women's rights to vote and stand for office³⁴ at the national, regional and local levels is of the utmost importance, yet it is not sufficient to ensure women and men enjoy equal political opportunities. Legal mechanisms must also be put in place to ensure women's presence and capacity for action in all political contexts, from political parties, unions and other politically relevant associations and actors in civil society, to institutional and decision-making positions. What follows will focus on legislation related to women's political participation.

1. Electoral legislation that guarantees equal opportunities for women and men to access political power

Because of the role elections play in representative democracies, ensuring that electoral laws articulate gender-sensitive mechanisms is crucial for enabling women's access to political decision making. Gender-sensitive mechanisms will necessarily vary along the different stages of the electoral process: the requirements to stand as a candidate, the design of the voting system or the design of the polling paper. When drafting gender-sensitive electoral laws, a foremost concern must thus be to optimise the possibilities enshrined in every stage of the electoral process,³⁵ to optimise women's chances for participation in politics.

A. The right to run for elections

The most basic step towards women's equal political rights is the constitutional recognition of their right to run for political positions on an equal footing with men and without incurring or allowing for discrimination. Even if constitutionally guaranteed, however, formal political equality does not make it any less complicated for women to run for office. Requirements to

[33] Li Ju Chen, "Do Gender Quotas Influence Women's Representations and Policies?", in *The European Journal of Comparative Economics*, Vol 7, n° 1, 2010, pp. 13-60. For more on the relationship between democracy and women's right to fair representation, see: EFI-IFE, Sylvia Suteu and Ibrahim Draji, *ABC for a Gender Sensitive Constitution*, EuroMed Feminist Initiative, Paris, 2016.

[34] Sylvia Suteu and Ibrahim Draji, *ABC for a Gender Sensitive Constitution*, EuroMed Feminist Initiative, Paris, 2016.

[35] For more on the various gender-sensitive electoral laws, see this handbook by the International Institute for Democracy and Electoral Assistance on Electoral System Design: <https://www.idea.int/sites/default/files/publications/electoral-system-design-the-new-international-idea-handbook.pdf>

run for office are often more difficult for women to meet than for men. One example is the requirement that candidacies to presidential elections be backed by a substantial number of electors (typically members of parliament, councils or municipal bodies, etc.), as in French,³⁶ Tunisian³⁷ and Algerian electoral laws;³⁸ another is the requirement that a financial deposit be made when filing a candidacy, as established in Tunisian presidential electoral law³⁹ and Japanese parliamentary electoral law.⁴⁰

While these requirements are intended to deter random nominations, they impact women's opportunities differently than men's: in a male-dominated political sphere, it is more difficult for women to have their candidacy recommended, whether by members of parliament or directly by voters. Electoral laws should take these differences into account and adopt affirmative action measures that favour women's standing for public office, such as requiring fewer signatures for women's candidacy than for men's. The same can be said about financial guarantees, as the economic disparity between women and men affects women's ability to secure it, or to obtain a bank loan to this effect, as also banks require guarantees that women may not be able to provide. These apparently neutral requirements are thus indirectly discriminatory against women. They also create disparities among women themselves, as they disproportionately affect women who reside in rural areas compared to those active in urban areas, particularly in major cities. Electoral laws should also address these disparities, by providing incentives for parties that cover the financial deposits of their women candidates, for example, or establishing a public fund to this effect.

B. The voting system

Voting systems constitute sets of rules by which votes are cast and counted in a system of representative democracy. They are usually regulated by laws, though some of their features can be constitutionally enshrined.⁴¹ There are more than 200 voting systems in the world, all of which differ in their essential elements. These influence, among other features, their capacity to ensure political accountability, stability and pluralism, and their capacity to offer fair representation to different social sectors, such as different geographical areas, minorities and, above all, women.

[36] Law n° 62-62 dated 6 November 1962 on the election of the President of the Republic by universal and direct suffrage. Article 3 stipulates that every candidate for the presidency must be supported by 500 elected persons, whether parliamentarians, regionals or locals and they must be distributed over at least thirty provinces.

[37] Electoral Law n° 2014-16 dated 26 May 2014, which stipulates in article 41 that the candidate must be recommended: "For the presidential elections by ten deputies of the People's Assembly, forty of the heads of local elected groups or ten thousand voters to be distributed over at least ten constituencies".

[38] Algerian Electoral Law n° 16-10 of August 25, 2016, in which its article 142 states that a list of either six hundred signatures of elected deputies in the parliament, the state councils or the municipal councils or one thousand signatories.

[39] Article 42 of the Electoral Law n° 2014-16 dated 26 May 2014, which states: "A candidate shall be granted a financial guarantee of ten thousand dinars, which shall be reimbursed only when he obtains at least three percent of the required votes".

[40] The Japanese Electoral Law of April 15, 1950 requires the candidate in single-seat constituencies to deposit 3 million yen and the candidate in constituencies where the election is held on lists under a proportional representation system to deposit 6 million yen. These amounts are only recovered if the candidate receives 3 or 5% of the votes depending on whether it is for individual districts or districts where lists are elected. The provisions of this law can be found at http://archive.ipu.org/parline-f/reports/1161_B.htm

[41] For example, Article 62 of the Constitution of Belgium of 17 February 1994, Article 31 of the Danish Constitution of 5 June 1953 and the Portuguese Constitution of 25 April 1976

Electoral systems based on electoral lists, where more than one seat is at stake in a given district, offer a more faithful representation of society, hence are associated with greater and better representation of women⁴² than systems that provide for one seat in every district. Here parties may not want to risk losing by having a woman candidate.⁴³ Representation, including women's representation, is in turn better where electoral lists are included in a system of proportional representation,⁴⁴ rather than a majoritarian system, as the former allows for more votes and voices to be taken into account.⁴⁵ This provides parties with more opportunities to include women on their ballots and encourage them to attract voters from the broadest possible social spectrum. Women appear to be four times more likely to win seats under proportionate than under majoritarian electoral systems.

Proportional representation, however, does not in itself guarantee women candidates' access to power. To do so, it must be accompanied by mechanisms that:

- Ensure women's presence as candidates in electoral lists.
- Enable women candidates to win seats in representative bodies.

C. Gender quotas and parity

Women's public representation continues to fall short of their demographic weight. This applies across the public sphere, from the media and civil society organisations to unions, political parties and institutional decision-making bodies. Despite the wide recognition of women's rights to vote and run for office, women's presence in parliaments,⁴⁶ the executive (Head of State, government, ministers, etc.) and others State institutions continues to be low.

Only three countries in the world have parliaments with equal shares for women and men: Rwanda with 49 women out of 80 members, Cuba with 322 women out of 605 members and Bolivia with 69 women out of 130 members. On average, in 126 States women's representation in parliament does not exceed 25%.⁴⁷ Similarly, the number of countries with equal numbers of male and female ministers does not exceed 9 out of 188. At the forefront of these countries is Sweden with 12 female ministers out of 22, Spain, with 11 out of 23, Rwanda with 14 out of 27 and Colombia with 9 of 17, then France with 8 ministers out of 16. Meanwhile, in 116 countries, the representation of women in government is below 25%.⁴⁸

To address this situation, a policy of affirmative actions in the form of gender quotas, or a

[42] See, in this regard, Julie Ballington and Azza Karam, *Women in Parliament: Beyond Numbers*, International Institute for Democracy and Electoral Assistance, p. 97.

[43] See J. McCann, *Electoral quotas for women: An overview*, ed by Parliament of Australia, Department of Parliamentary Services, November 2013, p. 9.

[44] Note that proportional representation can take many forms, including systems that rely on the largest remainder and systems that rely on the highest averages. On this, see: Andrew Reynolds, Ben Reilly and Andrew Ellis, *Electoral System Design* (Translated to Arabic by Ayman Ayoub), IDEA Handbook, Stockholm, 2010.

[45] See Andrew Reynolds, Ben Reilly, and Andrew Ellis, *Electoral System Design* (Translated to Arabic by Ayman Ayoub), IDEA Handbook, Stockholm 2010, p. 152.

[46] On women's representation in various parliaments, see: <http://archive.ipu.org/wmn-f/classif.htm>

[47] The figures were released by the UN organisation UN Women in January 2019. Link: <http://www.unwomen.org/en/digital-library/publications/2019/03/women-in-politics-2019-map>

[48] These are the UN Women statistics of January 2019, and can be found at the following link: <http://www.unwomen.org/en/digital-library/publications/2019/03/women-in-politics-2019-map>

policy of gender parity, need to be adopted in the context of political representation. Gender quotas are affirmative action measures. They aim to facilitate women's access to decision-making bodies, by assisting them in overcoming social barriers that have been perpetuated by patriarchal societies. To this aim, they establish that a minimum proportion of electoral seats or candidates on electoral lists must be reserved to either gender, or specifically to women. Gender parity, on the other hand, is not simply a 50% quota. It is rather an essentially different mechanism that entails a different approach to women's representation in the public sphere.⁴⁹ Parity revolves around women's entitlement to political representation on an equal footing with men, thus aiming not only at improving women's presence in decision-making bodies, but at women's equal presence with men in all of them. Despite their differences, however, gender parity will be here considered together with gender quotas, as means towards the same aim, namely women's equitable political representation and participation.

Since the 1990s, political systems have been adopting quota mechanisms in the political domain, aimed at remedying century-long discrimination against women that has impaired their political participation on equal grounds with men. Gender quotas have been widely adopted, especially in legislative elections, since the Beijing Conference,⁵⁰ despite criticisms that questioned their legitimacy, objected that they could act as a ceiling for women's representation, or all in all considered them damaging for women and democracy.⁵¹ Quota systems differ not only in the percentages of women's representation they aspire to reach. They vary in their origin: in more than 50 countries gender quotas have been voluntarily adopted by at least some political parties, whereas in more than 50 others a gender quota system has been made mandatory by law.⁵² Legally enforced gender quotas also vary in their strategies: where most quotas are played out at the electoral level, some are introduced in representative bodies directly.

- **Legally enforced electoral quotas**

A number of States, such as Italy, Belgium, Brazil, Argentina, Costa Rica, Tunisia and Algeria, have opted for quotas to be mandated via legal texts (legislation or the constitution).⁵³ In these systems, legal texts require political parties to nominate a certain percentage of women in elections, whether in a single transferable vote⁵⁴ or in an electoral list.⁵⁵ The average women's representation in parliaments that have adopted these legal quotas is 27.1%. Electoral quotas are generally considered a good legislative policy, as they quickly transform the composition of

[49] Bérengère Marques-MPereira, "Quotas ou parité, enjeux et argumentation", *Recherches féministes*, Vol 12, n° 1, 1999, link: <https://www.erudit.org/fr/revues/rf/1999-v12-n1-rf1659/058023ar.pdf%20evues/rf/1999-v12-n1-rf1659/058023ar.pdf>

[50] Fourth World Conference on Women, Beijing, 4-15 September 1995.

[51] See, for example, C Rodrigues, 'UNDP-USP Panel Discussion Considers Quotas to Promote Women in Pacific Parliaments', Pacific Parliaments Network, 8 May 2011, accessed 6 August 2013. and Drude Dahlerup and Lenita Freidenvall 'Judging gender quota: predictions and results' The policy Press, 2010 available at https://www.researchgate.net/publication/248994967_Quotas_as_a_Fast_Track_to_Equal_Representation_for_Women_Why_Scandinavia_Is_No_Longer_the_Model

[52] Gender Quotas Database can be found at <https://www.idea.int/data-tools/data/gender-quotas>

[53] Refer to the list of countries according to their parliamentary quotas here: <https://www.idea.int/data-tools/data/gender-quotas/legislative-overview>.

[54] This is the case, for example, with regard to the election of the French legislature (Chamber of Deputies).

[55] This is the case for the legislative elections in Tunisia (the People's Assembly).

parliaments by integrating more women, thus enhancing women's representation and political rights.⁵⁶ Others argue that legally imposed electoral quotas do not guarantee the sustainability of women's representation, which could recede if quota laws were amended.⁵⁷

Legally enforced electoral gender quotas have been gaining adherence. Quota regulations differ on important aspects that have bearing on their effectiveness, such as women's place within lists and penalties for non-compliance.

→ The structure of electoral lists

Adopting a quota system, no matter how large, does not guarantee women will have seats in parliament. This result is less certain the less proportionate a system of representation is, as low proportionality means that only candidates on top positions within electoral lists stand a chance to win. The elaboration of an electoral list is therefore a delicate process, prone to raising intra-party disputes. Some laws imposing quotas for women in electoral lists thus include provisions as to how these lists must be elaborated, indicating where women must be placed in them and imposing penalties of varying degrees for non-compliance.

Albanian electoral law of 2012 required that at least one woman and one man be nominated for the first three ranks in parliamentary elections. In case of non-compliance, the electoral administration would disqualify the list, or replace the man with the woman ranked right below him to ensure a place for women in the top three ranks in the list. In a similar vein, the 2011 electoral law in post-revolution Tunisia required parties and party coalitions participating in elections to the Constituent Assembly⁵⁸ to present lists that would, first, include the same number of male and female candidates and, second, alternate ranks between them in the list (vertical equity). This guarantees women at least the second place in the list and higher chances of winning a seat. In case of non-compliance, the list is disqualified by the electoral administration.⁵⁹ This system was then included in the electoral law of 2014⁶⁰ and is still in force.

→ Penalties for non-compliance with legally enforced gender quotas/parity

The effectiveness of legally enforced gender quotas can vary depending on how they are implemented. The following examples reflect different levels of effectiveness in increasing order.

[56] See: Drude Dahlerup, "Gender Quotas, Controversial but Trendy. On Expanding the Research Agenda", *International Feminist Journal of Politics*, vol 10 ; n° 3 ; 2008, pp.322-328

[57] See Micheline Amar, (dir.) *Les pièges de la parité. Arguments pour un débat*, Paris, Hachette, 1999.

[58] These elections were held on October 23, 2011 in accordance with Decree n° 2011-35 dated May 10, 2011, on the election of the members of the National Constituent Assembly. Article 16 states: "Candidates shall be submitted on the basis of the principle of equality between women and men. On the basis of rotation between women and men, a list which does not respect this principle shall only be accepted within the limits of the individual number of seats reserved for certain constituencies".

[59] Article 24 of the Basic Law n° 2014-16, dated 26 May 2014, on elections and referendum: "Candidates shall be submitted on the basis of the principle of equality between women and men and the rule of rotation between them within the list and a list that is non-compliant will not be accepted except within the limits of the individuals required for a single constituency."

[60] Basic Law n° 2014-16 dated 26 May 2014 relating to elections and referendum.

The first example is offered by Japanese electoral law. Its most recent revision, adopted on 16 May 2018,⁶¹ calls on political parties to submit electoral lists containing an equal number of women and men⁶² for both parliamentary and local elections. However, this law does not mandate parties to do so, but merely urges them to be fair when nominating their lists. Accordingly, it does not consider sanctions for parties that fail to comply with women and men's equality on their lists. One must thus question this law's capacity to change parties' attitudes towards women and improve women's chances to access politics. The local elections held in 2019 offer a good example,⁶³ with only 10.4% of women being nominated by parties and only 6 being elected as mayor in 59 municipalities.⁶⁴

The French electoral code of 2000, as revised in 2014, is a better piece of legislation. It imposed financial penalties for parties that do not comply with equality between women and men when submitting nominations, whether represented in single transferable voting systems or electoral lists. The penalty consists of cuts in State's financial support. If the gender difference between candidates in any political party exceeds 2% of their total number, the first instalment of public funding allocated to that party is reduced by 150% of that difference.⁶⁵ Financial penalties, however, are not necessarily effective, particularly not where parties can rely on alternative sources of funding, as most major parties can. Nearly 20 years after this legislation came into force, the presence of women in both chambers of the French parliament is still below half.⁶⁶

Albania offers an even clearer example of the ineffective character of financial penalties. Since 2013, Albanian electoral law has revised the penalties imposed on parties that fail to comply with quota requirements, replacing disqualification with financial penalties.⁶⁷ The consequences were quick to show: parties participating in the 2017 elections nominated women at the bottom of their electoral lists, significantly reducing their chances of winning seats, as they were able to pay the financial penalty for non-compliance. Parties, that is, were able to pay for excluding women from decision-making positions. Thus, although 42% of the candidates were women, only 28% of them won seats.

One of the best models is the system of vertical parity adopted in Tunisia in 2011, as explained

[61] Japan is ranked 125th out of 145 countries in the political empowerment of women and 129th out of 149 countries in the number of women parliamentarians, according to the 2018 census as presented by the World Economic Forum's Gender Report, p. 139.

[62] For a briefing on the enactment of the law in Japan, see the interview with Mari Miura, professor of political science at the University of Sofia, Japan, at <http://153.126.180.77/wp-content/uploads/2018/07/7-Miura.pdf> and an assessment of this law at <http://isdpeu.org/women-in-politics-japan/>

[63] These elections took place on 21 April 2019.

[64] The highest percentage of women candidates was 24% of the opposition Constitutional Democratic Party, while the Liberal Democratic Party provided only 3.5% of women. For more details on these elections, see <https://vivreatokyo.com/la-parite-en-politique-au-japon.html>.

[65] Article 60 of Law n° 2014-873, August 4, 2014, at <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000321646>.

[66] The French House of Representatives today includes 155 women out of 577 members (equivalent to 27%) and the Senate has 87 out of 348 members, or 25% of the total number of women elected at the local level. See <https://www.interieur.gouv.fr/Archives/Archives-elections/Dossier-elections-municipales-2014/Annexe-15-Statistiques-concernant-les-femmes-elues>

[67] Article 67.6 of the Law regulating the Albanian Parliamentary Elections after its revision in 2013 states: "At least 30% of the members of the candidate lists and/or one of the first three names on the list must be in each region of either sex." In the case of non-compliance with the quota, a financial penalty of one million Albanian Lek is imposed.

above, where non-complying lists are disqualified. Despite the apparent effectiveness of the system, however, the 2011 elections resulted in less than 29% of women in parliament (today they amount to 35.94%). This led several deputies and civil society groups to call for horizontal as well as vertical gender equity in electoral lists, to guarantee an equal number of women and men as heads of the lists presented by one party or coalition. This initiative failed, however, and only vertical equity within lists was included in the 2014 electoral law for parliamentary elections.⁶⁸ Yet in 2017 the electoral law was amended to require also horizontal equity in local elections.⁶⁹ This means that, if a party or party coalition submits, for example, ten electoral lists to municipal elections, five of them must be headed by women,⁷⁰ with the same penalty imposed in case of non-compliance, i.e. the disqualification of non-complying lists. Today women hold 47% of seats in local chambers.

Tunisia offers a model of good practice. It imposes gender parity in electoral lists based on vertical equity, i.e. zipper lists, under penalty of disqualification. This has led to an increased percentage of women in the Tunisian parliament, today amounting to 35.94%, thus making Tunisia the 38th country in the world in terms of female representation in parliament.

In 2017 also horizontal equity was imposed in local elections. During 2018 municipal elections, 47% of seats were won by women.

- **Legislative quota systems**

Legislative quota systems intervene at the level of electoral results. Rather than guaranteeing women a place as candidates on party lists and on the electoral process, they directly allocate them a specific number of seats in representative bodies, whether at the national level (parliaments), at the regional or at the local level (municipalities, provinces, etc.), ensuring that men may not compete for these seats. By guaranteeing women a number of seats, legislative quota systems aim to overcome the weaknesses of electoral quotas, as entrenched either in the electoral system itself (in the articulation of proportional representation) or in the articulation of the quotas (in the structure of electoral lists and women's place within them, or in penalties for non-compliance).

Among the States that have opted for this mechanism are Bangladesh, China, Iraq, Jordan, Sudan, and Rwanda.⁷¹ The average women's representation in these councils is 25.4%.

[68] Article 24 of the Electoral Law of 2014 was challenged before the Interim Commission to monitor the constitutionality of draft laws for violating the provisions of Article 46 of the Constitution ("... the State shall seek to achieve equality between women and men in elected councils ..."), on the grounds that vertical equity alone does not guarantee fairness in Parliament, as evidenced by the results of the 2011 National Constituent Assembly elections. However, the Interim Commission considered that Article 46 of the Constitution obliges the State to pursue equality, not to achieve it and that vertical equity fulfils this constitutional obligation.

[69] Basic Law n° 2017-7, dated 14 February 2017, supplementing and amending Basic Law n° 2014-16, dated 26 May 2014, relating to elections and referendum.

[70] Article 49 of the Electoral Law, after its revision in 2017 and with respect to local elections, states: "candidates for municipal and regional councils are submitted on the basis of the principle of equality between women and men (50-50%) and the principle of rotating among them within the list. The presidency of party and coalition lists must also respect the principle of equality between men and women."

[71] A list can be found at <https://www.idea.int/data-tools/data/gender-quotas/reserved-overview>.

Rwanda offers one of the best examples of legislative quotas for women in decision-making positions.⁷² Rwanda has surpassed Scandinavian countries, which until recently occupied the top ranks in the representation of women in political decision-making positions based on voluntary party quotas. According to 2018 statistics,⁷³ Rwanda ranks first in the world in terms of the number of women in parliament, even exceeding the legislative quota.⁷⁴ The 2018 legislative elections resulted in women occupying 49 out of 80 seats, or 61%,⁷⁵ while only 24, or 30%, are reserved for women. Despite their notable results, however, some of these measures prompt reservations, particularly in systems that do not comply with democratic standards. Here, rather than guaranteeing women's access to decision-making, legislative quotas render them mouthpieces for the dominant political actor or party.

Nevertheless, the figures in Rwanda come to show that gender quotas need not become a ceiling for women's representation. They also show legislative quotas to be the most effective mechanism in societies that are still patriarchal and conservative, especially those governed by legislation of a religious nature. These societies require laws to instigate change in people's mindsets and gradually help to recognise women's political capabilities. In Afghanistan, for example, the electoral system includes legislative quotas for women in the upper and lower chambers of parliament.⁷⁶ This has enabled women to gain 27% of the total seats in the lower chamber and 16% of the seats in the upper chamber, a percentage that would have been very difficult to reach if matters had been left to the free will of political actors.

The benefits of legislative quota systems go beyond securing seats for women. Most crucially, it influences the internal politics of parties, as having seats reserved to women will force them to recruit women within their ranks and take them seriously as political actors.

- **Voluntary quotas in political parties**

Voluntary quotas are based on an approach that emphasises the free will of political actors. One of the most important policies parties can adopt to support women's participation is the introduction of voluntary gender quotas in their electoral lists. In as far as they are not imposed by legislation, these quotas bespeak a party's commitment to gender equality. Their voluntary nature, however, makes for slow and gradual progress in women's political participation as compared to legally imposed quotas, which induce a more rapid shift in the composition of power in terms of women representation.⁷⁷

Among the political parties that have voluntarily introduced gender quotas are the Justicialist

[72] Article 95 of the Electoral Law of Rwanda No. 4/2018 of June 21, 2018.

[73] See World Economic Forum Global Gender Gap Report 2018.

[74] The Rwandan electoral law can be found at <https://rwandalii.africanlii.org/sites/default/files/gazette/Official%2BGazette%2Bn%C2%BA26%2Bof%2B25.06.2018.pdf>

[75] International IDEA database on Rwanda can be found at <https://www.idea.int/data-tools/data/gender-quotas/country-view/255/35>.

[76] Articles 20 and 23 of Afghanistan's 2010 electoral law reserve to women 68 of the 250 seats in the Jirga, while Article 84 of the Constitution states that the President appoints one-third of the members of the upper chamber, 50% of whom should be women.

[77] Drude Dahlerup, "Quotas as a "Fast Track" to Equal Political Representation for Women. Why Scandinavia Is No Longer the Model", *International Feminist Journal of Politics* 7(1):26-48.

Party in Argentina, the Socialist Left Party, the Workers' Communist Party, the Centre Party and the Christian Democratic Party in Norway; the Australian Workers Party, the Greens, the Social Democratic Party and the Party of Labour in Austria; and the South West Africa People's Organization in Namibia.⁷⁸

Although proven to be successful in Scandinavia as well as in some Latin American and African countries,⁷⁹ voluntary party quotas may be difficult to realise in some others, in particular where feminist movements are not strong enough⁸⁰ to pressure political parties, or test the electoral weight of women voters and their impact on electoral results.⁸¹ In such contexts, changes in social attitudes and political party practices towards women's political power ought to be instigated by legal measures – either mandatory or incentives.

2. Legal measures that focus on political parties

A. Enacting laws that govern party bylaws

Women's presence in political parties, especially in leadership positions, is still weak and many political parties still look like "boys' clubs".⁸² To address this and enhance women's participation within parties, gender-sensitive legislation is needed. Legislation should aim at eradicating intra-party gender discrimination and political discourses that could incite it. It should also stress the role of political parties in addressing violence, hatred or stigma against women party members, whether or not they hold leadership positions and whether attacks come from within or from outside the party, especially during election seasons and party conferences.

In this line, the law regulating political parties in Tunisia proscribes the advocacy of violence, hatred, intolerance and discrimination on religious, factional, sexual, or regional grounds;⁸³ it also

[78] For the full list of countries and parties that have adopted voluntary quotas, see: <https://www.idea.int/data-tools/data/gender-quotas/voluntary-overview>

[79] For example, Sweden is ranked fourth globally with 44.7% female representation in parliament, Nicaragua is ranked ninth globally with 40.2% of parliamentarians being women and Namibia ranks fifth globally with 46% of its parliament being women, according to the Foundation's database. International IDEA at <https://www.idea.int/data-tools/data/gender-quotas>.

[80] See Ibrahim Draji, Hoda Elsadda, Salsabil Klibi, Comparative Study on Constitutional Processes: A Gender Perspective, Euromed Feminist Initiative, Paris, 2017.

[81] In Sweden, before the 1994 election campaign started, the feminist movement threatened to form a party if the established parties did not speak up for women's rights. The Social Democratic Party responded by creating "zip lists" of candidates on which every second candidate was a woman. This resulted in women winning 41% of the seats in parliament.

[82] Wani Tombe Lacko, *cit.* 3.

[83] Article 4 of Decree No. 87-2011 of 24 September 2011 on political parties: "Political parties shall, in the statutes, statements, programmes or activities thereof, be prohibited from calling to violence, hatred, intolerance or discrimination on religious, denominational, gender or regional basis."

imposes penalties on non-compliant parties that could lead to their dissolution.⁸⁴ The aim is to compel parties to adhere to the principles of pluralism and democracy and provide women with the right environment to engage in political activity with both confidence and a sense of security.

B. Incentives to commit to equal representation of women and men

The nomination of women to decision-making positions in the executive branch and government depends on the duration of their activity within the party, just as their political empowerment depends on the duration of their activity in public office.⁸⁵ It is, therefore, necessary to incite parties to invest in women and strengthen their political skills.

In this regard, some countries have adopted legislation that encourages parties to allocate part of their public funding to pursuing gender equality. The Finnish government, for example, issues an annual resolution requiring publicly funded political parties to allocate 12% of this funding to support their women's committees. Along a similar line, Mexican law requires parties to allocate 3% of their public funding to providing political training for women and strengthening their leadership skills.⁸⁶ Also Colombian law on political parties requires these to allocate 15% of their State funding to train women, youth, and minorities.⁸⁷ In Kenya, this percentage reaches 30%. Here, the law requires that women represent at least a third of a party's membership in order for this to qualify for State funding.

Financial resources are of paramount importance for women when it comes to funding their election campaigns. As they usually have less access to private funding than their male counterparts, public funding plays a vital role in encouraging women's participation in elections and improving their chances of winning. Different legal mechanisms can influence this, albeit to varying degrees, depending on the extent of political parties' dependence on public funding.

State funding of electoral campaigns can take two forms: pre-allocated funding before the campaign and reimbursement funding after the campaign, which sometimes requires a party to have achieved specific results, passed a particular threshold, or have a percentage of female winners within their ranks. The Venice Commission and the Organization for Security and Co-

[84] Article 28 of the same decree: "Any violation of the provisions of Articles 3, 4, 7, 8, 9, 16, 17, 18, 19, 22, 23, 24, 25, 26 and 27 shall render a political party liable to sanctions as per the following actions:

1. Forewarning: The Prime Minister shall specify the violation committed and warn the party to remove such no later than thirty (30) days as of the date of reporting such forewarning.
2. Suspension of Party: Should the violation be not removed within the period stipulated in the first paragraph of the present Article, the President of the Court of First Instance of Tunisia shall, upon request from the Prime Minister, decree the suspension of a party's activities for no more than thirty (30) days. The party may challenge the suspension decree as per the procedures of summary justice.
3. Dissolution: Such shall take place by virtue of a ruling of the Court of First Instance at request of the Prime Minister in cases where the specified violations are not eliminated after receiving a forewarning, facing a period of suspension, and exhausting all means of appeal against the suspension. Provisions of the Code on Civil and Commercial Procedures shall apply to judicial procedures for the dissolution of parties and asset liquidation thereof."

[85] See D. Z. O'Brien, "Rising to the Top: Gender, Political Performance, and Party Leadership in Parliamentary Democracies", in *American Journal of Political Science*, vol. 59, n° 4, October 2015, pp. 1022-1039.

[86] Article 51 of the Electoral Law of 2014 <https://www.idea.int/data-tools/country-view/220/55>

[87] Article 18 of Law No. 1475 of 2011 on the Organization and Functioning of Political Parties and Organizations <https://www.idea.int/data-tools/country-view/82/55>.

operation in Europe (OSCE) recommends pre-funding over reimbursement, as the latter is less likely to benefit women and offers them no support during their campaign. This is all the more important, because parties tend not to prioritise women when funding their candidates' campaigns.⁸⁸

The allocation of public funding to political parties must, in sum, be an essential target of laws aimed at creating a gender-sensitive political environment. This is so, first, because political parties are necessary gateways from civil society to government and political power more generally and, second, because public funding is an important mechanism to influence a party's positions on women's political participation. In any case, the utility of this mechanism varies and is related to a range of factors, including, as previously mentioned, the chances parties have to access other sources of funding, the nature of the voting system, ultimately the openness of society and its legislation to women's representation in politics.

[88] Venice Commission and OSCE / CDIHR, 2010, art / 184.

1. ELECTORAL LEGISLATION THAT GUARANTEES EQUAL OPPORTUNITIES FOR WOMEN AND MEN TO ACCESS POLITICAL POWER

- Formally neutral requirements imposed on electoral candidates to deter random candidacies tend to affect women and men differently. Electoral laws should take these differences into account and adopt affirmative action measures that favour women's standing for public office, such as requiring fewer signatures to back women's candidacy as men's, providing financial incentives for parties that cover (part of) the financial deposits of their women candidates, or establishing a public fund that directly covers these deposits.
- Electoral laws should adopt electoral lists rather than an individual voting system, and proportionate representation systems rather than majority voting.
- Electoral laws should guarantee women's presence in electoral lists, rather than rely on voluntary party quotas/parity. They should include effectively deterring measures and penalties for non-complying lists, notably their disqualification. Awareness-raising programmes should be developed on the importance of this measure as a means to address women's structural exclusion from political space.
- Electoral laws should adopt parity in electoral lists based on vertical equity, by alternating women and men on electoral lists (zipper lists), and on horizontal equity, by having an equal number of men and women heading a party's lists.
- Where quotas are adopted, electoral laws should impose the inclusion of at least one woman among the first three candidates on electoral lists.

2. LEGAL MEASURES THAT FOCUS ON POLITICAL PARTIES

- Political parties should be required to abide by internal democratic rules and procedures, especially in terms of party leadership selection, in order to avert control over parties and party lines by specific groups of individuals.
- States should be required to deter parties from inciting discrimination against women, gender-based violence and hatred, degrading treatment, or stigmatisation of women in party rhetoric or platforms, introducing punitive measures against non-compliant parties.
- Political parties should be encouraged to produce bylaws and mechanisms to address violence against female party members, whether or not they hold leadership positions and whether violence comes from within or from outside the party, especially during election seasons.
- Financial incentives should be introduced to fund women's electoral campaigns and encourage parties to invest in women's training and capacity building and/or showcase women's capabilities by enabling them to represent the party in the media and in national and international meetings.

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CHAPTER 4

FAMILY OR PERSONAL STATUS LAW

Family or personal status law is an important tool in the hands of the State for organising and shaping society. The notion of family is often mentioned in constitutions, which recognise it as the core of society and stipulate the State's duty to protect it and its constituent elements. Constitutions, however, do not usually go beyond some general principles. Legislation is therefore needed to complement and enforce these general provisions. In this regard, family law has its own specificities and, although an integral part of civil law, is often presented as conforming a distinct, even extraordinary legal body.⁸⁹ This is so, first, because family law is often founded on ethical/religious considerations,⁹⁰ in turn expressive of specific cultural values, and second, because family law is concerned with what happens in the private sphere, in the context of private and even intimate relations between individuals that, in principle, fall within the scope of the right to privacy.⁹¹ The specificity of family law within civil law is thus related to the division between the private and the public sphere, to the perception that the private sphere is a privileged realm that must be subject to different rules, connected to religious and cultural values, that must even be concealed from the laws of the State. As the Japanese popular proverb puts it, "The law does not enter the household."⁹²

As a result of this, one of the basic principles governing civil law, namely the principle of individuals' free will as the basis of contractual relations between them, does not apply to relations between family members. Family ties and their implications cannot be circumvented by family members. Regarded as given, the family institution and familial ties take precedence over the rights and freedoms of individual members. This has turned family law into the most important vessel for inequality and discrimination against women.⁹³ This is so as patriarchal societies reject the idea that family law and the notion of personal status can be subject to a unified civil legal body. In India, for instance, each minority group is subject to its own legal system, and for decades Indian politicians have failed to mobilise all ethnic and religious groups around a unified civil family law.

Because of its singularity, close attention must be paid to family law and its relationship with other branches of the law. Close attention must be paid to the institution of marriage, centrepiece

[89] See M. R. Marella, G. Marini, *Di cosa parliamo quando parliamo di famiglia. Le relazioni familiari nella globalizzazione des diritto*, Ed. Laterza, Roma, Bari, 2018, pp. 7-10.

[90] The three monotheistic religions of Judaism, Christianity and Islam have significant influence on family law.

[91] Article 8 of the European Convention on Human Rights incorporates family life within the right to privacy, as well as the inviolability of the home and the confidentiality of correspondence, with all the consequent rights to be protected from arbitrary interference by third parties in the private sphere, including family affairs.

[92] Itsuyo Takizawa, "Quelques aspects du droit japonais de la famille", *Revue Internationale de Droit Comparé*, 1990, n° 42, p. 938; note n° 35.

[93] Zoya Hasan, "Clivages religieux, genre et politique en Inde", in *Cahier du genre*, Hors série, 2012, pp. 69-87.

of family relations, and to the construction of families as patriarchal structures that have men (fathers, husbands) at their head. This must be done, in the context of democratic systems, bearing in mind that the separation of public and private spheres and the right to privacy can in no way be an excuse for undermining the fundamental principles that sustain a democratic society and are usually stated in the constitution, such as dignity, freedom, equality and non-discrimination. Nor can privacy be a pretext for the State to shirk its responsibility to enforce respect for these principles by all its subjects.

1. Marriage

In most legal systems, marriage is the basis of the family, as it lies at the core of its formation.⁹⁴ Marriage has a double profile: it is both a contract and an institution, part of the family institution. As a contract, marriage relies on a number of pillars, the most important of which is the parties' free agreement to enter it, based on their equal right and capacity to do so. This requires in turn that a minimum age to marry be legally established and that this be the same for woman and man. The establishment of a specific minimum age for marriage is essential, as free consent to marriage, as to enter any contract, requires the parties' awareness of its meaning and consequences. Consistently with this, the minimum age to enter marriage should be the legal age of majority and should be so for everyone irrespective of gender.

As part of the family institution, however, marriage is often regulated in terms that discriminate against women in questions related to consent, the minimum age to enter marriage contracts and others. Yet since 1962 international law has addressed questions related to gender discrimination in marriage⁹⁵ and legal systems that discriminate against women in the context of marriage must be reformed accordingly. In order to conform with gender-sensitive standards, several aspects of marriage law need to be considered.

A. Abolition of the legal guardianship of women

Until not very long ago, most legal systems, including those of western countries,⁹⁶ considered women legally incapable regardless of their age. This deprived them of their right to enter obligations or contracts on their own accord. A woman needed a guardian in every legal act she sought, remaining under her father's guardianship until her marriage, at which point her husband became her guardian. In some countries this situation remains a reality to this day. Some legal systems, including several Arab and Islamic countries, deny women legal capacity even to enter a marriage contract without a guardian. More specifically, although the woman's

[94] Italy, Article 29 of the Constitution of 27 December 1947: "The Republic recognizes the rights of the family as a natural society founded on matrimony."

Morocco, Article 32 of the Constitution of 29 July 2011: "The family, founded on the legal ties of marriage, is the basic unit [cellule] of society... The State works to guarantee, by the law, the protection of the family under the juridical, social and economic plans, in a manner to guarantee its unity, its stability and its preservation."

[95] Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages of 7 November 1962.

[96] This is notably the case of the Napoleonic Code, or the lower civil code of France, and those indebted to it.

consent is necessary for the validity of the marriage, consent of her guardian is also required. This is the case in the UAE Federal Personal Status Law of 2005, for example, as its article 39 states that “The tutor of the adult woman shall proceed with her marriage, with her consent, and the authorised religious official shall obtain her signature on the contract. The contract is invalid in the absence of a tutor. If marriage has been consummated the spouses shall be separated and the affiliation of the born child established.” In such cases, a woman might be forced out of her marriage because of her guardian’s objection to it. Her guardian, be this her father or her brother, even a younger brother, is thus granted the right to act upon her life by forcing her out of a marriage and/or into one she does not wish to enter. Although the law certainly requires the woman’s consent to marry, one can hardly speak of the free will of someone subjected to the mandate of others.

Such laws openly discriminate against women. By denying them free will, they diminish their agency and ability to make decisions and manage their own affairs and lives, hence their autonomy. A number of Arab countries, including Tunisia and Morocco, have drawn attention to these issues and have pursued legal reforms aimed to be consistent with international human rights, specifically women’s rights. These countries have thus sought to eliminate all forms of discrimination against women and establish equality between women and men in rights and responsibilities.

B. Introduction of equality in the age of marriage

Equality between women and men in minimum marriage age should be established in all legal systems, as called for in CEDAW recommendation No. 21 of 1994.⁹⁷ Many countries have already adopted legislation in this direction. This is the case of Jordan,⁹⁸ Lebanon,⁹⁹ and Tunisia,¹⁰⁰ where the marriage age for both sexes is set at 18. Yet other countries continue to stipulate different thresholds for women and men. For example, Kuwait has set the age of marriage for males at 17, while girls may be married at the age of 15; Mali has set the age of marriage for males at 18 and 16 for girls; males in Iran may be married at the age of 15, while this age drops to 13 for girls. The same disparity can be found in the US, which permits the marriage of boys at the age of 14 and girls at the age of 12. As the above examples show, disparities are based on a lower marriage age for women than for men. This constitutes a form of discrimination against women, who are expected to commit to marriage and abandon other life projects from a younger age, often without the maturity that should be required to do so, thus restricting their resources and making them vulnerable to abuses by legal guardians, including their husbands. Disparities in the marriage age should thus be abolished.

[97] This recommendation can be found at <https://www.refworld.org/docid/48abd52c0.html>

[98] Article 10 of the Jordanian Personal Status Law of 2010: “Eligibility for marriage is required for the fiancé and fiancée, to be mature and each to be eighteen years of age.”

[99] Article 7 of the Lebanese Personal Status Law: “Eligibility to marry is strictly required and eighteen years must be completed.”

[100] Article 5 of the Tunisian Personal Status Code of 1956: “Both spouses must be free of legal impediments, and furthermore, anyone who has not reached the age of eighteen years cannot conclude a marriage contract. Concluding a marriage contract under the designated age is contingent to a special permission from the courts, and this permission is given only for serious reasons and for evident interest of the couple.”

C. Protection of girls from early marriage

Disparities in marriage age do not only pose a general problem of discrimination against women. They also raise the more serious issue of child marriage, girl marriage in particular. Child marriage is prohibited by many international treaties and instruments, such as the Convention on the Rights of the Child of 1989, which defined the child as a human being below the age of eighteen,¹⁰¹ and the African Charter on the Rights and Welfare of the Child of 1990.¹⁰² Girl marriage is thus in contradiction with international treaties. It is, moreover, harmful to the physical and psychological health of girls, especially as it often leads to early and multiple pregnancies and births. It is also the cause for the early end of education for women and for curtailment of their opportunities to study, to work, and have access to economic independence.

Yet, early marriage is still a reality in many societies, regardless of their culture or religion. The UNFPA annual report found that one in every five girls is married before the age of 18, and that this percentage rises to 42% in developing countries, where 12% of girls are married before reaching 15 years of age.¹⁰³ Girl marriages are especially persistent in Arab and Islamic countries, notably in the form of customary or *'urfi* marriages, of which they constitute a large percentage. Customary or *'urfi* marriages are non-legal marriage contracts, usually brokered through a cleric and two witnesses, that remain undocumented in civil registries. They thus circumvent legal restrictions. As a result, girls who are married off by their fathers or guardians are deprived from the legal guarantees surrounding marriage, including the established minimum age and the enjoyment of their rights as wives and mothers.

To end girl marriages, therefore, merely establishing a minimum legal age for marriage seems insufficient, even if this age is equal for women and men. Effective punitive measures must also be established for those who embark on this practice.¹⁰⁴

D. Recognition of the right to choose one's spouse

Article 16 of the UDHR of 10 December 1948 states: "Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to form a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution." However, laws in some States restrict women's freedom to choose their husbands, thus discriminating against them, as they prohibit their marriage to a man who adheres to a different faith than theirs, while not subjecting men to the same restrictions. This is the case in countries with a Muslim majority, especially where Islamic law is at the source of legislation.

[101] Article 1 of the Convention on the Rights of the Child, of 20 November 1989, states: "For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier." The text of the Convention is available at: <https://www.ohchr.org/documents/professionalinterest/crc.pdf>.

[102] Article 21 of the African Charter on the Rights and Welfare of the Child: "Child marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be 18 years..." Link: https://www.un.org/en/africa/osaa/pdf/au/afr_charter_rights_welfare_child_africa_1990.pdf.

[103] UN Population Fund report can be found at: <https://www.unfpa.org/child-marriage> and the UNICEF report at: <https://data.unicef.org/resources/child-marriage-latest-trends-and-future-prospects/>.

[104] Tunisian law imposes a one-year prison sentence and/or a fine of 240,000 francs to anyone contracting a marriage that is not recognised by the law (Article 18 of the Code of Personal Status, of 1 August 1956):

In this line, article 17 of the Lebanese Family Law (1959) states that “it is permissible for a Muslim to marry a woman of the book [Christian or Jewish], and it is not permissible for a Muslim woman to marry a non-Muslim” (of the book or not). Similarly, according to article 39 of the Moroccan Family Code (2004), one of the temporary impediments to marriage is: “The marriage of a Muslim woman to a non-Muslim man, and the marriage of a Muslim man to a non-Muslim woman unless she is of the Christian or Jewish faith.” Article 30 of the Algerian Family Code (1984) also subjects women to temporary impediments on their marriage to a non-Muslim. These restrictions on the freedom of Muslim women to choose their husbands stand as cases of open discrimination against them. It particularly poses problems for women who marry foreigners or marry abroad, as they are prevented from registering their marriage in their countries at a later stage. Yet registration of marriage contracts is a right guaranteed by international treaties and texts, as it stands as legal proof of marriage and is as such relevant in the fields, among others, of lineage or inheritance. Freedom of choice in marriage should be guaranteed as a basic right for both women and men.

E. Abolition of the dowry system

Mahr or dowry is a monetary sum the husband pays his wife upon marrying her. In legal systems that adopt it, notably countries that take Islamic law as a source of legislation, this is an obligatory payment, a condition for a marriage to be considered valid.¹⁰⁵ *Mahr* is obligatory before the consummation of marriage, and remains agreed upon and included in the marriage contract, unless consummation takes place, in which case the dowry is considered a degradation of the woman’s dignity. The husband may thus not compel his wife to consummate the marriage if the dowry has not yet been paid.¹⁰⁶ Conversely, payment of *mahr* would appear to legitimise demanding the wife to consummate the marriage. *Mahr*, in brief, gives access to consummation, thus degrading women’s dignity, and justifying violence against them.

Dowry systems should thus be abolished.¹⁰⁷ Moreover, attention must be paid to unofficial forms of ‘marriage’, such as customary *urfi* marriages, which try to circumvent legal requirements and result in greater vulnerability for the wife and children.

F. Banning of polygamous marriages

Polygamous marriages raise a central issue in family law and the definition of the family structure itself, as they challenge the integrity and balance of the family, particularly, in patriarchal polygyny, in regards to the status of wives and children. This is especially problematic because, as happens with other aspects of family law, polygamy is often justified under the right to privacy, individual freedom, or even religious freedom. Facing polygamy thus requires the deconstruction of these discourses in favour of one based on human dignity and equality as universal values.

[105] Article 3 of the Tunisian Personal Status Code, 13 August 1956: “For the validity of marriage... a dowry for the wife must be specified.”

[106] Article 13 of the Tunisian Code of Personal Status and Articles 31 and 32 of the Moroccan Family Code of 3 February 2004.

[107] Report of the Tunisian Individual Freedoms and Equality Committee updated by Presidential Decree No. 111-2017 of 13 August 2017. On the question of dowry, refer to pages 147-149.

Polygamy, as a male privilege of having many spouses, dismisses equality between women and men, and is one of the most flagrant manifestations of patriarchy. In some cases, it also entails a violation of equality among the women themselves. Because of its patriarchal nature, moreover, polygamy relies on a division of roles between the wives, who are typically confined to household work, while the husband provides for his wives and children. This translates into wives' economic dependency on their husband, hence into their and their children's economic vulnerability, which is enhanced by the size of the family as compared to monogamous marriages.¹⁰⁸ Among the worst manifestations of polygamous marriage is, furthermore, the "competition" between two or more women over one husband, which may prompt them to tolerate his abuses, often under threat of remarriage. Furthermore, families based on polygamous marriages are fertile ground for domestic violence against women and children, and for the early marriage of girls.¹⁰⁹

Polygamy prevails not only in Muslim communities, but also among some Christian fundamentalists, specifically Mormons in the US and Canada, despite it being criminalised in both legal systems.¹¹⁰ There are also examples of customary polygamous marriage in some African countries such as Namibia. There are, on the other hand, numerous examples of criminalisation of polygamy. When confronted with polygamous marriages within the Mormon community in 1879, the US Supreme Court decreed that their criminalisation is not a violation of religious freedom, as religious practice cannot justify illegal acts.¹¹¹ Judge Robert Bauman, from British Columbia, Canada, ruled in 2011 that the criminalisation of polygamy does not violate the Canadian Charter of Rights and Freedoms, arguing that polygamous marriages result in grave damage to women and children, who are more likely to be subjected to domestic and sexual violence than in monogamous ones. Judge Bauman added that women in polygamous marriages also bear more children, at greater risk for their health, including maternal death.

A good model of criminalisation in the Arab world is Article 18 of the Tunisian Personal Status Code, that states: "Polygamous marriage is prohibited. Each who marries before separation from the earlier marriage shall be liable to a term of one-year imprisonment and a fine of two hundred and forty thousand francs, or one of the two sentences, even if the new marriage is not brokered according to the provisions of the law." This does not only criminalise polygamy, but also any attempt at circumventing criminalisation through secret customary marriages.

[108] Angela Campbell, "Comment les approches politiques relatives à la polygamie ont-elles tenu compte des expériences et des droits des femmes? Une analyse comparative internationale", in *La polygamie au Canada: conséquences juridiques et sociales pour les femmes et les enfants*, Recueil de rapport de recherches, Ottawa, Condition féminine Canada, 2005. Link: <https://docplayer.fr/21763247-La-polygamie-au-canada-consequences-juridiques-et-sociales-pour-les-femmes-et-les-enfants-recueil-de-rapports-de-recherche-en-matiere-de-politiques.html>

[109] Marie-Pierre Robert, Stéphane Bernatchez, "La criminalisation de la polygamie soumise à l'épreuve de la Charte", *Revue générale de droit*, vol. 10, n° 2, 2010, p. 544.

[110] Section 293 of the Canadian Penal Code of 1890 specifies the penalty for this act at five years' imprisonment.

[111] See: *Reynolds v. US*, 98, US, 145, 1879.

2. The head of family

Women's social status is contingent on their family status. This is so in so far as women's prime or even only social role is to act as wife and mother, as domestic caretaker at the service of husband and children. Despite being primary caretakers within the family, women are also here subordinate to men, hence occupy a secondary position in decision making about family affairs, from financial issues to questions concerning the interests or fate of children. This form of discrimination is sometimes formally sanctioned by the law, notably through the concept of head of family and its identification with the husband/father.

This raises issues of equality and non-discrimination between women and men, as the notion of head of family does not only refer to the relationship between a father and his children, but also to the relationship between the husband/father and the whole family, including his wife. Based on this, the relationship between spouses is not one of partnership in a joint family project, but a hierarchical relationship between a superior and a subordinate. This is confirmed by other related notions, such as the wife's duty to obey her husband, hence the notion of *nushooz* (disobedience) and the right of the husband to discipline and punish his disobeying wife, or the wife's need to obtain his consent to work outside the home, to travel or go about her own affairs. These notions do not only deny women their right to self-determination and self-fulfilment, but sometimes render them prisoners of the marital home, where there is even abuse or violence perpetrated by the husband.

Having one spouse as the head of household over the other, who is in turn under the obligation to obey the former, stands as a contradiction with the definition of the marriage as a contract based on the free will and consent of the parties thereto as equal parties. Yet this contradiction is still often endorsed by the law. Some legal systems state marriage to be a partnership between the spouses within a life project based on affection, mutual respect, and good cohabitation. This idea is embraced, for example, by the Tunisian Personal Status Code, the Jordanian Family Code and the Moroccan Family Code.¹¹² The duty of obedience was abolished from the Tunisian Personal Status Code in 1993, which then ruled that spouses must cooperate in running their family and the proper upbringing of their children, including education, travel and finances.¹¹³ At the same time, however, this and other codes continue to resort to the notion of the head of the family, a role conferred on the husband. This situation is further compounded as the Tunisian Personal Status Code includes references to norms and traditions in the context of marital duties.

[112] Article 23, Paragraph 1 of the Tunisian Code of Personal Status: "Each spouse shall treat the other with courtesy, decency and avoid harm."

Article 77 of the Jordanian Family Law: "Each of the spouses shall exhibit good cohabitation and treatment of the other, protect each other, and exchange respect, affection, compassion and the preservation of the interests of the family."

Article 51 of the Moroccan Family Code of 3 February 2004: "Mutual rights and duties between the spouses... 2/ cohabitation and mutual respect and affection and compassion and preservation of the interest of the family."

[113] Article 23 of the Personal Status Code: "Each spouse shall treat the other with favor and avoid harm to them. The spouses shall perform marital duties as required by norms and customs. They shall cooperate in the conduct of family affairs and the good upbringing of children and the conduct of their affairs, including education, travel and financial transactions."

There are thus discrepancies between provisions that respond to the principles of equality and non-discrimination, as stated in international treaties and covenants, on the one hand, and those that maintain the subordination of the wife to her husband, on the other, based on the notion of head of the family. Whilst the former responds to the contractual nature of marriage, the latter approach it as a patriarchal institution. Laws are thus required that abandon the concepts of head of the family and clearly establish women and men's partnership as spouses and parents on an equal footing.

1. MARRIAGE

- Marriage and family law are parts of civil law and should as such be ruled by its general principles, starting with the principle of individual autonomy that governs civil law.
- Laws must recognise that women and men have the right to marry in equal terms: equal right to choose a spouse, to have marriage with the chosen spouse recognised, and to enter marriage not before the legal age of majority.
- Norms that subject adult women to the guardianship of father, husband or legal tutor must be repealed.
- Child marriage must be prohibited and void and its procurement or facilitation should be criminalised. States must commit to eradicating child marriage, especially the practice of marrying young girls, where it exists.
- Dowry systems must be abandoned, as they affect women's dignity.
- Polygamy must be prohibited as a patriarchal institution particularly damaging for women and their children.
- States must commit to persecuting non-legal customary marriage and protect women and children from the circumvention of the rights and guarantees surrounding legal marriage.

2. THE HEAD OF FAMILY

- The notion of head of family must be substituted by the notion of spousal and parental family co-responsibility based on spousal and parental equality.

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CHAPTER 5

CRIMINAL LAW

Criminal law plays a crucial social role in protecting both individual and group interests and serves as a buttress against chaos. It does so by combating criminality and preventing it with the threat of punishment. In doing so, moreover, criminal law guarantees security to members of society – women and men alike- insofar as it clearly delineates what is legally permitted or otherwise prohibited and clearly establishes penalties for transgressions. Finally, criminal law promotes social justice, as it ideally holds all members of society in the same regard without exception, exclusion, or discrimination.

Criminal law is thus most relevant for women's rights. It stands as the foremost legal tool to ensure the protection of women's existence and integrity and of women's rights as guaranteed in other branches of the law. To serve this purpose, however, criminal law must be drafted and implemented in gender-sensitive terms. The importance and impact of criminal law will depend on its content and the terms of its implementation, and on the mechanisms deployed. While criminal law could be a means to ensure women's protection from murder and abuse and to guarantee their rights more generally, it can also become a tool for perpetuating women's abuse and rights violations. This latter scenario prevails, for example, in States that permit the husband to harm his wife under the pretext of legally sanctioned "discipline."

An analysis of good and bad legal practices in different States on several continents suggests that, to provide appropriate and necessary protection for women, gender-sensitive criminal law should meet eight criteria spelt out below.

1. Criminal legislation should be adopted for the specific protection of women

Many States have adopted legislation designed to protect women from all forms of violence. Such States have taken into account that legislation in this area ought to be multidisciplinary and comprehensive and criminalise all forms of violence against women. These laws include provisions aimed to prevent and protect women against all forms of violence, to empower them as a form of prevention and to offer survivors adequate support (in the economic, social, and psychological areas as well as healthcare). They also stipulate adequate sentencing for offenders and reparations for survivors.¹¹⁴ Examples of such legislation include the Spanish Organic Act on

[114] *Handbook for Legislation on Violence against Women*, issued in 2012 by the United Nations Entity for Gender Equality and the Empowerment of Women (UN Women), New York - 2012, p. 11.

Integrated Protection Measures against Gender Violence of 2004, which introduced provisions on awareness, prevention, detection, and victims' rights. This Act focuses on violence against women perpetrated by a current or former male partner, whether or not married or cohabiting with the victim. Within this context, it embraces a comprehensive and multidisciplinary spirit to establish specific institutional mechanisms to address violence against women, set up specific criminal law regulations and provide specific protection for survivors.

Such comprehensive policies are to be preferred to approaches consisting of "limited criminal law reforms" (read more in Chapter 6). Limited reforms focus only on prosecuting perpetrators, while overlooking other aspects of the legal response to violence against women, such as the importance of prevention, protection of survivors and their social reintegration, and are therefore widely inadequate.¹¹⁵ This is the approach adopted in most Arab countries, that is, in most of the few Arab countries that have introduced laws specifically designed to combat violence against women or at least some forms of it, such as domestic violence. Countries that do not yet have specific legislation on violence against women continue to prosecute it on the basis of other criminal charges, such as physical or sexual abuse. This often leads them to deal with strangers who abuse women in the same way as they deal with a husband who abuses his wife, thus disregarding the specific structural inequalities that prevail within couples and the role they play on violence against women in private life.¹¹⁶

Algeria offers an example of this limited approach. On 10 December 2016, the Algerian Parliament passed Law No. 15-19, which amended the Penal Code by identifying several forms of domestic violence as distinct crimes and imposing stricter penalties to them. While this is an important step forward in the recognition of domestic violence as a serious crime, a crime that mostly affects women, it does not address domestic violence in comprehensive terms, nor does it recognise the specificities of violence against women in the domestic sphere and beyond.¹¹⁷

Other countries err on the side of adopting criminal legislation under bold and ambitious titles, such as "combating violence against women", while women are not its sole object of attention, but only one of the groups it protects. In this line, Morocco adopted a piece of legislation which came into force on 13 September 2018, entitled "Law No. 130.13 on combating violence against women". Its title suggests that the whole of this Law is devoted to criminalising and prosecuting violence against women in all its forms and manifestations. Its aim, however, is to protect any family member, including ascendants, minors, spouses, legal guardians and people who have jurisdiction or authority over the perpetrator, or caretakers. The Law thus appears to be addressing the specificities of violence against women, while most of its provisions, with only minor exceptions, are concerned with the protection of the family institution. A more apt title, then, would have been "Law on combating violence against family members".¹¹⁸

[115] Status of Arab Women Report 2017 Violence against Women: What is at Stake, op. cit., p. 14.

[116] E / ESCWA / ECW / 2017/2

[117] "Your Destiny is to Stay with Him" *State Response to Domestic Violence in Algeria*, Human Rights Watch Report, 23 April 2017, p. 25.

[118] See: Dr. Saadia Asris, Reflections on Bill 103-13 on Combating Violence against Women, Published on 27/11/2018. Link: <https://www.aljamaa.net/en/2018/11/27>

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2. Criminal legislation should protect all women in all contexts in gender-sensitive terms

All women must enjoy the protection of the law, which may not discriminate among different groups of women. This applies to criminal legislation. In this line, the 2004 Turkish Criminal Law reform included the repeal of provisions that would have reduced or annulled penalties for violence against unmarried women or non-virgin women, to ensure that the law protects all women equally.¹¹⁹ This does not preclude legislation from adopting targeted measures directed at specific groups of women, when appropriate.

Criminal legislation should also protect all women in all contexts where they may be subjected to violence or abuse, including the family, workplace, politics, education, and local communities. It also ought to cover violence against women in conflict situations or situations where violence is condoned by the State, such as police custody or violence committed by security services. An example of legislation that covers these contexts is the 2007 Mexican General Law on Women's Access to a Life Free of Violence, which addresses all forms of violence against women in the family, the workplace, educational institutions, local communities as well as State institutions.¹²⁰

Protecting all women in all contexts includes protecting women in the context of prostitution. Yet, in many countries, women in prostitution are criminalised, while the users of "sexual services" are overlooked by criminal law. As a result, women who are coerced into prostitution are dealt with as criminals and targeted by criminal sanctions as well as social punishments, which in their most severe forms may amount to killing by male family members or members of the community. Meanwhile, male beneficiaries from their "sexual services" escape legal and social retribution. Moreover, both where legislation criminalises prostitution, as in the Anti-Prostitution Law No. 10 of 1961 in Syria or similar legislation in Egypt, and where it does not do so, as for example in Germany, criminal law tends to ignore violence against women in prostitution perpetrated by clients.

To overcome this reality, in 1999 Sweden introduced what is now known as the Nordic model of addressing prostitution, which considers the system of prostitution as violence against women, tightly linked to trafficking of women for sexual exploitation, and an obstacle to gender equality and women's rights, as in a society of equality between women and men, it is 'unacceptable that men obtain casual sex with women for remuneration'¹²¹. Thus, this gender equality approach moves the criminal focus from the person in prostitution to the buyer of sexual services. Consequently, criminal legislation deals with women in prostitution as victims, providing them with opportunities for recovery as well as social and economic reintegration and criminalises the solicitation of sexual services. Similar legal frameworks have now been also adopted in Norway, Iceland, Northern Ireland, Canada, France, Ireland, and more recently, Israel.¹²²

[119] *Handbook for Legislation on Violence against Women* - UN Women, New York, 2012, p. 11.

[120] *Handbook for Legislation on Violence against Women* - UN Women, New York, 2012, p. 21.

[121] Prop. 1997/98:55 Kvinnofrid, as noted in fn 2, at 22.

[122] *What is the Nordic Model?* Link: <https://nordicmodelnow.org/what-is-the-nordic-model/>.

Another example of this approach to prostitution is French Act No. 2016- 444, issued on 13 April 2016, with the aim to strengthen the fight against the prostitution system, provide legal assistance to women in prostitution and end prostitution and human trafficking related to it.¹²³ To this end, the law treats all women in prostitution as victims, regardless of the woman's situation, her nationality and the legality of her residence on French territory. It then sets up mechanisms to assist women to move on from prostitution, while criminalising all solicitation of sexual services. Chapter II of the law provides for the protection of victims of prostitution and the creation of a path away from it, including social and vocational integration. According to Chapter V, all ministries of the State shall guarantee the protection of victims of prostitution, procurement, or human trafficking, and provide them with the assistance they need. The aim is that "in each institution [there] exists a committee to organise and coordinate work for victims of prostitution, and human trafficking, and to provide a way out of prostitution, including social and professional integration, for any person who is a victim of prostitution and human trafficking for the purpose of sexual exploitation." The law expands its protection to foreign victims of prostitution, allowing them to make use of the means of recovery and reintegration it provides, and facilitates their obtaining a temporary residence permit. At the same time, Articles 20-21 stipulate fines and other punitive measures for solicitation. These include a driving licence suspension, performance of 20 to 120 hours of community service or attendance in a training course to raise awareness of the fight against prostitution. Penalties amount to up to three years' imprisonment and a fine of up to €45,000 if the victim of prostitution is a minor, or in a weakened state due to illness, disability, or pregnancy. To ensure the implementation of the law, Article 7 stipulates that a State fund be established to counter prostitution and finance the provision of social and vocational support. It also offers support to any initiative aimed at raising public awareness on the effects of prostitution, as well as the social integration of women in it. The resources of the fund consist of State allocations, the amount of which is to be determined under the Finance Act, and of the revenues of confiscating assets and goods related to trafficking and procurement, as stipulated in the Penal Code.

3. Violence against women should be criminalised without exceptions, suspensions of sentences or the possibility of immunity resulting from the perpetrator's relation to victims

In many cases, the perpetrator of violence against women is someone who has or has had an intimate or otherwise family relationship with the victim. Violence between intimate partners and domestic violence, including marital and non-marital relations, sexual relations, as well as familial relations at large, cause more deaths than civil wars and result in higher economic costs than those incurred as a result of civil wars and mass murders, thus causing suffering to individual women, groups and society at large.¹²⁴ The UN Secretary-General, in his 2016 report on the

[123] Loi n° 2016-444 du 13 avril 2016 visant à renforcer la lutte contre le système prostitutionnel et à adjoindre les personnes prostituées.

[124] A / 71/219 - 27 July 2016.

elimination of all forms of violence against women and girls, warned that violence between intimate partners is the most common form of violence against women. It is estimated that 35% of women worldwide have suffered physical and/or sexual violence at some point in their lives at the hands of an intimate partner, a prevalence which can reach up to 70% in some countries. Cases of violence against women should therefore not be excluded from criminalisation and punitive action based on the existence of personal relationships between the perpetrator and the victim. In this line, the 2004 Spanish Organic Act on Integrated Protection Measures against Gender Violence embraces violence against women in the context of intimate relations, which according to the Act, and as said above, includes violence inflicted on a woman by a current or former male partner, whether or not married or cohabiting with her. The Spanish Criminal Code also includes specific protection against domestic violence, particularly if addressed against vulnerable individuals, including ascendants, descendants, siblings or other blood relatives or in-laws, minors or persons with disabilities who cohabit with the perpetrator who are under their guardianship or custody, or any other vulnerable cohabiting person. Article 5 of the 2006 Brazilian Maria da Penha Act also embraces violence committed within the “family unit” and in the context of intimate relationships. Meanwhile, the Indonesian Law on the Elimination of Domestic Violence, no. 23 of the year 2004, extends its scope to include domestic workers as well.¹²⁵ This is in clear contrast with the bad practices by which some States restrict the notion and criminal prosecution of violence against women. For example, the Algerian Law No. 15-19 of December 2016, amending the Penal Code, does not cover all possible perpetrators of domestic violence, restricting them to spouses and former spouses and thus excluding relatives and other members of the household.¹²⁶

Conversely, legislation could err on the side of requiring a relationship with the victim to exist in order to provide protection to victims of violence against women. This is the case in Austria, where survivors of violence against women must establish their relationship with the perpetrator to receive the protection of the law, which has resulted in occasional indirect harm. Where the perpetrators denied the existence of such a relationship to avoid being subject to the protection order, victims have had to prove the relationship. This has raised questions about the definition of “relationship” in this context, including whether a victim must prove that she had a sexual relationship with the offender in order to be eligible for protection.¹²⁷

The existence or absence of a relationship between perpetrator and victim should thus not be an obstacle to the prosecution of violence against women, nor should it be a condition for victims to access the specific protections provided for in legislations aimed to combat it.

[125] *Handbook for Legislation on Violence against Women* - UN Women, New York, 2012, p. 23

[126] “Your destiny is to stay with him” *The State treats domestic violence in Algeria*. Human Rights Watch Report, 23 April 2017, p. 32.

[127] *Handbook for Legislation on Violence against Women* - UN Women, New York, 2012, p. 23.

4. All forms of violence against women should be criminalised

The Handbook for Legislation on Violence against Women, issued in 2012 by the UN Entity for Gender Equality and the Empowerment of Women (UN Women), suggests that criminal legislation applies to all forms of violence against women. These include domestic violence; sexual violence, including sexual abuse and harassment; harmful practices such as marriage of minors, forced marriage, FGM, female infanticide, prenatal sex selection, virginity testing, HIV/AIDS clearance, so-called “honour” crimes, acid throwing attacks and crimes involving the bride dowry, abuse of widows, forced pregnancy, women’s trials for sorcery/witchcraft, femicide, human trafficking and sexual slavery (see Chapter 6).¹²⁸ It is worth acknowledging that there is no all-inclusive list of possible forms of violence against women, that the aforementioned instances are mentioned by way of example. States are thus required to recognise the evolving nature of violence against women and respond to new challenges as they are identified.¹²⁹

In practice, some States have resorted to extensive legislation dealing with various forms of violence, such as Mexico’s General Law on Women’s Access to a Life Free of Violence (2007), Brazil’s Maria da Penha Act (2006) and the Uruguay’s Law no. 17514 on the prevention, early detection, attention, and eradication of domestic violence (2002). Other States have enacted separate legislation addressing individual forms of violence, such as Namibia’s Combating of Rape Act (2000) and the Republic of Benin Act on the Suppression of Female Genital Mutilation (No. 3 of 2003). Generally, and regardless of whether different forms of violence against women are dealt with in unified or separate pieces of legislation, a comprehensive legal framework must apply to all of them. This includes measures to prevent violence, to protect, support and empower survivors and punish offenders, as well as measures to ensure thorough implementation and in-depth evaluation of the law.¹³⁰

The danger in such cases is for the State to promote apparently comprehensive criminal legislation to protect women from all forms of violence, while failing to criminalise certain acts of violence to which women are actually subject, the implication being that these acts are permitted. This is one of the most prominent criticisms issued against the Mauritanian law on gender-based violence, passed in 2016 but not yet ratified, which excludes several forms of violence against women, such as FGM, early marriage, marriage of minors and forced marriage.¹³¹ This is also the case of the 2018 Moroccan law on combating violence against women, where definitions of violence are formulated in a restricted manner that prevents the law from covering types of unforeseen violence, but which can emerge alongside social developments.¹³²

[128] *Handbook for Legislation on Violence against Women* - UN Women, New York, 2012, New York 2012, p. 21.

[129] A / 61/122 / Add.1-6 July 2006.

[130] *Handbook for Legislation on Violence against Women* - UN Women, New York, 2012, p. 22.

[131] “They Told Me to Keep Quiet” *Obstacles to Justice and Remedy for Sexual Assault Survivors in Mauritania*, Human Rights Watch, September 2018, pp. 52-53.

[132] See Al-Saadia Adris, *Reflections on Law 103.13 Relating to Violence Against Women*, 27 November 2018. Link: <https://www.aljamaa.net/ar/2018/11/27/>.

And: *Letter from Human Rights Watch to the Government of Morocco on Domestic Violence Law Reforms*, Human Rights Watch, February 2016. Link: <https://www.hrw.org/news/2016/02/15/letter-human-rights-watch-government-morocco-domestic-violence-law-reforms>.

A good, gender-sensitive legal practice thus consists of the adoption of legislation that criminalises violence against women and defines it in broad terms. Another one is the adoption of criminal legislation against serious cases of violation of women's rights. An example of this is the Republic of Benin Law on the Suppression of Female Genital Mutilation (No. 3 of 2003). Although it is difficult to obtain accurate information on the extent of FGM, according to the WHO, between 100 and 140 million girls and women around the world have experienced it in some form.¹³³ Legislation should unambiguously criminalise such practices and include a legal definition of FGM covering all forms of the phenomenon based on WHO terminology and definitions. The law should also specify the persons subject to prosecution according to the law and the forms of penalties and sentences therein, with the requirement that communities be educated about the new legal provisions, especially if accompanied by criminal penalties.

Another example of good practice is Kenya's approach to sexual harassment as included in three pieces of legislation: section 23 of the Sexual Offences Act (2006), which criminalises sexual harassment incurred by those in a position of authority or holding a public office; section 6 of the Employment Act (2007), which includes harassment by employers or co-workers; and section 21 of the Public Officers Ethics Act (2003), which includes harassment within the context of public services and their provision.¹³⁴ However, the report of the UN Secretary-General on intensifying efforts to eliminate all forms of violence against women and girls, issued in 2018,¹³⁵ shows that legal frameworks relating to sexual

The European Union 2014 Report on *"Violence against women: an EU-wide survey"* found that of the 42,000 surveyed women in the 28 Member States of the European Union, every second woman (55 per cent) had experienced sexual harassment at least once since the age of 15, and one in five women (21 per cent) had experienced it in the 12 months preceding the survey. Among women who had experienced sexual harassment at least once since the age of 15, 32 per cent indicated that the perpetrator had been someone that they had come in contact with in the employment context, such as a colleague, a boss or a customer.

According to the 2018 UN Secretary-General's report on *Intensification of efforts to eliminate all forms of violence against women and girls*, of the 189 countries surveyed, 35 do not have legislation on sexual harassment in general; 59 have no legislation on sexual harassment in the workplace; 123 have no legislation on sexual harassment in education; and 157 have no legislation on sexual harassment in public spaces.

harassment remain inadequate and unequal across countries and are generally insufficient to enable women to mobilise and seek justice. Although progress has been made in enacting laws to address harassment in the workplace, women remain unprotected in other areas of life, such as education and public spaces. Legislation is thus required to address the phenomenon and cover it in such areas as public spaces, education and employment, both public and private, and the provision of goods and services. A good, gender-sensitive practice when drafting legislation against sexual harassment legislation is to include an explicit requirement that employers and

[133] "They Took Me and Told Me Nothing" *Female Genital Mutilation in Iraqi Kurdistan*, Human Rights Watch, June 2010, pp. 22-23.

[134] *Handbook for Legislation on Violence against Women* - UN Women, New York, 2012, p. 23.

[135] A/73/294 - 3 August 2018.

educational institutions take steps to prevent it, as well as provisions on employers' liability in cases of sexual harassment where they had not taken reasonable steps towards preventing it (Canada and Lithuania). Another one is to extend the legal protection against sexual harassment to cyberspace, as has been done in countries such as Ecuador, the United Arab Emirates, the Republic of Korea, Denmark, El Salvador and Kenya.¹³⁶

Chapter II of the Indian Protection of Women from Domestic Violence Act, 2005, expands the definition of abuse to include physical, sexual, verbal, emotional and economic abuse. It thus creates a good precedent, as domestic violence laws often protect against physical, sexual, and psychological violence, but exclude economic violence as manifest in the deprivation of women from access to, and control over, basic financial resources. Such practices make it immensely more difficult for women to deal with abusive relationships. For this reason, States have begun to address this form of violence either through new or revised laws (Italy, New Zealand, Hungary).

Criminal laws should be consistent in the criminalisation of, and protection from, all phenomena affecting women's exercise of all their rights. This includes political rights. The UN Secretary-General's report on violence against women in political life, issued in 2018, indicated that violence against women targets them on the basis of gender and takes gender-based forms, such as gendered threats, sexual harassment and sexual violence. Such violence is directed at any woman in the political sphere for no other reason than her gender. Its aim is to preserve traditional gender roles and stereotypes, and to perpetuate structural and gender inequalities in politics and society at large. It can take many forms, from threats and harassment to murder, as happened to Joe Cox in the UK in 2016, to Marielle Franco¹³⁷ in Brazil in March 2018, and to Berta Caceres in Honduras in 2016.¹³⁸ In 2007, 17 former French female ministers went public about the sexual harassment they had suffered in politics. States then began to address violence against women in political life, through legislation and other corrective measures to eliminate it. Such legislation could be incorporated into the broader legal framework of violence against women or could consist of stand-alone provisions. This is the case of the Bolivian Law Against Harassment and Political Violence Against Women (No. 243 of May 2012), the only one worldwide that specifically criminalises violence against women in political life.¹³⁹

5. Criminal legislation should include precise and clear definitions that avoid inadequacies or ambiguities which deprive women of certain protections or enable perpetrators to escape. Rape as a case study

Criminal legislation should be cautious when drafting definitions of crimes and punishments. Any discrepancy in the formulation of the crime and real life will make the former inapplicable, thus gravely harming victims of crime, whose protection the law is supposed to ensure and safeguard. This harm becomes clear in the definition of the crime of rape in some legal systems. Most Arab countries, for example, still adopt a narrow definition of rape that limits it to "the penetration

[136] A/73/294 – 3 August 2018.

[137] Brazilian of African descent and prominent human rights defender.

[138] A/73/301 - 6 August 2018.

[139] A/73/301 - 6 August 2018.

of the penis into the female vagina". This leaves out anal and oral rape, as well as the penetration with anything other than the penis, all of which then fall under crimes such as indecent assault, defilement, lewd or obscene act, etc.¹⁴⁰ Most laws in the region stipulate as well that the rapist's agreement to marry his victim ensures that he is acquitted of the rape charge, or has his sentence reduced – even if the girl is a minor. In fact, the rape victim is often forced to agree to marry her rapist, for fear of scandal and due to social stigma surrounding victims of rape.

The Bolivian Law Against Harassment and Political Violence Against Women (2012) provides mechanisms to prevent, monitor and penalise individual or collective acts of harassment and political violence against women in any political or public role.

A National Observatory for Parity Democracy was designed to monitor gender and intercultural parity and women's political rights, generating data, and raising visibility and awareness about a range of issues related to women's political participation, including violence.

This connects with the definition of rape and sexual crimes as crimes against modesty, public or family morals and "honour", not with human rights and dignity. Some legal systems confuse sexual crimes and crimes against public morals and incorporate them under the same heading.¹⁴¹ In the Belgian Criminal Code, for example, rape is listed under the heading "Crimes against the family system and public morals"¹⁴², whereas Dutch law includes it as a case of "Violation of public morals"¹⁴³. The UN Committee on the Elimination of Discrimination against Women called for abandoning this approach and declaring rape a self-standing crime that targets the physical and psychological integrity of the victim as an individual and constitutes an attack on her freedom.¹⁴⁴ Singling out sexual crimes as crimes against a person's right to individual freedom and physical and psychological integrity, and considering every person who suffers them the victim of a crime, is essential both to give victims the widest and most effective protection, especially if they are women, and to reduce their sense of guilt. It is looking at rape from the standpoint of social norms and morals that prevents many women from reporting abuse and makes them bear the effects on their own, including "family penalties" that can amount to murder. Silence, moreover, often leads to impunity for perpetrators.

Some pertinent laws, moreover, do not consider marital rape a crime.¹⁴⁵ On the contrary, sexual intercourse between spouses, whether consensual or not, is considered an inherent right of the

[140] In the framework of session 60 of the UN Women's Committee, 57 NGOs from the Middle East and North Africa demand legislative reform to combat sexual violence against women, research paper, link: <http://www.nazra.org/node/458>.

[141] In this regard, see Amnesty International's 2018 report, especially p. 14. This report can be found at <https://www.amnesty.org/download/Documents/EUR0194522018ENGLISH.PDF>.

[142] Penal code (Belgium), June 8, 1867, title VII, available at: www.ejustice.just.fgov.be/cgi_loi/loi_a1.pl?language=fr&caller=list&cn=1867060801&la=f&fromtab=loi&tri=dd+as+rank#LNKR 0127.

[143] Criminal Code (The Netherlands), Act of 3 March 1881, Part XIV, available at: www.legislationline.org/documents/section/criminal-codes.

[144] CEDAW Committee, General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, UN. Doc. CEDAW / C / CG / 35, 2017, para 33.

[145] Note that the first draft for law no. 293 for the year 2014 in Lebanon, on the protection of women and the family from domestic violence, did criminalise marital rape. However, this was later removed due to the influence of religious authorities. See: Report on the Status of Arab Women, 2017. Violence Against Women - How Much Damage? op. cit., p. 14.

husband, which the wife is obliged to abide by in order to meet his needs. Hence domestic violence laws are only concerned with physical, not sexual harm.¹⁴⁶ This is evident in the exclusion of the husband as a possible perpetrator of the crime of rape. Article 489 of the Syrian Penal Code thus explicitly defines a rapist as: “A person who forces or intimidates a person other than his wife towards intercourse”. Article 292 of the Jordanian Penal Code also states that: “Whoever has sexual intercourse with a woman other than his wife, without her consent — whether through coercion, threat, deception, or fraud — is punished”. This is based, first, on the presumption that consent to sex relationships results from consent to marriage and, second, on existing customs, traditions, and religious beliefs about a woman’s role within marriage, often incorporated in legislation. This includes a wife’s duty of obedience towards her husband, or her marital duty to accommodate his sexual desires, which serves as a basis for legitimating what are in fact acts of marital rape. In this regard, the Indian Minister of Interior Chaudhary Haribhai Partibhai stated in April 2015, that “the concept of marital rape as it is internationally recognised cannot be adopted in the Indian framework because of many factors including the level of education, illiteracy, poverty, customs, traditions, religious values, beliefs and holiness that surround the institution of marriage.”¹⁴⁷

This contrasts with existing good practices, to be considered when dealing with the crime of rape.¹⁴⁸ These include:

- a. Addressing *rape as a violation of the physical integrity and human dignity of women*, not as a crime against good morals, public ethics, or “honour”, against the family, modesty, or society. A number of Latin American countries, including Argentina, Bolivia and Ecuador, as well as Turkey, are reviewing their criminal laws to regard sexual violence as a violation of the victim’s freedom and rights to physical and psychological integrity, rather than as a threat to her “honour”, to “customs” and “morality”.
- b. Adopting a *broad definition of rape* that goes beyond vaginal penetration and a *broad definition of “sexual violence”* that is not restricted to rape alone. For example, Article 102 of the Turkish Criminal Law 2004) defines rape as a crime that violates the sexual immunity of a person by “inserting an organ or instrument into a body”. Chapter 227 of the Tunisian Law on the Elimination of Violence against Women considers “rape any act that leads to sexual penetration” regardless of its nature and the means used against a female or male without his/her consent. Canadian criminal law includes within sexual violence sexual assault offenses (section 271), sexual assault by use of a weapon, threat of a third party, physical harm (section 272) and aggravated sexual assault in which the offender injures or maims the victim or endangers her life (section 273). Article 375 of the Belgian Penal Code considers rape as any sexual penetration without the consent of the victim.

[146] In the framework of session 60 of the UN Women’s Committee, 57 NGOs from the Middle East and North Africa demand legislative reform to combat sexual violence against women.

[147] “Reconciling Cultural Difference in the Study of Marital Rape.” *Marital Rape: Consent, Marriage and Social Change in Global Context*. Ed. Kersti Yllö, MG Torres. London: Oxford University Press, 2016, pp. 7-16.

[148] *Handbook for Legislation on Violence against Women* - UN Women, New York, 2012, pp. 24-25.

- c. *Repealing any requirement that rape or sexual assault be committed by force or violence*, in order to minimise the indirect victimisation of survivors in judicial proceedings. The basic element in the definition of rape is the absence of consent, as recognised by international texts and instruments such as Article 36 of the Istanbul Treaty on Combating Violence against Women and Domestic Violence¹⁴⁹ and Article 7 of the Rome Treaty establishing the International Criminal Court.¹⁵⁰ Definitions of rape and sexual assault must thus embrace cases where voluntary and unambiguous consent is missing, ruling out that a person's inactivity or ambiguous signals be taken for consent, or cases where "coercive circumstances", widely defined, have been at play (see more on the issue of consent in Chapter 6).
- d. Including the *specific criminalisation of marital rape*. This can be done either by stating that the provisions on sexual abuse apply "irrespective of the nature of the relationship" between the offender and the complainant; or by stating that "marriage or any other relationship is not a defence against sexual assault under legislation." This is the solution adopted by the Namibian Combating of Rape Act (2000), which states that "No marriage or other relationship shall constitute a defence to a charge of rape under this Act."

Under Canadian criminal law consent in this context means "the voluntary agreement of the complainant to engage in the sexual activity in question".

Under Swedish criminal law, "If a person wants to engage in sexual activities with someone who remains inactive or gives ambiguous signals, he or she will have to find out if the other person is willing".

Under Namibia's Combating of Rape Act (2000), rape requires the existence of certain "coercive circumstances".

A similar definition has been adopted in Lesotho's Sexual Offenses Act (2003).

6. Sweeping criminalisation of acts or practices that embody women's autonomy should be avoided. Abortion as a case study

The biggest challenges criminal law presents for women is not necessarily the lack of protection it grants them and their rights, but the targeting of women as criminals. Legal addressal of the voluntary termination of pregnancy is a model example of this. According to a 2018 report by the UN Working Group on the issue of discrimination against women in law and in practice, 25% of

[149] <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680084840>

[150] Article 7 (1) - (g) 1 (1): International Criminal Court, Elements of Crimes, PCNICC / 2000/1 / Add.2 (2000). The International Criminal Court's Elements of Crimes further refer to such an invasion having been "committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent." (Article 7 (1) - (g) 1 (2)).

the world's population live in countries where laws severely restrict abortion, prompting women to resort to unsafe termination of unwanted pregnancies, as a result of which "each year some 47,000 women die, and a further 5 million suffer temporary or permanent disability."¹⁵¹

As the above figures show, women in many countries are deprived of their right to control their own bodies in terms of deciding on the continuation or termination of their pregnancy. In Mauritania, for example, the Reproductive Health Act of 2017 prohibits abortion, without exceptions given to pregnancies resulting from sexual assault.¹⁵² Similarly, in Algeria abortion is not permitted on the basis of rape or incest and women seeking or executing an abortion outside the scope of permissibility face up to two years' imprisonment. This includes women who are pregnant because of marital rape.¹⁵³ The worst model is El Salvador, where it is illegal to perform any abortions under any circumstances, even if the pregnancy puts the pregnant woman's life at risk. Women in El Salvador are thus forced to deliver their pregnancy even at the risk of their own physical or mental health, where pregnancy results from rape or in the event of genetic disorders or disability of the fetus, even if it cannot be expected to survive or will suffer if born. All this also applies to pregnant minors. Amnesty International's report on El Salvador for 2017-2018 indicates that a comprehensive ban on abortion continues in all circumstances, and criminal penalties against women and health care providers persist as well. Perhaps the best-known case is that of Ms. Manuela, a woman convicted to 30 years of imprisonment on charges of premeditated murder upon the still-birth of her fetus, and who died of cancer while in prison for lack of adequate medical care. Such penalties continue to be applied.¹⁵⁴

The criminalisation and restriction of abortion violates the most basic rights of women, deprives them of access to necessary healthcare, exposes women to exploitation and endangers their lives in the event of resorting to informal and unsafe abortion.¹⁵⁵ This issue remains highly controversial and schismatic, as conservative religious movements in many countries have influenced decision-making to halt or reverse progress, through concerted efforts to enact or maintain bans on abortion. In a few countries, there have been attempts to ban abortion completely, even if pregnancy threatens the pregnant woman's life. Measures have also been taken to impose further restrictions on funding contraception. In many regions, higher courts have failed to fulfil their duty to promote women's human dignity in the field of abortion, as reflected in some of their landmark decisions.¹⁵⁶

The paradox lies in the lack of correspondence between restrictions on abortion and low abortion rates. As the 2018 report by the UN Working Group on the issue of discrimination against women in law and practice reveals, "Countries in Northern Europe where women have the right to

[151] A/HRC/38/46 - 14 May 2018.

[152] *"They Told Me to Keep Quiet" Obstacles to Justice and Remedy for Sexual Assault Survivors in Mauritania*, Human Rights Watch, September 2018, p. 34

[153] "Your destiny is to stay with him" *The state treats domestic violence in Algeria*. Human Rights Watch Report, 23 April 2017, p. 34

[154] Amnesty International Annual Report: El Salvador 2017/2018. Link: <https://www.amnesty.org/en/countries/americas/el-salvador/report-el-salvador/>.

[155] In the framework of session 60 of the UN Women's Committee, 57 NGOs from the Middle East and North Africa demand legislative reform to combat sexual violence against women.

[156] A/HRC/38/46 - 14 May 2018.

termination of pregnancy and are provided with access to information and to all methods of contraception have the lowest rates of termination of pregnancy. In countries where induced termination of pregnancy is restricted by law and/or otherwise unavailable, safe termination of pregnancy is a privilege of the rich, while women with limited resources have little choice but to resort to unsafe providers and practices.”¹⁵⁷

The issue of abortion will be covered in detail in Chapter 8, in the context of health and reproductive rights.

7. Laws should include mechanisms for the protection and care for women victims of crimes

Many women victims fear resorting to the protection mechanisms provided in criminal legislations. This is so for various reasons, including fear of retaliation, lack of knowledge of their legal rights, lack of a safe space and/or lack of financial, psychological and health support. Women also fear additional victimisation, personal and professional, if they are branded as victims of crime, particularly of gender-based crime.

It is the role of criminal legislation to address these concerns and to do so explicitly, clearly stating the mechanisms available for the protection and care of women victims of crimes. These mechanisms vary with the nature of the crime and with the gravity of its implications. Some safeguards and mechanisms may be related to the nature of crimes affecting women, while others are linked to the need to provide tangible services to the victim.¹⁵⁸

A. The nature of crimes affecting women

Some legal systems include good gender-sensitive practices that take account of the specific nature of gender-based crimes. It is good practice, for example, explicitly to state that, because of the singularity of violence against women and how it affects victims, no negative inferences are to be drawn from victims’ delay in reporting it.

“In criminal proceedings at which an accused is charged with an offence of a sexual or indecent nature, the court shall not draw any inference only from the length of the delay between the commission of the sexual or indecent act and the laying of a complaint.”

Section 7 of the Combating of Rape Act of Namibia, 2000

Similar provisions can be found in relevant legislation in South Africa and in the Anti-Violence Against Women and Their Children Act (2004) in the Philippines.

It is also good practice to provide protection orders. Aimed at promoting the safety and autonomy of survivors of violence against women, protection orders are considered to be the most effective legal remedies available to

[157] A/HRC/38/46 - 14 May 2018.

[158] See *Handbook for Legislation on Violence against Women* - UN Women, New York, 2012, p. 29

them. The availability of protection orders also stands as a “general declaration” of the country’s commitment to addressing violence against women, an important step in changing the socio-legal culture surrounding it.¹⁵⁹ For example, Chapter VI of Mexico’s General Law on Women’s Access to a Life Free of Violence (2007), provides protection orders for survivors of any form of violence defined by law, including domestic violence, violence in the workplace and educational institutions, community violence, institutional violence and femicide. The Spanish Act 27/2003 on regulation of Protection Order of Victims of Domestic Violence, provides for a variety of protective and redress orders, such as those prohibiting the offender from approaching the survivor directly or through other persons; or those ordering the accused to remain at a specific distance away from the survivor of violence, her children, family, place of residence, place of work or any other place she may visit or frequent. Protection orders can also include the offender’s obligation to leave a shared dwelling, or to pay child support and basic living expenses, including rent and insurance; they can also include, for the survivor, temporary child custody or parental leave. Examples of this can be found across many countries, including Albania, the Netherlands, the US, the UK and Ghana under its Domestic Violence Act (2007), as well as India’s Protection of Women from Domestic Violence Act (2005).

B. The need to provide services to victims

Guaranteeing free assistance in all judicial proceedings to women survivors of gender-based violence is basic good legal practice. Article 21 of the Guatemalan Law Against Femicide and other Forms of Violence against Women (2008) obliges the government to provide free legal assistance to female survivors of violence. In Spain, any victim is entitled to receive specialised and immediate legal assistance, whereby she is entitled to free legal counsel and representation in litigation in all administrative and judicial proceedings, directly or indirectly associated with the violence to which they were subject.

Criminal legislation can also establish the State’s obligation to fund or otherwise contribute to establish a comprehensive support framework for women survivors of violence, including shelter, healthcare, and all necessary forms of support. For example, the Austrian Federal Act on Protection against Domestic Violence (1997) stipulates that all provincial states establish intervention centres to provide assistance to survivors of domestic violence following police intervention. These intervention centres are run by civil society organisations (CSOs), funded by the Federal Ministries of the Interior and of Social Affairs, on the basis of five-year contracts. Another example is the Guatemalan Law Against Femicide and other Forms of Violence against Women (2008), Article 17 of which requires government to ensure that survivors of violence have access to integrated service centres, including the provision of financial assistance. Section 29 of the Domestic Violence Act of Ghana (2007) stipulates the establishment of a fund to support victims of domestic violence. The fund receives contributions from individuals, organisations, and the private sector, allocations approved by Parliament, and funds from any other source approved by the Minister of Finance. The fund’s resources are used for a variety of purposes,

[159] *Policy Brief on Standards of Care, Violence Against Women, and Protection Orders in the Arab Region*, ESCWA, Beirut, 2018, p. 2.

including basic material support for victims of domestic violence and all matters related to their rescue, rehabilitation, and reintegration, including the establishment of shelters, training and capacity-building.

Some legal systems provide guarantees to ensure the recovery and future safety of victims of violence against women. In this line, Article 21 of the Spanish Organic Act on Integrated Protection Measures against Gender Violence (2004), it recognises that survivors have the right to reduce or reorganise working hours. In the Philippines, Article 43 of the Anti-Violence Against Women and Their Children Act (2004) stipulates that survivors are entitled to 10 days' paid leave, plus other paid leave opportunities. In Honduras, under the Law Against Domestic Violence (2006), public and private employers are required to grant employees permission to attend related programmes, including support groups for survivors of violence, and re-education seminars for offenders.

Not all legal systems have introduced good practices in this field. In Algeria, the Law no. 15-19 of December 2016, lacks any preventive measures for victims of domestic violence seeking State protection and no other such preventive legal measures exist.¹⁶⁰ Moroccan law has so far also failed in this regard: while the Moroccan law on combating violence against women (2018) provides survivors of violence against women with housing in shelters or social welfare institutions, the State has not as yet provided any such housing.¹⁶¹ Failing to introduce criminal law safeguards and protection for victims of violence against women, or doing so only formally, is problematic. It does not only deprive victims of the protection and care they need, but forces them to accept unjust compromises that entail new violations of their rights, make them more vulnerable to future acts of violence and stigmatise them as victims.

Social stigmatisation, the cost of judicial action, the lack of access to court compensation, the risk of prosecution and financial instability, are all factors that lead many women to opt for out-of-court settlements, reconciliations or arrangements instead of demanding justice in the criminal justice system. Such settlements are brokered within a demeaning framework, lessening women's sense of self-worth and autonomy. This is particularly so in the case of poor women, who are more likely to waive their rights and opt for financial compensation [settlement offers].¹⁶²

8. Appropriate sanctions for crimes committed against women should be provided without exemptions or pardons for perpetrators

In some countries, criminal law is still discriminatory against women. In Nigeria, for example, the Penal Code applies disparate penalties for the same act depending on the sex of the victim. According to Article 353 – Chapter 29, if a person unlawfully assaults another who is a “male”, the offense is considered a felony punishable with three years' imprisonment. According to Article 360 - Chapter 30 however, if the same act is committed against a “female” victim it is considered

[160] "Your destiny is to stay with him" *The state treats domestic violence in Algeria*. Human Rights Watch Report, 23 April 2017, p. 32.

[161] Dr. Saadia Asris, *Reflections on Bill 103-13 on Combating Violence against Women*, 2018.

[162] *"They Told Me to Keep Quiet" Obstacles to Justice and Remedy for Sexual Assault Survivors in Mauritania*, Human Rights Watch, September 2018.

a mere misdemeanour and punishable with no more than two years' imprisonment.¹⁶³

Criminal law sanctions must be commensurate with the gravity of gender-based crimes. This requires two fundamental considerations.

First, more severe penalties must be imposed in the event of certain aggravating circumstances, including, but not limited to, the victim's age, the relationship between perpetrator and victim, the use or the threat of violence, the number of perpetrators, and the gravity of the physical and/or psychological consequences of the victim's abuse. Furthermore, charges should be aggravated for recurrent perpetrators of domestic violence and criminal sentencing may order damages to be paid to the victim in addition to the prescribed prison sentence. An example of good practice is the Criminal Code of the Czech Republic, which in item 215/A establishes harsher penalties in cases of repeated domestic violence. Another example is the Swedish Criminal Code, where a group of reform laws introduced the crime of grave violation of a woman's security and integrity (Kvinnofrid) in 1998, to address criminal acts frequently committed by a man against a woman who is or was his wife, or with whom he cohabits or cohabited. Regarding compensation in criminal cases, Article 11 of the Guatemalan Law Against Femicide and other Forms of Violence against Women (2008) offers compensation in proportion to the damages caused by the violent act.

Second, all legal texts providing for mitigating factors, leading to reduced sentencing and/or acquittal of perpetrators of so-called "honour crimes" ought to be repealed. These include the acquittal or reduced sentencing of perpetrators of violence who subsequently marry their victims, or the imposition of lighter penalties in cases involving specific "categories" of women, such as women in prostitution and "non-virgin" women. A World Bank study in 2016 indicated that, of the 173 countries considered, 32 maintained conditions that exempt the perpetrator of rape from trial if they were, or became after the fact, married to their rape victims.¹⁶⁴ Marriage as a basis for legal exemption or reduced sentencing in cases of so-called "honour crimes", including rape, still exists in most Arab countries. Here criminal legislation must be reviewed in order to address every loophole that enables the mitigation or impunity of perpetrators. Many countries have already done this, as is the case of Brazil in 1994, Uruguay in 2006 and Turkey in 2003. In others, by contrast, criminal legislation still allows for violators of women's rights and integrity to be exempted from criminal responsibility or have it reduced, thus allowing for their impunity. In Algeria, according to Law no. 15-19 of December 2016 the victim's pardon translates into criminal impunity in cases of psychological and economic violence, including theft, and cases of physical violence that do not lead to permanent disability; where violence does result in some permanent disability, the victim's pardon reduces the penalty. In view of this, Human Rights Watch comments that "By including possibilities to pardon into such criminal provisions, the law encourages victims to pardon their offenders, and their abusers to know that such escape is possible. This indeed appears to have been the aim of the drafters."¹⁶⁵

[163] Criminal Code Act of 1916 (southern states of Nigeria) of 1916, revised in 1990.

[164] A/71/219 - 27 July 2016.

[165] *"Your Destiny is to Stay with Him" State Response to Domestic Violence in Algeria*, Human Rights Watch Report, 23 April 2017, p. 32.

1. CRIMINAL LEGISLATION SHOULD BE ADOPTED FOR THE SPECIFIC PROTECTION OF WOMEN

- Criminal law should address the specific protection women require from all forms of gender-based violence through new legislation aimed at the core of the problem, as a better option than improving on existing legal texts that were not designed to this end. Laws must recognise that women and men have the right to marry in equal terms: equal right to choose a spouse, to have marriage with the chosen spouse recognised, and to enter marriage not before the legal age of maturity.

2. CRIMINAL LEGISLATION SHOULD PROTECT ALL WOMEN IN ALL CONTEXTS IN GENDER-SENSITIVE TERMS

- Gender-sensitive criminal law must benefit all women without exception, exclusion, or discrimination. They must also ensure the protection of women in all contexts, in times of war or peace, within or outside the household, at the workplace, in education or any other context.
- These laws should decriminalize women in prostitution and should aspire to secure all forms of support for them, including economic and social reintegration.

3. VIOLENCE AGAINST WOMEN SHOULD BE CRIMINALISED WITHOUT EXCEPTIONS, SUSPENSIONS OF SENTENCES OR THE POSSIBILITY OF IMMUNITY RESULTING FROM THE PERPETRATOR'S RELATION TO VICTIMS

- Criminal laws must criminalise all acts of violence against women, not allowing for exceptions or reduced responsibility based on the existing relationship between perpetrator and victim.

4. ALL FORMS OF VIOLENCE AGAINST WOMEN SHOULD BE CRIMINALISED

- Criminal law must address violence against women in all its breadth, thus guaranteeing the criminalisation of all forms of gender-based crimes. These include domestic violence, sexual violence including sexual assault and harassment, harmful practices such as marriage of minors, forced marriage, FGM and female infanticide, prenatal sex selection, virginity tests, HIV-related practices, so-called "honour" killings, acid attacks, crimes related to dowry, maltreatment of widows, forced pregnancy, and trials of women on the pretext of witchcraft, femicide, human trafficking, sexual slavery and marital rape. These laws should also include appropriate and effective penalties and deprive perpetrators of the opportunity to benefit from gender-biased exemptions or excuses.

5. CRIMINAL LEGISLATION SHOULD INCLUDE PRECISE AND CLEAR DEFINITIONS THAT AVOID INADEQUACIES OR AMBIGUITIES WHICH DEPRIVE WOMEN OF CERTAIN PROTECTIONS OR ENABLE PERPETRATORS TO ESCAPE. RAPE AS A CASE STUDY

- Criminal laws should clearly define crimes, so as to avert ambiguities that might deprive women of protection or enable perpetrators to escape criminal responsibility, as happens with crimes such as rape.

6. SWEEPING CRIMINALISATION OF ACTS OR PRACTICES THAT EMBODY WOMEN'S AUTONOMY SHOULD BE AVOIDED. ABORTION AS A CASE STUDY

- Caution must also apply to avoid the instrumentalization of criminal law to target women, instead of guaranteeing their rights, as can happen with prostitution and abortion.

7. MECHANISMS FOR THE PROTECTION AND CARE FOR WOMEN VICTIMS OF CRIMES SHOULD BE ARTICULATED

- Gender-sensitive criminal laws must include mechanisms to protect and provide care for women victims of gender-based crimes, both at the procedural level through protection orders, and at the material level through services designed for victims.

8. APPROPRIATE SANCTIONS FOR CRIMES COMMITTED AGAINST WOMEN SHOULD BE PROVIDED WITHOUT EXEMPTIONS OR PARDONS FOR PERPETRATORS

- Criminal law sanctions must be commensurate with the gravity of gender-based crimes, taking account of any aggravating circumstances, such as the victim's age, her relationship with the perpetrator, the use or the threat of violence, the number of perpetrators, the gravity of the physical and/or psychological damage to the victim or the habitual character of the violence.
- Criminal law should repeal any mitigating factors, such as marrying the victim or obtaining her pardon, as a basis for perpetrators' acquittal or reduced sentencing.

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CHAPTER 6

LAWS ON ELIMINATION OF VIOLENCE AGAINST WOMEN

Violence against women represents the most extreme expression of the structural inequality between women and men, the repercussions of which can be felt in a variety of areas, including health, education, work, and the economy, among others. As a 2017¹⁶⁶ UN report shows, violence against women is widespread across countries worldwide. It shows that, albeit in varying proportions, each and every country in the world suffers from this scourge, which spares neither the West nor the East, the North nor the South, the so-called 'developed' nor 'developing' countries.

The numbers are overwhelming. According to this UN report, 35% of the world's women have been victims of physical and/or sexual violence by their partner or other male. More than 133 million girls have undergone FGM. More than half of the world's victims of human trafficking are women. Moreover, almost 82% of women parliamentarians who participated in a questionnaire conducted by the Inter-Parliamentary Union in 39 countries from 5 regions of the world stated that they had been harassed in the form of insults, contempt, harassment or threats during their term of office.¹⁶⁷ Research conducted at 27 universities in the US in 2015 showed that 23% of first-year students had been sexually abused or ill-treated¹⁶⁸, and according to a report by the European Union (2014) one woman in ten has suffered cyber harassment.¹⁶⁹ In the Middle East and North Africa, the proportion of women who have been subjected to sexual harassment in the public space has been estimated to be between 40 and 60%.

These are some examples of the scale of violence women face. The question that now arises is, how can this widespread and many-faceted phenomenon be faced as a social scourge, and how can it be eradicated?

1. Incorporating main international instruments and covenants in national legislation

Charlotte Bunch wrote in the early 1990s that "a significant number of the world's population is almost daily subjected to torture, starvation, terrorism, humiliation, amputation and even

[166] This report can be found at <https://www.unwomen.org/fr/what-we-do/ending-violence-against-women/facts-and-figures>.

[167] This report can be found at <https://www.ipu.org/resources/publications/issue-briefs/2016-10/sexism-harassment-and-violence-against-women-parliamentarians>.

[168] D. Cantor, B. Fisher, S. Chibnall, R. Townsend, H. Lee, C. Bruce and G. Thomas (2015). *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct*, pp. 13 et 35.

[169] European Union Agency for Fundamental Rights (2014). *Violence Against Women: an EU-wide survey*, p. 104

murder, just because they are women. Despite the significant toll of deaths and victims of violence against women, women's rights are not classified as being among human rights.”¹⁷⁰

Despite the long-lastingness and magnitude of the phenomenon and the fact that Article 2 of the UDHR, of 10 December 1948, prohibited gender discrimination, calling for an end to violence against women did not enter the international agenda until the 1990s. In 1979 the CEDAW did not regard violence as a form of discrimination. The situation remained unchanged until the UN Committee on the Elimination of Discrimination against Women issued Recommendation No. 19 of 1992, to recognise that “gender-based violence is a form of discrimination against women and seriously prevents women from enjoying their rights and freedoms as men do.”¹⁷¹ This recommendation added that discrimination within the meaning of the CEDAW Treaty is not limited to acts committed by or on behalf of Governments; that the Member States are obliged under the Treaty to take measures to eliminate all forms of discrimination against women, whether perpetrated by a person, organisation or institution of whatever nature; and that Member States are responsible under international law for failing to respond to human rights violations and prosecuting the perpetrators.¹⁷²

In the wake of this recommendation, the International Conference on Human Rights held in Vienna on 12 July 1993 resulted in a Declaration where for the first time, in its Paragraph 18, violence against women is recognised as a phenomenon that existed both in the public and private spheres, and

VIENNA DECLARATION AND PROGRAMME OF ACTION (1993)

Paragraph 18:

“The human rights of women and of the girl child are an inalienable, integral and indivisible part of universal human rights. The full and equal participation of women in political, civil, economic, social and cultural life, at the national, regional and international levels, and the eradication of all forms of discrimination on grounds of sex are priority objectives of the international community.

Gender-based violence and all forms of sexual harassment and exploitation, including those resulting from cultural prejudice and international trafficking, are incompatible with the dignity and worth of the human person, and must be eliminated. This can be achieved by legal measures and through national action and international cooperation in such fields as economic and social development, education, safe maternity and health care, and social support.

The human rights of women should form an integral part of the United Nations human rights activities, including the promotion of all human rights instruments relating to women.

The World Conference on Human Rights urges Governments, institutions, intergovernmental and non-governmental organisations to intensify their efforts for the protection and promotion of human rights of women and the girl-child.”

[170] Charlotte Bunch, «Women's Rights as Human Rights: Toward a re-vision of Human Rights», *Human Rights Quarterly*, vol. 12, n° 4, 1990, p. 486.

[171] Available on the following link [https://tbinternet.ohchr.org/Treaties/CEDAW/Shared Documents / 1_Global / INT_CEDAW_GEC_3731_E.pdf](https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/INT_CEDAW_GEC_3731_E.pdf).

[172] Paragraph 9 of Recommendation No. 19 of 1992 of the UN Committee on the Elimination of Discrimination against Women is available on the previous link.

called for measures to combat it.¹⁷³

Following this Declaration, the UN General Assembly adopted a Declaration on the Elimination of Violence against Women in Resolution No. 104/48, of 20 December 1993.¹⁷⁴ One of the most important challenges the drafting of this Declaration had to face was the inclusion of violence against women on the human rights agenda. The dominant perception of human rights violations at that time was that they could only be committed by public power against individuals, not by individuals against one another. This perception led to the idea that, in as far as it takes place within the family, the quintessentially private space, violence against women is a private issue, a cultural one, not a political issue or a public matter.¹⁷⁵ Violence against women, however, had started to be regarded as a violation of human rights, as was the failure or refusal on the part of a State to protect women from it, regardless of the context where it occurs.¹⁷⁶ This means that States cannot be exempt from their duty to protect women from violence and hold its perpetrators accountable, based on the fact that violence has its source, not in public agents, but in some private individuals.¹⁷⁷ Allowing for this exception would amount to allowing States to become complicit in violence against women.

This Declaration thus came to offer a definition of violence against women that bypasses the traditional duality of public/private space, a most important contribution. It recognises that: "Any act of gender-based violence which results in or is likely to result in harm or suffering to women, be it physical, sexual or psychological, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life." It also clearly states that violence against women is a special kind of violence because it targets women as such, just because they are women, and is thus an expression of the long-lasting domination of men over them.

Although as a Declaration it has no binding force, the symbolic value and the importance of this international document should not be underestimated. Following it, a UN agenda, and a plan for the elimination of violence against women started to be put into place and a number of covenants and resolutions were drawn up, both at the international and regional levels. At the international level, a series of resolutions were issued by the Beijing Conference and Platform for Action that stemmed from the Conference, as violence against women was recognised as one of the 12 critical points for action by governments, the international community and civil society. There also followed several UN resolutions on women and peace, notably resolution 1325 of the year 2000, which emphasises the role of women in conflict prevention and resolution as well as peace building and the need to protect women and girls in times of war and conflict.¹⁷⁸ Important

[173] UN Doc. A / CONF. 157/23, 12 July 1993, Part I, § 18 is available in Arabic on this link <https://www.ohchr.org/AR/ProfessionalInterest/Pages/Vienna.aspx>.

[174] Available in Arabic at <https://www.ohchr.org/AR/ProfessionalInterest/Pages/ViolenceAgainstWomen.aspx>

[175] See Charlotte Bunch. "Women's Rights as Human Rights: Toward a re-vision of Human Rights", *Human Rights Quarterly*, vol. 12, n° 4, 1990, pp. 486-498.

[176] See Beaseley, "Domestic violence as a human rights issue", *Human Rights Quarterly*, vol 15, n° 1, 1993, pp. 36-62.

[177] See Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law in to Local Justice*, University of Chicago Press, 2006, p. 22.

[178] Available on the following link [https://undocs.org/ar/S/RES/1325\(2000\)](https://undocs.org/ar/S/RES/1325(2000)).

is also the Additional Protocol to the UN Convention against Transnational Organized Crime, to Prevent and Suppress Trafficking in Persons, Especially Women and Children, dated 15 November 2000, Article 9 of which calls on Member States to take or support legislative or other measures to address all forms of exploitation of persons, especially women and children.¹⁷⁹ Nor can we lose sight of the provisions of the Rome Treaty (17 July 1998), which updated the Statute of the International Criminal Court. According to its Article 7, “for the purpose of this Statute ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”. These acts include “Rape, sexual slavery, forced prostitution, forced pregnancy, forced sterilisation, or any other form of sexual violence of comparable gravity.”¹⁸⁰

At the regional level, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women of 1994, known as the Convention of Belem Do Para,¹⁸¹ opened with a recognition that violence against women is a violation of human rights and fundamental freedoms as well as a violation of human dignity, the embodiment of an age-old relationship based on male domination over women. Among other things, it called on Member States to pass laws to prevent and punish violence against women, including harassment and threats. It also called for a revision of laws and customs that tolerate it. More recently, the Protocol on Women's Rights, known as Maputo Protocol, was annexed to the African Charter on Human and Peoples' Rights (11 July 2003) and the Council of Europe adopted the Convention on the Prevention of Violence against Women and Domestic Violence, known as the Istanbul Convention (4 April 2011), both of which also called on Member States to adopt all the necessary laws and measures to ensure the prevention, suppression and elimination of violence against women.¹⁸²

However, despite all these international and regional documents, and despite the legal, social and moral pressure on States to commit to them, the biggest challenge remains for States to transform their principles, provisions and mechanisms into domestic laws, their implementation by Governments through practical, integrated and effective measures and the creation of a context of institutional enforcement and social support through awareness-raising and education policies. To this end, as most of the above-mentioned texts and conventions emphasise, States need to develop a comprehensive legal framework on the elimination of all forms of violence against women, aimed at preventing and eradicating this phenomenon as well as protecting women who have suffered it.

[179] https://www.ohchr.org/Documents/ProfessionalInterest/ProtocolTraffickingInPersons_fr.pdf.

[180] The text of the convention can be found on the following link <https://www.icrc.org/ar/doc/resources/documents/misc/6e7ec5.htm>.

[181] Inter-American Convention on the Prevention, Punishment and Eradication of Violence Women against Women, *Convention of Belem Do Para Brasil*, 9th June 1994 <http://www.cidh.org/Basicos/English/basic13.Conv%20of%20Belem%20Do%20Para.htm>.

[182] Maputo Protocol of 11 July 2003, available on the following link https://www.un.org/fr/africa/osaa/pdf/au/protocol_rights_women_africa_2003f.pdf.

2. Why do we need a Comprehensive Law on Elimination of Violence against Women?

Violence against women is a widespread phenomenon in both the private sphere, i.e. the family space, and the public sphere, including public roads, transportation, educational institutions of all kinds, workplaces, etc. It affects women of all categories, in their personal and social status. Due to its pervasiveness and complexity, a gender-sensitive approach to combating this phenomenon should include the enactment of a comprehensive law that takes account of its different interlocking aspects and addresses the various actors involved (police forces, health centres, social services, courts).

When speaking of a comprehensive legal approach to violence against women, reference is being made to at least three issues:

- **Laws should not stop at criminalising violence against women**

Comprehensive criminalisation could be achieved through a review of existing criminal codes, either by introducing new crimes or by increasing penalties for existing crimes if committed against women or girls. In societies where violence against women is culturally entrenched, however, this purely criminal approach can be curbed by the complacency of public authorities dealing with complaints from victims of violence and, in the absence of protection mechanisms for such victims, it can even lead to retaliation from aggressors. It can also be seen, in the absence of awareness policies and education on human rights, as a repressive policy against males. Therefore, the fight on violence against women will not be effective unless it goes far beyond the criminal approach. It requires preventive measures, such as awareness and education on the principles of human rights, starting with the equality of women and men before the law, in rights and in human dignity. Human dignity also requires protective measures for victims of violence and mechanisms that help them deal with their various consequences. Finally, adequate training must be provided for all participants in the fight against violence against women.

- **Violence against women cannot be reduced to physical violence**

Violence against women can take a variety of forms and shapes. Most severe is perhaps psychological violence. Psychological violence is not only difficult to detect and to combat in its effects, which are often difficult if not impossible to erase, but is often harder to prove at court than physical violence, or than violence of an economic nature. Laws enacted to combat violence against women must thus be comprehensive in the sense that they must encompass all its forms. Because of the ubiquitous character of violence against women, moreover, they must also cover all places where it could occur, including private and public spaces, as well as cyberspace.

- **Laws to combat violence against women must be comprehensive and inclusive**

This means, above all, that they must not exclude any category of women or discriminate against them on any grounds, whether religion, race, language, class, origin, migration, family, health status, age, disability, or others. It also means that they must be holistic, taking into account

the multiplicity of systems of oppression and violence that are imposed on women, leading to multiple discrimination. Special attention must be paid to the specific impact these systems have on some women, on the fact that some systems of oppression intertwine to affect some specific group of women (intersectional discrimination). Thus, some women suffer specific gender-based violence because they belong to a given social class, race, ethnicity, or religion, and/or because of their status as a migrant or refugee. At the same time, intersectional discrimination recognises the intellectual, social and political systems that exert violence, including contempt, stigmatisation, marginalisation and violence in other symbolic forms.¹⁸³ This is important as symbolic violence produces systems of hegemony, discrimination or preferential relationships between women themselves, thus dispelling solidarity and a sense of shared participation in the same cause: the right to equality, security and human dignity.

3. Key Elements of a Comprehensive Law on Elimination of Violence against Women

A. Definition of violence against women

Providing a clear definition of violence against women and its different types is an important first step. Doing so will create consensus around the meaning of violence against women and a dynamic that will facilitate the emergence of a global united front for a coherent strategy to combat it. This definition must include an explicit statement that violence against women is a form of discrimination that targets women solely because of their gender. It is also a violation of human rights and human dignity, hence an offence within the meaning of international human rights instruments and treaties that must therefore be criminalised in domestic law. It is important that domestic laws in this area refer to these instruments and treaties, especially as the international human rights

Spanish Organic Act 1/2004 on Integrated Protection Measures against Gender Violence. Statement of Reasons:

“Gender violence is not a problem confined to the private sphere. On the contrary, it stands as the most brutal symbol of the inequality persisting in our society. It is violence directed against women for the mere fact of being women; considered, by their aggressors, as lacking the most basic rights of freedom, respect and power of decision.”

Costa Rican Act of 30 May 2007 on the Criminalisation of Violence against Women. Article 1:

“This Act is designed to protect the rights of victims of violence and to punish forms of physical, psychological, sexual and patrimonial violence against adult women, as discriminatory practices based on gender, and specifically in a relationship of marriage, de facto union declared or not, in compliance with the obligations undertaken by the State under the Convention on the Elimination of All Forms of Discrimination against Women, Law No. 6968 of October 2, 1984, as well as the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, Act No. 7499, May 2, 1995.”

[183] See in this regard Sirma Bilge, “Feminist theories of intersectionality”, *Diogenes*, 2009, n° 225, pp. 70-88 - available on the following link <https://www.cairn.info/revue-diogene-2009-1-page-70.htm>.

system refers to the legislative policy to be adopted by States. Thus, in the context of cases it investigated, the Commission on the Elimination of Violence against Women has stressed the need for the States concerned to adopt and implement laws to that effect. In the case of *AT vs. Hungary*, for example, the Committee stated that the absence of a law against domestic violence and sexual harassment constituted a violation of human rights and fundamental freedoms, specifically a violation of the right to security of the person.¹⁸⁴ On the occasion of its investigation under point 8 of the Optional Protocol on the abduction, raping and killing of women in the Mexican region of Chihuahua, the CEDAW Committee recommended that Mexico should sensitise all its provinces and municipalities to the fact that violence against women must be regarded as a violation of human rights and that it should review all its legislation in that direction.¹⁸⁵ Examples of good practice in this regard are the Statement of Reasons of the Spanish Organic Act 1/2004, on Integrated Protection Measures against Gender Violence,¹⁸⁶ and Article 1 of the Costa Rican Act of 30 May 2007 on the Criminalisation of Violence Against Women.¹⁸⁷

B. Comprehensive description of the different types of violence against women

The definition of violence against women must cover all its various types and forms. To be sure, the variety of means and methods that can be used to commit violence against women and girls makes it difficult to enumerate them all.¹⁸⁸ Yet a law that aspires to be comprehensive must take notice of the well-known forms it can take, while leaving room for other ones that might arise. It must thus refer to violence against women as possibly taking some form of physical, social, psychological, sexual (including sexual abuse and harassment), economic or political violence, among others. Special attention must be paid to specific forms of violence that are particularly damaging, like femicide, including “honour” killings and selective abortion of female fetuses, prostitution, trafficking in women and girls for slavery and sexual exploitation, acid throwing attacks, crimes involving early and/or forced marriage (see Chapter 4), virginity testing, HIV/AIDS clearance, abuse of widows, women’s trials for sorcery/witchcraft, or FGM.

C. Comprehensive description of the different contexts where violence against women might occur

A comprehensive law on violence against women must also criminalise such violence regardless of the context in which it occurs and of the nature of the relationship between the aggressor and the victim: whether it is an intimate or familial relationship, by blood or marriage, a professional relationship, or one that gives the aggressor some kind of authority over the victim, hence the

[184] *A.T. v. Hungary*, communication n° 2/2003, visions adopted on January 26, 2005. See http://www2.ohchr.org/english/law/docs/Case2_2003.pdf.

[185] Report on Mexico produced by the Committee for the Elimination of Discrimination against Women, regarding article 8 of the Optional Protocol to the Convention and response of the Mexican Government. CEDAW / C / 2005 / OP.8 / MEXICO, par. 286. See <http://www.un.org/womenwatch/daw/cedaw/cedaw32/CEDAW-C-2005-OP.8MEXICO-E.pdf>.

[186] The French text of this law can be found on the following link https://www.coe.int/t/dg2/equality/domesticviolencecampaign/countryinformationpages/spain/LeyViolenciadeGenerofrances_fr.pdf

[187] The text of this law in Spanish can be found at the following link http://www.ciem.ucr.ac.cr/IMG/pdf/ley_8589_penalizacion_de_la_vcm-2.pdf.

[188] We can mention, for example, some countries that criminalise specific types of attacks on women, such as fire or acid attack in countries such as India, Bangladesh, Pakistan, and Cambodia.

power to influence her, as could be her relationship with her doctor, teacher, educator, or a person with some social, scientific, literary, artistic, political or other kind of reputation, even State agents and armed forces of all kinds. Such circumstances should, if anything, act as aggravating factors leading to harder punishment for the aggressor. Moreover, to break the wall of silence about violence against women, the law must cover violence against those who stand as witnesses in cases of violence against women. Finally, special protection must be granted to women under circumstances that could increase their vulnerability as victims, such as age (young or old), disability or illness, asylum or immigration, whether legal or illegal, detention or imprisonment, state of war.

D. Forms of violence against women requiring particular attention

It will not suffice for a comprehensive law on the elimination of violence against women to mention its different types and the various circumstances where it may occur. These aspects will have to be spelt out. This section will focus only on some aspects that require special clarification, because of their gravity and/or because they tend to be absent of national legislation on the matter and should be included therein.

- **Economic violence**

Whilst most laws on violence against women deal with its physical, sexual, and moral forms, many of them overlook economic violence and violence based on women's financial means and properties. These are, however, central issues. Access to financial resources and the freedom to dispose of them are essential for women's economic independence. In turn, vulnerability and subordination, especially to men, often come from economic dependence, often both a cause and a result of violence. Acts of economic or financial violence can take place in private, in the form of forcing women to work or preventing them from doing it, robbing the whole or part of a their salary or income, scrapping, retaining or destroying documents or bonds linked to or proving women's ownership of funds or property. Economic and financial violence can also take the form of direct or indirect discrimination against women in pay or compensation for work, in the access to financial loans or in access to inheritance.

Some laws on the matter do refer to economic violence. It is for example the case of the Mexican Law on the Right of Women to a Life Safe from Violence dated February 2007. Its Article 3 states that the Act aims at preventing all forms of violence against women throughout their lives, and to suppress and eliminate such acts and provide attention to victims thereof. Article 5 then defines violence against women as any act or omission based on sex that causes psychological, physical, material, economic or sexual harm or suffering or death whether in the private space or in the public space. The law thus mentions economic violence, which it defines as any act or omission aimed at controlling the income of a woman or at giving her a lower salary than that of a man for the same effort and the same work. It also refers to violence against the financial resources or interests of the victim, defined as any act or omission aimed at destroying, retaining or robbing documents, bonds, funds or property that represent personal or collective means of livelihood

for the victim.¹⁸⁹

In a similar vein, the Tunisian law on the elimination of violence against women, of 11 August 2017, mentions economic violence and defines it, in its article 3, as any act or omission that aims at the exploitation of women or their deprivation of economic resources, regardless of their source, such as deprivation of money, remuneration or income, control of wages or incomes, and attendance or coercion of work.

Note that neither the Mexican nor the Tunisian law explicitly mentions violence resulting from depriving women of their inheritance, or part of it, or from discriminating against women in their entitlement to access inheritance. This is so despite the Mexican law's broad approach to economic violence, which includes violence linked to the victim's financial interests. Yet inheritance is a most important way to access and transfer wealth. A comprehensive law on the elimination of violence against women should thus ensure that women's equal right to access inheritance is guaranteed and protected.

- **Sexual aggression and abuse**

Sexual violence requires special attention, because not only is it an archetypical manifestation of the patriarchal imbalance of power that prevails in society, it also causes severe physical and psychological damage. Studies have shown that between 50% and 90% of rape victims suffer damage to their reproductive organs,¹⁹⁰ as well as psychological disorders such as depression, anxiety, or suicidal behaviour.¹⁹¹ Particular attention must be paid to rape, the most widespread form of sexual assault, yet often unreported, which prevents it from being addressed and its perpetrators punished. When addressing it, some considerations should be considered.

First, rape ought to be regarded as an assault on the freedom and physical integrity of the victim, not as a crime against the family or public morality. Second, rape should also be defined in the broadest possible terms, to cover all forms of sexual penetration. Third, the existence of rape should revolve around lack of consent to the sexual act. As these questions were considered in Chapter 5, further attention will only be paid here to the question of consent.

Feminists have been pressuring governments for years to have explicit consent to sexual acts required in the law, to guarantee free will in sexual relations. To this end, consent cannot be presumed from the absence of physical resistance on the side of victims of sexual aggressions. Countries such as Iceland (March 2018) and Sweden (May 2018) have succeeded in promoting such change in legislation. This is particularly important as the absence of consent is not necessarily accompanied by violence or threats. This has been confirmed by the European Court of Human Rights, which in a 1998 decision stated that "A narrow approach to the tracking of

[189] This can be found in the Spanish text of the law on this link https://www.gob.mx/cms/uploads/attachment/file/209278/Ley_General_de_Acceso_de_las_Mujeres_a_una_Vida_Libre_de_Violencia.pdf.

[190] See in this regard, Marilyn Sawyer Sommer, "Defining Patterns of Genital Injuries from Sexual Assaults: A review", in *Trauma Violence and Abuse*, 2007, n° 3, pp. 270-280.

[191] See in this regard, Kristin Carbone Lopez, Candace Kruttschmitt and Rose Macmillan, "Patterns of intimate partners Violence and their Association with Physical Health, Psychological Distress and substance use", *Public Health Report*, 2006, n° 4, pp. 382-392/.

sexual crimes, such as the requirement of proof in all cases of the presence of physical resistance by the victim, could lead to impunity for a number of rapists and thus threaten the effective protection of the free will of the individual in his or her sexual life.”¹⁹²

The problem, however, is that there is no definition of women’s consent or expression of their free will to engage in sexual acts in international human rights treaties and covenants. The Istanbul Convention left it up to Member States to choose the appropriate phrases in their laws to define consent regarding a sexual relationship.¹⁹³ A study by Amnesty International issued in 2018 and including 31 European countries showed that only 8 of these countries consider the absence of consent a key element in the definition of rape; these are: Britain, Scotland, Northern Ireland, Belgium, Cyprus, Germany, Iceland, Luxembourg and Sweden.¹⁹⁴

Clearly requiring that the existence of free will to engage in a sexual relationship be established in order to rule out rape is central in at least two cases. The first case relates to the age of the victim and her capacity to knowingly express consent, particularly if she is under the influence of intoxicating substances (whether she had taken them willingly or had been lured into doing so). Therefore, it is recommended that a comprehensive law on elimination of violence against women recognises that:

- **lack of explicit consent constitutes a presumption of rape if the victim is under a certain age** (which may vary in different States, with France setting it at 15 and Tunisia at 16).
- **consent is not linked to proof of physical resistance**, based on the theory of “no means no”, thus acknowledging that the absence of traces of resistance on the victim’s part does not necessarily mean that she consented to the sexual relation.

The second case refers to the marital relationship between the victim and the offender. Consent to engage in sex cannot be presumed upon marriage. Hence the need to speak of marital rape. Yet the concept of marital rape is relatively recent in legal texts. As explained in Chapter 5, national legislations are still reluctant to address it. On the other hand, feminist advocacy has led to the incorporation of the concept of marital rape in many countries, such as Denmark, Switzerland, France, Tunisia, Namibia, Brazil, Burundi, Côte d’Ivoire or Cuba, among others.¹⁹⁵

- **Femicide**

Femicide is the ultimate form of violence against women. To define it, it is not enough to refer to the intentional killing of a woman or a girl. Femicide is more than that. It is the killing of a woman or a girl because she is a female.¹⁹⁶ What defines it, is the motive, i.e. that women are targeted because they are women.

[192] See the decision of the European Court of Human Rights in *M.C. v Bulgaria*, No. 39279/98, ECHR 2203XII, paras 169-187.

[193] Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence Istanbul, 2011, para 193.

[194] This report can be found at <https://www.amnesty.org/download/Documents/EUR0194522018ENGLISH.PDF>.

[195] The table of countries on whether or not they consecrate marital rape can be found on the following link https://en.wikipedia.org/wiki/Marital_rape#cite_ref-World_Bank_2018_229-13.

[196] We can find the first definition of Femicide by Radford Jill and Diana F. H. Russel, “Introduction: Femicide. The Politics of Women Killing”, New-York Twayne Publishers, pp. 3-12, 1992.

Femicide can take different forms. It can consist of systematic killings of women, especially on the street, sometimes in terrible ways, including mutilation. According to some studies in Latin America, over the last 10 years more than 400 women have been killed in a horrendous manner in Mexico, near the border with the US, while 700 were killed in Guatemala in 2008 after being tortured and mistreated.¹⁹⁷ These figures show, if anything, that there is a common belief that women's lives have not the same value as men's. They also show the absence or weakness of mechanisms to prevent violence against women in its less severe forms, which allows it to grow and become lethal. The most important recommendation in this regard is that a comprehensive law on elimination of violence against women should single out femicide as a self-standing crime, as a crime based on discrimination against women and contempt for women's lives, which makes it different from "ordinary" murder. This crime has its own name, "femicide", a name that should be adopted by such a law.

Of the different forms that femicide can take, the focus here will be on three of them. They appear to be most in need to be addressed within a comprehensive law on elimination of violence against women because they lie hidden from view or they lack social condemnation or rejection.¹⁹⁸

→ Killing by a man of his wife, partner, companion, or ex-wife

Despite the scarcity of data and figures in this area, the study of the World Health Organization (WHO) with the London School of Hygiene and Tropical Medicine¹⁹⁹ has shown that more than 35% of the femicides in the world are committed by the women's partners, or ex-partners (regardless of the legal nature of the relationship between them, i.e. whether they are married or not), compared to 5% of homicides committed by women against their husbands or partners. This crime is addressed in Chapter 5.

→ Crimes of "honour"

"Honour" crimes can be defined as "rituals" involving the killing of a woman or girl by a member of her family, tribe or clan, on the charge of having violated their "honour" with words or actions, suspicion of words or actions or even rumours spread about her.²⁰⁰ "Honour" killings are based on the belief that women are inferior to men and are not covered by the principles of human rights and human dignity. They are also based, and this is their specific feature, on the belief that women are a source of threat to the reputation and prestige of the family, tribe, or clan. This explains that these crimes are committed exclusively in private circles, i.e. in family contexts, which include not only the husband or fiancé, but also by the father, brother, uncle on the

[197] See in this regard, the WHO report for 2012 on the following link https://apps.who.int/iris/bitstream/handle/10665/86253/WHO_RHR_12.38_fre.pdf;jsessionid=ED873248099FA6625401F712283B8AAF?sequence=1.

[198] For this purpose, a 2006 article by Bob Herbert published in The New York Times can be found on the following link <https://www.nytimes.com/2006/10/16/opinion/16herbert.html>.

[199] This study can be found on the following link <https://www.thelancet.com/action/showPdf?pii=S0140-6736%2813%2961030-2>.

[200] See in this regard Aurore Schwab, "Crimes of honor on the margin of gender hierarchy", *Marginalized women*, vol. 50, n° 2, 2017, p. 124, available on the following link <https://www.erudit.org/fr/revues/crimino/2017-v50-n2-crimino03239/1041701ar.pdf>.

mother's or the father's side, cousin from the mother's or the father's side, etc. Home and family thus sometimes become the most dangerous places for women and girls.

"Honour" crimes rest on two notions: family and "honour". They take place within the family, an archetypically patriarchal social structure characterised by the control male members exert over female members in both their public and private lives. The father, the brother, and the husband are the ones who decide on the wife, the sister, the daughter and even on the mother, establishing what behaviour is acceptable and what is not. This includes everyday details, such as dress code and language, and life-shaping decisions in matters related to school and university education, employment and especially marriage. In "honour" crimes, the definition of "honour" is linked to this notion of family, as is the nature of the conduct that may be considered to be a violation of it and the reactions it triggers. These are often based on impressionistic or moody perceptions, which explains that murder sometimes occurs as a reaction, not to the victim's behaviour, but to mere gossip or rumours.²⁰¹ "Honour" crimes are thus based on an intolerant notion of "honour" and reputation related to the family or clan, where bigotry obscures the idea of the individual and the right to self-determination, especially for women and girls.

The inclusion of "honour" crimes in a comprehensive law on elimination of violence against women can meet social resistance, rooted in patriarchal constructions of both the family and the notion of "honour". In some countries, especially in the Middle East and Latin America, it can also meet with legal hurdles, as "honour" crimes find some legal support in concepts such as the excuse of provocation, crime of passion or some other excuse of permissibility. Based on these concepts, perpetrators of "honour" crimes can have their punishment reduced or even be completely exempted from criminal responsibility. Moreover, those concepts are undetermined, subject to flexible interpretations likely, in a patriarchal context, to be more favourable to men than to women. Article 340 of the Jordanian Penal Code, for example, allows for a reduction of penalty when a man kills or attacks his wife or a female relative upon allegations of "adultery", or if he discovers them himself. Article 409 of the Iraqi Penal Code imposes up to three years imprisonment on anyone who, upon surprising his wife or a female relative committing an act of "adultery", kills or assaults both her and her partner, or either of them, even if this leads to death or sustained disability.

A comprehensive law on elimination of violence against women should abolish any such concept, related to custom, tradition, or religious consideration, that might legitimise the killing of women and girls. This step was taken by the State of Guatemala, in Article 9 of its 2008 law on combating the killing of women and all forms of violence against women,²⁰² aware that it is the State with the world's highest incidence of femicide and violence against women more generally.²⁰³

[201] Refer to Fadia Faqir, «Intrafamily femicide in defence of honour: the Case of Jordan», *Third World Quarterly*, vol 22; n° 1, 2001, p. 70. It can be found on this link https://www.jstor.org/stable/pdf/3993346.pdf?casa_token=SvbFEhSudDcAAAAA:yBISKwoGA-il6yrlVc15Ji-5S_RrhgXWxZdWQbld4NBG3ldVgxVc7loEbWzw_gXCNZODDHAgI-pf2PAOs-HOQB5FTxm45611BjPQ5sllWxPVHdpRR52sQ.

[202] This law can be found in Spanish on the following link https://www.oas.org/dil/esp/ley_contra_el_femicidio_y_otras_formas_de_violencia_contra_la_mujer_guatemala.pdf.

[203] See the 2012-2013 report of Institut Destree prepared by Rebecca Pascual Prats on the following link http://www.millennia2015.org/files/files/Publications/Institut_Destree_Education_Permanente_Perception_situation_femme_Guatemala_Rebeca_Pascual_Prats_2011_11_25.pdf.

→ Selective abortion

Selective abortion consists of the selective elimination of female fetuses. Its peculiarity and seriousness lie in three elements: First, it is the systematic killing of females; second, it is muted and silent killing, as it is done through abortion, which often obscures the action, the reasons behind it and its victims from society's concerns; third, and in connection to this, it is killing that hides behind women's long-fought-for reproductive rights, namely the right to abortion, which are still widely threatened and denied.

Since the 1970s women find themselves caught up between demands for freedom to decide on the termination of their pregnancies and demands not to be deprived of the right to exist. A clear distinction must thus be drawn between women's right to control their reproductive process, hence their right to abortion, and policies that lead to elimination of female fetuses, between women's reproductive rights and violence against women through discriminatory abortion practices.

In countries with birth control policies, the legislation on abortion attached to it has connived with the higher social value attached to men's lives compared to women's to produce the selective killing of female fetuses. This is the case in India and China. The evolution of modern medical techniques and early diagnosis of fetal sex plays a key role in facilitating such practices. Modern medical technologies also allow for female embryos to be discarded in assisted reproduction, where more than one embryo, male and female, can be "produced". All of this has led to disturbing results regarding the ratio of male and female births. If the normal ratio ranges from 102 to 106 males per 100 females, in some countries these percentages are today alerting: 112 males per 100 females in Albania and Armenia, 116 males per 100 females in Azerbaijan, or 117 males per 100 females in China.²⁰⁴

Although some international texts and conventions criminalise such practices, domestic legislation is still mostly silent in this regard. Yet Fetal Femicide is highly discriminatory against women. It is physical and psychological violence against pregnant women, who may be compelled to eliminate their female fetus, and it is symbolic violence against women as a whole. However, the ways to combat such practices remain controversial and problematic.

Some international resolutions and covenants offer assistance in this regard and can be relied on by States when drafting legislation to counter and criminalise such practices. The Council of Europe 1997 Treaty on Human Rights and Biomedicine²⁰⁵ prohibits any medical assistance that would allow the choice of sex of the fetus.²⁰⁶ The 1995 Beijing Conference went in the same direction. Accordingly, a UN General Assembly Resolution on the girl child was adopted on 11 February 1998, paragraph 3 of which urges States to adopt the necessary laws to protect the

[204] See in this regard the Report of the Commissioner for Human Rights and the European Council on the following link <https://www.coe.int/fr/web/commissioner/-/sex-selective-abortion-are-discriminatory-and-should-be-banned-1>.

[205] This treaty entered into power in December 1999.

[206] The text of this treaty can be found on the following link.

girl child from all forms of violence, including the killing of girls and the selection of fetuses according to their sex.²⁰⁷ This should be complemented with strict transparency controls on birth statistics and with protective and preventive measures, such as education and gender-sensitive medical professional training.

4. Mechanisms for the protection of women victims of violence

The most important element in ensuring the effectiveness of laws criminalising various types of violence against women is the adoption of measures to ensure the tracking, prosecution, and punishment of perpetrators. At the same time, mechanisms must be established to protect women and children from aggressors, to enable them to receive information and to provide material assistance against the situation of need and destitution in which they may find themselves.

A. Informing victims of their rights and protection measures

First and foremost, a comprehensive law on elimination of violence against women must ensure that women and girls are informed of their rights as victims. Beyond campaigns of awareness-raising and education deployed within civil society, laws should establish the duty of security agents who receive complaints of violence against women or girls to inform them of their legal right to protection, security, safety and physical and psychological inviolability. Being informed by police and security officers can reassure victims from an early stage: because these officers are at the front line in the chain of interventions to protect women from violence, because women are often unaware of their rights, and because law enforcement officials have the power to intervene quickly to put an end to situations and acts of violence or assault and arrest the perpetrators. In this line, Article 26 of the Tunisian law on the elimination of violence against women stipulates that: “The competent unit shall inform the victim of all her rights under this law, including claiming her right to protection to the family judge.”

It is important to emphasise that victims must be informed of their rights and the protection available for them in terms they understand. The law must thus stipulate the duty of the State to provide translators to assist foreign victims, specifically when it comes to refugee or migrant women, regardless of whether their status is legal or not.

B. Allocating special units to receive complaints from women victims of violence

A comprehensive law on elimination of violence against women must require security authorities to respond immediately to women’s requests of relief and complaints in cases of violence. This is particularly important at the police primary level, where women are known to be afraid and believe their complaint will not be taken seriously, especially if domestic violence is involved. Examples of this good practice can be found in Article 7 of the Ghana Law on Domestic Violence

[207] The text of the resolution can be found on the following link https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/52/106&referer=/english/&Lang=F.

of 2007²⁰⁸ and Article 25 of the Tunisian Law on the Elimination of Violence against Women of 2017²⁰⁹.

Laws must also prevent all types of security officers from trying to influence victims, by forcing them either to abandon their complaints or to change their statements. Tunisian law prohibits security officials to engage in such acts under threat of prison sentence.²¹⁰ It is important to adopt a strict attitude towards authorities in this regard, lest they and the State as a whole lose credibility in their efforts to combat violence against women.

In view of the specific nature of crimes of violence against women and the vulnerability of their victims in mostly patriarchal societies, it is recommended that laws demand the provision of special spaces in police and security headquarters in general, as well as special units, to receive such complaints. Specialisation would allow the relevant teams to adapt to the specifics of such crimes and the treatment they require, which would help to enforce the law more effectively and thus provide better chances of success in the fight against this kind of violence. Some States even require that at least one female security agent or police officer be included in these units, as is the case under Tunisian law.²¹¹ Doing so will help to reassure victims, making it easier for them to talk about the aggression they have suffered, particularly in the context of sexual assault.

Laws should also provide for special registers at security and police stations to keep record of complaints of acts of violence against women, regardless of their nature and seriousness. Once again, Tunisian law includes such a provision.²¹² Keeping such records is an important means to elaborate reliable, updated statistics about crimes of violence against women, in turn a useful tool not only to monitor the levels of violence against women in a given society, but also and in particular to assess the success of existing legal mechanisms in the fight against it.

C. Guaranteeing the right to medical and psychological support

Violence against women or girls indisputably causes them physical and especially psychological harm.²¹³ It is therefore essential to provide them with mechanisms to obtain relevant medical information. The law should order fluent communication between security authorities and doctors, hospital, or health institutions in this regard. On the one hand, it must require security authorities to transfer the victim to a health institution in order to receive first aid, especially if the

[208] This law can be found on the following link http://www.africanchildforum.org/cfr/Legislation%20Per%20Country/ghana/ghana_domviolence_%202007_en.pdf.

[209] Article 25 of the Tunisian Law on the Elimination of Violence against Women: "Upon receipt of a report or notification of flagrante delicto of a crime of violence against women, agents of the competent unit must immediately proceed to the scene for research after informing the Public Prosecutor's Office."

[210] Article 25, paragraph 2, of the Tunisian law on the elimination of violence against women of 11 August 2017: "The member of the unit responsible for investigating crimes of violence against women who deliberately exerts pressure on the victim or any kind of coercion to force her to surrender her rights or to change or reverse the content of her complaint shall be punished by imprisonment from one to six months."

[211] Chapter 24 of the Tunisian Law on Elimination of Violence against Women of 11 August 11 2017, deploys in every national security zone and national guard in all States a specialised unit competent to investigate crimes of violence against women in accordance with the provisions of this Act, which must include women.

[212] Article 24 of the Tunisian Act on the Elimination of Violence against Women of August 11, 2017: "The competent unit shall have a numbered register of these crimes."

[213] See in this regard, Marilyn Sawyer Sommer, "Defining Patterns of Genital Injuries from Sexual Assaults: A review", in *Trauma Violence and Abuse*, 2007, n° 3, pp. 270-280.

wounds are severe. On the other hand, the law must require those involved in the health sector, whether doctors or paramedical personnel, to notify security authorities or the Department of Public Prosecutions whenever they see physical damage or mental disorders that could result from acts of violence against women or girls.

D. Guaranteeing the right to shelter and distancing the victim from the perpetrator

One of the reasons why many women are reluctant to report violence, especially domestic violence, or violence at the workplace, is the fear that the aggressor will then retaliate. Thus, it is necessary for the law to provide protective measures. These can be of two types. The first type focuses on separating the aggressor from the victim if he has not yet been detained and judicial proceedings are still pending. This can be done by obliging him to keep a certain distance from the victim's place of residence, noting that, in cases they shared the same residence, the aggressor will have to leave it, whether he is the spouse, intimate partner, brother or other, as the victim and the children that accompany her may stay in it.

The second type focuses on the establishment of shelters for women victims of violence who have no accommodation. This is provided for in Tunisian law on eliminating violence against women of 2017, for example, article 39 of which stipulates that "all persons entrusted with the protection of women from violence, including the prosecutors, Child Protection Delegates, Health Officers and Women's Affairs agents... Intervention in cases of loss of housing as a result of violence to provide shelter in centres for the protection of women victims of violence". The UN Guide on Laws on Violence against Women recommends that States provide a shelter for every 10,000 residents in order to admit victims of violence, provide them with security and help them find decent housing, as well as provide competent and specialised counsellors to assist them.²¹⁴

E. Immediate judicial commitment and legal aid

The fight against violence against women does not stop at the police level. It also has a judicial component. Judicial proceedings are complex, and success is often subject to access to laws and procedures. For this reason, laws should contain a commitment on the part of the Public Prosecutor's office to initiate the immediate prosecution of crime of violence against women, as soon as it has been notified by security authorities. This must be done whether or not the victim herself presses charges or files for damages, as in Austrian law, where the Public Prosecutor's Office automatically undertakes to prosecute the aggressor, regardless of the severity of harm done (Austrian Code of Criminal Procedure, Article 1(2)).

The Public Prosecutor's Office should also be made responsible for keeping the victim informed of how the case proceeds, especially in the event of release of the offender on bail after his arrest, as this could expose her to the danger of further attacks or some kind of revenge. Such provisions are included in the Spanish Act for the Protection of Victims of Domestic Violence of 2003. Also, the Austrian Penal Code of 2006 obliges the Public Prosecutor's Office to inform the

[214] *UN Handbook on Legislation on Violence against Women*, 2010, p. 33 Available on the following link https://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2012/12/unw-legislation_ar%20pdf.pdf?la=en&vs=1502.

victim of the release of her assailant.

The most important assistance women victims of violence need is the necessary legal aid to guarantee them full and free access to justice. Even though some States, like Bulgaria,²¹⁵ do not require victims to file claims through a lawyer in order to obtain a judicial protection order, a lawyer's assistance will bring better chances of winning a case. Therefore, legal aid throughout all judicial stages becomes an essential protective measure for victims of violence against women. It is thus recommended that laws establish the State's duty to provide such assistance free of charge and to cover all costs, both direct (e.g. attorneys' fees) or indirect (such as fees, medical tests and interpreter fees for foreign victims, especially refugee women, for example), derived from legal services, as is done in the Philippines, Guatemala, Spain and Tunisia.²¹⁶

F. Financial provisions

Financial provisions are a central component of every State's policy to eliminate violence against women because, as all the protective measures and mechanisms recommended above indicate, such a policy is extremely costly. It is not sufficient to put in place a comprehensive law on elimination of violence against women without special budgets to cover all the expenses that reaching this goal entails, from ensuring support to the security services to providing adequate shelters and psychosocial support for victims who need it.

Mara Glennie, founder of Ebrat (Tears), and South African activist, says: "At the moment we have no money, so there is little change in this area (especially with regard to police training and awareness). We are limited to meetings and round tables only. If we want to change the situation, we have to find money for it."²¹⁷ It is therefore recommendable that States adopt gender-sensitive budgets that cover the costs of a comprehensive fight against violence against women, based on the principle of equality between women and men. Article 18 of Tunisia's Basic Budget Act of 13 February 2019 states: "The Finance Law distributes allocations for State budget expenditures according to missions and programs...The Head of the Program prepares the budget on the basis of targets and indicators that guarantee equality and equal opportunities for women and men and, in general, for all the factions of the society without discrimination, and the evaluation happens accordingly."²¹⁸

[215] Bulgarian Law of March 16, 2005, on Protection against Spousal Violence.

[216] In this regard we can refer to pages 41 and 42 of the *UN Handbook on Legislation on Violence against Women* mentioned above.

[217] <https://fr.allafrica.com/stories/201909030233.html>

[218] This law can be found on the following link http://www.legislation.tn/detailtexte/Loi-num-2019-15-du----jort-2019-015__2019015000151.

5. State strategies and mechanisms to prevent violence and accompany the process of law enforcement

All the above elements are essential components of a comprehensive law on elimination of violence against women because they address its root causes, not only the symptoms. To ensure the sustainability of policies based on them, their implementation must also be monitored. Good practices in this regard include:

- Establishing national observatories or programmes on violence against women. They should be responsible for producing knowledge and information, monitoring cases of violence and developing statistics, disaggregated by nature, severity, social and psychological specifics, age, and degree of education of aggressors and victims. They should also be responsible for monitoring the enforcement of laws and evaluating their effectiveness.
- Introducing specific training programmes designed for the various participants in the fight against violence against women, specifically security and judicial agents and officials. Special attention should be paid to the need to respect the privacy of victims, to attend to their vulnerability and to grant them specific and urgent treatment when needed.
- Introducing specialised educational programmes in the field of human rights at all educational levels. These programmes should emphasise the importance of human rights, in particular human dignity and equality, as a basis for the rejection of all forms of violence against women.
- Establishing mechanisms to prevent violence against women and girls in the media. Their aim should not only be to help broadcast special programmes to raise awareness in this field, but also to compel them to commit to not broadcasting messages or images that imply contempt or discrimination against women, advocate violence against women, or glorify any speech or conduct carrying such messages. This can be found, for example, in the Spanish Organic Act 1/2004 on Integrated Protection Measures against Gender Violence, article 14,²¹⁹ and in the Tunisian law on elimination violence against women, article 11²²⁰. Media regulatory bodies must ensure that these regulations are respected (read more in Chapter 9).

[219] See in this regard *UN Legislation Guide on Violence against Women* on page 31.

[220] Article 11 of the Tunisian Law on the Elimination of Violence against Women of August 11, 2017, states: “The public and private media are responsible for raising awareness on the dangers of violence against women, methods of combating and preventing it. They provide training to their staff working in media on dealing with violence against women in a spirit of respect for professional ethics, human rights and equality. Publicity and dissemination of information material containing stereotypical images, scenes, words or acts that are offensive to the image of women, or that are devoted to consecrate violence against women or that undermine it, shall be prohibited by all means and media. The Audio-Visual Communication Authority shall take the measures and penalties required by law to deal with the abuses described in the preceding paragraph.”

1. INCORPORATING MAIN INTERNATIONAL INSTRUMENTS AND COVENANTS INTO NATIONAL LEGISLATION

- Although calling for an end to violence against women did not enter the international agenda until the 1990s, relevant international treaties and instruments now focus on the elimination of all forms of violence against women as a form of discrimination. They should be incorporated into national legislation on the matter.

2. WHY DO WE NEED A COMPREHENSIVE LAW ON ELIMINATION OF VIOLENCE AGAINST WOMEN?

- Violence against women must be addressed as a violation of human rights and human dignity in all its extension and complexity.

3. KEY ELEMENTS OF A COMPREHENSIVE LAW ON ELIMINATION OF VIOLENCE AGAINST WOMEN

- A broad definition of violence against women should embrace its different forms and take account of the contexts where it may take place. Appropriate penalties should be provided for every situation.
- Special attention should be paid to forms of violence that are particularly entrenched, damaging and/or difficult to combat. These include economic violence, sexual violence and femicides, including killings by husbands or partners, “honour” crimes and selective abortions.
- In the context of sexual violence, rape should be defined in broad terms that embrace all possible ways and contexts in which it may happen, including marital rape. A necessary element in that definition must be lack of consent or lack of the expression of free and unambiguous will to engage in a sexual act, or the inability to express that will and inability to express a refusal.

4. MECHANISMS FOR THE PROTECTION OF WOMEN VICTIMS OF VIOLENCE

- The protection of women and girls from violence is the responsibility of the State, which must adopt all measures to protect the victims.
- Legislation must require the State to provide a list of the legal and institutional mechanisms available to protect and support victims of violence against women.

5. STATE STRATEGIES AND MECHANISMS TO PREVENT VIOLENCE AND ACCOMPANY THE PROCESS OF LAW ENFORCEMENT

- Legislation must require the State to provide a list of the preventive measures counteracting violence against women.
- Legislation must require the State to establish national bodies or programmes for monitoring the enforcement of existing measures to combat violence against women and evaluating their effectiveness.
- Legislation must require the State to introduce specific training programmes for first respondents, specifically for security and judicial actors.
- Legislation must require the State to introduce specialised educational programmes on human rights and equality between women and men.
- Legislation must require the State to establish mechanisms to prevent violence against women and girls in the media.

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CHAPTER 7

LABOUR LAW

As political rights define our status as citizens, so does the right to participate in the labour market determine our capacity to enjoy that status, to act as autonomous citizens. True equality between women and men thus requires that both enjoy substantive equality within the labour market: to access it, to stay in it and to benefit from it. This will require a redefinition of the labour market, still rooted on the idea of men as sole or main breadwinners. It will also largely depend on a redefinition of its intersection with the family, which still revolves around the construction of women as mostly domestic citizens and primary caregivers (Chapter 4).

1. Equal access to the job market

Gender equality and non-discrimination requires gender-sensitive legislation in working relations. To this end, States must first and foremost guarantee equal access to the labour market. Legal, social, cultural and religious barriers standing in the way of women accessing the job market must be removed and replaced with laws that encourage, incentivise and support women who seek employment. Guaranteeing women's right to work requires laws that guarantee that they can access it on equal terms with men.

Across the world, rates of female employment tend to be lower than those of men. According to the International Labour Organization (ILO), in 2018 women's participation rate in the global labour force was 48.5%, a full 26.5% lower than the participation rate of men.²²¹ The ILO has also noted that, while there have been minor improvements in recent years, the outlook for the period 2018-2021 indicated this would slow down and even regress. Additionally, women are more likely to be unemployed in large parts of the world, to find themselves in vulnerable employment (such as informal work with no access to social

"The overwhelmingly unequal demands that women face with regard to household and care responsibilities continue to manifest themselves as labour market inequalities in terms of the types of jobs which women can both access and in which they can enjoy sustained employment.

... Reducing gender gaps in the labour market therefore requires comprehensive measures, tailored specifically to women (in recognition of their widely varying circumstances), which will ultimately contribute to the welfare of society."

International Labour Organization, *World Employment and Social Outlook: Trends for Women 2018*, 12

[221] International Labour Organization, *World Employment and Social Outlook: Trends for Women 2018*, 6 https://www.ilo.org/global/research/global-reports/weso/trends-for-women2018/WCMS_619577/lang--en/index.htm.

protection systems), and to experience ‘working poverty’ (to fall below the poverty threshold despite being employed).²²² The ILO attributes this state of affairs to entrenched gender roles and labour market discrimination, but also to States not adopting sufficient measures to reverse the situation.

Some regions have comparatively lower absolute rates of women’s employment. The same ILO report identified Arab States, Northern Africa and Southern Asia as having the largest gender labour gap. Another 2017 study of the Middle East and North Africa (MENA) region found that only 24% of MENA women were in employment, compared to 60% of women in OECD countries.²²³ The same study found that such gender-based discrimination cost the region \$575 billion every year. In other words, while first and foremost an issue of equality and justice, women’s absence from the labour force is also a problem for a country’s economy. There is also a stark discrepancy between women’s educational levels and their participation in the workforce: despite most MENA region girls being in school and women outnumbering men at universities, the region continues to have one of the lowest rates of women’s employment in the world.²²⁴

The OECD report specifically pointed at the absence of necessary legislation as a barrier to women’s participation in the workforce in the MENA region. This was found to be the case even in societies that had otherwise made significant advances and even reformed their legal systems, including their constitutions, to render them more gender sensitive. Social attitudes towards working women also play a significant role. Having a majority of the population believe women’s primary role is in the home raises substantial obstacles to their employment, all the more so as women themselves can end up internalising prevalent gender stereotypes.²²⁵ Moreover, restrictions on women’s freedom of movement, including needing a guardian to travel, as is the case in Saudi Arabia, or laws requiring permission from husbands or fathers to work, common in Egypt, Jordan and Libya, have a significant negative impact.

In order to redress this situation, legislators should take several steps.

A. Removing all legal barriers that hinder women’s entering the labour market

This first step is needed, even if it requires going against strongly held cultural and even religious beliefs. Saudi Arabia retains significant restrictions on women joining the workforce, such as prohibiting them to work in settings where they might mix with men. While some of these restrictions have begun to ease, and while informally there is greater acceptance of women presence in the labour market, the current targets are still among the lowest in the world: the Saudi government aims to increase female participation in the workforce from 22% to 30% by 2030.²²⁶ In 2018, women accessed the right to drive, which increased their freedom of movement

[222] Ibid.

[223] OECD, *Women’s Economic Empowerment in Selected MENA Countries: The Impact of Legal Frameworks in Algeria, Egypt, Jordan, Libya, Morocco and Tunisia*, 7 October 2017, <https://www.oecd.org/employment/women-s-economic-empowerment-in-selected-mena-countries-9789264279322-en.htm>.

[224] Adela Suliman, ‘Educated but Not at Work: Lack of Women in Middle East Workforce Hinders Growth’, *Reuters*, 17 October 2017.

[225] Ibid.

[226] Sarah Hassan, ‘Saudi Women Join the Workforce as Country Reforms’, *CNN*, 7 February 2018.

and employment opportunities. However, women continue to face difficulties that are specific to their gender: the cost of driving lessons, for example, is several times higher for women than for men. At the same time as the reform was being implemented, moreover, Saudi women activists who had long campaigned for that legislative change continued to face challenges, including imprisonment.²²⁷ It is thus crucial that women's rights are made the object of real efforts aimed at legal and social progress.

B. Removing discrimination in hiring and firing practices

It is also crucial that States ban and persecute any discrimination, both direct and indirect, against female job applicants. Inquiries into their pregnancy status, childbearing plans or caring responsibilities should be prohibited, as should be job requirements that, although formally neutral, are more likely to exclude women. Similarly, States should ban and persecute the dismissal of pregnant women, women on maternity leave or who attempt to go back to work when the leave is over. Instead, employers should be required to adopt affirmative action measures, such as providing breastfeeding and baby changing facilities where possible. While public bodies should be models of good behaviour in this field, private employers should also be required to adopt affirmative action measures to the best of their available possibilities.

C. Guaranteeing equal working conditions to women and men

Empirical evidence shows that guaranteeing equal working conditions to women and men is an important factor in bringing about higher rates of women's participation in the labour force. This means, for example, ensuring women can work the same number of hours as men, are guaranteed the same salary for the same work (see more on this below) and are not precluded from entering certain professions.²²⁸ Moreover, equitable parental leave policies that support both women and men to care for their children will ensure employers do not avoid hiring women if likely to take maternity leaves, for fear that they will be 'unproductive'. While such restrictions might appear to be protective of women (limiting women's working hours upon return to work after childbirth), they are so in paternalistic terms that reinforce gender stereotypes and discriminatory practices.

D. Paying attention to four sets of factors that have bearings on women's access to the job market

- **Employment policies:** Some policies, notably policies on parental leave (discussed below), directly benefit women's employment. The availability of non-standard working arrangements, such as more flexible working hours, could also benefit workers with caring responsibilities, mostly women. This is so provided such arrangements are not relied upon to discriminate against women indirectly, by keeping them in part-time and lower paid positions. To avoid this, measures must be taken to ensure such arrangements are made available to women employees but are in no way imposed on them. Women, in brief, should

[227] *Free Saudi Women Who Fought for the Right to Drive*, Amnesty International, <https://www.amnesty.org.uk/saudidrivers>.

[228] Alice Newton, 'How Can Policy Makers Increase Women's Labor Force Participation?', *Private Sector Development Blog*, World Bank, 23 January 2012.

not be side-lined or penalised on account of their caring responsibilities.

- **Taxation:** Fair taxation policies are a necessity. Many countries retain higher taxation rates for the second earner in the family, who tends to be female, than they do for single individuals. Some also retain joint taxation policies which, in practice, disadvantage women. Such discriminatory taxation policies must be removed, and individualised taxation regimes adopted, if women are to be encouraged to become equal earners in their own right (read more in Chapter 11).
- **Education:** Ensuring that women and girls have access to education on an equal basis with men and boys is key to ensuring they are competitive as potential job seekers. Any barriers to education, at any level and in any discipline or specialty, should be removed (see Chapter 9).
- **Cultural attitudes:** Cultural attitudes continue to be a primary barrier to women's participation in the labour force in many countries. These can be rooted in religion, tradition or other sets of beliefs and may prevent women from seeking employment altogether, or else may restrict their choices, by limiting them to certain jobs, for example (such as those that require no interactions with men), or by encouraging them to quit their job upon having children. Legislation and education programmes are key in changing such entrenched social attitudes. A study of the MENA region coordinated by UN Women and Promundo has shown that even where men accept the need for legislation that encourages women's participation in employment, as is the case in Morocco, they continue to hold conservative views about gender roles in their private lives.²²⁹ Similar findings have been made about Sweden, where despite marked progress towards gender equality (including the adoption of gender-sensitive legislation in a number of areas), conservative attitudes persist in the private sphere, violence against women remains considerably high²³⁰ and streets are perceived as "less safe" than before.²³¹

"What is the point of educating our daughters if we expect them to sit at home when they are old enough to work?"

A male small business owner from Peshawar, Pakistan, interviewed by the World Bank.

E. Removing legal barriers preventing refugees and asylum seekers from working in their host countries

Ensuring refugees and asylum seekers access to the job market should be regarded as a win-win move for all involved: they will be able to support themselves and become productive members of their host society, while the host State will benefit from their increased independence. Yet barriers persist, affecting mostly women refugees and asylum seekers, who experience multiple discrimination in the host State's labour market, as well as intersectional discrimination that is specific to their double condition, a consequence of the specific vulnerabilities attached to the intersection of their gender and their status as asylum seekers or refugees (such as increased risk

[229] UN Women and Promundo, *Understanding Masculinities: Results from the International Men and Gender Equality Study in the Middle East and North Africa*, 2017, <https://www.unwomen.org/en/digital-library/publications/2017/5/understanding-masculinities-results-from-the-images-in-the-middle-east-and-north-africa>.

[230] *Report of the Special Rapporteur on violence against women, its causes and consequences, Yakin Ertürk, Mission to Sweden*, A/HRC/4/34/Add.3, 6 February 2007.

[231] <https://www.bbc.co.uk/news/world-europe-39004991>.

of gender-based violence, or vulnerabilities derived from the gender-specific trauma provoked by their fleeing their country of origin).²³² Policies and legislation regarding refugees and asylum seekers must take into account these women's gendered experiences when seeking their social integration through the labour market.

The UN Refugee Agency has clarified that, under their international legal obligations, States must not discriminate against refugees and asylum seekers in employment (or in other areas such as property, education or housing).²³³ Articles 17-19 of the 1951 UN Refugee Convention require States to ensure that refugees in their territory are permitted to seek gainful employment. To this end, travel documents must be issued to recognised refugees. Although not amounting to granting them nationality, this will allow them to travel, hence to travel for employment purposes.²³⁴

The UN has also indicated that asylum seekers should be ensured a certain level of protection via employment while their status is being determined.

"Allowing asylum-seekers to work during the asylum determination process, or at the very least, to be self-employed, helps to reduce their social and economic exclusion, and can alleviate the loss of skills, low self-esteem and mental health problems that often accompany prolonged periods of idleness. It can also reduce asylum-seekers' vulnerability to exploitation and improve their integration prospects if they are permitted to remain in the host country, as well as their chances of successful reintegration in the context of return."

Inter-Parliamentary Union and UNHCR, *A Guide to International Refugee Protection and Building State Asylum Systems, Handbook for Parliamentarians*, 2017

Some States ensure this by allowing asylum seekers to work immediately, once they have established their identity (Sweden) or once they have registered (Greece). Others do so once their asylum status has been determined, but ensure this is done expediently (Portugal, typically after one month).²³⁵ Many countries in Latin America also ensure immediate access to the labour market for asylum seekers. Other countries, however, are less expeditious. The US, for example, only allows them access to the labour market after 180 days and there might be considerable obstacles in obtaining the relevant work permission even then. Training programmes, including skill training and language courses, will also be important in order to maximise the chances of integration into the labour force. To this end, special attention must be paid to the situation and requirements of female asylum seekers.

[232] *Female Refugees and Asylum Seekers: The Issue of Integration*, FEMM Committee of the European Parliament, 2016, [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556929/IPOL_STU\(2016\)556929_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556929/IPOL_STU(2016)556929_EN.pdf).

[233] Inter-Parliamentary Union and UNHCR, *A Guide to International Refugee Protection and Building State Asylum Systems, Handbook for Parliamentarians*, 2017, 54, <https://www.refworld.org/docid/5a9d57554.html>.

[234] *Ibid.*, 62.

[235] *Ibid.*

2. Equal pay and equal benefits entitlements

There is irrefutable evidence of gender gaps in payment, pensions, and other State benefits. Around the world, women are discriminated against not just in their ability to enter the labour force, but also in their remuneration and enjoyment of benefits associated to employment.

A. Equal pay

According to a 2018 study, the global gender wage gap (measuring the difference between men's and women's wages) stood at 16% when measuring hourly pay.²³⁶ It rose to 22% when measuring average monthly wages, however. The gap is narrower in high-income countries, among which Sweden has the narrowest pay gap, and wider in low-income and middle-income countries, among which South Africa and Namibia have the highest inequality levels. Literature on the gender pay gap differentiates between the so-called "explained" gender pay gap, which refers to lower wages for women reflecting their comparatively lower education rates and choice of lower-paid professions worldwide, and the "unexplained" pay gap, which refers to differences that cannot be explained by such factors. Empirical evidence shows that women earn considerably less than men *regardless* of education levels and other labour market attributes such as age, experience, occupation, or industry. This is mostly due to two factors: the persistent undervaluation of women's work and the so-called 'motherhood pay gap'.²³⁷ The latter measures the discrepancy in wages between mothers and non-mothers and is found to range significantly across countries: from 1% or less in Canada, Mongolia or South Africa to 30% in Turkey.²³⁸ Explanations for the motherhood pay gap include: maternity leave, switching to part-time work, employment in more family-friendly jobs which are also lower paying, or "stereotypical hiring and promotion decisions at enterprise level which penalise the careers of mothers."²³⁹

"Gender pay gaps represent one of today's greatest social injustices, and I am glad to see that eradicating this injustice has taken on significant momentum in recent times."

Guy Ryder, Director-General of the International Labour Organization, 2019

International law requires States to take all appropriate measures to ensure women are paid equally to men. The ILO's *Equal Remuneration Convention* 1951 is one of the organisation's fundamental conventions and has been ratified by 173 States. It requires them to ensure that all workers, women and men, receive equal remuneration for work of equal value (Article 2). This aim is to be achieved through legislation, collective bargaining by trade unions, or a combination of these. This obligation does not mean employers will not be able to set differential pay rates between workers based on objective differences in the work performed (Article 3(3)). It means, however, that they cannot be based on gender.

Among the measures States should take to address the gender pay gap are:

[236] International Labour Organization, *Global Wage Report 2018/19: What Lies behind Gender Pay Gaps*, 26 November 2018, https://www.ilo.org/global/publications/books/WCMS_650553/lang--en/index.htm.

[237] Ibid.

[238] Ibid., xvii.

[239] Ibid.

- **Introducing equal pay legislation:** Legislation must not only require employers to ensure equal pay to their employees. It must also introduce transparency and reporting obligations on employers. A number of countries have introduced such legislation, including employers' duty to show the measures they are taking to eliminate the gender pay gap. Iceland (see section 7 below) and the Canadian provinces of Ontario and Quebec, for example, have made the elimination of the pay gap compulsory. Other States, such as Switzerland, have introduced an incentive-based system that requires companies with 50 or more employees that want to participate in public tenders to carry out pay audits and remove discriminatory pay differences.²⁴⁰ Swiss authorities have also created a self-assessment tool to help companies comply with these requirements.
- **Monitoring the gender pay gap:** It is important to design statistical tools that not only capture the raw wage numbers, but also track factors that might explain the gender gap. In 2012, for example, Jordan introduced the Jordanian Woman's Questionnaire, administered as part of the 2012 Jordanian Population and Family Health Survey, to monitor women's experiences, including their experiences in the labour market. Integrating a gender lens throughout the model used by the State to monitor developments in the labour market would be even more efficient.²⁴¹
- **Tailoring measures to the pay range where the gender pay gap is found:** Different measures have been found to be more or less effective depending on which income category is targeted. For example, introducing a minimum wage has been found to help alleviate the gender pay gap at the bottom of the income ladder, as long as this minimum is not itself designed in discriminatory terms.²⁴² Collective pay agreements and rules requiring female representation in union leadership positions have been found to be effective at reducing earning disparities higher on the income ladder.

**United Nations Sustainable Development Goals,
Target 8.5:**

By 2030, achieve full and productive employment and decent work for all women and men, including for young people and persons with disabilities, and equal pay for work of equal value.

**International Labour Organization's Equal
Remuneration Convention 1951, Article 2:**

1. Each Member shall, by means appropriate to the methods in operation for determining rates of remuneration, promote and, in so far as is consistent with such methods, ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value.
2. This principle may be applied by means of
 - (a) national laws or regulations,
 - (b) legally established or recognised machinery for wage determination,
 - (c) collective agreements between employers and workers, or
 - (d) a combination of these various means.

[240] *Ibid.*, 96.

[241] *Ibid.*, 89.

[242] For example, by setting lower wages in feminised sectors or occupations, or even excluding female-dominated sectors or occupations (such as domestic work) from legal coverage. *Ibid.*, 91.

France, where collective bargaining rules are strong and the law mandates the reduction of the gender pay gap, is an example of this.²⁴³

- **Introducing measures in both the public and the private sector:** The private sector should not be perceived to be beyond the reach of the law and immune to it. It should rather be required to publicise its gender pay gap data and put in place measures to bridge it. Incentives such as access to public funding or other benefits could also be introduced to help private companies' performance in equalising pay.

B. Equal access to pensions and other State benefits

Regarding pensions, the gender gap leaves older women at a significant disadvantage. Even in the European Union, which has taken significant steps toward equalising wages and pensions, the pension gender gap remains significant: it was estimated at 38% in 2012 and stood above 40% in Germany, Luxembourg and the Netherlands.²⁴⁴ Despite European countries gradually raising the retirement age for women to 65, a pension gender gap has remained. This can be explained by looking at the gendered structural factors of inequality permeating the labour market. These include:

- **Labour market participation:** women's lower employment rates and lower rates of access to decision-making positions in the workforce will automatically mean that, overall, women will be less well provided for in old age through pension benefits.
- **Distribution of working hours (in particular part-time work):** insofar as women are more likely than men to be pushed to lower hour contracts and part-time work, their contributions to pension funds will be lower than men's, as will be their pension entitlements.
- **The impact of maternity and other forms of leave:** insofar as women tend to be the primary caregivers, both for their children and other family members (such as elderly relatives), they tend to take more leaves from work, which has a negative impact on their pension contributions.
- **The gender pay gap:** as seen, women tend to earn less than men, which automatically reduces their pensions in later life.
- **Absence of pension and other benefits for unpaid work or work in the informal economy:** unpaid work and work in informal economy entails no pensions benefits and is disproportionately carried out by women.

"The gender gap in pensions can be understood as the sum of gender inequalities over a lifetime, including differences in the life course (motherhood penalty), segregated labour market and gendered social norms and stereotypes more generally. Therefore, it is important not only to illustrate this equation, but also to consider how the gender gap in pensions relates to wider gender inequalities in society."

European Institute for Gender Equality, *Gender Gap in Pensions in the EU*, 2015

[243] Loi relative à l'égalité salariale entre les femmes et les hommes, Act No. 2006-340, *Journal officiel*, No. 71, 23 March 2006.

[244] European Institute for Gender Equality, *Gender Gap in Pensions in the EU*, 2015, http://eige.europa.eu/sites/default/files/documents/MH0415087ENN_Web.pdf. "Wide Gap in Pension Benefits between Men and Women, OECD", March 2020, <https://www.oecd.org/gender/data/wide-gap-in-pension-benefits-between-men-and-women.htm>.

States can address and redress this situation through pension laws.²⁴⁵ The calculation of individuals' contributions towards their pension fund, for example, should not unduly harm the lowest income earners or those who have carried out care work as stay-home parents, both of whom tend to be women. The State can consider topping up their contributions under certain conditions. There should also be clear rules for divorced couples where the man was the main breadwinner and thus pension-earner. At the very least, pensions will then have to be considered an asset to be divided as part of the separation agreement, so that the wife can be protected. Rules regarding pension transfer from one spouse to another should also be gender equal. Age equalisation schemes, such as those rolled out throughout the European Union, are generally uncontested, but the terms of their implementation matter. Thus, laws aimed at changing the retirement age, typically raising women's pension age to match that of men's, should be clearly spelt out and introduced gradually, so as not to place certain generations of women at a significant disadvantage.²⁴⁶ A number of these reforms have been implemented around the world, including Latin American countries that have taken a gendered approach to pension reform.²⁴⁷ Promoting equal division of responsibilities within the household, including childrearing, will also help alleviate these gendered disparities in pension entitlements (more on this in Chapter 4).

3. Discrimination and sexual harassment in the workplace

A. Gender-based discrimination

Gender-based discrimination at the workplace can take a variety of forms. The law must make it clear that employers should not discriminate on the basis of gender at any stage and under any circumstances. This includes the process of hiring, the duration of employment and its termination. Employers often discriminate on the basis of gender when hiring new recruits, by not hiring women or by relegating them to lower paid positions. In this context, affirmative action measures are in order. During employment, gender-based discrimination can take a variety of forms: passing over women for promotions, pay raises and training opportunities; holding them to stricter standards and harsher evaluations than their male counterparts; insulting, disparaging or otherwise subjecting women employees to a hostile working environment on account of their gender.²⁴⁸ Sometimes discrimination will be overt, but it will often be more subtle and therefore difficult to prove, should the woman wish to complain. Therefore, it is important for States to create legal frameworks that support those affected by discrimination in the workplace and encourage healthy working environments. This includes placing the burden of proof of discrimination on employers, making it their duty to justify differential treatment as not

[245] See Josephine Cumbo, 'How to Close the Gender Pensions Gap', *Financial Times*, 9 November 2018.

[246] This is what happened when the UK recently raised the retirement age for women too abruptly, leaving almost 4 million women born in the 1950s at a significant financial disadvantage. Some brought a court case alleging discrimination on the basis of both sex and age but were not successful. See Amelia Hill, 'Women Not Entitled to Pension Age Change Compensation, High Court Rules', *The Guardian*, 3 October 2019.

[247] See Camila Arza, *Pension Reforms and Gender Equality in Latin America*, UNRISD Research Paper, 2012, [http://www.unrisd.org/unrisd/website/document.nsf/\(httpPublications\)/3513162DF26920D5C12579CF0053534B](http://www.unrisd.org/unrisd/website/document.nsf/(httpPublications)/3513162DF26920D5C12579CF0053534B).

[248] For more examples, see Equal Rights Advocates, *Know Your Rights at Work: Gender Discrimination at Work*, <https://www.equalrights.org/issue/economic-workplace-equality/discrimination-at-work/>.

discriminatory, as recommended in the Council Directive 97/80/EC, of 15 December 1997, on the burden of proof in cases of discrimination based on sex.²⁴⁹

B. Sexual harassment

Sexual harassment is a form of gender-based discrimination that causes distinct harm, particularly in a working environment. Sexual harassment refers to prohibited conduct in the work context and has been defined as:

“Such unwelcome sexually determined behaviour as physical contact and advances, sexually coloured remarks, showing pornography and sexual demands, whether by words or actions. Such conduct can be humiliating and may constitute a health and safety problem; it is discriminatory when the woman has reasonable ground to believe that her objection would disadvantage her in connection with her employment, including recruitment or promotion, or when it creates a hostile working environment.”²⁵⁰

While sexual harassment is gender-neutral, most of its victims worldwide are women. It is not just a form of employment discrimination, but a form of gender-based abuse. The UN has recently taken a stronger stance against sexual harassment, after it was revealed in 2019 that 1 in 3 UN workers reported having been sexually harassed in the previous two years.²⁵¹ The UN has since passed a Resolution calling on States to intensify their efforts to prevent and eliminate sexual harassment, which it classified as a human rights violation and a form of violence against women and girls.²⁵² It has called on States to adopt measures towards:

Sexual harassment in private and public spaces, including in educational institutions and the workplace, as well as in digital contexts, leads to a hostile environment, which has a further negative impact on women and girls in the enjoyment of their rights and equal opportunities, has negative physical and mental health consequences for the victims and may negatively affect their families.

United Nations General Assembly Resolution A/RES/73/148, Intensification of efforts to prevent and eliminate all forms of violence against women and girls: sexual harassment, 17 December 2018

“Developing, adopting, strengthening and implementing legislation and policies that address the issue of sexual harassment in a comprehensive manner by, inter alia, prohibiting and considering, where appropriate, criminalizing sexual harassment, exercising due diligence by taking protective and preventive measures, ensuring appropriate complaints mechanisms and reporting procedures, as well as accountability and access to effective, timely and appropriate remedies, including through adequate enforcement by the police and the judiciary of civil remedies, orders of protection and, where applicable, criminal sanctions in order to eliminate impunity and avoid revictimization.”²⁵³

[249] Included in the Directive 2006/54/EC of the European Parliament and of the Council, of 5 July 2006, on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).

[250] CEDAW General Recommendation No. 19: Violence against women, 1992, para. 18.

[251] ‘One in Three UN Workers Say They Have Been Sexually Harassed in Past Two Years’, *Reuters*, 16 January 2019.

[252] UN General Assembly Resolution A/RES/73/148, *Intensification of efforts to prevent and eliminate all forms of violence against women and girls: sexual harassment*, 17 December 2018.

[253] UN General Assembly Resolution A/RES/73/148.

Importantly, the Resolution made it clear that States have a duty to ensure that protections against sexual harassment extend to the private sector. This means ensuring that employers in all sectors discharge their duty to prevent and punish all cases of sexual harassment.

Recently, States around the world have begun grasping the importance of preventing and punishing sexual harassment in the workplace and its interconnectedness with gender-based violence. For example, Australia passed a Sex Discrimination Act in 1984, which prohibits gender-based discrimination in a variety of contexts including work. The Act also explicitly defines and bans sexual harassment. An EU Directive prohibits discrimination in employment, including sexual harassment.²⁵⁴ It should be noted, however, that although Directives must be implemented in all Member States, they leave some flexibility as to how to be integrated domestically. Although all EU law prevails over conflicting domestic legislation, only Regulations must be directly applied without further elaboration by Member States. It would therefore be desirable for the EU to take a firmer stance on an area as sensitive and relevant for women's citizenship as this and to issue Regulations on questions related to gender, including sexual harassment, so as to homogenise its gender policies across all EU Member States.

Other States are also making progress. Morocco, for example, adopted a tougher law on violence against women in 2016, including more protection for victims of sexual harassment.²⁵⁵ It did so after it had been reported that existing laws were not being enforced in these areas, which left women unprotected even when they reported abuse.²⁵⁶ The new law bans sexual harassment in public, at work and online. While there remain serious gaps in Morocco's law,²⁵⁷ the explicit criminalisation of sexual harassment and tougher penalties for it were an important step in signalling the State's commitment to eradicating gender-based violence and discrimination in all its forms.²⁵⁸

To tackle gender-based discrimination and sexual harassment at work, it is recommended that laws:

- Adopt codes of conduct and reporting mechanisms, including a zero-tolerance policy.
- Extend such policies to all work sectors, both public and private, and attach penalties to non-compliance.
- Foster a culture of compliance with such policies, including the provision of guidelines and training for monitoring and enforcement bodies.

Protection must extend across different employment sectors and contexts. This includes domestic workers, who are often most vulnerable to discrimination and sexual harassment, but

[254] See Directive 2002/73/EC – equal treatment of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

[255] Law no. 103-13 on combating violence against women, 2018.

[256] "Morocco criminalises violence against women and sexual harassment", *Al Jazeera*, 12 September 2018.

[257] *Ibid.*

[258] For an example of comprehensive measures designed to change workplace culture in the area of gender equality, see *Women and the Workplace: How Employers Can Advance Gender Equality and Diversity*, The Government of Canada's Labour Program, 2019, <https://www.canada.ca/en/employment-social-development/corporate/reports/women-symposium.html>.

also most likely to be ignored by legislation that favours more ‘traditional’ working environments. As the UN has also clarified, discrimination and harassment online must also be addressed: digital technology companies who own online platforms have a duty to prevent the perpetuation of a culture of harassment, bullying and intimidation of women.²⁵⁹ The UN has repeatedly emphasised the importance of education and training in this area. The only way to ensure a change in social attitudes and cultural patterns in workplaces around the world is to educate individuals on the importance of having zero tolerance for gender-based discrimination and sexual harassment at work and beyond. Laws and policies have a relevant educational role.

4. Maternity, paternity, and parental leave

There is an urgent need to provide fair and adequate parental leaves and protection against penalties for parents, especially mothers, who choose to benefit from them. While a generous maternity leave policy is important, and as stated in Chapter 4, it should not be designed to perpetuate gender-based stereotypes. Increasingly, countries are moving towards regimes that are more flexible and gender-sensitive than in the past, notably by facilitating the involvement of fathers in childcare responsibilities. For example, the European Union strengthened its parental leave provisions in 2018 by adopting a new Directive aimed at improving the work-life balance of both parents. The Directive strengthens the existing right to 4 months of paid leave for parents; introduces an up-to-5-days carers’ leave for workers providing personal care or support to a relative or person living in the same household and extends the existing right to request flexible working arrangements for parents.²⁶⁰ Moreover, the Directive makes it mandatory, across all Member States, to set a minimum 10-day, non-transferable paternity leave around the birth of the child, compensated at least at the same level as sick leaves. This measure was adopted in recognition of the gender disparity in provision of childcare, but also on the basis of empirical evidence showing the level of leave uptake (fathers actually taking leave they are entitled to legally) increases when it is non-transferable. Other benefits were shown to include the sharing of domestic responsibilities between parents, as well as men’s engagement in unpaid work correlating with higher rates of women’s employment.²⁶¹

According to a recent OECD report, Finland is the only country in the world where fathers spend more time with their school-aged children than mothers.²⁶² This, as well as Finland’s informal title as the best country in the world to be a parent, has been attributed to a combination of legislative measures and policies aimed at supporting families. These include a flexible and gender-balanced policy on parental leave, wherein parents can share paid parental leave and can take part-time

[259] Ibid.

[260] European Commission, Employment, Social Affairs & Inclusion, *Work-life Balance*, <https://ec.europa.eu/social/main.jsp?catId=1311&langId=en>.

[261] European Commission, *Paternity and parental leave policies across the European Union: Assessment of current provision*, 2018.

[262] OECD, *The Pursuit of Gender Equality: An Uphill Battle*, 2017.

leave by agreeing with their employers on reduced working hours.²⁶³ The country's tradition of offering government-sponsored maternity boxes to new-born babies—which include bedding, clothing, diapers, toys, baby care and breastfeeding guides—dates back to 1938 and has begun to be emulated in other places, as is the case of Scotland.

Many of the countries with the longest parental leaves are found in Europe, particularly in Central and Eastern Europe, likely as a legacy of welfare policies introduced during their communist past.²⁶⁴ However, any assessment of best practices must take a comprehensive view of all policies designed to facilitate family life and childcare. Rankings often shift when taking into account not just the length of parental leaves, but other types of benefits as well. In this respect, the ILO recommends a minimum of 14 weeks of paid leave and a cash benefit ensuring the mother and child can support themselves “in proper conditions of health and with a suitable standard of living” during that period.²⁶⁵

At the opposite end of the spectrum, the US offers most workers no leave, whether paid or unpaid, with some exceptions covered by the Family and Medical Leave Act of 1993. Even under this legislation, leaves are unpaid and last a maximum of 12 weeks. The US remains the only high-income country, and one of the only eight countries overall, that offer no paid maternity leave to mothers (or fathers) of new-borns.²⁶⁶

Even where countries are adopting legislation mandating paid parental leave, it is important to emphasise that the approach must be holistic, so as to avoid undesirable knock-on effects. For example, in 2017 India adopted the Maternity Benefit (Amendment) Act, a new law that doubled the length of the mandatory paid maternity leave, bringing it to 26 weeks. However, this law did not include compensations for employers and many, it was feared, would find it difficult to implement. This is notably the case of medium and small businesses, which would have trouble covering the costs of hiring and training replacements and providing day-care facilities (made mandatory by companies with over 50 employees).²⁶⁷ In a country where there is stark discrimination against women who attempt to enter the labour force, where less than 30% of women are employed, the measure could have a deterring effect on employers, who might prefer to avoid hiring women altogether. This is all the more so as no corresponding provision was made to encourage fathers to take parental leaves. This legislation might still promote gender equality in India's labour market, but it will likely require adequate reforms.²⁶⁸

[263] Ministry of Economic Affairs and Employment of Finland, *Maternity, Paternity and Parental leave*, <https://tem.fi/en/maternity-paternity-and-parental-leave>.

[264] See Kati Kuitto, *Post-Communist Welfare States in European Context: Patterns of Welfare Policies in Central and Eastern Europe* (Edward Elgar 2016), 24.

[265] ILO Maternity Protection Convention, 2000 (No. 183), Articles 4 and 6, respectively.

[266] Heymann, Jody and Kristen McNeill, *Children's Chances: How Countries Can Move from Surviving to Thriving*. Cambridge: Harvard University Press, 2013.

[267] Medhavi Arora, “India's generous maternity leave may be bad for women”, *CNN*, 30 March 2017. Such small and medium companies, as well as start-ups, account for 40% of India's workforce. See Jean D'Cunha, “India's Bold Maternity Benefit Act Can Become a Game Changer if it Addresses Current Limitations”, *EPW Engage*, 4 August 2018.

[268] *Ibid.*

5. Care work and domestic work

A. Care work

Caring responsibilities are increasingly being recognised as a form of labour. Largely unpaid and performed by women, care work and the so-called ‘care economy’ are a significant source of inequalities between women and men. The ILO has defined care work as follows:

“Care work is broadly defined as consisting of activities and relations involved in meeting the physical, psychological and emotional needs of adults and children, old and young, frail and able-bodied. New-borns and young people, older persons, the sick and those with disabilities, and even healthy adults, have physical, psychological, cognitive and emotional needs and require varying degrees of protection, care or support.”²⁶⁹

The ILO has also reported that, globally, more than 3/4 of care work (both paid and unpaid) is performed by women and girls, who make up 2/3 of care workers.²⁷⁰ This puts women at a significant disadvantage in the labour market: the more time they spend engaged in care work, the less time they can spend doing other types of work. Being engaged in (often unpaid) care work is also an important determinant for women’s poorer employment opportunities, as it tends to trap them in this type of labour.²⁷¹ It also tends to create a cycle that reinforces the allocation to women of caring roles, which are often devalued as implying no ‘real work’ and, accordingly, unpaid. They tend, moreover, to entail serious emotional and physical burdens, which carers often carry silently.

Some States have taken positive steps towards the regulation of care work that might be inspiring for others. For example, in 2016 Uruguay passed a Care Act stipulating that all children, persons with disabilities and elderly persons have the right to access care services. According to the Act, the State is not only under the obligation to provide those services but must also guarantee their quality by providing training to care workers. The law also aimed to ensure care workers enjoy decent working conditions and to change the prevalent gendered division of labour. This law was the flagship policy of Uruguay’s President and gained momentum after statistics collected by the UN on the division of care work between women and men showed a drastic disparity. The ILO has called this legislation the model for future regulation of care work.²⁷²

B. Domestic work

Domestic work is similarly undervalued and often the site of the worst abuses against female workers. It is estimated to be carried out by over 65 million workers across the world, most of them women. As the ILO has observed,

[269] International Labour Organization, *Care Work and Care Jobs: For the Future of Decent Work*, 2018, 6, <https://ilostat.ilo.org/topics/unpaid-work/>.

[270] *Ibid.*, vi.

[271] *Ibid.*

[272] International Labour Organization, *How a New Law in Uruguay Boosted Care Services While Breaking Gender Stereotypes*, 27 August 2018.

“In many countries, domestic work is excluded from the coverage of labour law because it is not considered “work”. In other countries, domestic work may be covered by law but may not be afforded treatment on par with other types of work. For example, the minimum wage paid to unskilled labour may not apply to domestic workers or may apply at a rate much lower than that set for other workers.”²⁷³

Domestic workers are vulnerable, mostly because legislation does not offer them sufficient protection. They are often informal workers, are paid low wages and do not have access to many (or any) social benefits, such as sick leave pensions etc. In many parts of the world, domestic workers are migrant workers whose livelihood (and that of their family back home) often depends entirely on their earnings. Migrant domestic workers find

themselves at the mercy of their employers, with reported cases of abuse including confiscation of their passports or mobile telephones, denial of any time off, physical, emotional and sexual abuse, and indecent lodging conditions. In some instances, we may even speak of a modern form of slavery, as the UN has done, in recognition that the forms of abuse and discrimination suffered by domestic workers amount to a gross violation of their human rights and of the basic principles of the international community.

“Globally, more than 40 million people are subject to modern forms of slavery — 71 per cent of them women and girls — a grave human rights situation exacerbated by gender inequality, poverty, cultural norms and discriminatory laws that demand change.”

UN Special Rapporteur on Contemporary Forms of Slavery, 2018

Legislation on domestic workers is also gaining ground. In 2013, Brazil, a country with more than 7 million domestic workers, amended its constitution to include explicit protection for them. The country also passed a comprehensive law in this area in 2015. As a result, Brazil’s domestic workers now have a maximum eight-hour working day and 44-hour working week, as well as a guaranteed legal right to overtime pay; employers can be reported and fined for not complying with the law. In 2018, Brazil also ratified the ILO’s Domestic Workers’ Convention 2011, which sets out States’ duties to monitor and improve labour laws for domestic workers. According to the ILO’s guide to legislators,²⁷⁴ legislation on domestic workers should cover:

- formalising the employment relationship (through formal contracts),
- clearly setting out the working time and remuneration, including overtime pay,
- clearly setting out fundamental principles and rights at work,
- protecting domestic workers from abuse and harassment, and
- setting out specific protection for migrant and child domestic workers.

[273] International Labour Organization, *Global Wage Report 2018/19: What Lies Behind Gender Pay Gaps*, 26 November 2018, p. 91.

[274] International Labour Organization, *Effective Protection for Domestic Workers: A Guide to Designing Labour Laws*, 2012, https://www.ilo.org/travail/areasofwork/domestic-workers/WCMS_173365/lang--en/index.htm.

6. Gender stereotypes and feminised professions

Gender inequality in labour relations can also take the form of gendered stereotypes in the allocation of jobs to men or to women. Examples include the belief that women are unable to perform certain jobs, because they are naturally weaker than men or have childcare responsibilities that somehow render them more vulnerable. Jobs in the military, finance, law, heavy industries, jobs requiring long or late-night shifts etc., are jobs typically considered too high-pressure or ‘morally inappropriate’ for women, hence may be deemed off-limits for them. 104 countries impose restrictions on women accessing certain professions and may even publish lists of jobs that are not open to them – Russia, for example, lists 456 such jobs, which include driving a train or steering a ship.²⁷⁵ Conversely, certain professions have become ‘feminised’. Jobs such as nursing and teaching are dominated by women around the world, a situation that is mistakenly taken to confirm women’s predilection to gravitate towards professions that rely on their supposed superior empathy and caring abilities.

Women are of course free to choose their profession. The problem, however, is that feminised jobs are more likely to have lower pay and less prestige. Studies have shown that differences in productivity, such as human capital, job-specific skills and time investment, do not fully explain this gender pay gap; it rather results from gender stereotypes and the devaluation attached to jobs perceived as female.²⁷⁶ Where a previously male-dominated profession becomes more ‘feminised’, payment becomes lower; even men moving into female-dominated fields are likely to earn substantially less than in other professions – with one study putting the percentage at 15% less in Britain, Germany and Switzerland.²⁷⁷ Behind these dynamics is the lesser value attached to women’s role as citizens that extends over activities perceived as female. The system seems stuck in this scenario and institutions display a certain inertia towards it.²⁷⁸

This is where legislation must play a role. States can pass laws that redress this type of occupational segregation both in the public and in the private spheres. As a public employer, the State can and should act as a model: employ an equal number of women and men and pay and promote them equally. It can also incentivise private employers to do so and correct gender inequalities. Some positive examples include Iceland, where the State implemented comprehensive measures to mainstream gender in working relations,

“I’m 50 now and have encountered a certain amount of sexism in my career. I’ve had 118 people – mostly women – refuse to be cared for by me. I have had other patients who were shocked to see a man; there was one who didn’t say anything, but the look of total shock on her face was very funny. Most people assume I’m a doctor when they see me. I have to be very aware of that. My gender is technically irrelevant, but there are underlying perceptions and unconscious attitudes.”

Paul Byrne, a midwife at Northwick Park hospital in London, UK, interviewed in *The Guardian*, 9 May 2019

[275] ‘Labour Laws in 104 Countries Reserve Some Jobs for Men Only’, *The Economist*, 26 May 2018.

[276] Emily Murphy and Daniel Oesch, “The Feminization of Occupations and Change in Wages: A Panel Analysis of Britain, Germany, and Switzerland”, *Social Forces*, 94(3), pp. 1221-1255.

[277] *Ibid.*

[278] Paula England et al., ‘Does Bad Pay Cause Occupations to Feminize, Does Feminization Reduce Pay, and How Can We Tell With Longitudinal Data?’, *Social Science Research* 36(3) (2007), pp. 1237-1256.

including gender quotas on corporate boards (see section 7 below). Similarly, Belgium adopted legislation in 2011²⁷⁹ that required State-owned and publicly traded companies to include more women at the top management level. The law required at least a third of board of director members to be women within six years and the publication of measures each company would take to improve gender balance. Elsewhere, however, developments have been more timid. Pakistan's Companies Act of 2017, for example, merely requires that there should be at least one female director on the board of all public interest companies.

It will admittedly take some concerted efforts to change social attitudes towards professions. Meanwhile, it would help for States to take decisive steps to improve women's working conditions, to guarantee better pay for feminised jobs and adopt affirmative action measure, such as quotas, to encourage women's employment in professions that have traditionally been male-dominated. All of this will, at the very least, signal the State's strong commitment to gender equality.

7. The feminisation of poverty, especially in contexts of crisis and austerity

The feminisation of poverty has long been a well-documented phenomenon.²⁸⁰ According to estimates of the UN and the World Bank, there are 122 women aged 25-34 for every 100 men of the same age group living in extreme poverty.²⁸¹ They estimate that, globally, women are 4% more likely than men to live in extreme poverty; this varies at the regional level, with higher extreme poverty rates among women than men in Central and Southern Asia, Latin America and the Caribbean, Oceania (excluding Australia and New Zealand) and sub-Saharan Africa. The World Social Report 2020 of UN Department of Economic and Social Affairs shows that women are more likely to be undernourished even in non-poor households.²⁸²

Furthermore, women and girls suffer disproportionately in times of economic crisis. As documented by the UN, during such times "women and girls are more likely to be taken out of school, are the first to reduce the quantity or quality of the food they eat or to forgo essential medicines, and are more likely to sell sex in order to survive."²⁸³ This does not have just short-term effects but risks undoing previous progress and significantly affects long-term development. Furthermore, given that economic crises affect different sectors in different ways, this can also have a disparate impact on women. For example, most employees in manufacturing jobs such as the garment industry are women; as these jobs diminished with the crisis, unemployed women turned to informal work in the household or, in some instances, prostitution.²⁸⁴

Women suffer more acutely the impact of socio-economic policies also in affluent countries.²⁸⁵ A

[279] Article 518bis of the Belgian Companies Code.

[280] Hilda Scott, *Working Your Way to the Bottom: The Feminization of Poverty* (Pandora 1984).

[281] UN Women, *Turning Promises into Action: Gender Equality in the 2030 Agenda for Sustainable Development*, 2018, p. 76.

[282] <https://www.un.org/development/desa/dspd/world-social-report/2020-2.html>, p. 39

[283] UNAIDS, *Impact of the Global Economic Crisis on Women, Girls and Gender Equality*, August 2012, p. 2.

[284] *Ibid.*, p. 5.

[285] See Nancy Fraser, *Fortunes of Feminism. From State-Managed Capitalism to Neoliberal Crisis* (Verso, 2013).

gender pay gap persists here, as do gender stereotypes and segregation in the labour market, including women's exclusion from leadership positions in both the private and the public sector. In this context, austerity measures introduced during financial crises have a marked gendered impact. Feminist economists have recognised the need for a gendered critique of the measures taken in the aftermath of the 2008 crisis, which they argue have only "trivialise[d] feminist concerns while further embedding a masculinised, white and elitist culture of global financial privilege."²⁸⁶

An example of a gender-sensitive approach to tackling the financial crisis is offered by Iceland. After the country's banking system collapsed in 2009,²⁸⁷ a feminist government was elected, headed by Jóhanna Sigurðardóttir and comprising a majority of women cabinet members, including the economics and finance ministers. This new administration commissioned an analysis of the banking crisis, which confirmed feminist critiques that male financial culture of unfettered risk and neoliberal policies had been a major causal factor. Between 2009 and 2013, Government introduced temporary measures aimed at alleviating the effects of the crisis on women and men. Cuts in funding affected health care, primary education, family, and children's benefits such as parental leave. However, the resulting funds were used to provide nominal increases in basic unemployment benefits, social protection allowances and disability pensions in order to shelter individuals most affected by the resource cuts. Women,

especially elderly women and women with disabilities, were the major beneficiaries of these increases. Additionally, measures that sheltered low-income and single-parent households from losing their disposable earnings also benefitted women, who featured more prominently in both categories. At the same time, long-term planning included measures such as the introduction of gender-responsive budgeting; the appointment of gender equality experts within different ministries; the adoption of gender quotas in the boards of corporations; or the approval of plans

Gender-sensitive legislation introduced in Iceland in the aftermath of the 2009 financial crisis

- 2010 legislation stating that each gender must be represented with a minimum of 40% in the corporate boards of directors of all State-owned enterprises, publicly traded firms and all private limited companies with 50 or more employees.
- 2016 Public Finance Act on gender budgeting, requiring Government to assess the gendered impact of its proposed policies and address them in its Budget Bills.
- 2018 legislation requiring companies and governmental agencies employing 25 or more people to obtain an equal pay certification, seeking to render the gender pay gap obsolete by 2020; companies will have to renew their certification every three years and will face fines upon non-compliance.

[286] Penny Griffin, "Crisis, Austerity and Gendered Governance: A Feminist Perspective", *Feminist Review* 109: 1 (2015), p. 49. See also Aida A. Hozic and Jacqui True, eds., *Scandalous Economics: Gender and the Politics of Financial Crises* (OUP 2016).

[287] The following description of the Icelandic case study is based on the Good Practices Thematic Report (A/HRC/35/29) Appendix: Good Practices Case Studies of the Working Group on the issue of discrimination against women in law and practice (June 2017). See also Einarsdóttir, T., Johnson, J. and Pétursdóttir, G. (2013). "A Feminist Theory of Corruption: Lessons from Iceland." *Politics & Gender*, 9(2), 174-206.

of action for gender equality and for the prevention of violence. Government also established monitoring mechanisms, such as the Gender Equality Watch and the Welfare Watch, tasked with identifying welfare needs and gender-sensitive responses. Not only did the Icelandic government's response increase overall knowledge and awareness of the centrality of gender to financial crises, it also "pre-empted a regression in welfare and women's rights that usually accompanies austerity measures."²⁸⁸

The above contrasts with the situation in the UK. Also here measures were introduced in the aftermath of the 2008 financial crisis, in particular following the 2010 election, with deleterious effects on women. Benefit cuts and tax credits, the majority of whose beneficiaries were women, had a disproportionate impact on women in most age groups,²⁸⁹ who were disproportionately hit by austerity measures as compared to men, especially single mothers. The Women's Budget Group, a network of feminist economists, researchers, policy experts and campaigners, estimated that women-led households would stand to lose the most under the austerity policies.²⁹⁰ This would disproportionately affect single mothers and single female pensioners. The 2010 Equality Act, the UK's main equality legislation, prohibits discrimination based on age, disability, gender, pregnancy and maternity, race, religion or belief, sex, and sexual orientation. It also imposes upon public authorities a so-called "Public Sector Equality Duty". Thus, according to section 149(1) of the Equality Act 2010,

- "(1) A public authority must, in the exercise of its functions, have due regard to the need to—
- (a) eliminate discrimination, harassment, victimisation, and any other conduct that is prohibited by or under this Act.
 - (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it.
 - (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it."

Thus, public authorities are under a duty to eliminate prohibited conduct, to create equality of opportunities, and to foster good relations, including by tackling prejudice and promoting understanding.²⁹¹ The Women's Budget Group has argued that the Government failed its Public Sector Equality Duty by not commissioning gender impact assessments of the austerity measures it adopted.²⁹² While such assessments are not mandatory by law in the UK, they have been used in the past in order to assess the impact of specific policies.

[288] Ibid.

[289] House of Commons Library Briefing Paper, *Estimating the Gender Impact of Tax and Benefits Changes*, 18 December 2017.

[290] Women's Budget Group, *A Cumulative Gender Impact Assessment of Ten Years of Austerity Policies* (16 November 2016).

[291] For more on what this duty means for public authorities, see Equality and Human Rights Commission, *The public sector equality duty*, <https://www.equalityhumanrights.com/en/corporate-reporting/public-sector-equality-duty>, and House of Commons Library Briefing Paper, *The Public Sector Equality Duty and Equality Impact Assessments*, 8 March 2018.

[292] Women's Budget Group, *A chancellor tinkering at the margins*, December 2017.

1. EQUAL ACCESS TO THE JOB MARKET

- Legal barriers to women's participation in the workforce must be removed at all levels.
- Gender-based discrimination in hiring and firing practices must be banned; this includes discrimination related to pregnancy and maternity.
- Promoting women's employment includes ensuring equal access to education, the labour market, a fair taxation system and parental and maternity leave policies.
- Given that social attitudes are often responsible for women's lower levels of participation in the workforce, States must take measures to educate citizens (both women and men) about women's right to equality in employment.
- Legal barriers preventing refugees and asylum seekers from working in their host countries have a gendered impact and must be removed.

2. EQUAL PAY AND EQUAL BENEFITS ENTITLEMENTS

- Ensuring equal pay for equal work is an obligation for States under international law.
- Legislation should be adopted to guarantee equal pay for equal work, as well as to require the gender pay gap to be reported, monitored, and actively addressed by both public and private bodies.
- Unequal pensions are a direct consequence of the gender pay gap and the gendered experiences of women in the workforce, including women's reduced labour force participation, the over-representation of women in part-time or unpaid working arrangements, the impact of maternity and other forms of leave and the feminisation of low-paid work.
- Legislators should keep these factors in mind when designing pension schemes and aim to mitigate their impact through measures such as creating separate, non-discriminatory pension entitlement rules for lower income individuals.

3. DISCRIMINATION AND SEXUAL HARASSMENT IN THE WORKPLACE

- All forms of gender-based discrimination in the workplace must be prohibited at all stages, including the hiring process, the duration of the working relationship and dismissal, both in the public and private sectors.
- Affirmative action measures in hiring practices are appropriate and comply with international human rights law.
- Sexual harassment is a form of gender-based discrimination and violence against women and should be categorically and clearly banned by law and prosecuted in all contexts, including work.

- Measures to prevent and prosecute sexual harassment, such as codes of conduct and the monitoring of compliance, are necessary to foster a culture of zero-tolerance for sexual harassment and compliance with anti-sexual harassment laws.

4. MATERNITY, PATERNITY, AND PARENTAL LEAVE

- To rebalance the gendered distribution of caring responsibilities within the home, including childcare, States must provide for equitable parental leave for both parents that aim at the equal share of child-rearing tasks and their labour costs.
- Paternity leave must be made mandatory, non-transferable and equal to maternity leave.
- Neither parent should be penalised, whether directly or indirectly, for making use of their parental leave entitlements (by being demoted or otherwise having their work hours or conditions negatively affected).

5. CARE WORK AND DOMESTIC WORK

- Both care and domestic work are overwhelmingly performed by women worldwide and undervalued.
- Legislation should ensure access to adequate social services, including childcare, health, and elder care facilities, as a means to guarantee a more balanced distribution of care and domestic work.

6. THE PROBLEM OF FEMINISED PROFESSIONS

- The public sector should be a model in terms of gender balance within the workforce. To this end, gender-based quotas should be introduced for decision making positions.
- States should introduce incentives in the private sector as well as quotas for corporate boards to redress gender imbalances in the workforce and allow access of women to leadership.
- Education can play a crucial role in addressing gender stereotypes in the work field and in changing social attitudes about female and male professions. Media can also contribute alongside legislative changes to instigate gender balance in all professional sectors.

7. THE FEMINISATION OF POVERTY, ESPECIALLY IN CONTEXTS OF CRISIS AND AUSTERITY

- Laws should require governments to pay attention to the gendered impact of economic measures in times of crises, as cuts to social services and benefits impact women disproportionately.
- Laws should instruct governments to take measures aimed at preventing the feminisation of poverty, such as earmarking the funds saved from cuts to certain sectors and using them to provide social benefits for the most vulnerable.

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International Labour Organization, World Employment and Social Outlook: Trends for Women 2018, https://www.ilo.org/global/research/global-reports/weso/trends-for-women2018/WCMS_619577/lang--en/index.htm

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International Labour Organization Working Conditions Laws Database <https://www.ilo.org/dyn/travail/travmain.home>

OECD Family Database <http://www.oecd.org/els/family/database.htm>

CHAPTER 8

HEALTH LAW

True equality cannot be achieved without everyone having access to health services and health education, being free to make decisions about their own bodies and being able to engage in family planning at will. Gender-sensitive State policies in all these areas will ensure true gender equality and a better quality of life for both women and men.

1. Access to safe and legal abortion

Access to safe and legal abortion is a necessity. It reinforces women's decisional autonomy and serves to protect their health and wellbeing. Worldwide, countries have moved in the direction of liberalising access to abortion, expanding the grounds on which it is permitted and taking measures to ensure adequate services are in place to guarantee effective access to it. The UN has estimated that about 97% of countries allow for abortion to save the life of the pregnant woman; about two thirds allow it in cases where the physical or mental health of the woman is endangered; while only about one third allow abortion for social or economic reasons or upon request.²⁹³

Women's human rights include the rights to equality, to dignity, autonomy, information and bodily integrity and respect for private life and the highest attainable standard of health, including sexual and reproductive health, without discrimination; as well as the right to freedom from torture and cruel, inhuman and degrading treatment.

Working Group on the issue of discrimination against women in law and in practice, UNHR Special Procedures, December 2017

Nevertheless, several restrictive abortion regimes remain in place and are disproportionately found in developing countries. According to the UN Working group on the issue of discrimination against women in law and in practice, 47,000 women die each year due to unsafe abortions and a further 5 million suffer some form of temporary or permanent disability.²⁹⁴ An estimated 225 million women worldwide lack access to modern contraception and are at risk of unplanned pregnancies. Moreover, data from the WHO show that criminalisation does not reduce the number of abortions—instead, it forces women to resort to unsafe procedures.²⁹⁵ By contrast,

[293] UN Department of Economic and Social Affairs Population Division, *Abortion Policies and Reproductive Health around the World*, ST/ESA/SER.A/343, 2014.

[294] "Access to legal abortion services needed, to prevent 47,000 women dying each year - UN rights experts", *UN News*, 28 September 2018, <https://news.un.org/en/story/2018/09/1021332>.

[295] World Health Organization, *Safe Abortion: Technical and Policy Guidance for Health Systems* (2nd ed., 2012).

the Nordic countries, where women have had access to pregnancy termination since the 1970s and 1980s and are provided with access to information and all methods of contraception, have the lowest abortion rates.²⁹⁶

Some countries have seen a regression in abortion policies, typically because of the growing influence of conservative forces. In the US, for example, the state of Alabama imposed a near-total ban on abortions in 2019, outlawing termination of pregnancy even in extreme cases, such as rape or incest, and imposing a 99-year prison sentence on doctors performing abortions. Many other US states have introduced harsh legislation seeking to reverse the country's liberalisation of abortion in the 1970s. The UN Deputy High Commissioner for Human Rights has called these strings of new laws gender-based violence against women, torture, a form of extremist hate and a deprivation of women's right to health.²⁹⁷ The example of the US illustrates how gender equality activists must remain vigilant at all times and not assume that progress in any one area will not be rolled back by legislators.

Northern and Western European countries consistently have some of the lowest abortion rates in the world.²⁹⁸ This has been attributed to access to information and all methods of contraception, as well as to legalisation on pregnancy termination in force for decades. In the Netherlands for example, abortion was

"...This is gender-based violence against women, no question. It's clear it's torture – it's a deprivation of a right to health."

UN Deputy High Commissioner for Human Rights, referring to changes in US policy regarding abortion, 2019

legalised in 1984 and is available for up to 24 weeks into the pregnancy. In practice, however, the gestational limit is 22 weeks, with abortions during the additional two weeks being at the discretion of medical professionals. The law itself mentions fetal viability as the time limit for abortion, so application of the law may change with technological advances that may bring forward the period after which the fetus may be viable outside the womb. The procedure must be performed by a physician at a certified hospital or clinic and there is a mandatory five-day waiting period after the woman has consulted and discussed her intention with them (except in case of imminent danger to the woman's life or health). The facility must also ensure women are provided with adequate information on how to prevent unwanted pregnancies. The procedure is free for Dutch citizens. Parental consent is required for minors under the age of 16. The abortion rate in the country has remained stable and there are almost no reported illegal abortions.²⁹⁹

The situation is different in Latin America, where the Catholic Church still has much social influence. A notable exception is Uruguay. The country liberalised its abortion policy in 2012 after a 25-year struggle by the feminist movement. The new legislation, titled *The Voluntary*

[296] UN Working group on the issue of discrimination against women in law and in practice, *Thematic analysis: eliminating discrimination against women in the area of health and safety, with a focus on the instrumentalization of women's bodies*, A/HRC/32/44, 2016, para. 80.

[297] Liz Ford, "US Abortion Policy Is 'Extremist Hate' and 'Torture', Says UN Commissioner", *The Guardian*, 4 June 2019.

[298] World Health Organization, *World Abortion Policies* 2013.

[299] International Planned Parenthood Federation European Network, *Abortion Legislation in Europe*, January 2012, 57.

Termination of Pregnancy Act (Abortion Act, No. 18.987), allows for termination on demand up to 12 weeks into the pregnancy and up to 14 weeks in cases of rape. Some other restrictions remain in place, however: the woman must discuss her options with a three-member panel made up of a gynaecologist, a mental health professional and a social worker, after which there is a mandatory five-day waiting period.³⁰⁰ Uruguay's exceptionalism in the region has been attributed to its longstanding embrace of secularism and hailed as best practice. Doubts remain, however, as to whether the law will suffice to overcome pernicious gender stereotypes about women seeking pregnancy terminations.³⁰¹

Ireland has recently moved from having one of the strictest legal regimes on abortion worldwide to liberalising access to abortion, following a national referendum in 2018. Prior to the referendum, a constitutional amendment (the Eighth Amendment) had recognised the right to life of the unborn fetus. However, the Thirty-sixth Amendment was approved via referendum and it ushered in the Health (Regulation of Termination of Pregnancy) Act 2018. Based on this new law, access to abortion is now permitted in Ireland during the first twelve weeks of pregnancy and later in cases where the pregnant woman's life or health is at risk, or in the cases of a fatal fetal abnormality. Ireland thus poses the compelling example of a country where a popular vote in a referendum triggered the move from a restrictive to a more liberal abortion regime. It is difficult to know, however, to what extent Ireland's example may be replicated elsewhere. There are legitimate fears that participatory mechanisms such as popular initiatives and referendums may not fare well for women.³⁰² The case of the Bahamas is a cautionary tale, as a series of amendments meant to enshrine gender equality guarantees in the constitution were defeated in a referendum in 2016.³⁰³

One of the most restrictive abortion regimes in the world was in place in Romania during communist times. The criminalisation of abortion in Romania during the period 1967-1989 was accompanied by invasive policies, such as forced gynaecological check-ups disguised as mandatory regular medical examinations at the workplace; severely restricted access to contraception; taxes on childless citizens older than 25 or rewards for mothers of five or more children.³⁰⁴ At the same time, childcare facilities were woefully inadequate and leave policies – restricted to mothers and not available to fathers – were also insufficient. The impact of these measures was severe: an estimated 10,000 women died due to self-induced or backstreet abortions; the lack of easy access to contraception left behind a legacy of exceedingly high rates of abortions; while the number of children in orphanages in 1990 was estimated to have been in the hundreds of

[300] Pamela Duncan *et al.*, "Abortion laws around the world: from bans to easy access", *The Guardian*, 5 January 2016.

[301] Lucía Berro Pizarro, "'Women are not in the Best Position to Make These Decisions by Themselves': Gender Stereotypes in the Uruguayan Abortion Law", *University of Oxford Human Rights Hub Journal* 1 (2019) 25-54.

[302] Silvia Suteu, "Women and Participatory Constitution-making" in Helen Irving, ed., *Constitutions and Gender* (Edward Elgar 2017), 19-46.

[303] *Ibid.*, 40.

[304] Gail Kligman, *The Politics of Duplicity: Controlling Reproduction in Ceausescu's Romania* (University of California Press, 1998). See also Elena Brodeala and Silvia Suteu, "Women and Constitution-making in Post-communist Romania" in Helen Irving and Ruth Rubio Marin, eds., *Women as Constitution-Makers: Case Studies from The New Democratic Era* (Cambridge University Press 2019).

thousands.³⁰⁵

Restrictive abortion policies continue to exist today. In Europe, Poland bans abortion except where the woman's life or health is endangered, pregnancy is the result of rape or incest, or the fetus has suffered severe and irreversible damage. The first and third of these exceptions require medical certification, while the second one requires a prosecutor to confirm the crime. In 2018, the Polish Government attempted to restrict access to abortion even further by removing the third exception; the bill was dropped following widespread protests.³⁰⁶ However, on 22 October 2020, the Constitutional Court ruled that abortion due to severe and irreversible damage of the fetus was unconstitutional and suppressed this clause. Until October 2019, Northern Ireland had a separate abortion regime within the UK. While in the UK abortion was liberalised in 1967, Northern Ireland maintained a restrictive regime that only allowed it in cases where the pregnant woman's life was at risk or there was a risk of permanent and serious damage to her mental or physical health. Consequently, hundreds of women travelled to mainland UK every year to access abortions. In the aftermath of the Republic of Ireland's liberalising access to abortion in 2018, the Northern Irish situation came under severe pressure by women's rights activists. The UK Central Government had initially refused to intervene to extend the 1967 legislation to Northern Ireland, claiming it was a matter for Northern Ireland's devolved authorities.³⁰⁷ There were also attempts to get the liberalisation through court intervention, with women bringing cases before the Northern Irish and UK courts claiming the current law unfairly discriminated against them and subjected them to undue burdens.³⁰⁸ The abortion regime in Northern Ireland was finally changed in October 2019, with the Central UK Government legislating to bring it in line with the rest of the country's.

Many Latin American countries are among those with the most restrictive abortion laws still in place. Among them, the most severe regime is that of El Salvador.³⁰⁹ The Salvadoran Constitution declares that life begins at conception, an amendment introduced in 1998 following lobbying by the country's Catholic Church. Article 133 of El Salvador's Penal Code completely bans access to abortion regardless of the circumstances, including if a woman's life is at risk or if her pregnancy is the result of sexual violence. Many doctors, who fear being prosecuted for assisting an abortion, refuse to intervene during medical emergencies. This has had a disparate impact on lower-income women who cannot afford care in private facilities where patient confidentiality is maintained. Moreover, judges accept spurious evidence and have convicted women who had suffered miscarriages, some of them without even knowing they were pregnant. According to the UN, between 1988 and 2017 at least 42 women have been convicted on charges of attempted or aggravated homicide on the basis of the provision—convictions that often carry decade-

[305] Jane Perlez, "Romania's Communist Legacy: 'Abortion Culture'", *The New York Times*, 21 November 1996 and Wendell Steavenson, "Ceausescu's children", *The Guardian*, 10 December 2014.

[306] Poland abortion: Protests against bill imposing new limits, BBC News, 26 March 2018.

[307] Andrew MacAskill, "Britain's May refuses to relax Northern Ireland abortion rules", *Reuters*, 27 May 2018.

[308] UK Supreme Court, *In the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review* (Northern Ireland) [2018] UKSC 27. See also Bríd Ní Ghráinne and Aisling McMahon, 'Abortion in Northern Ireland and the ECHR: Reflections from the UK Supreme Court', *International and Comparative Law Quarterly* (2019).

[309] Lisa Kowalchuk, "The Unspeakable Cruelty of El Salvador's Abortion Laws", *The Conversation*, 12 April 2018, <http://theconversation.com/the-unspeakable-cruelty-of-el-salvadors-abortion-laws-94004>.

long sentences (the case of Manuela was referred to in Chapter 5).³¹⁰ Many more have been prosecuted. The regime is so draconian, Amnesty International has labelled it ‘institutionalised violence’ against women and ‘torture’.³¹¹ Unsurprisingly, the legal regime in combination with poor access to contraception have led to a growth in illegal underground abortions.³¹²

Five other countries in the region also have total abortion bans: The Dominican Republic, Haiti, Honduras, Nicaragua, and Suriname. While countries such as Bolivia have liberalised access to abortion in recent years, others have tried and failed. Chile liberalised its abortion laws in 2017, making it available in cases where the life of the pregnant woman was at risk, where the pregnancy was the result of rape and where the fetus was not viable outside the womb. However, the law allowed doctors to raise conscience-based objections to perform the procedure, whereas a court interpretation extended this further and allowed entire private hospitals to refuse to offer abortions.³¹³ Government subsequently allowed such refusals without requiring a justification, thus leaving in place serious barriers to women actually accessing safe abortions. Moreover, prior requirements that doctors would need to register as conscientious objectors ahead of time, and that hospitals needed to ensure they had staff on the premises who would perform abortions, were removed from the law. This undermines the continuity of care provisions and severely affects women in areas where there is a scarcity of doctors. Chile is therefore an example of how government regulations and omissions can seriously curtail access to abortion, even where legislation may have formally guaranteed such access.

2. Sexual health education and access to contraceptives

A. Sexual health education

Sexual health education is a component of the right to health and the right to education and is a precondition for a gender equal and healthy society. Rather than being resisted, it should be embraced by States as an opportunity to improve their societies’ overall health standards.

There are several arguments in favour of comprehensive, accurate and non-judgmental sexual health education policies. They have been shown to reduce the rate of sexually-transmitted diseases, thereby reducing overall health service costs and freeing up funds for other expenses. Such educational programmes have been shown to be especially important for young girls, as they allow them to make better informed choices about their bodies, prevent unwanted pregnancies and stay in school. In 2018, UNESCO updated guidelines on sexual education aimed primarily at children and young adults and emphasising its clear benefits.³¹⁴ While such education

[310] ‘UN Rights Office Urges El Salvador to Reform ‘Draconian’ Abortion Laws’, *UN News*, 15 December 2017.

[311] Amnesty International, *On the Brink of Death: Violence against Women and the Abortion Ban in El Salvador*, 2014.

[312] Nina Storchlic, “On the Front Lines of El Salvador’s Underground Abortion Economy”, *Foreign Policy*, 3 January 2017.

[313] José Miguel Vivanco, “A Backward Step for Reproductive Rights in Chile”, Human Rights Watch, 16 April 2018.

[314] UNESCO, *International Technical Guidance on Sexuality Education: An Evidence-informed Approach*, 2018, <https://unesdoc.unesco.org/ark:/48223/pf0000183281>.

programmes are especially important for women and girls, they would help improve the quality of life for both women and men and should therefore be a priority for all States.

Unfortunately, some countries remain resistant to introducing sexual health education programmes. They invoke several types of arguments, none of which withstand scrutiny. Individuals may believe that there are cultural or religious reasons to resist sexual health education. This occurs often in the form of parents objecting to their children receiving such instruction in schools. Examples include Muslim parents believing that lessons on menstruation and safe sexual behaviour are *haram* (forbidden by Islamic teachings), or Christian parents objecting to their children learning about and having access to contraception, preferring instead that they be taught abstinence only. These views actually risk exposing children and young adults to more danger by leaving them

uninformed about healthy sexual behaviour, informed consent, contraception and sexually-transmitted diseases. Some strong voices from within religious or cultural communities have set up resources to tell parents about the benefits of sexual health education and to do away with stigma.³¹⁵ Such voices can help shift the conversation and encourage individuals and parents to embrace sexual health education.

Opponents of sexual health education may also mistakenly believe such programmes aim to promote some non-normative sexual conducts or sexual orientation. This is a misconception. Not only is there no link between sexual health education and sexual orientation—whether heterosexual or any other—but the former can help individuals, especially children, better to understand sexuality and safe sexual behaviour. There is no scientific link between education on these matters and an individual's sexual orientation. Moreover, a comprehensive sexual education programme can help better to understand one's sexual orientation and specific sexual health needs.

Finally, sexual health education might be mistakenly linked to promiscuity, a rise in sexually-transmitted diseases, including HIV, and sexual risk-taking behaviour. A former Indian health minister, for example, opposed sexual health education programmes because he believed they corrupted young people, “offended Indian values” and would lead to promiscuity,

Evidence reviewed by UNESCO in 2018 has confirmed that curriculum-based sexuality education programmes contribute to the following outcomes:

- Delayed initiation of sexual intercourse
- Decreased frequency of sexual intercourse
- Decreased number of sexual partners
- Reduced risk taking
- Increased use of condoms
- Increased use of contraception

While the focus of many studies is on health outcomes, UNESCO also recognised that this kind of education can contribute to wider outcomes such as gender equitable attitudes, confidence or self-identity.

[315] For the personal account of a Muslim father, see Yasir Khan, ‘How to Have “the Talk” as a Muslim Father’, *The Walrus*, 18 January 2019.

experimentation and irresponsible sexual behaviour.³¹⁶ His attitude was especially dangerous in a country with very high levels of teenage pregnancies and sexual abuse. Such views have been thoroughly debunked by evidence, which shows that such education programmes actually help *reduce* risk-taking sexual behaviour and infection rates for sexually-transmitted diseases. The link is simple: educating individuals about sexual activities, the risks associated with them and how they can protect themselves against those risks (such as through the use of condoms and other contraceptives), results in reduced rates of infections and lower numbers of teenage pregnancies. No connection has been found between such education programmes and increased sexual activity. Instead, States must accept that everywhere in the world individuals of all ages engage in sexual activity, whether inside or outside marriage, and should try to minimise the risk factors accompanying it. Doing so starts with adequate sexual health education and access to contraceptives.

B. Access to contraceptives

Access to contraceptives is connected to comprehensive sexual health education programmes. It is also a requirement to ensure adequate access to family planning for all members of society, particularly for women. It is only when contraceptives are widely available, free of charge insofar as possible, that individuals can truly exercise their bodily and sexual autonomy without fear of negative repercussions, such as sexually-transmitted diseases and unwanted pregnancies. Countries that understand the importance of access to contraceptives have reaped significant benefits, including benefits of an economic nature.

According to the WHO, access to contraceptives has a direct impact on a woman's health and well-being.³¹⁷ It allows spacing of pregnancies and can delay pregnancies for young women, who are at increased risk of health problems and death from early childbearing. It prevents unintended pregnancies, including those of older women who face increased risks related to pregnancy. Family planning enables women who wish to limit the size of their families to do so. Evidence suggests that women who have more than four children are at increased risk of maternal mortality. By reducing rates of unintended pregnancies, family planning also reduces the need for unsafe abortion. Moreover, pregnancies that are too closely spaced or ill-timed are also tied to higher risks of infant mortality, so reducing the former will also help reduce the risk of infant deaths. The WHO lists these benefits in addition to those attached to

"It is important that family planning is widely available and easily accessible through midwives and other trained health workers to anyone who is sexually active, including adolescents. Midwives are trained to provide (where authorised) locally available and culturally acceptable contraceptive methods. Other trained health workers, for example community health workers, also provide counselling and some family planning methods, for example pills and condoms."

World Health Organization

[316] Abby Young-Powell, "Six of the Best Sex Education Programmes Around the World", *The Guardian*, 20 May 2016.

[317] World Health Organization, *Family Planning/Contraception*, 8 February 2018, <https://www.who.int/news-room/fact-sheets/detail/family-planning-contraception>.

certain contraceptive methods, such as condoms, which reduce the risk of sexually-transmitted diseases, including HIV.

Iran's example is telling. Ayatollah Ruhollah Khomeini, the country's supreme leader, had encouraged a baby boom upon seizing power in 1979, but was persuaded in the 1980s that the country could no longer sustain such population growth in economic terms. He then issued *fatwas* making birth control widely available and acceptable to Muslims.³¹⁸ Contraceptives could be obtained free at state clinics, including thousands of new rural health centres; health workers promoted contraception as a way to leave more time between births and help reduce maternal and child mortality; and couples intending to marry were required to receive counselling in family planning. The cumulative result was a drop in birth rates from around 7 births to under 2 births per woman. This in turn allowed families to invest more in each child. A few years into the new century, President Mahmoud Ahmadinejad wanted to reverse these social changes and encourage population growth. To this end, it resorted to denouncing the contraceptive programme as "a prescription for extinction," encouraging young girls to marry not over 16 or 17 years of age and offering financial bonuses for each child. He was, however, largely ignored. As one Iranian woman put it, "Iranian women are not going back."³¹⁹

While Iran's example is instructive, it is important to remember that its policies on access to contraceptives remain tied to a conservative agenda. Family planning education is tied to marriage, thereby leaving out unmarried individuals. This results in dangerous ignorance, not least about sexually-transmitted diseases, that could have negative consequences for individuals, especially women. In fact, lack of knowledge has been shown to lead to lower rates of condom use, an increase in sexually-transmitted illnesses and potentially in infertility rates due to such illnesses.³²⁰ Moreover, poor sexual health education and access to contraceptives is likely to have a disproportionate impact on young women, as it is likely to result in higher rates of teen pregnancies. The US Federal Government, for example, has spent millions on education programmes that promote abstinence (abstaining from sexual relations until marriage). Evidence shows, however, that such programmes backfire, with States that spend most money on them experiencing the highest rates of teen pregnancy.³²¹ Simply expecting young adults not to engage in sexual activity is unrealistic and has detrimental effects, primarily on young women, who in the event of pregnancy are often forced to drop out of school in order to care for their children, have their professional paths altered and their overall ability to lead fulfilling, productive lives curtailed.

[318] "Iran's Birth Control Policy Sent Birthrate Tumbling", *LA Times*, 22 July 2012.

[319] *Ibid.*

[320] David P. Goldman, "The Strategic Implications of Iran's STD Epidemic", *Asia Times Online*, 30 January 2015.

[321] Aaron E. Carroll, "Sex Education Based on Abstinence? There's a Real Absence of Evidence", *The New York Times*, 22 August 2017.

3. Access to assisted reproductive technologies and surrogacy

Technology has evolved significantly in the area of reproduction. Since the first child conceived via in vitro fertilisation was born in 1978, it has been understood that conception and reproduction can be decoupled. International human rights law and national law have tried to keep up with technological advancements ever since.

A. In vitro fertilisation (IVF)

In vitro fertilisation (IVF) is one type of assisted reproductive technology consisting of fertilisation of eggs by sperm outside the womb, followed by implantation within the womb. It is typically used in situations involving infertile or partially infertile women to become pregnant. The legal regulation of IVF differs greatly across the world. In Latin America, for example, Costa Rica is at one extreme of the spectrum, having imposed a total ban on IVF on grounds of protecting the right to life of the fetus – this complete prohibition was later found discriminatory against infertile women by the Inter-American Court of Human Rights.³²² Mexico allows access to IVF but only for infertile couples, whereas Peru requires the gestating and the genetic mothers to be the same person (in other words, only allows IVF in situations where the mother's eggs can be harvested and used during the procedure).³²³ With infertility rates growing worldwide, more and more couples are seeking parenthood through IVF. This has also been the case in the Middle East, where Saudi Arabia and the UAE are leading in terms of numbers of treatment sought.³²⁴

Some good practice for States seeking to regulate IVF would include clear, non-discriminatory regulation of who should have access to IVF, women's right to refuse transfer of embryos to their bodies and both women's and men's right to forbid the use of their embryos without their consent.

B. Surrogacy

Surrogacy refers to the practice of a woman (the surrogate) carrying and delivering a child for a couple or another individual. Typically, insemination is achieved artificially through IVF. There are two broad types of surrogacy: under one, the surrogate donates her own egg for fertilisation by the father's sperm and as such is genetically related to the child; under the other, there is a donor egg that is fertilised by the father's sperm and the surrogate is therefore not genetically related to the child. Under the second scenario, the surrogate is sometimes referred to as a "gestational carrier".

Different countries in the world regulate surrogacy differently. Some recognise parental rights for the intended parents already during the pregnancy, while others do so only after birth. Some recognise the surrogate as the legal mother of the child, while others recognise as such the intended mother. Approaches also differ regarding compensation: some countries ban any

[322] Martin Hevia and Carlos Herrera Vacafior, "The Legal Status of In Vitro Fertilization in Latin America and the American Convention on Human Rights", *Suffolk Transnational Law Review* 36(1) (2013) 52.

[323] Ibid.

[324] Jennifer Bell, 'Why IVF Is No longer a Stigma in the Middle East', *Arab News*, 25 July 2019.

form of payment for surrogacy and only allow so-called “altruistic surrogacy”, while others allow “commercial surrogacy” (contracting a surrogate in exchange for payment) as well. Given the propensity for abuse and exploitation of the most vulnerable women, the distinction between “altruistic” and “commercial” surrogacy is not tenable. A 2016 investigation by Swedish authorities into the ethical implications of legalising “altruistic surrogacy” (the country has a total ban on the practise) found that there was no way to

“The most important reason we don't want to allow surrogacy in Sweden is the risk that women face pressure to become surrogate mothers. It is a big commitment and it involves risks to go through pregnancy and childbirth. We believe that even with a proper trial and strong support for women, it can never be ruled out that it was prompted by coercion.”

Wendel Rosberg, Swedish investigator into the country's total ban on surrogacy

ensure coercion or under the table payment would not occur.³²⁵ This is especially concerning given the very significant risks associated with pregnancy faced by the surrogate mother. Given the exploitation that is often hidden behind either form of surrogacy, only a total ban on the practice will ensure gender equality and non-discrimination.

The use of surrogacy is, however, growing around the world. It is typically framed as a case of remunerated labour or else as a fertility option for couples or individuals unable to conceive. Yet the truth is that there is serious exploitation and health risk at play, particularly for women from developing countries who resort to surrogacy for economic reasons. Most countries in the European Union prohibit surrogacy, the exception being the UK. The UK does ban “commercial” surrogacy, yet its citizens were the largest consumers of the Indian surrogacy industry.³²⁶ India had legalised commercial surrogacy in 2002 and its economy came to benefit by \$400 million per year from its surrogacy industry, with primarily poor Indian women acting as surrogates.³²⁷ It then, however, introduced restrictions. After a UN Committee on the Rights of the Child said that “commercial” surrogacy, if not regulated, amounted to the sale of children, in 2015 India banned foreign couples from using Indian surrogates.³²⁸ Then, in 2019, following accusations that the industry was exploiting the most vulnerable in Indian society, India initiated legislative change to ban “commercial” surrogacy altogether. Thailand has similarly changed its regulations following high profile cases, such as that of an Australian couple who in 2015 abandoned their surrogate child as he had been born with Down syndrome. Other States that regulate surrogacy include Russia, Georgia and Ukraine.³²⁹

Also concerning is the spread of so-called “surrogacy tourism” in countries that do not legally regulate surrogacy. There have been several reports of “baby factories” in operation in different

[325] “Investigator: Keep Ban on Surrogacy”, *Swedish Radio*, 24 February 2016.

[326] Herjeet Marway and Gulzaar Barn, ‘Surrogacy laws: why a global approach is needed to stop exploitation of women’, *The Conversation*, 30 July 2018, <https://theconversation.com/surrogacy-laws-why-a-global-approach-is-needed-to-stop-exploitation-of-women-98966>.

[327] *Ibid.*

[328] ‘Factbox: Which Countries Allow Commercial Surrogacy?’, *Reuters*, 19 January 2017, <https://www.reuters.com/article/us-india-women-surrogacy-factbox/factbox-which-countries-allow-commercial-surrogacy-idUSKBN1530FP>.

[329] *Ibid.*

countries, where the world's rich can "order" babies without legal oversight.³³⁰ In such non-regulated situations, the risks for all involved – surrogate mother, child and intended parent(s) – are high. They include exploitation of the surrogate mother, child trafficking, a change of heart of one party, as well as an array of legal uncertainties triggered by unforeseen circumstances (such as divorce of the intended parents, death of the surrogate mother or serious threats to her health for reasons related to the pregnancy).

The UN has strongly condemned such practices, as they amount to the commodification of children. In 2018, the UN Special Rapporteur on the sale and sexual exploitation of children explained that insofar as a sale is involved, both the surrogate and the child were at risk: "This practise entails power imbalances and increases the vulnerability of the children and surrogate mothers to various forms of exploitation."³³¹ The UN Convention on the Rights of the Child contains provisions applicable to surrogacy: Article 2 prohibits the sale of children and Article 35 stipulates that "State Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, *the sale of, or traffic in children for any purpose or in any form*" (*emphasis added*). As the UN Special Rapporteur stated, "there is no 'right to a child' in international law."

In view of the dangers and risks of exploitation associated with surrogacy, States should ban the practice completely, in both its "commercial" and its "altruistic" forms. They should also ensure the ban extends to so-called "fertility tourism", while making other options, such as IVF treatment, available at home.

4. Forced sterilisation

Forced or compulsory sterilisation is a human right violation and should be condemned in no uncertain terms by all States. The practice has its roots in eugenics programmes performed in the twentieth century on individual members of communities deemed inferior or deficient. It has survived to this date: several countries have been found to have such programmes in place, typically as part of national population planning (for example, Bangladesh or China). Other countries demand sterilisation as a requisite for legal recognition of the gender identity of reassigned intersex or transgender individuals, as was the case in Germany until 2011, when the German Constitutional Court declared the practice unconstitutional (*BVerfGE* 128, 109, of 11 January 2011). Others have simply failed in their duty of care, insofar as public hospitals have been found to have performed sterilisations without consent. This was the case in Slovakia, for example, where several Roma women who had been sterilised without consent won cases before the European Court of Human Rights, which declared the practice amounted to inhumane or degrading treatment.³³²

[330] Kevin Rawlinson, "Interpol Investigates 'Baby Factory' as Men Fathers 16 Surrogate Children", *The Guardian*, 23 August 2014.

[331] 'Children Risk Being "Commodities" as Surrogacy Spreads, UN Rights Expert Warns', OHCHR, 6 March 2018, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22763&LangID=E>.

[332] *V.C. v. Slovakia* (no. 18968/07), European Court of Human Rights, 8 November 2011.

The UN has strongly condemned all instances of forced sterilisation.³³³ It has found that such practices disproportionately target women (especially poor, HIV positive and ethnic, indigenous, and racial minority women), disabled, intersex and transgender individuals. The UN has criticised relying on such sterilisation programmes for the purposes of population control, especially insofar as sterilisation often occurs under unhygienic conditions and specifically targets vulnerable women and groups. It has also criticised the use of rewards for health workers to meet sterilisation targets, misinforming material and inadequate consent forms. Instead, the UN has put forward a set of guiding principles for States to follow in order to ensure their health programmes, including sterilisation, meet international standards and avoid resulting in human rights violations.³³⁴ Among these principles are:

- Autonomy in decision-making, expressed through free and informed consent
- Comprehensive provision of information and support
- Effective access to medical records
- Ensuring non-discrimination in provision of sterilisation services
- Effective accountability, participation, and access to remedies (including courts)
- Taking all appropriate legal, regulatory, policy and practice actions

[333] World Health Organization, OHCHR, UN Women, UNAIDS, UNDP, UNFPA and UNICEF, *Eliminating Forced, Coercive and Otherwise Involuntary Sterilization: An Interagency Statement*, May 2014, https://www.unaids.org/sites/default/files/media_asset/201405_sterilization_en.pdf.

[334] Ibid.

1. ACCESS TO SAFE AND LEGAL ABORTION

- Access to abortion should be decriminalised.
- As the UN has recognised, blanket bans on abortions contravene human rights. States should legislate to ensure access to safe abortions.
- The ‘rights’ of the fetus should not be constitutionalised.
- Where the law restricts access to abortion, by limiting it to cases of threats to the life and well-being of the woman or of fetal abnormalities, for example, restrictions should take into consideration the protection of the woman's health.
- There should be no undue burdens on women accessing abortions, such as overly extensive mandatory delays, overly demanding medical certifications, or invasive counselling.
- Where the law allows for conscientious objection to providing abortions, this should be restricted to individual medical professionals and be accompanied by provisions ensuring continuity of care in the premises.
- Women having undergone abortions or having assisted them should not be criminalised.
- Access to abortion should be facilitated by ensuring that a sufficient number of clinics and medical professionals are available to women across the country, in particular in rural and remote areas. The State must take measures to avoid the creation of ‘abortion deserts’ (areas where access to abortion is legally allowed, but no providers exist).
- The State must guarantee access to information about abortion that is comprehensive, accurate, and impartial.

2. SEXUAL HEALTH EDUCATION AND ACCESS TO CONTRACEPTIVES

- Access to family planning and contraceptives is a human right. Guaranteeing legally sexual health education and access to contraceptives, reduces the need for abortion, especially unsafe abortion, reinforces people's rights to determine and space out the number of children they have, prevents deaths of mothers and children and, in the case of contraceptives such as condoms, it helps to prevent HIV and other sexually transmitted infections.

3. ACCESS TO ASSISTED REPRODUCTIVE TECHNOLOGIES AND SURROGACY

- While there is no international legal right to access IVF, where the law does provide it, it should do so in clear and non-discriminatory terms.
- Women should retain the right to refuse transfer of embryos to their bodies.

- Women and men should retain the right to forbid the use of their embryos without their consent.
- States should ban the practice of surrogacy, recognising the unavoidable risk of exploitation it entails.
- The ban of surrogacy should extend to both its so-called “commercial” and “altruistic” forms, in recognition of the untenable nature of this distinction in practice, as there is no way to ensure that coercion or under the table payment does not occur.
- States should also ensure the ban extends to so-called “fertility tourism”, wherein intended parents travel abroad to access surrogacy services.
- States should take measures to discourage their citizens from seeking access to surrogacy abroad by broadening their options at home, for example through IVF treatment.

4. FORCED STERILISATION

- Forced, coerced and otherwise involuntary sterilisation is a human rights violation and should be banned by law.
- There should be legal guarantees for full, free, and informed decision-making on matters of health and reproduction.
- Anti-discrimination laws should extend to the medical field and seek to prevent stereotyping of patients that might result in forced sterilisations.
- Legal recognition of one’s gender identity should not be tied to having undergone sterilisation.
- There should be no sterilisation incentive programmes for either patients or health professionals.
- Access to sterilisation procedures should be ensured for all individuals who seek it voluntarily but should be closely monitored to prevent abuse.

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https://www.unaids.org/sites/default/files/media_asset/201405_sterilization_en.pdf

CHAPTER 9

LAWS GOVERNING EDUCATION AND THE MEDIA

This Chapter is devoted to the discussion of education and media laws and the serious implications the regulations of both fields have for gender equality.

1. Education Law

The right to education, including its equal enjoyment by girls and boys, is recognised and guaranteed in a number of international and regional legal instruments. Nevertheless, as the UN High Commissioner for Human Rights warned in 2015, “...almost one third of all countries had not achieved parity in primary education and in less than half there were as many girls as boys in lower-secondary grades. Despite the progress made, discrimination against girls persisted.”^[335] A wide variety of factors operate in restricting girls’ access to education on an equal footing with boys, the most striking one being the persistence of discriminatory laws and policies. This is confirmed by a World Bank study, according to which “There exist, in several countries, laws and policies that undermine equal enjoyment of the right to education by girls.”^[336] Even laws and policies that appear to be gender-neutral can be indirectly discriminatory, due to prevailing social norms, and lead to the exclusion or restriction of girls’ access to education.^[337] In order to ensure that the principles of gender equality and non-discrimination between girls and boys are guaranteed in this field, existing legislation has to be examined in the light of binding international standards and the principles spelt out therein.

A. Recognition of the right to education

The “right” to education ought to be explicitly recognised in legislation. This is relevant both symbolically, as it sends an important message about the value of education, and in practical terms, as it provides a clear legal basis to claim access to it. It is, in both respects, particularly important for girls. Some legal systems do unambiguously recognise this right. This is the case, for example, of the Republic of Armenia, where the 1999 Act on Education states: “The Republic of Armenia shall ensure the right to education, irrespective of national origin, race, gender, language, religion, political or other opinion, social origin, property status or other circumstances.” Similarly, Article 1 of the Education Code L. 111 in France states that “the right to

[335] A/HRC/30/23 - 20 July 2015.

[336] World Bank, *Women, Business and the Law 2016: Getting to equal* (2015), pp. 4-5.

[337] A/HRC/35/11 - 5 April 2017

education is guaranteed to all.”³³⁸ The Dominican Republic offers a particularly good example, as the General Education Act, no. 66/97 (1997), states in its Article 4(A): “Education is a permanent and inalienable human right,”³³⁹ thus granting it the same privileged status as, for example, the rights to life and to self-determination.

Legislation should also clearly affirm the State’s duty to implement this right, including the duty to remove obstacles that might impede or limit access to it. In this line, Article 4 of the Chilean General Education Law (2009) requires the State to ensure the quality of education and equal opportunities to access it, as well as to reduce inequalities resulting from factors such as gender, financial, social, ethnic or geographical circumstances.³⁴⁰ A similar provision is found in the Argentine Law no. 26-206 (2006) on National Education, Article 4 of which requires the federal and provincial governments to ensure equal and fair access to education.

An explicit commitment to gender equality and non-discrimination should also be included in laws on education, in order to ensure that all educational institutions adhere to rules and regulations that promote and guarantee it in gender-sensitive terms. This includes private and religious schools, which in some countries fall outside the public normative framework and often abuse their margin of freedom to promote curricula and put mechanisms in place that undermine gender equality. Moreover, regulatory frameworks ought to guarantee a minimal level of cohesion in the curricula of all educational institutions with regard to gender-sensitive questions and beyond, regardless of their status or affiliation.

B. Emphasis on gender equality and non-discrimination

Guaranteeing equality in education means ensuring that girls have the same access to all levels of education as boys and that their education has the same content and meets the same quality standards. Non-discrimination is therefore intended to ensure that every girl enjoys a non-discriminatory, gender-sensitive educational environment and that the same standards apply to boys and girls in all educational institutions, both public and private, and at all educational levels. To this end, education laws must ensure that quality education is economically accessible to all without discrimination and explicitly state that every girl has equal access to grants and scholarships.³⁴¹ An example of good legal practice in this regard is the General Education Act 66-97 (1997) of the Dominican Republic, Article 4 (J) of which states: “It is the duty of the State to enforce the principle of equality of educational opportunities for all.”³⁴²

Some laws phrase the prohibition of discrimination in the field of education in generic terms, without naming any specific grounds for discrimination. An example of this is the Framework Law on Primary and Secondary Education (2003) of Bosnia and Herzegovina, Article 4.1 of which stipulates that “Any child shall have equal right of access and equal opportunities for participation

[338] *Implementing the Right to Education* - Published in 2016 by the United Nations Educational, Scientific and Cultural Organization, p. 23.

[339] *Implementing the Right to Education*, op. cit. p. 23.

[340] *Implementing the Right to Education*, op. cit. p. 26.

[341] The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), general comment No. 13 (1999), para. 6 (b).

[342] *Implementing the Right to Education*, op. cit. p. 25.

in appropriate education, without discrimination on any basis.”³⁴³ A similar provision can be found in Article 2 (4) of Romania’s Law of National Education no. 1/2011. Other laws explicitly prohibit some grounds for discrimination – including sex and gender identity. This is the case of the General Education Act in the Dominican Republic 66-97 (1997), Article 4 (a), or of the Education Act of Burkina Faso (2007), which states that “Everyone living in Burkina Faso shall have the right to education without discrimination on any ground, such as sex, social origin, race, religion, political opinions, nationality or state of health[...] This right shall be exercised on the basis of equity and equal opportunities for all citizens.”³⁴⁴

In some legal systems, discrimination in education is addressed in laws other than the Education Act itself. In Sweden, the Discrimination Act (2008) bans any discrimination based on sex, sexual identity, ethnicity, religion, belief, disability, sexual orientation or age and applies this ban in the field of education.³⁴⁵ Yet, even where such overarching anti-discrimination legislation exists, it would be appropriate to include an explicit ban of discrimination in the Education Act itself, as Swedish legislation on education does. This helps to prevent misinterpretations or misapplication of generic legislation in terms that affect girls’ right to education, while also sending an explicit and clear message about the State’s commitments to this right.

In this line, laws on education should explicitly assert substantive gender equality and non-discrimination as a fundamental objective of national education policies. For example, Article 11 of the Argentina’s National Education Act, no. 26-206 (2006) states that the national policy on education aims to ensure equality and respect for people and their differences and to prevent discrimination based on gender or any other ground. The Framework Law on Primary and Secondary Education in Bosnia and Herzegovina (2003) establishes as one of the general goals of education the “promotion of respect for human rights and basic freedoms, and preparation of each person for life in a society that respects the principles of democracy and rule of law.” Article 121.1 of the French Education Code stipulates that educational institutions “contribute to the promotion of co-education and gender equality.”³⁴⁶ Such statements constitute a significant step in the promotion of gender equality in education.

Discrimination in education on grounds other than gender is persistent around the world and should also be explicitly banned. These grounds include health, disability, ethnicity, nationality, and religious identity. The aim is to ensure that boys and girls from vulnerable demographic groups, such as specific religious or ethnic communities, with refugee backgrounds or otherwise special needs, are not deprived of their right to education.³⁴⁷ Specially striking is discrimination against Roma people, one of the largest ethnic minorities in Europe and, according to World Bank reports³⁴⁸, among the poorest and most vulnerable demographic groups in that region

[343] *Implementing the Right to Education*, op. cit. p. 25.

[344] *Implementing the Right to Education*, op. cit. p. 23.

[345] *Implementing the Right to Education*, op. cit. p. 47.

[346] *Implementing the Right to Education*, op. cit. p. 30.

[347] An example of this would be the right to wear traditional or religious garbs in school, and discrimination in education on that basis.

[348] *Equal Opportunity for Marginalized Roma – the Foundation of Inclusive Growth in Aging Europe*. Link: <https://www.worldbank.org/en/news/feature/2016/01/20/equal-opportunity-for-marginalized-roma-foundation-of-inclusive-growth-in-aging-europe>.

of the world. Despite the self-evident fact that early childhood education is crucial for success later in life, Roma children are 50% less likely to access kindergarten than their non-Roma peers. This difference persists in later years and it undermines the prospects of present and future generations, as lower levels of education and training lead to lesser opportunities of good employment. This particularly affects Roma girls and women, who suffer multiple and intersectional discrimination. Furthermore, equal access to early education is not enough on its own. For education to fulfil its purpose, policies need to tackle the unequitable circumstances in which most Roma children grow up, including the promotion of adequate livelihood conditions and assistance for parents in obtaining steady employment.³⁴⁹

C. Provision of compulsory and free education

Education laws should explicitly provide for compulsory, cost-free education for all. Although this is not a gender commitment *per se*, data show that girls benefit from compulsory and cost-free education even more than boys do.

Compulsory education applies to children up to a certain age and refers to the fact that, for them, the right to education also entails a duty: their parents, legal guardians, or the State are not entitled to decide whether or not to embark them on an educational path, but are legally obliged to do so. Compulsory education should cover primary education and extend to secondary education as well. As said, this principle applies to both girls and boys, but it primarily benefits girls, as gender stereotypes pose specific obstacles to girls' equal access to quality education. Girls are typically socialised to assume household and care responsibilities, under the presumption that they will be economically dependent on men. Conversely, the stereotypical perception of men as family breadwinners lends priority to the education of boys. These stereotypes also impose different expectations for boys and girls once they enter education, which do not only affect their choice of subjects, but their very chances of completing education.³⁵⁰

Compulsory education must also be cost-free. Charges, fees and other direct and indirect costs are disincentives to the enjoyment of the right to education. They particularly affect girls. At the institutional level, the privatisation of costs makes for limited availability of school places, which can lead to "competition" to access them. In a context of gender disparities, where labour laws, policies and markets favour men's employment over women's, chances are that schools prioritise boys' education at the expense of girls'.³⁵¹ At the family level, an increase in the cost of education can lead to "competition" between brothers and sisters for places at school, where parents or legal guardians cannot bear the costs of schooling all their children (including tuition fees, books, uniforms, transportation, lunches, etc.). Again, gender expectations make this particularly damaging for girls.³⁵²

Most States articulate the principles of compulsory and cost-free education within their laws on

[349] *Equal Opportunity for Marginalized Roma* – the Foundation of Inclusive Growth in Aging Europe. Link: <https://www.worldbank.org/en/news/feature/2016/01/20/equal-opportunity-for-marginalized-roma-foundation-of-inclusive-growth-in-aging-europe>.

[350] A/HRC/35/11 - 5 April 2017.

[351] A/HRC/35/11 - 5 April 2017.

[352] A/HRC/35/11 - 5 April 2017.

education. New Zealand Education Act (1989), for example, states in Article 20 that “compulsory education from the age of 6 to the age of 16, free of charge at the primary and secondary levels for students aged between 5 to 19 years.”³⁵³ Other countries have resorted to special legislation. Syria, for example, enacted a special piece of legislation (Law no. 7 of 2012) requiring parents of Syrian children between the ages of 6 and 15 to enrol them in primary education.

France and Norway offer examples of good legal practice in this regard. In France, Article L. 131.1 of the Education Code states that “Education is compulsory for children of both sexes, French and foreign, between the ages of six and sixteen years.” Article 132.1 of the same law stipulates that compulsory education be available free of charge.³⁵⁴ The text is unambiguous and uses clear gender-sensitive language, as it refers to children of both sexes and bans discrimination based on sex and nationality, since compulsory and cost-free education is afforded to French and foreign nationals alike. This is important on account of social norms and beliefs that restrict girls' access to education, particularly in the case of non-nationals, a number of whom may be immigrants or refugees and may face financial obstacles, which might lead them to prioritise the education of boys over girls. By way of contrast, a large number of States restrict compulsory and free education to nationals. An example is Kuwait, where Law no. 11 of 1965 on compulsory education, amended in 2014, states in its first article that “Education shall be compulsory and free for all male and female Kuwaiti children from the beginning of the primary stage until the end of the intermediate stage.”

The second model is Norway, where the Education Act provides a detailed elaboration of free education in Section 2-15. It states that compulsory education will be provided free of charge for students or their families. This includes teaching materials, transport and school associated activities, such as stays at school camps or other excursions or outings designed as part of primary and lower secondary education.³⁵⁵ Unlike other laws on education, Norwegian law thus makes apparent that free education includes not only direct expenses, but also indirect costs.

In order to be made effective, the provision of compulsory and cost-free education should be buttressed by sanctions on those who contravene it, by preventing children from attending school or turning a blind eye on their skipping education. Provisions to this effect are found in the Basic Education Act of Nigeria 2004 and in the Syrian Law no. 7 of 2012, Article 11 of which provides financial and criminal sanctions for parents or legal guardians who do not send their children to school or fail to ensure that they actually attend it. This law provides financial or in-kind benefits for families of children who attend school, which cease to be granted if the children drop out.

D. Inclusion of special provisions for literacy and adult education

Education laws should not only seek to achieve equality between girls and boys in structural terms but should also address the specific consequences of girls' exclusion from education. For many decades, girls have been deprived of access to education, leading to millions of women worldwide who are illiterate or lack higher education. Gender-sensitive laws on education should

[353] *Implementing the Right to Education*, op. cit. p. 27.

[354] *Implementing the Right to Education*, op. cit. p. 28.

[355] *Implementing the Right to Education*, op. cit. p. 27.

pay close attention to this fact and attempt to address it by encouraging young mothers and girls who have dropped out of school to re-engage in the educational system. A 2017 report by the UN High Commissioner for Human Rights, on the realisation of the equal enjoyment of the right to education by every girl, has shown that “... women account for nearly two thirds of the world’s 758 million adults who cannot read or write, and the gap is even wider in situations of conflict, where girls are nearly two and a half times more likely to be out of school than boys.”³⁵⁶

“Women account for nearly two thirds of the world’s 758 million adults who cannot read or write, and the gap is even wider in situations of conflict, where girls are nearly two and a half times more likely to be out of school than boys.”

2017 report by the UN High Commissioner for Human Rights

For this reason, many laws on education include the promotion of literacy and adult education as one of their main objectives. Bahrain Law no. 27, on Education (2005), states in Article 9 that “literacy and adult education are a national responsibility.” Similar provisions can be found in Article 20 of the Framework Law on Primary and Secondary Education in Bosnia and Herzegovina, as well as in Romania’s Law of National Education no. 1/2011 (article 2-4), both of which contain provisions for adult education and lifelong learning.

E. Ensuring gender-sensitive educational curricula

According to the UN Committee on Economic, Social and Cultural Rights (CESCR), one of the most frequent violations of the right to education by States is the use of curricula inconsistent with educational objectives.³⁵⁷ This includes failure to curb structural discrimination in education as entrenched in curricula and teaching materials. Curricula and teaching materials are crucial in shaping children’s minds. They can play a positive or a negative role, depending on their contents and the context in which they are employed: they could promote gender equality or perpetuate stereotypes. To ensure that girls enjoy their right to education on par with boys, therefore, States must eliminate such structural barriers and ensure that curricula and learning materials are free from gender stereotypes and bias.³⁵⁸

One of the best practices in this field is found in the Philippines, where Act no. 9710 of 2009, known as the Magna Carta of Women, stipulates in its Article 13 (a) that “The State shall ensure that gender stereotypes and images in educational materials and curricula are adequately and appropriately revised. Gender-sensitive language shall be used at all times.”³⁵⁹ In Argentina, the Law of Comprehensive Sexual Education, no. 26.150 (2006), contains curriculum guidelines, including the requirement to foster learning that respects diversity, rejects all forms of discrimination and provides for equal gender treatment and opportunities.³⁶⁰

[356] A/HRC/35/11 - 5 April 2017

[357] UN Committee on Economic, Social and Cultural Rights, General Comment No.13 (1999), para. 59

[358] A/HRC/30/23 - 20 July 2015.

[359] *Implementing the Right to Education*, op. cit p. 30.

[360] *Ibid.*

F. Abolition of policies, regulations and practices that directly or indirectly prevent girls' access to education

According to the UN CESCR, another frequent source of violations of the right to education is the enactment, or non-abrogation, of discriminatory legislation.³⁶¹ This includes legislation that allows for policies and practices that restrict girls' access to education or the continuation of their studies, whether they do so directly or indirectly. This situation must be proactively addressed by States.

One practice of direct discrimination against girls is the exclusion of pregnant girls or girls with "out-of-wedlock" pregnancies from educational institutions. One example of good legislation in this regard is Chile's General Education Law, Article 11 of which states that "neither pregnancy nor motherhood is to be an impediment to entering or remaining within educational establishments." Another is the Philippines' Act no. 9710 of 2009, the Magna Carta of Women, which devotes its 13th section to equality, the elimination of discrimination in education and the explicit outlawing of expelling girls from school on the grounds of pregnancy outside of marriage.³⁶² Also Nigerian law provides for this, but does so within the Child Rights Act, Section 15 of which guarantees for "female students the opportunity to complete their education should they become pregnant, while in school."³⁶³

Discriminatory practices can also be indirect. Girls, for example, may be reluctant to attend school, or discouraged by parents or legal guardians to do so, if school establishments lack water and toilet facilities or safe and separate changing rooms, or if they do not take girls' specific health needs into account. Such deficiencies may adversely affect girls' participation and school performance. To address them, laws on education must oblige schools to provide gender-sensitive facilities. For example, the General Education Law in Chile indicates in Article 11 that school facilities must be suitable for all, including cases of pregnancy and maternity. In Ethiopia, the National Plan for Gender Equality includes several initiatives to achieve equity for women in schools and higher education, including establishing separate latrine facilities for girls, as well as the provision of health services to encourage and motivate them.

Beyond these structural obstacles, the roots of girls' discrimination in education go beyond educational policies and practices and relate to policies and practices in place in other fields. This is the case of early marriage, as regulated by law or tolerated in practice on religious grounds without legal registration (see Chapter 4), which allows for girls to be forced into marriage and out of school. Another example are laws that prevent refugees from registering their children or obtaining necessary legal documents, thus hindering girls' and boys' access to free compulsory education as per relevant laws in the field. Equal access to education must thus not only be secured in laws on education; it also requires that laws that interfere with it be effectively revised.

[361] UN Committee on Economic, Social and Cultural Rights, General Comment No.13 (1999), para. 59

[362] *Implementing the Right to Education*, op. cit. p. 68.

[363] *Implementing the Right to Education*, op. cit. p. 110.

G. Protection of girls from all forms of violence and harassment

The 2017 report of the UN High Commissioner for Human Rights, on the realisation of the equal enjoyment of the right to education by every girl, indicates that girls are exposed to gender-based violence on their way to and from school. This includes sexual harassment and abuse, threat of kidnapping, psychological abuse, and bullying. Such violence is committed primarily by male students, teachers and members of the local community, sometimes even women and girls, often without the perpetrators being prosecuted or punished.³⁶⁴ This is confirmed in a World Bank report on women, business and law issued in 2019.³⁶⁵

A number of countries have sought to address this problem through laws on combating sexual harassment or violence against women more generally. An example of this is the Tunisian Organic Law on the elimination of violence against women, no. 58 of 2017, Chapter VII of which obliges ministries responsible for education and higher education to protect women from violence and eliminate gender-based violence in educational institutions.

Whether or not such provisions exist, it is advisable to address gender-based violence and sexual harassment in education within specific legislation in force in the field. The Swedish Education Act of 2010 provides in Section 7 for a special mechanism to investigate cases of harassment in education: providers of educational services must initiate an immediate investigation upon being made aware of alleged harassment, in order to take appropriate measures to stop it and prevent its recurrence.

The US has introduced an amendment to its education laws to include sexual harassment in education as a form of sex discrimination. Title IX of the 1972 Education Amendments, as well as its executive regulations, prohibit discrimination on the basis of sex in any federally funded education programme or activity. Under this amendment, sexual harassment is treated as a form of sex discrimination and prohibited in all forms in the context of education, understood in broad

"In 65% of economies, there are no laws protecting women and girls from sexual harassment in education.

In some areas, the fear for girls to be harassed or assaulted on their way to school or experiencing it in schools is mentioned by parents as one of the reasons why girls drop out of school without completing their secondary education"

World Bank's report on women, business and law (2019)

terms. Students are therefore protected in all academic, educational, extracurricular, athletic and other school programmes, whether on school campus, on the school bus, in the classroom or in a school-sponsored off-campus training programme, and whether the conduct comes from other students, teachers or other members of staff.³⁶⁶ Subsequently, the federal Every Student Succeeds Act (ESSA) of 2016 addressed acts of violence, sexual harassment and abuse that could

[364] A/HRC/35/11 - 5 April 2017.

[365] *Sexual harassment – Where do we stand on legal protection for women?* Link: <https://blogs.worldbank.org/voices/sexual-harassment-where-do-we-stand-legal-protection-women>.

[366] US Department of Education. SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES. See article link: <http://web.archive.org/web/20180718001521/https://www2.ed.gov/about/offices/list/ocr/docs/sexhar01.html>.

occur in school and included rules and mechanisms to prevent it.³⁶⁷

Education laws should thus ensure that appropriate measures be taken to eliminate all forms of gender-based violence and harmful practices at all educational levels. To this end, these laws must actively prevent instances of gender-based violence, investigate, prosecute and punish perpetrators, and ensure the victims' right to an effective, child-sensitive and gender-sensitive means of redress. The law should also adopt specific safeguards and policies and articulate mechanisms for monitoring and reporting abuse.

H. Guaranteeing means of redress for violations of the right to education

Without an effective and comprehensive system of accountability, all human rights, including the right to education, remain at the level of promises. It is therefore of paramount importance that individuals can claim the enforcement of their right to education. To ensure gender equality, the law must guarantee that every girl has judicial and non-judicial means of redress which are safe, child-sensitive and gender-sensitive. It should ensure access to information on the avenues open to them whenever their rights are violated.³⁶⁸ National human rights institutions can also play an important role in monitoring equal access to education for girls and in receiving and adjudicating complaints.

Laws on education often lack clear references to judicial guarantees. In some States, as in South Africa and India, these are provided in the constitution itself. In these cases, courts can contribute to safeguarding girls' right to education through a favourable interpretation of the legal and constitutional framework. In 1988, for instance, the Supreme Court of Colombia upheld a pregnant girl's right to education against contrary regulation by schools. A similar ruling was issued by the Botswana Court of Appeals in 2003.³⁶⁹

Some countries provide for the possibility of administrative complaints. Article 111 of the Law on the Fundamentals of the Education System (LFES) in Serbia states: "A student, his/her parent or caregiver who considers that his/her rights guaranteed by this law or the pertaining law have been violated, by means of adoption or non-adoption of a decision following the filing of an application, a complaint or an appeal or if a prohibition as stipulated in Articles 44 and 45 has been violated as well as the right in Article 103 of this law impacting the student's status, shall be entitled to file a request for the protection of rights to the Ministry, within eight days from the day he/she learned that his/her rights have been violated. If the Ministry assesses that the request as stated in paragraph 1 of this article has merit, it shall issue a warning to the school and set an appropriate deadline for the elimination of rights violation. Should the school fail to act on the warning as stated in paragraph 2 of this Article, the Ministry shall decide on the request."³⁷⁰

[367] Elementary and Secondary Education Act of 1965 [As Amended Through P.L. 115–224, Enacted July 31, 2018]
- See article link: <https://legcounsel.house.gov/Comps/Elementary%20And%20Secondary%20Education%20Act%20Of%201965.pdf>.

[368] Convention on the Rights of the Child, article 12 (2); Committee on the Rights of the Child, general comment No. 12 (2009), para. 47

[369] A/HRC/23/35 - 10 May 2013.

[370] *Implementing the Right to Education*, op. cit. p. 39.

Even where the right to education is guaranteed by the constitution, laws on education should outline its scope and the responsibilities of all the parties involved. At a minimum, they should establish the legal framework for primary, secondary, higher, and vocational education systems as rooted on the rights to gender equality and non-discrimination. They should also provide mechanisms for monitoring and reporting violations of these rights, as well as the necessary indicators and statistics, so that access to the right to education can be effectively assessed and enforced. Reference should also be made to mechanisms and procedures, both administrative and judicial, to address alleged violations.³⁷¹

2. Media Laws

Media are vital components of every democracy and essential to political activism. They are the primary means to exercise the right to freedom of expression and the right to access and provide information. Both include the right to a free press. Media hold a privileged position as prime means of communication between political representatives and the represented citizenry. This applies both to conventional print and audio-visual media and to new digital and social media. Empowering women within the media scene is thus essential to render them visible and capable of shaping the landscape of political opinions of both representatives and voters.

“We cannot talk about equality, good governance, freedom of expression and sustainability when women are effectively silenced in and through the media”

Global Alliance on Media and Gender (GAMAG)

As channels for the exercise of free speech and information rights, the media act as the reflective mirror of society, while in turn playing an important role in shaping social principles and values. They thus play a large role in the consolidation or demolition of gender equality. Media content may promote and reinforce this equality, or may give credence to existing discrimination, to the point of inciting manifestations and practices of gender-based violence. It is therefore important to ensure that the media are in tune with democratic and human rights principles, hence that they promote rather than undermine gender equality and non-discrimination as democratic principles.

Laws on the media are abundant and often vary even within the same legal system. There are laws that regulate written, audio, or visual media, as well as digital media. There are also laws that regulate the process of communication, publishing, and broadcasting, including commercial advertisements that are presented across various media. Other laws outline media standards and ethics. Despite their diversity, all these laws should meet certain standards. Media legislation ought to comply with international standards guaranteeing the right to freedom of expression, diversity, independence, access to information and its circulation. They should also ensure the

[371] A/HRC/23/35 - 10 May 2013.

existence of independent media organisations and the implementation of other agreed-upon international standards. They should, moreover, be gender sensitive. To this end, they must address core issues concerning both the internal structure of media organisations and the content they broadcast and promote.

A. Women's balanced representation in the media

One of the reasons that explains the abundance of discriminatory images of women in the media is that media products, as a rule, are still created by men and for men.³⁷²

For many women, challenges do not end with their breaking into the industry; they continue as they try to climb to the highest levels of their careers. Women, in brief, find it difficult

to make a professional career in the media, both as journalists, especially in higher positions, and as media owners or managers. This is shown in the 2011 Global Report on the Status of Women in the News Media, by the International Women's Media Foundation.³⁷³ According to the Global Media Monitoring Project, women's share of news-making roles in the traditional media (newspapers, radio, television) is 24% of the total.³⁷⁴ Women's lack of representation in newsrooms, decision-making and positions of leadership in the media has an important impact on editorial lines: on the choice of news and on their coverage and priority, regarding women's causes but also beyond them, as well as in women's portrayal in the media. It for example conditions the place and treatment in the media of issues related to violence against women, especially in online media outlets. Women, moreover, continue having difficulties to access the media to voice their opinions on public affairs, be it economics, politics, security-related matters or others. Women are rarely invited to television and radio programmes unless it is to speak about women's issues. This results from the general perception that women have no relevant experience on matters other than women's causes, a narrative which is perpetuated by the media itself. For this reason, Canadian women's rights activist Shari Graydon began *Informed Opinions*³⁷⁵, a database for expert women that aims to combat the narrative that there are no women experts in all fields. This is particularly important as regards fields of expertise perceived as masculine, such as politics, economics, security, foreign or military affairs. The preconception that there are few or no competent expert women in these fields directly impacts women's chances of being heard or deemed credible by the public. It thus raises further challenges on women's ability to present their visions and policy proposals, making it more difficult to compete with men in the political arena.

"Between two thirds and three fourths of leadership positions in media organisations are occupied by men, who have 72-74% of board seats."

The International Women's Media Foundation Global Report

To overcome this reality, some media legislations have resorted to enforcing gender quotas in some of the higher councils concerned with the management of media work. The Iraqi Media

[372] Anna Davtyan-Gevorgyan - Women and Mass Media. 8 April 2016 <http://feminism-boell.org/en/2016/04/08/women-and-mass-media>.

[373] <https://www.iwmf.org/wp-content/uploads/2018/06/IWMF-Global-Report.pdf> (p. 24-26)

[374] A/72/290 - 4 August 2017.

[375] <https://informedopinions.org/>.

Network Law, no. 26 of 2015, stipulates the formation of a Board of Trustees to supervise media operations and designates a women's quota that must be met. Its Article 8 states that "The Board of Trustees consists of six members, all non-executives, at least one-third of whom are women with experience and knowledge of media, cultural, administrative, financial or legal matters, and taking into consideration the diversity of people's backgrounds and cultures." A similar quota is also found in German's Interstate Treaty on Broadcasting and Telemedia³⁷⁶ of 1991, which was subsequently amended in 2017. In the case of management of the second public television station, known as ZDF, 39 of its 77 board members must be women. The Commissioner of the station is then responsible for ensuring equal opportunity and fulfilling the gender equality requirements.

A good model is the Australian Broadcasting Corporation's Code of Practice, which requires the presence of women in the media not only in operational media circles, but also as guests, experts, or commentators. As stated in Article 3, Paragraph 4, in order to avoid promoting stereotypes, "programme makers should ensure a gender balance of commentators and experts where possible."³⁷⁷

Guaranteeing women's participation in the media, however, is not enough to break away from gender stereotypes and make a difference in the way women are portrayed therein. Women and men have to receive adequate, gender-sensitive vocational training. Several international organisations have initiated agreements and treaties with States in order to support the training of women working in the media and develop gender-sensitive policies in this context.³⁷⁸

B. Respect for gender equality and non-discrimination

Media play a central role in shaping public opinion, in general, and social perceptions of women, in particular. This makes it urgent to introduce mechanisms that articulate women's fair treatment by the media, both as professionals within media organisations and in the perception of women they promote. As the Global Alliance on Media and Gender (GAMAG) has stated, "We cannot talk about equality, good governance, freedom of expression and sustainability when women are effectively silenced in and through the media."³⁷⁹

Where the media treat women with fairness, women will improve their political credibility and resources, whereas media hostility towards women will undermine their right to participate in political life. Promoting this is particularly important in countries where social norms and gender stereotypes remain a formidable challenge, potentially undermining women's ability to begin or sustain careers in journalism and media on an equal footing with men. Female journalists generally earn less than their male counterparts and are also less likely to receive contractual protection than men. Furthermore, there are fewer women in senior and managerial positions and women are less likely to be asked to work on feature topics, as well as more likely to be

[376] Interstate Treaty on Broadcasting and Telemedia of 1991, later amended in 2017.

[377] Learning Resource Kit for Gender-Ethical Journalism and Media House Policy: Book 1: Conceptual Issues – p. 37.

[378] Anna Davtyan-Gevorgyan, *Women and Mass Media*. 8 April 2016 <http://feminism-boell.org/en/2016/04/08/women-and-mass-media>.

[379] See the full statement at https://iamcr.org/sites/default/files/GAMAG-Pressrelease_0.pdf

relegated to so-called women's issues, making their work less visible and taken less seriously.³⁸⁰

Media laws tend to address this issue. The Kenyan Media Act of 2007 contains the professional ethic code of journalism, its Code of Conduct, and provides for the equal treatment of women and men -although it includes no mechanism to enforce or enhance fulfilment.³⁸¹ Though it does not refer to respect for gender and other forms of diversity, the Press Code of Bosnia and Herzegovina of 2011 includes in its initial general provisions the obligation to interpret the entire code in the light of journalistic ethics, abide by standards of human rights, develop awareness of gender equality and protect the rights of the individual. It also sets out basic principles for gender-sensitive reporting and guidelines for the fair treatment of women and men in media coverage, addressing gender stereotypes within a wider framework with a view to minimising harm.³⁸²

Other laws consider gender equality among the main objectives to be pursued by the media. The Press Code of Bosnia and Herzegovina states in its first article that "... the press shall develop awareness of gender equality."³⁸³ The Croatian Electronic Media Act³⁸⁴ of 2013 states in Article 9 that the provision of audio-visual and radio programmes is in the interest of the Republic of Croatia when programmes "pertain to gender equality". Article 64 also promotes the development of awareness of gender equality and other higher values of the constitutional order. The Code of Conduct for the Practice of Journalism in Kenya (2007), also stipulates that "Women and men should be treated equally as news subjects and news sources" under Article 15 thereof.³⁸⁵

There are also examples of good practice addressing discrimination. Many media laws include the obligation not to produce or broadcast materials that might promote gender discrimination. For example, Article 6 of the Ghana Journalists Association Code of Ethics (1994) states that "A journalist should not originate material, which encourages discrimination on the grounds of ethnicity, colour, creed, gender or sexual orientation."³⁸⁶ The Bulgarian Journalists' Code of Ethics (1999) states in Article 3, paragraph (i), that "journalists must not create or shape any subject in such a manner as to incite discrimination on the basis of race, skin colour, religion, gender, or sexual orientation."³⁸⁷ Similarly, the Czech Radio and Television Broadcasting Act³⁸⁸ (amended in 2010) stipulates, in Section 48, the "Prohibition of the transmission of any communications containing discrimination on the basis of sex". The Czech On-demand Audio-Visual Services Act of 2010,³⁸⁹ Section 8, also states that "on-demand audio-visual service providers shall ensure that audio-visual commercial communications... do not contain or do not promote discrimination on

[380] UNGA, Report of the Secretary-General, *The Safety of Journalists, and the Issue of Impunity*, 2017, see UN document: A/72/290 - 4 August 2017.

[381] Learning Resource Kit for Gender-Ethical Journalism and Media House Policy: Book 1: Conceptual Issues – p. 25

[382] *Ibid.*, p. 28

[383] *Ibid.*, p. 34

[384] Electronic Media Act of 2013.

[385] Learning Resource Kit for Gender-Ethical Journalism and Media House Policy: Book 1: Conceptual Issues – p. 31

[386] *Ibid.*, p. 31

[387] *Ibid.*, p. 34

[388] Radio and Television Broadcasting Act last amended in 2010.

[389] The On-demand Audio-Visual Services Act, of 2010.

grounds of sex, race... or other status.” Interestingly, the Code of Ethics of Albanian Media (2006) contains one clause that places non-discrimination and respect for diversity of opinion in the context of enabling democracy.³⁹⁰

C. Commitment to eradicating gender-based violence or hatred

The media are often accused of promoting violence against women or portraying them in stereotypical terms that endorse misogyny, none of which can be excused on the basis of free speech, as these attitudes entail a violation of women’s fundamental human rights. Many media laws have thus explicitly prohibited incitement to gender-based violence or hatred.

Media laws differ in how they address this issue. Some merely provide that programmes may contain no incitement to gender-based violence or hatred, as stipulated, for example, in the Estonian Media Services Act³⁹¹ of 2010, which states that “Upon providing media services, the programmes shall not contain incitement to hatred based on sex... degrading of law-abiding behaviour or incitement to violation...”. Other laws pose an obligation on the media to prohibit such incitement and remove any coverage that disseminates gender-based hatred, as in the case of the Croatian Electronic Media Act (2013).³⁹²

The Czech Radio and Television Broadcasting Act³⁹³ (last amended in 2010), in Section 12 prohibits “the broadcasting of programmes that incite hatred on the basis of race or gender.” Moreover, according to Section VI of the On-demand Audio-Visual Services Act (2010),³⁹⁴ audio-visual service providers have to ensure that their services contain no incitement to hatred on the basis of gender, race or other status.

French law is also considered a good model. The Freedom of Communication Act³⁹⁵ no. 86-1067 of 1986 (amended in 2014) contains provisions relating to respect for human dignity, diversity, and women's rights. Moreover, Article 15 of the Act makes the French Superior Council of Audio-Visual (French abbreviation: CSA) responsible for monitoring that all programmes available to the public respect human dignity and ensuring that their content contains no incitement to hatred or violence on the grounds of gender, sex, social norms, religion or nationality.

Good legal practice in this field would include the withdrawal of public support to media outlets that tolerate rhetoric of violence and discrimination against women.

D. Elimination of gender-based prejudices and stereotypes in commercial advertisements

Commercial advertisements often perpetuate gender stereotypes, thus wasting decades of struggle against images that perpetuate women's discrimination and undermine their rights and

[390] Learning Resource Kit for Gender-Ethical Journalism and Media House Policy: Book 1: Conceptual Issues – p. 27.

[391] Media Services Act, 2010.

[392] Electronic Media Act of 2013.

[393] Radio and Television Broadcasting Act, last amended in 2010.

[394] The On-demand Audio-Visual Services Act, of 2010.

[395] Law No. 86-1067 of September 30, 1986, on the Freedom of Communication (Law Léotard, as amended up to August 6, 2014).

dignity. Some advertisements objectify women, by portraying them as objects to be acquired; some even induce to different forms of violence against women. Examples abound. A relatively recent one is the Bulgarian advertisement run by a beverage company under the slogan “What a man needs: a new car, a nice wife and a good drink.”³⁹⁶

There are significant disparities in how laws on media and advertising deal with gender stereotypes in advertisements. Many legal systems ignore the issue entirely, for lack of awareness of its importance, because addressing it is not a priority, or because they fear that regulation might interfere with business interests or undermine freedom of expression. This is the case in Sweden and the US, where free speech receives paramount protection.

In contrast, legislation in many States restricts how women, or both women and men, can be depicted in commercial advertisements. In Norway and Denmark, for example, the law prohibits “gender prejudice” in advertisements and, according to their respective Ombudsman Offices, the legislation is violated if a “model” is used that is not linked to the product. In France, Germany and Bulgaria, human dignity plays an important role when evaluating the content of ads. The fourth chapter of the Bulgarian Radio and Television Act³⁹⁷ regulates commercial advertising, with article 76, Paragraph 5, stipulating that ads shall not infringe upon human dignity or include or promote discrimination based on such grounds as sex, race or sexual orientation. Article 76, Paragraph 2, obliges media providers to observe the norms of the Code of Ethics of Bulgarian media, developed by the National Council for Journalistic Ethics, as well as the national ethical rules for advertising and commercial communication developed by the National Council for Self-Regulation.³⁹⁸

Denmark offers an example of good practice in this regard. Here gendered advertisements are subject to the guidelines issued by the Danish Consumer Ombudsman,³⁹⁹ dated 1 April 2012. In accordance with these principles, and with the Danish Gender Equality Act, an advertisement may not contain gender-based discrimination and should be appropriate and designed with a sense of social responsibility in mind. The Consumer Ombudsman has set several criteria to indicate whether an advertisement is discriminatory on the basis of gender. Criteria include that the advertisement presents one gender in an demeaning manner; that it portrays one gender as socially, financially or culturally subjugated to the other; that it portrays one gender as less capable, less intelligent or less suited to performing tasks that both sexes can equally perform; or that it presents one gender as having specific negative personality traits. Clear mechanisms have been established, moreover, to monitor violations of these principles before the Danish Ombudsman.⁴⁰⁰

French legislation also offers a good example. The French Freedom of Communication Act⁴⁰¹ of

[396] LEGAL FRAMEWORKS REGARDING SEXISM IN ADVERTISING: COMPARISON OF NATIONAL SYSTEMS Legal Memorandum Prepared by the Public International Law & Policy Group - June 2015, p. 4.

[397] Law on Radio and Television (Bulgaria, 1999).

[398] LEGAL FRAMEWORKS REGARDING SEXISM IN ADVERTISING, op. cit., pp. 3-4.

[399] Forbrugerombudsmanden, Guidelines on gender-related advertising, 1 (Apr. 1, 2012).

[400] LEGAL FRAMEWORKS REGARDING SEXISM IN ADVERTISING, op. cit. pp. 5-6.

[401] Loi n° 86-1067 du 30 septembre 1986 relative à la liberté de communication (Loi Léotard). (République française).

1986 contains provisions about respect for human dignity, diversity and women's rights. The Equality of Opportunities Act⁴⁰² of 2006 also prohibits discrimination in the media. In accordance with Article 15 of this Act, the Audio-Visual Council (CSA) monitors respect for human dignity in all programming available to the public while imposing penalties on those in violation of these provisions. According to Decree 92-280 of 1992, advertising service providers must respect human dignity and the principle of non-discrimination on the basis of gender. The Act for Real Equality Between Women and Men, of 2014, grants the CSA the right to intervene on matters of violation of women's rights and their representation in the audio-visual media and to promote equality between women and men.⁴⁰³ The CSA also intervenes in cases involving the broadcast of gender-based stereotypes and content that is degrading for women.⁴⁰⁴

E. Commitment to ending online targeting of women

Amnesty International indicates that violence and abuse against women on the internet has become a broadscale issue. This is especially the case for women from racial, ethnic, or religious minorities and for women with disabilities. It creates an antagonistic environment on the internet which aims to shame, intimidate, or denigrate women.⁴⁰⁵

There is evidence to show that the targeting of women on the internet has become increasingly common, especially with the widespread and daily use of social media and other platforms and applications. Polling data, collected by Ipsos Mori and commissioned by Amnesty International in eight countries, showed that 23% of the women who participated in the polls had been subjected to abuse or harassment on the internet.⁴⁰⁶ Moreover, an analysis of more than 2 million tweets found that female journalists have about three times as many abusive comments as their male counterparts on Twitter. Of the top 10 journalists who received the highest level of abuse, eight were women and two were black men. News articles written by women also receive the highest proportion of abusive comments and replies. The Guardian notes that abuse often extends beyond the website in which their work was originally published.⁴⁰⁷

Violence and abuse against women on the internet can take many forms and are extensions of real violence and abuse. They can involve direct or indirect threats of violence, including physical and sexual threats. They also include discriminatory speech based on sex, race, homophobia, or attacks on the basis of identity, as they seek to humiliate the person or undermine their livelihood. Furthermore, harassment on the internet can involve several attackers in coordination who repeatedly target a woman. Online targeting can take various shapes, such as access to private data, information, audio clips, photographs and/or videos, including those sexual in nature, which are obtained, manipulated and spread without the consent of the person in question. It

[402] Loi n°2006-396 du 31 mars 2006 pour l'égalité des chances. (République française).

[403] Décret n°92-280 du 27 mars 1992 pris pour l'application des articles 27 et 33 de la loi n° 86-1067 du 30 septembre 1986 relative à la liberté de communication (Loi Léotard). (République française).

[404] LEGAL FRAMEWORKS REGARDING SEXISM IN ADVERTISING- op cit 7-8.

[405] What is online violence and abuse against women? By Shiromi Pinto - 20 November 2017. Amnesty International paper. Link: <https://www.amnesty.org/en/latest/campaigns/2017/11/what-is-online-violence-and-abuse-against-women>.

[406] Ibid.

[407] World Trends in Freedom of Expression and Media Development in 2017-2018, UNESCO, 2018 – p. 158.

can involve the disclosure of personal information and details, including a person's address, full name, phone number and email address, even her children's names, all of which violates the right to privacy and constitutes psychological violence. The circulation of private photos without consent is also used to humiliate or blackmail women.⁴⁰⁸ The publication of sexual images on the internet has already led to the suicide of young girls, sparking debate on the need for legislative reform including the adoption of specific laws that address these cases.⁴⁰⁹

Some countries have so far ignored these emerging and dangerous phenomena while others have addressed them through laws against cybercrime, criminal laws, laws on domestic violence and violence against women, hate speech laws and laws on data protection and privacy. With regard to the digital targeting of female journalists, the Organization for Security and Cooperation in Europe (OSCE) has advised Member States not to issue new laws that restrict abusive speech on the Internet, as these steps may have a disincentive to freedom of expression.⁴¹⁰ Yet specific, gender-sensitive legislation ought to be adopted to address the online targeting of women, along the following lines:⁴¹¹

- **Prevention:** Comprehensive information on legal services and protection available should be provided to stop violations and prevent their recurrence. All necessary measures should be taken to prevent violations committed abroad through internet intermediaries under the State's jurisdiction.
- **Protection:** Any content associated with gender abuse should immediately be removed and the original materials deleted, or its dissemination halted. Protection also requires immediate judicial action in the form of orders issued by national courts and swift interventions by internet intermediaries.
- **Criminal prosecution and punishment:** Appropriate sanctions should be established.
- **Reparation, compensation, and redress:** Any harmful content should immediately be removed and forms of restitution, rehabilitation, satisfaction or guarantees of non-repetition granted, while the dissemination of harmful and abusive content should be prevented.
- **Responsibility of intermediaries:** Internet intermediaries play a pivotal role in creating digital spaces for communication and thus bear specific responsibilities. Internet intermediaries, or any company that stores client and entity data, or that provide cloud storage, must comply with the law by maintaining data security. These entities must also be held accountable in case of data leaks or where insufficient guarantees are provided.

[408] Amnesty International, "What is online violence and abuse against women?"

[409] Report of the Special Rapporteur on violence against women, its causes and consequences on online violence against women and girls from a human rights perspective*, UNHRC, Session 88, June-July 2012, see UN document: A/HRC/38/47 - 18 June 2018.

[410] World Trends in Freedom of Expression and Media Development in 2017-2018, UNESCO, 2018 – p. 159-160.

[411] Report of the Special Rapporteur on violence against women, its causes and consequences on online violence against women and girls from a human rights perspective*, UNHRC, Session 88, June-July 2012, see UN document: A/HRC/38/47 - 18 June 2018.

F. Definition of media standards and ethics to ensure gender equality in the media sector

Codes of ethics and professional codes of conduct for the media began to be drafted in the early 1920s, yet fewer than 50 countries in the world have codes of media ethics today.⁴¹² Among those who have, the Media Ethics Act of Tanzania (2009) offers an example of good practice, as it supports gender equality in the sector, both in terms of internal organisation and in the content of its broadcast and information materials. The Media Ethics Act was presented by the Media Council of Tanzania in 2008 and adopted in 2009. It aimed to address the exclusion of women in relevant positions in the majority of Tanzanian news media, at a time when all administrative positions were exclusively held by men, while women were relegated to office and junior positions. The shortcomings were further noted in news programmes and articles, where the sources were predominantly male. Women were only portrayed in the media alongside children and in family settings. Moreover, there existed a problematic “gender distribution” of news stories, as male journalists covered stories on the ground, while women were assigned stories about fashion, cuisine, etc.

To redress this situation, the law targets media owners, publishers, directors/editors, broadcasters, photographers and video producers, news agencies, journalists, public relations professionals and advertisers. It also promotes gender-specific programmes and opportunities for women. Furthermore, it encourages the media at all times to give a fair and equal space to women and men, with their various and diverse reporting.⁴¹³ This law also aims to ensure compliance with its provisions. The Ethics Committee adjudicates cases of violation of the law, including journalists, editors and media organisations, which can then be sanctioned in multiple ways. The Media Council also monitors print and broadcast news, identifies weaknesses or violations of the law and issues letters to media organisations or editors responsible for the violations.⁴¹⁴

[412] *Ethics and Principles of Journalistic and Media Work*, HRDO Center for Digital Expression, Cairo, 2016, p. 7

[413] *Learning Resource Kit for Gender-Ethical Journalism and Media House Policy: Book 1: Conceptual Issues*, p. 45

[414] *ibid.*

1. EDUCATION LAW

- Laws on education must explicitly state the promotion of gender equality and a culture of non-discrimination as one of the core objectives of national education policies.
- Girls' and boys' equal right to education must be guaranteed formally and in practice. This means guaranteeing that all girls, without exception, exclusion, or discrimination, have access to the same levels of education, with the same content and quality, as boys have.
- The State's responsibility to guarantee everyone's right to education must be clearly spelt out. This includes removing policies, systems, and practices that directly or indirectly hinder access of girls and women to education and protecting female students from all forms of violence and harassment. It also includes the provision of both judicial and non-judicial means of redress, when this right is violated.
- Laws must guarantee an educational environment where gender considerations are taken on board and the same standards apply to boys and girls in all educational institutions, both public and private, and across all stages of education.
- Laws on education must state the need to take gender considerations into account within school curricula to be taught to all students at all institutions, regardless of their description or affiliation. They must provide for regular reviews and updates on curricula, textbooks, programmes, and methods, to combat gender stereotypes. Measures should also be taken to guarantee that the inclusion of sex education in school curricula does not prompt parents to withdraw their children, especially girls, from school.
- Primary and secondary education must be compulsory and free of both direct and indirect costs. Its scope of beneficiaries must be clearly established to include all girls and boys, regardless of nationality. Penalties must be applied to those, private persons or public agents, who interfere with a girl's or boy's access to compulsory, cost-free education.
- Laws on education must include special provisions for literacy and adult education to address the consequences of early drop out, which especially affects girls and has resulted in millions of illiterate women.

2. MEDIA LAW

- The principles of gender equality and non-discrimination must be clearly upheld in the media. Gender-sensitive rules and dynamics must be applied in the media's internal structures and working environment and when producing and broadcasting news and content, which must also be gender-sensitive.
- Media laws must impose a fair treatment of women in the media that breaks with gender

stereotypes and guarantees that no discriminatory content is produced or broadcast. Different media outlets must abide by the ethics of journalistic work, and professional conduct, all of which must be gender sensitive.

- Women must be represented in all forms of media in a manner that is equitable, effective and free from stigma. Women should be equally represented both within the administration of media work and as journalists, as well as experts and commentators.
- It is important to provide for initial and continuous gender-sensitive education of media professionals and promote the creation of special units covering gender issues in media outlets.
- Laws must ensure that serious and credible coverage is given to all forms of violence against women, including violence against women in politics, especially in electoral seasons.
- Media law should contemplate the withdrawal of public support to media outlets that are not gender sensitive or tolerate rhetoric of violence and discrimination against women
- Laws must guarantee that no materials are produced which encourage gender-based violence or misogyny and that no gender-based abuse or discrimination takes place in advertisement. They should provide clear mechanisms to address any such violations.
- Laws must criminalise targeting of women on the internet or through social media platforms and other applications, including: access to private data, information or content, photos or videos, including sexual content, altered audio, video or photos of a person circulated without their consent, threats of violence, both direct and indirect, and online harassment.
- Laws on digital media and the use of digital platforms must approach women's protection in holistic terms concerned with prevention, protection, criminal prosecution with proportionate penalties, as well as the provision of damages, compensation and redress, while establishing the responsibility of internet service providers.
- Media laws should encourage the adoption of professional codes of conduct where standards and ethics are defined to ensure gender equality in the media sector.

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CHAPTER 10

GENDER-SENSITIVE TAXATION

1. The problem

Taxation cuts across the creation of a gender-sensitive legal framework. Worldwide, governments grapple with finding fiscal policies that best balance social needs and economic possibilities. When doing so, they may not ignore the gendered aspects embedded in existing taxation regimes and must take steps to correct them.

Fiscal policies have a direct or indirect negative effect on women. Such policies include:

- Tax incentives for married couples and families that, in practice, discourage women from joining or returning to the labour force, as they maintain asymmetries between spouses.
- Joint taxation policies for married couples, which disproportionately disadvantage women.
- Taxing goods used by women at higher rates and failing to classify them as basic necessities – an example is the treatment of menstrual products as ‘luxury goods’ and taxing them accordingly.
- Regressive taxation policies that fail to tax adequately the highest revenue-producing economic actors, such as corporations and elites, and thus lead to underfunded social services, leading in turn to higher reliance on unpaid domestic work (disproportionately provided by women).

The gendered impact of taxation policies can occur due to both direct and indirect bias in a State’s legislation. Thus, they can occur both when the State decides to tax women and men differently, but also when its otherwise neutral taxation policies have a disproportionate negative impact on women (such as policies that disadvantage single parents, the majority of whom tend to be women).

It has become increasingly clear that, without a gender-sensitive approach to tax law, States will continue to perpetuate gender unequal results in the distribution of wealth in society. This is especially true when austerity measures are adopted, as was seen in Chapter 7.

2. Basic principles for gender-sensitive taxation

In redesigning their tax laws, States should aim to treat women and men as equal and autonomous individuals. Their equality before the law should be retained regardless of marital status.

States should also aim to redress the multiple disadvantages women suffer, including those that derive from the gender pay gap (being paid less than men for equal work), the employment gap (being underrepresented in the labour force) and other patterns leading to women on average earning less than men (career breaks due to caring responsibilities, being more likely to be relegated to part-time work, slower career progression due to structural sexism, etc.). Taxation policies should aim to correct these disadvantages, not reinforce them.

3. Solutions towards gender-sensitive taxation

There are a number of measures States should adopt in order to ensure that tax laws become gender-sensitive:

A. Individual taxation on personal income

Individualised personal income taxation is the only way to ensure a fair tax system that does not discriminate against women. Taxes on personal income may include deductions related to work, pensions, housing, social security contributions, childcare and dependent family members. The European Parliament has recently found, on the basis of a comprehensive study of all European Union Member States' taxation policies,⁴¹⁵ that there is a need to change their legislation to acknowledge:

- that tax policies have varying impacts on different types of households (dual-earner households, female single-earner households, male single-earner households, etc.)
- that failing to incentivise women's employment and economic independence has negative consequences for them.
- that joint taxation for married couples results in a high gender pension gap.

The same report highlighted that tax systems should no longer be based on the assumption that households pool and share their funds equally and emphasised that individual taxation is instrumental to achieving tax fairness for women. As such, it recommended Member States to move away from systems of joint taxation and adopt individual taxation models that ensure that all tax benefits, cash benefits and in-kind government services are given to individuals in order to ensure their financial and societal autonomy.

B. Indirect taxation and fair taxes on products aimed at women

Taxation policies can also be indirectly discriminatory. In particular, tax regimes can fail to take adequately into account women's different consumption patterns as well as their different needs when it comes to basic goods. Women often spend a higher proportion of their income on consumer goods, so higher taxes on these will impact women disproportionately. Women's different basic consumer needs must also be kept in mind. An illustrative example comes in the

[415] European Parliament resolution of 15 January 2019 on gender equality and taxation policies in the EU (2018/2095(INI)). See also European Parliament Policy Department C, *Gender Equality and Taxation in the European Union*, 2017.

form of VAT tax on menstruation products. These are often taxed as ‘luxury goods’ instead of being classified as basic health-related products. This is especially worrying in light of the widespread phenomenon of ‘period poverty’ – the phenomenon resulting from women’s increased economic vulnerability due to their need for menstruation products, combined with the stigma attached to difficulties to access such products. According to Plan International UK, 1 in 10 girls worldwide are unable to afford menstruation products, with many more struggling to do so and suffering from stigma related to their periods.⁴¹⁶

“The higher tax rate on these products amounts to fiscal discrimination of women, based on their sex, which is not allowed by the Constitution... We wanted to show that discrimination is deeply ingrained in places like the financial system,” she said. “But that it is possible to change it.”

Nanna-Josephine Roloff and Yasemin Kotra, German campaigners to reduce taxes on period products

At the very least, States should adopt legislation that corrects the misclassification of such products as ‘luxury’. In 2020, a new law entered into force in Germany that reclassified menstrual products as ‘necessities’ – putting them in the same category as other goods such as foodstuffs, newspapers and books.⁴¹⁷ The change resulted in taxes on menstrual products being lowered from 19 to 7 percent. Also in 2020, Scotland was on track to passing legislation that would implement the world’s most comprehensive scheme to provide menstrual products.⁴¹⁸ According to this legislation, Scottish public institutions (including schools and universities) would be required to provide free menstrual products in their sanitary facilities. Such a comprehensive policy should be the gold standard in taking women’s health needs seriously and affording them equal status and priority.

C. Progressive taxation, wealth and corporation taxes, and tax avoidance schemes

Ultimately, ensuring fairness in taxation policies will require a comprehensive approach. A gender-sensitive system will be one that removes direct and indirect discrimination against women in tax rules, but also one that fairly and proportionately taxes individuals and corporations so as to ensure the State has the revenues needed to provide services. There is a close link between failure to tax the richest in society, both individuals and corporations, and States’ subsequent inability to provide the public services their citizens need. The same is true where tax avoidance schemes and money laundering are allowed to operate, as both funnel money away from the State. This imbalance has a gendered dimension. For example, women’s over-representation among those with caring responsibilities is directly tied to countries not ensuring adequate public childcare and care for the elderly.

[416] “Plan International UK’s Research on Period Poverty and Stigma”, 20 December 2017, <https://plan-uk.org/media-centre/plan-international-uks-research-on-period-poverty-and-stigma>.

[417] Melissa Eddy, “Tampons to Be Taxed as Essential, Not Luxury, Items in Germany”, *The New York Times*, 12 November 2019.

[418] Libby Brooks, “Scotland on Course to Pass “Groundbreaking” Period Poverty Law”, *The Guardian*, 19 February 2020.

- Legislators and gender equality activists should remain vigilant to the potential for direct and indirect discrimination perpetuated by a State's taxation policy.
- They should aim for individualised taxation of personal income, as the taxation of families has indirect discriminatory effects on women.
- They should ensure fair taxation of wealth and sanction tax avoidance schemes that would funnel money away from public services.

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PART III

THE IMPLEMENTATION OF GENDER-SENSITIVE LAWS

CHAPTER 11

GUARANTEES FOR THE IMPLEMENTATION OF GENDER-SENSITIVE LAWS

A survey of 133 countries that have introduced laws on violence against women shows that these laws are fully implemented in only 44% of them.⁴¹⁹ This underlines that enacting gender-sensitive legislation is only a necessary first step towards protecting women and guaranteeing their rights. The next challenging step is finding ways to implement such legislation on the ground. As the CEDAW Committee established under the Optional Protocol clarified, “the State’s obligation to protect women from domestic violence extends beyond passing laws and that the concerned States had failed to act with ‘due diligence’ by not ensuring that the law was implemented properly.”⁴²⁰

Of the various reasons that stand in the way of an adequate implementation of gender-sensitive legislation, lack of appropriate monitoring, linked to lack of political will, is probably most prominent. This can have several consequences. It can provoke that gender-sensitive legislation is not backed by sufficient budget or clear plans and strategies for implementation. It can lead to misinterpretations that empty it of meaning or lead to undesired results. It can ultimately encourage the enactment of contrary legislation, adding to further legal as well as social and cultural obstacles in the way of women and men’s substantive equality.

To avoid such setbacks, gender-sensitive legislation should ensure its adequate interpretation and implementation. To this end, laws should be drafted in gender-sensitive language that avoids ambiguity and prevents misinterpretations.⁴²¹ They should also be enforced by bodies with gender-sensitive training and applied by an independent and gender-sensitive judiciary. Legal assistance, moreover, should be provided to women and obstacles to their accessing of justice should be addressed and removed. Ultimately, the implementation and interpretation of gender-sensitive laws should be overseen by a Constitutional Court.

[419] Report of the Secretary-General on the intensification of efforts to eliminate all forms of violence against women - Seventy-first Session - See UN Doc. A / 71/219 - 27 July 2016.

[420] The CEDAW Committee issued this opinion on the occasion of a complaint against Austria concerning the murder of two women, Shahida Fawgkah and Fatima Yildirim, who were killed by their husbands after years of harsh abuse and despite reporting violence to the police and obtaining protection orders. The lack of coordination between law enforcement agencies and judicial officials led to repeated failures in detaining perpetrators and ensuring the safety of the wives. Two NGOs submitted the cases to the CEDAW Committee, under the Optional Protocol. In response to the Committee's recommendations and the media attention surrounding the case, the Austrian government made several amendments to ensure the implementation or amendment of existing laws. See: Progress of the World's Women 2011-2012-In Pursuit of Justice-UN Women-p. 18.

[421] Silvia Suteu and Ibrahim Draji, *ABC for a Gender Sensitive Constitution*, EuroMed Feminist Initiative, 2016. Chapter IV - pp. 76 and beyond.

1. Constitutional review of the content and implementation of the law

In many legal systems, the constitutional conformity of legislation, even its conformity with the State's international commitments and obligations, can be controlled by a Constitutional Court or a judicial body with similar functions. Where a constitution recognises the principles of equality and non-discrimination based on gender or any other grounds, this is a crucial asset for the adequate implementation of gender-sensitive laws.

Systems of constitutional review of legislation vary across countries.⁴²² In some, as in France, constitutional review is pre-emptive, i.e. carried out before bills are enacted or come into force. In most, it is subsequent to laws coming into force. In these cases, review can take place in abstract terms, i.e. independently from laws' actual application, during a short period of time thereafter, as in Germany. It can also take place in the context of their judicial application. This is the most common form of constitutional review, sometimes, as in Germany or Spain, coexisting with the former, abstract version.

Granting individuals access to requesting constitutional review of legislation is a powerful tool for ensuring respect for their constitutional rights. It is a way to ensure laws respect gender-sensitive constitutional provisions. Yet the possibility of requesting both pre-emptive and subsequent abstract control is usually limited to a list of political actors and bodies and not granted directly to individuals. The Jordanian Constitution, for example, states in Article 60, Paragraph 1: "The following entities - for limitation - shall have the right to directly challenge at the Constitutional Court the constitutionality of the applicable laws and regulations: a. The Senate. b. The House of Representatives. c. The Council of Ministers." Some countries, however, do extend this right to individuals.⁴²³ In Germany, for example, individuals can address a "direct [abstract] claim of unconstitutionality" before the Constitutional Court regarding a law the mere existence of which would violate one of their fundamental rights. Similarly, the Colombian Constitution gives every citizen the right to go before the Constitutional Court to question the constitutionality of laws, executive decrees, and amendments to the Constitution (Article 241). Also, South Africa allows for direct individual appeals of unconstitutionality before the Constitutional Court.⁴²⁴ It has been argued that granting individuals the right to request constitutional review could overwhelm the review process. Yet, it has been proven that the review process can be organized through filtering the constitutional appeals, which inevitably will allow more women and women's groups to appeal against discriminatory legislation.

In most countries, however, individual access to constitutional review is only open in the context of a judicial case, where the judicial application of legislation can be challenged. This means that, in order to challenge legislation that does not conform to constitutional, gender-sensitive parameters, women have to wait for such legislation to be applied to them. Furthermore, most

[422] See: *Judicial Review in New Democracies Constitutional Courts in Asian Cases*, Center for Constitutional Transitions, New York University School of Law, Information Note, No. 40, September 2013, pp. 8-9.

[423] For details see Hassan Bahri, *Constitutional Judiciary. Comparative Study* - Damascus - First Edition 2018, pp. 86 and beyond.

[424] *Subsequent oversight of the constitutionality of laws in comparative law* - DRI Report, p. 8.

of these countries allow ordinary courts to sort out appeals to constitutional review, i.e. to assess whether or not the constitutional question being raised is related to the case at hand and therefore qualifies to be referred to the Constitutional Court.⁴²⁵ This system is in force in countries like Italy, France, Spain and South Africa. Tunisia offers an example of good practice in this regard. Article 56 of the Constitutional Court Act obliges judges automatically to refer cases to the Constitutional Court, their role being simply to establish that the appeal is in accordance with a constitutional rule without examining the merit of the appeal case.⁴²⁶

Good practice also involves extending constitutional review beyond the content of the legislation to include the implementation in practice. Gender-sensitive laws can fail through misinterpretations or wrongful execution of laws and regulations. As the Working Group on Discrimination Against Women in Law and Practice explained, determining the effectiveness of laws is a complex process that not only involves examination of their written text, but also the monitoring of interpretations, jurisprudence rulings and implementing regulations.⁴²⁷ Often, gender-sensitive legislation can be countered by patriarchal judicial interpretations. If legislation that criminalises rape is interpreted and applied in terms that allow for marital rape, for example, such criminalisation cannot offer women meaningful protection. Similarly, executive regulations issued to facilitate the implementation of gender-sensitive laws must be subject to constitutional review. Executive regulations must facilitate the implementation of laws, yet they must do so while respecting the limits imposed by these laws and by the constitution itself.

2. The independence, impartiality, and gender-sensitivity of the judiciary

Beyond constitutional review, gender equality and women's empowerment require that gender-sensitive laws be applied by an independent and impartial judiciary with gender-sensitive training. Gender sensitivity needs to be at the core of justice.⁴²⁸

A. Independence of the judiciary

Having an independent judiciary means that courts and judges must apply the law without external interference, whether direct or indirect.⁴²⁹ Having an impartial judiciary means that courts and judges may not be biased towards any of the parties. Both these principles are particularly relevant in the context of gender-sensitive legislation. When the judiciary is influenced by prevailing patriarchal social mores and biased towards the party that embodies them, gender-sensitive laws can be emptied of their content and women deprived of their protection. They

[425] *Subsequent oversight of the constitutionality of laws in comparative law* - DRI Report, pp. 10-11.

[426] *Let's talk about the Constitutional Court*, International Organization for Reporting on Democracy, Tunis Office, March 2018, pp. 50-51.

[427] *Report of the Working Group on Discrimination against Women and Girls in Law and in Practice - Human Rights Council* - See UN Doc. A / HRC / 2/28, 5 April 2012.

[428] *Special Rapporteur on the independence of judges and lawyers*, Human Rights Council, see UN Doc. A / HRC / 17/30, 29 April 2011.

[429] See *Human Rights and the Achievement of justice*, The United Nations High Commissioner for Human Rights, United Nations, New York - Geneva, 2003, p. 105.

can even be deprived of their procedural rights, even of their right to access justice altogether, and subjected to alternative social or religious systems of conflict resolution that prevail in their patriarchal, cultural heritage beyond regular legal justice. Women may thus find themselves excluded from the law, subjected to parallel systems ruled by religious and customary norms outside the legal realm.

There are agreements and conventions that promote gender equality and ensure the judicial protection of women's rights. The Special Rapporteur on the independence of judges and lawyers has stressed the importance of ensuring the independence and impartiality of the judiciary and in determining the most appropriate course of action to redress violations of women's rights.⁴³⁰ Important is also to ensure that the State apparatus will enforce all judicial orders. To this end, the judiciary should receive the full support of law enforcement officials with special training on gender and women's rights.

B. Judicial impartiality in the face of judges' power of adjudication

While judges need room for the interpretation of the legal system when adjudicating cases, their power of interpretation allows them to load their decisions with preconceived notions that are discriminatory against women. Room for interpretation is particularly broad in family court cases, where judges can - and often do - use it to deprive women of equality and justice. This situation is worse in countries where family cases are judged based on religious laws. In such cases, the judge's room for interpretation is crucial and dangerous. It is even more dangerous as women are forced to submit to religious rulings that, as a matter of principle, view them as inferior to men, thus perpetuating the violation of their rights to justice and equality. The Algerian Family Law of 2007 grants judges great power of interpretation in matters of authorising marriage before the legal age, according to its Article 7. The same law grants judges similarly wide power with regards to scientific methods of proving descent (Article 40), damaging compensation to divorced women except in cases of arbitrary divorce (Article 52 - amended) or requests for divorce (Article 53). The same applies to the estimation of alimony (Article 79), which cannot be reviewed before a year after the ruling.

Gender-sensitive legislation, particularly legislation on family and personal status, thus needs to be drafted in terms that curtail the wide power of interpretation granted to judges, so that women's rights can be guaranteed. To this end, the judiciary must also be ensured to be gender sensitive.

C. The importance of a gender-sensitive judiciary

In addition to being independent and impartial in the application of gender-sensitive laws, the judiciary also needs to be gender-sensitive in the interpretation and application of the law. This requires that women be adequately represented at all levels of the judicial system. Having gender parity within the judiciary is not only a question of justice. It is also a way to ensure that a woman's lived experience is properly taken into account by judges that, on the face of it, have

[430] Special Rapporteur on the independence of judges and lawyers, Human Rights Council, see UN Doc. A / HRC / 17/30 - 29 April 2011.

appropriate gender sensitivity.⁴³¹ In this regard, there is evidence that female judges can create a more favourable judicial environment for women and make a difference in results. Studies in the US found that female judges were 11% more likely than male judges to rule in favour of plaintiffs in labour discrimination cases. Similarly, male Federal Appeals Court judges were more likely to support plaintiffs in cases of sexual harassment or gender discrimination if there was a female judge on the panel.⁴³²

Yet, while quotas have led to a significant increase in female representation in legislative bodies, a gendered approach to the judiciary is still missing. Available facts reveal that women worldwide continue to be underrepresented in the judiciary and the legal profession, particularly in senior positions. Gender discrimination is still institutionalised in the justice system. To counter this, States must ensure that women and men effectively have equal access to serving as judges, prosecutors or magistrates, particularly at high levels.⁴³³ This will help to bring courts closer to women who resort to them, who may then feel that the judiciary consists of judges that represent social diversity. Particularly important is to have women from minorities or underrepresented groups adequately represented in the judiciary.⁴³⁴ To this end, temporary affirmative action measures may be needed.⁴³⁵

In order to ensure that a gender-sensitive perspective prevails throughout the judiciary, States must also provide judges and all judicial staff with gender-sensitive training, enhancing their commitment to making independent, impartial rulings at all levels and in all legal fields.

International precedents and practices offer various examples of measures and mechanisms designed to bring about the desired change. This may take various forms, including constitutional or legal reform and public awareness campaigns. For any combination of measures to be effective, conscious efforts are required from all branches of government and those in the legal profession.⁴³⁶

The Argentinian Supreme Court of Justice is a good example. In March 2010, it led the process of developing a gender map of the justice sector⁴³⁷ and establishing a Women's Bureau within it, with a view to developing and implementing gender-sensitive policies within the judiciary. This includes facilitating women's access to justice by several means, notably training on mainstreaming gender sensitivity.⁴³⁸

[431] See the text of the speech delivered by Ms. Navanethem Pillay, former UN High Commissioner for Human Rights, during the biennial conference of the International Association of Women Judges on 12 May 2010, in Seoul.

[432] Progress of the World's Women 2011-2012 - In Pursuit of Justice - UN Women, p. 61.

[433] *Special Rapporteur on the independence of judges and lawyers*, Human Rights Council, see UN Doc. A / 66/289 - 10 August 2011.

[434] *Special Rapporteur on the independence of judges and lawyers*, Human Rights Council, see UN Doc. A / HRC / 17/30 - 29 April 2011.

[435] Shelby Quast, *Gender and SSR Toolkit*. Justice Reform and Gender - Geneva Center for the Democratic Control of Armed Forces (DCAF), OSCE / ODIHR and UNIDIR Advancement of Women, 2008, p. 27.

[436] *Special Rapporteur on the independence of judges and lawyers*, Human Rights Council, see UN Doc. A / 66/289 - 10 August 2011.

[437] See Report: "A Gender Map of Argentine Justice". Available at: <http://www.csjn.gov.ar/om/mapa.html>.

[438] *Special Rapporteur on the independence of judges and lawyers*, Human Rights Council, see UN Doc. A / HRC / 17/30 - 29 April 2011.

3. Legal assistance and removal of obstacles to women's access to justice

Access to justice and effective means for redress are essential to the enforcement of rights. Access to justice is rooted in the principles of equality and non-discrimination: it entails a right to equal access to courts and tribunals, equal means of defence and legal assistance⁴³⁹, to the equal treatment of all parties before court and to redress for violated rights without any form of discrimination. In this sense, it constitutes “a fundamental pillar for the protection of human rights and a practical means of upholding the rule of law.”⁴⁴⁰

Access to justice thus means access to every stage of the justice system. Ensuring this is particularly relevant for women.⁴⁴¹ Among the main obstacles to the effectiveness of gender-sensitive laws are the difficulties women encounter when trying to access justice. These have been eloquently explained by one woman from Kalangala, Uganda: ““Sometimes, we are seriously wronged by other people, usually men. Men beat us or abuse us sexually... If you try to pursue a case to the Kalangala Police Station, no single boat owner will allow you to use their boat or engine to go. They always protect their rich and powerful fellows. In any case, you would need to raise money for fuel and hiring a boat and engine. In the end, you simply give up and suffer quietly.”⁴⁴²

Obstacles to women's access to justice range from poverty to decades of social discrimination, exclusion and marginalisation. In combination, they lead to lack of implementation of gender-sensitive laws, where such exist. Hence the importance of overcoming those obstacles and providing women with the necessary legal assistance to ensure the actual implementation of gender-sensitive laws.

A. Constraints to women's access to justice

Constraints to women's capacity to resort to courts in pursuit of justice and fair redress range from the feminisation of poverty to women's lack of knowledge of the rights and laws that protect them, against a backdrop of traditional legal practices that discriminate against women and impose on them alternative religious or customary norms.⁴⁴³

Economic constraints: The UN Special Rapporteur on the independence of judges and lawyers has

[439] See the judgement of the European Court of Human Rights (ECHR) in the case of *Airey v Ireland* (Application No. 6289/73, Judgment of 9 October 1979). Here the applicant sought a court order on her separation from her physically abusive husband. Yet she could not obtain it because she could not pay the lawyer's fees and lacked legal aid. The ECHR found a violation of her right of access to justice (Article 6 ECHR). The Court stated that remedies must be effective and not illusory and noted that many civil and political rights have social and economic implications entailing positive obligations for States. It recognised a right to legal assistance where this is indispensable for effective access to courts (Referred to in *Women's Rights in Human Rights – United Nations*. United Nations. Office of the UN High Commissioner for Human Rights, New York and Geneva 2014, p. 106).

[440] *Access to Justice for Women and Girls in the Arab Region: From Ratification to Implementation of International Instruments*, Report on the Status of Arab Women - United Nations. Economic and Social Commission for Western Asia, p. 9.

[441] *Access to Justice for Women and Girls in the Arab Region: From Ratification to Implementation of International Instruments*, Report on the Status of Arab Women - United Nations. Economic and Social Commission for Western Asia, p. 12.

[442] *The Progress of the World's Women 2011-2012 - In Pursuit of Justice*, UN Women, p. 10.

[443] *Report of the Special Rapporteur on the independence of judges and lawyers*, Human Rights Council, see UN Doc. A / HRC / 17/30 - 29 April 2011.

expressed concern about the increasing economic disparities that continue to hamper women's enjoyment of human rights and impede their access to justice.⁴⁴⁴ This was also confirmed by the UN Special Rapporteur on extreme poverty, which explained that *economic obstacles* to access justice are "a major and unacceptable challenge for all people living in poverty, but they are particularly pronounced for women, due to the unequal distribution of resources at both the household and societal levels."⁴⁴⁵ This is the reality of women in many countries. In Uganda, for example, women who report domestic violence are usually required to provide the police with money for transportation to arrest suspects.⁴⁴⁶ This means the majority of poor women end up accepting violence instead of reporting it, unable to face the cost of raising a judicial case. In Kenya, a World Bank study found that a formal claim to land in inheritance cases could involve 17 different legal steps and cost about \$780 in attorneys' fees and other administrative expenses. In Nepal, women who demand their inheritance rights sometimes must undergo DNA testing, the cost of which is too high for most women.⁴⁴⁷

Legal constraints: In some countries, the lack of recognition of equality between women and men, even the institutionalisation of gender inequalities, seriously impede women's access to justice. An example is male guardianship, i.e. a woman's subjection to a male guardian's approval to act in the public sphere (signing contracts, including marriage, accessing legal services, travelling, making decisions on health -read more in Chapter 4). This applies to access to justice.⁴⁴⁸ It means that, in some cases, women cannot file a complaint, testify, or appear in court without the consent or even the presence of a male guardian. This is of particular concern in cases of domestic violence, where the guardian may be the person who committed the violence. It is also of great concern in cases of rape and other forms of sexual and gender-based violence committed against women. As these forms of violence "bring shame" to the family, the male guardian may feel compelled not to facilitate access to justice.⁴⁴⁹

Social constraints: Social mores often connive with the law to exclude women from formal justice and resort to traditional or community-based arbitration or justice mechanisms. In Lesotho, Mozambique and Vietnam the number of women who said they had contacted a traditional or local leader for justice was three times higher than those who contacted a government official. In a study of family courts in Morocco, 68% of women who experienced domestic violence said they would prefer to resolve the problem within the family. Those who had suffered domestic violence preferred to deal with family courts to obtain a divorce rather than resort to the police and initiate lawsuits.⁴⁵⁰ This raises concerns because traditional or community-based justice

[444] *Special Rapporteur on the independence of judges and lawyers*, Human Rights Council, see UN Doc. A / HRC / 17/30, 29 April 2011.

[445] *Access to Justice for Women and Girls in the Arab Region: From Ratification to Implementation of International Instruments*, Report on the Status of Arab Women, United Nations. Economic and Social Commission for Western Asia, p. 9.

[446] *Progress of the World's Women 2011-2012 - In Pursuit of Justice* - UN Women, p. 53.

[447] *Ibid.*

[448] *Women and Girls Seeking Justice: From Ratification of International Instruments to Implementation* - Report on the Status of Arab Women - United Nations. Economic and Social Commission for Western Asia, p. 31.

[449] *Report of the Special Rapporteur on the independence of judges and lawyers*, Human Rights Council, see UN Doc. A / HRC / 17/30 - 29 April 2011.

[450] *Progress of the World's Women 2011-2012 - In Pursuit of Justice* - UN Women, p. 52..

mechanisms are often entrenched in gender stereotypes and overlook considerations on equality and women's rights. Often, moreover, they do not issue penalties for gender-based violence. Furthermore, in most places, these mechanisms are implemented by older men that often rely on a discriminatory interpretation of customary laws.⁴⁵¹ States, therefore, must ensure women have access to formal justice systems or that, if used, informal justice mechanisms conform to international human rights standards - not an easy aim to achieve. Marriage, divorce, land ownership and property are examples of issues that are often addressed through arbitration or other informal justice mechanisms that affect women negatively. So is violence against women. Here, moreover, informal conciliation has been shown not to be advisable, as the parties do not have symmetrical negotiating positions and the weaker party, i.e. the woman, can be put at higher physical and emotional risk.⁴⁵² In these cases, ensuring women's access to legal justice is particularly relevant and urgent.

Women's knowledge and awareness of their rights: Women's lack of knowledge and awareness of their rights affects the implementation of gender-sensitive legislation.⁴⁵³ Therefore, gender-sensitive legislation should include provisions aimed at raising awareness and disseminating knowledge of it within the population, in general, including in educational curricula, and amongst women, in particular. The 2008 Law Against Femicide in Guatemala stipulates that the government is responsible for coordination between agencies, for promoting and monitoring awareness-raising campaigns, for establishing dialogue and for promoting policies that prevent violence against women. Article 8 of the Brazilian Maria da Penha Act (2006) provides for integrated prevention measures. These include encouraging the media to avoid stereotyped gender roles that legitimise or encourage violence against women, organising public educational campaigns and emphasising human rights and the problem of domestic and family violence against women in educational curricula at all levels.⁴⁵⁴

B. Legal assistance frameworks

In order to ensure women's access to justice, States must also ensure women's access to free legal advice, assistance and representation when they need it. Many States provide free legal aid to those who require it. Some, particularly in Latin America, have established public attorneys' offices where lawyers work as public officials paid by the State in return for free legal services, either as government institutions affiliated to the judiciary or ministry of justice, or as autonomous entities. In the Netherlands, for example, the legal aid system relies on a network of public legal aid centres that provide legal services to those who request them and private lawyers paid by the State to provide direct services to low-income applicants.

[451] *Special Rapporteur on the independence of judges and lawyers*, Human Rights Council, see UN Doc. A / HRC / 17/30, 29 April 2011.

[452] This is so, according to the Inter-American Commission on Human Rights, since the aggressor is not bound by an informal agreement and this does not address the causes and consequences of violence (Women's rights are human rights - United Nations. Office of the UN High Commissioner for Human Rights, New York and Geneva 2014, p. 109).

[453] Shelby Quast, *Gender and SSR Toolkit*. Justice Reform and Gender - Geneva Center for the Democratic Control of Armed Forces (DCAF), OSCE / ODIHR and UNIDIR Advancement of Women, 2008 - Pp. 28-29.

[454] See the presentation of these laws: Handbook for legislation on violence against women, op. cit., pp. 26-28.

Over and above these provisions, special measures should be adopted to ensure that women have substantial access to legal aid.⁴⁵⁵ Legal services aimed at meeting women's needs remain limited, especially for poor women. Even when free legal services are provided, they usually focus on defendants in criminal cases, not on women who need legal advice and representation as plaintiffs and in civil cases.⁴⁵⁶ The Special Rapporteur on the independence of judges and lawyers has already referred to the competition between women and men for the allocation of resources, usually designed to provide one type of service despite varying needs.⁴⁵⁷ The Special Rapporteur has, therefore, emphasised the importance of establishing a system within the State that provides women appropriate legal aid and support, with a specific focus on women belonging to vulnerable groups.⁴⁵⁸ In order to improve women's access to legal aid, Guideline 9 of the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems recommends:

“(a) Introducing an active policy of incorporating a gender perspective into all policies, laws, procedures, programmes, and practices relating to legal aid to ensure gender equality and equal and fair access to justice.

(b) Taking active steps to ensure that, where possible, female lawyers are available to represent female defendants, accused and victims.

(c) Providing legal aid, advice and court support services in all legal proceedings to female victims of violence in order to ensure access to justice and avoid secondary victimisation and other such services, which may include the translation of legal documents where requested or required.”⁴⁵⁹

C. Adequate funding of legal assistance to women

Making the justice systems work for women implies investing in it. It requires instigating legal reform, supporting free legal services and integrated service centres, as well as the training of judges. Adequate funding should thus be allocated to legal aid services for women. This matter has not been heeded by many countries. Funding for projects aiming to achieve gender equality, in general, and to promote women's access to justice, in particular, remains low. The World Bank's funding of donations and loans (2000-2010) indicates that only a very reduced part of this funding was allocated to those projects: the total amount allocated by the World Bank to financing 2,946 projects during this period was US \$261 billion, while the amount allocated to financing 262 legal projects was US \$16 billion, not more than 6% of the total funding. Similarly, the total amount allocated to 4 legal projects on gender equality was US \$61 million, not more than 0.2% of the total funding, while the total amount allocated for gender equality components

[455] *Special Rapporteur on the independence of judges and lawyers*, Human Rights Council, see UN Doc. A / HRC / 23/43, 15 March 2013.

[456] *Progress of the World's Women 2011-2012. In Pursuit of Justice* - UN Women, p. 54.

[457] *Special Rapporteur on the independence of judges and lawyers*, Human Rights Council, see UN Doc: I, see UN Doc. A / HRC / 23/43, 15 March 2013.

[458] *Special Rapporteur on the independence of judges and lawyers*, Human Rights Council, see UN Doc.: I, see UN Doc. A / HRC / 17/30, 29 April 2011.

[459] In December 2012, the General Assembly unanimously adopted the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (67/187), the first international instrument on the right to legal assistance.

in these projects was US \$9.6 million dollars, only 0.004% of the total funding.⁴⁶⁰

These figures point to the need for full and sustainable funding to ensure the enforcement of gender-sensitive legislation. An effective way to achieve this is to include a specific provision within the State budget. For example, the Republic of Korea has allocated a part of its national budget to funding the implementation of laws on domestic and sexual violence.⁴⁶¹ Among the specific measures that need financing are: the elimination of costs of judicial proceedings related to personal status issues; the development of training and awareness-raising programmes on women's rights and gender equality issues; the development of programmes that empower women by giving precise and straightforward information about their rights and the resources they can resort to in case of their violation, the initiation of capacity-building activities to raise awareness among women, especially concerning legal affairs; ensuring that local legislation and practices increase the number of courts so that women can access them in their urban and rural areas; supporting the establishment of mobile courts in a number of locations to bring justice to women, especially in remote rural areas; increasing the representation of women in the judiciary and law enforcement sectors and ensuring that they enjoy equal positions to men therein.⁴⁶²

4. Gender-sensitive training of law enforcement agencies

Law enforcement agencies are all the official and non-official parties and persons involved in the enforcement and implementation of the law. They include judges, prosecutors and defence parties, independent lawyers, court staff and experts that provide assistance in relevant fields, such as medicine and health care, psychology, social work and others.

One of the reasons for the deficient implementation of gender-sensitive legislation is the lack of gender-sensitive qualifications of those involved and the lack of investment in training them. In East Timor, for example, there was only one trained doctor to collect evidence in rape cases, while in Sierra Leone there were only 100 trained lawyers, 90 of whom were based in the capital, Freetown, serving more than 5 million people.⁴⁶³ The most prominent criticism of the Mauritanian bill on gender-based violence of 2016 was that, although it provided for the establishment of special courts and police forces, it completely ignored the provision for mandatory, periodic and institutional training for all law enforcement officials, including the judiciary and health workers, about gender-based violence and gender-sensitive responsiveness.⁴⁶⁴

This situation is couched within a deeply patriarchal culture that impregnates the rules and procedures in the judicial system, leading to gender-biased behaviour and judgements. Gender prejudices are notably evident in the implementation of laws that seek to eradicate violence

[460] *Progress of the World's Women 2011-2012 - In Pursuit of Justice* - UN Women, p. 15.

[461] *Progress of the World's Women 2011-2012 - In Pursuit of Justice* - UN Women, p. 34.

[462] *Women and Girls Seeking Justice: From Ratification of International Instruments to Implementation* - Report on the Status of Arab Women - United Nations. Economic and Social Commission for Western Asia - p. 53.

[463] *Progress of the World's Women 2011-2012 - In Pursuit of Justice*, UN Women, p. 53.

[464] *"They told me to be silent" Obstacles to justice and redress for survivors of sexual assault in Mauritania*, Human Rights Watch, September 2018, pp. 52-53.

against women. Although the number of such laws is increasing worldwide, the number of lawsuits being dropped in relation to violence against women is also increasing in different countries, thus creating a significant problem of impunity.⁴⁶⁵ This can be traced to the gender prejudices of the agents involved in the implementation of those laws: assuming that women are likely to lie; requiring physical evidence for non-consent, inferring consent from a woman's silence even if it was forced silence; assuming that a woman that had had sex before automatically consents to sex; assuming that certain behaviours (being out late, walking through isolated places or dressing in a certain way) encourages such assaults, as it makes women available for sex; believing that prostitutes cannot be raped; believing that a woman who is raped loses her "honour", is worthy of shame or guilty, not a victim; generally blaming women for being sexual assaulted.⁴⁶⁶

In a study by Population Council on police attitudes in two countries in South Asia, 74%-94% of respondents agreed that "a husband has the right to rape his wife." This means that often women seeking justice face hostility or contempt from the very people who should protect their rights. In many countries, the police dismiss domestic violence as a "personal matter" to be resolved within the family. In a survey of 30 of the 34 provinces in Afghanistan conducted by the UN Assistance Mission, it was found that in almost every case investigated, rape victims were themselves accused of "adultery".⁴⁶⁷

CEDAW has looked into the gender stereotyping that takes place in rape cases, stressing that "gender stereotyping affects women's right to a fair and impartial trial". It requested the concerned State to ensure that all legal proceedings in cases involving rape crimes and other forms of sexual violence be impartial and honest and that they be not affected by prejudice or gender stereotypes. To this end, the Commission recommended a wide range of measures aimed to improve the treatment of rape by the judiciary, including gender-sensitive training and education of those involved.⁴⁶⁸

Building gender-sensitive capacities in law enforcement agencies requires sustained institutional efforts in the form of ongoing training, education and capacity-building programmes, in compliance with international standards and commitments as well as national anti-discrimination laws. This has been made clear by CEDAW when recommending "mandatory cross-cultural gender and child-sensitivity training modules for police, criminal justice officials and professionals involved in the criminal justice system on the unacceptability of all forms of violence against women and on their harmful impact and consequences on all those who experience such violence."⁴⁶⁹

A positive experience is the work of Sakshi, an Indian non-governmental organisation (NGO) that

[465] Lisa Gormley, "Gender stereotyping in cases of rape and violence against women: developments in human rights jurisprudence", *INTERIGHTS Bulletin*, vol. 16, No. 3 (2011), p. 140.

[466] *Ibid.*

[467] *Progress of the World's Women 2011-2012 - In Pursuit of Justice*, UN Women, p. 54.

[468] Judicial profiling. *Vertido v. Philippines* - Committee on the Elimination of Discrimination against Women, communication No. 18/2008, Views adopted on 16 July 2010 - Referred to in the human rights of women - United Nations. Office of the UN High Commissioner for Human Rights, New York and Geneva 2014, p. 105.

[469] Para. 24 (b) of general recommendation 19. See also *Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice* (General Assembly resolution 65/228, annex), para. 20 / a.

trains female and male judges. In 1996, Sakshi interviewed 109 district court judges, members of higher State courts, Supreme Court magistrates, lawyers, and litigants to examine the impact of legal concepts and judicial decision-making processes on women who attended the courts. Around half the judges interviewed stated that women abused by their husbands carried some of the blame, while 68% stated that women in attractive clothes were to blame for being raped. Subsequently, Sakshi developed a programme for judges, NGOs, social workers, and prosecutors to change inherited gender myths, which was then subsequently circulated to 16 countries in the Asia-Pacific region.⁴⁷⁰

Often, however, the need to provide gender-sensitive qualification and training to law enforcement officials is not taken seriously enough. Training is regarded as an unnecessary burden or an insignificant formality and carried out for the sake of complying with international standards or for political purposes. Efficient trainings should consider the following:

- **There should be binding legal grounds for training**

Legislation itself should provide for gender-sensitive training and capacity-building, making the training mandatory and including a clear and appropriate budget to cover it. For example, the Philippine Anti-Violence Against Women and Their Children Act of 2004, Section 42 requires for all bodies that address violence against women and their children to undergo education and training on the nature and causes of such violence, on the legal rights, remedies and services available for victims, on the legal requirements imposed on police officers to conduct arrest, as well as on the protection and assistance they can offer and the best methods for dealing with cases of violence against women and their children.⁴⁷¹ Alternatively, regulations governing the work of those involved in the implementation of laws should state their obligation to undergo such training before being allowed to operate.⁴⁷²

- **Training should be provided to all actors in law enforcement at all levels**

This includes judges, prosecutors, defence counsels, independent lawyers, court personnel, police and legal assistants at the national, provincial and district levels.⁴⁷³ It should also include informal actors involved in the implementation or monitoring of gender-sensitive laws or the provision of services to victims such as community service providers and media representatives.

- **Training should be institutionalised**

Training initiatives should be institutionalised and developed on the basis of a unified curriculum to ensure the sustainability of results. Of particular importance is the integration of gender issues in the training of judges and in police academies. A good practice is the inclusion of educational modules on women's socio-economic rights, gender discrimination and gender equality in the

[470] *Progress of the World's Women 2011-2012 - In Pursuit of Justice*, UN Women, p. 61.

[471] See the presentation of these laws in *Handbook for Legislation on Violence against Women*, UN Women. New York 2012 - pp. 15--16.

[472] Shelby Quast - *Gender and SSR Toolkit*. Justice Reform and Gender - Geneva Center for the Democratic Control of Armed Forces (DCAF), OSCE / ODIHR and UNIDIR Advancement of Women, 2008, p. 19.

[473] Shelby Quast - *Gender and SSR Toolkit*. Justice Reform and Gender - Geneva Center for the Democratic Control of Armed Forces (DCAF), OSCE / ODIHR and UNIDIR Advancement of Women, 2008, p. 19.

workplace, as part of the compulsory curriculum at the Judges Academy in Serbia. So is the laying down of a protocol on the prevention of sexual violence in situations of armed conflict and the protection of female victims in Colombia, a protocol that became mandatory in all government institutions and is used to train legal staff, including public prosecutors. Partnerships involving national judicial institutions and civil society organisations would be beneficial, as they would help in communicating with judges who may object to addressing women's rights and gender equality issues, or do not tend to them at all.

- **Training should be specific and specialised**

One of the main reasons for the failure of training programmes is the use of the same general training materials around the world, regardless of the specificities of the legal system and of the targeted groups. Instead, specialised and tailored training programmes should be designed. These should rest on fluent communication with the group to be trained, so that a better understanding of their daily reality can be gained, and their requirements effectively and adequately met. Gender-sensitive discussions with the group should, therefore, take place before the training programme is developed. The needs of different groups of women (rural women, indigenous women, women who are HIV positive or live with those who are) should also be taken into account in the development of training initiatives.⁴⁷⁴ Programmes should also focus on the practical aspects of law enforcement and not only on theoretical discussions about gender equality and human rights.

5. Additional structural reforms

The implementation of gender-sensitive laws faces additional structural hurdles that should be addressed comprehensively.

- **Legal provisions that are inconsistent with international human rights and principles of gender equality and non-discrimination should be repealed or amended**

To ensure a coherent legal framework that promotes women's human rights, gender equality and non-discrimination, and the elimination of violence against women, legal provisions that are inconsistent with this aim should be repealed or amended. Many Arab countries have adopted legislation prohibiting violence against women, while retaining legal provisions that authorise and legitimise such violence (with the pretext of disciplining the wife under personal status laws, for example, or in the context of "honour" crimes under criminal law). An illustration of good practice can be found in the Spanish Organic Act 1/2004 on Integrated Protection Measures against Gender Violence, which amended a number of laws to ensure the overall consistency of the legal system. These include the Civil Code, the Criminal Code, the Codes of Civil and Criminal Procedure, the Free Legal Aid Act, the Workers' Statute, the General Social Security Act, the

[474] Special Rapporteur on the independence of judges and lawyers, Human Rights Council, see UN Doc. A / HRC / 20/20, 20 June 2012.

- **Law enforcement should be gender sensitive**

Gender-sensitive law enforcement should be ensured. To this end, some legislation has resorted to establishing *specialised courts* and *police units* dealing with gender-based crimes. Specialised integrated courts have been established under the Spanish Organic Act 1/2004 on Integrated Protection Measures against Gender Violence and in Article 14 of the Brazilian Maria da Penha Act of 2006, as well as in South Africa. In response to the low conviction rate, South Africa established Sexual Offenses Courts and Thuthuzela centres (Consolation and Rehabilitation). Sexual Offenses Courts are competent to prosecute cases of sexual violence and all its members have been specially trained to deal with them. The Thuthuzela centres are linked to these courts and serve as dedicated centres for rape victims. A project manager heads the centre and provides police, healthcare, counselling and legal services under one roof, enabling rape cases to be well managed. This has resulted in a 75-95% increase in conviction rates, as well as the capacity to adjudicate the case within six months of the initial report. Before the establishment of these centres, a case would take between 18 months and two years to be decided.⁴⁷⁶

Some legal systems have also established police and *public prosecution units* that specialise in violence against women. In many police stations in Italy, special investigation bodies have been set up to respond more effectively to women who report having suffered sexual violence. In Jamaica, a Sexual Offenses Unit has been established within the police, to create an environment that encourages victims to report incidents of sexual and child abuse, effectively investigate complaints of abuse and provide counselling and other services.⁴⁷⁷ In Brazil, since the promulgation of the Maria da Penha Act on Domestic Violence in 2006, women police officers have been given a leading role in initiating legal proceedings in cases of violence against women and the police have broader responsibilities in securing protection measures and providing other urgent assistance to victims.⁴⁷⁸

- **Gender-sensitive laws and policies should be coordinated**

To ensure a comprehensive approach to the implementation of gender-sensitive legislation, it is advisable to provide for national plans that coordinate gender-sensitive laws and policies. The Uruguayan Law for the Prevention, Early Detection, Attention to, and Eradication of Domestic Violence of 2002 provides for the design of a national plan to combat family violence. Article 46 of the Sexual Offenses Act of Kenya of 2006 stipulates that the competent minister shall prepare a national policy framework to guide the implementation and administration of the law, to be reviewed at least every five years.⁴⁷⁹

[475] See the presentation of these laws in *Handbook for Legislation on Violence against Women*, UN Women. New York 2012, pp. 13-14.

[476] Shelby Quast - *Gender and SSR Toolkit*. Justice Reform and Gender - Geneva Center for the Democratic Control of Armed Forces (DCAF), OSCE / ODIHR and UNIDIR Advancement of Women, 2008 - P. 19. See the text of the report at the following link: www.dcaf.ch

[477] See the presentation of these law in *Handbook of Legislation on Violence against Women*, UN Women. New York 2012, p. 16.

[478] *The Progress of the World's Women 2011-2012 - Seeking Justice* - UN Women, p. 58.

[479] See the presentation of these laws in *Handbook for Legislation on Violence against Women*, UN Women. New York 2012, p. 14.

- **Law enforcement should be sufficiently funded**

The lack of sufficient funds is used by some parties as an excuse to obstruct the enforcement of gender-sensitive laws. Gender-sensitive legislation must therefore explicitly foresee the allocation of sufficient funds for its own implementation, either by making government responsible for providing them as budget items or by opening opportunities for funding to governmental and/or nongovernmental organisations. In this line, Mexico's General Law on Women's Access to a Life Free of Violence (2007) imposes obligations on the State and municipalities to take administrative and budgetary measures to ensure women's rights to lives free from violence.

- **Mechanisms and sanctions should be established to support, control, and evaluate the implementation of laws**

A main challenge faced by the implementation and enforcement of gender-sensitive laws is the lack of political will. Many gender-sensitive laws are passed without true commitment or close enough attention to implementation and are gradually undermined and emptied of their substance. To avoid this, some laws provide specific mechanisms to control and evaluate their implementation, sanction those who hinder or fail to implement them or to comply with them and propose amendments if needed. In Honduras, for example, a special Committee was established to oversee the implementation of the Domestic Violence Act of 1997. It was made up of members of government and civil society. In 2004 the Committee proposed amendments to the law, including the expansion of provisions on protection orders and the criminalisation of recurrent domestic violence cases. Congress approved these amendments, which have been in force since 2006. Similar instruments were put in place by the Spanish Organic Act 1/2004 on Integrated Protection Measures against Gender Violence and by the Philippine Anti-Violence Against Women and their Children Act of 2004.

Other laws provide for sanctions against competent authorities that do not comply with their provisions. Article 5 of the Costa Rican Criminalisation of Violence against Women Law of 2007 states that public officials who deal with violence against women "must act promptly and effectively while respecting the procedures and the human rights of affected women" or else face accusations of failing to perform their duty. Articles 22, 23 and 24 of the Venezuelan Law on Violence against Women and the Family of 1998 also impose penalties on authorities in employment, education and other activities centres, health professionals and officials of the justice system who do not carry out relevant procedures within the set time frame.⁴⁸⁰

In this context, it is important that the mechanisms for issuing regular reports on the implementation and evaluation of gender-sensitive laws be clearly established and the relevant actors and their tasks specified, so as to ensure effective and continuous implementation of these laws.

[480] See the presentation of these laws in Handbook for Legislation on Violence against Women, UN Women. New York 2012, p. 19.

1. CONSTITUTIONAL REVIEW OF THE CONTENT AND IMPLEMENTATION OF THE LAW

- Individuals should be granted access to Constitutional Courts to question the constitutional conformity of laws affecting their rights, thus enabling women, advocacy groups and civil society organisations to request the constitutional review of discriminatory laws.
- Constitutional review should not be restricted to the text of laws, but also embrace their interpretation, enforcement and the executive regulations elaborated to implement them.

2. INDEPENDENCE, IMPARTIALITY, AND GENDER-SENSITIVITY OF THE JUDICIARY

- Laws and policies should be implemented to ensure an independent and gender-sensitive judiciary.
- Laws should be worded in terms that minimise judges' scope for interpretation, as this is often misused to undermine women's interests.
- Women should be equally represented in the judicatory at all levels.

3. LEGAL ASSISTANCE AND REMOVAL OF OBSTACLES TO WOMEN'S ACCESS TO JUSTICE

- Hurdles to women's access to justice should be removed.
- Women seeking access to justice should be granted free legal assistance and be adequately informed of their rights and the relevant laws assisting them.
- Laws should ensure women access to justice in formal courts rather than in traditional or community courts.

4. GENDER-SENSITIVE TRAINING OF LAW ENFORCEMENT AGENCIES

- Laws should provide for gender-sensitive training for law enforcement agencies. This training should be mandatory, institutionalised, specialised and inclusive of all involved in law enforcement.
- Judge training and police academy programmes should be updated to improve capacities to enforce gender-sensitive laws.

5. ADDITIONAL STRUCTURAL REFORMS

- Legal texts that contradict gender-sensitive legislation should be amended.
- Specialised gender-sensitive agencies should be established for the enforcement of gender-sensitive laws.

- Clear and binding control mechanisms should be established for the enforcement of gender-sensitive laws, including the production of reports and evaluations, the elaboration of national plans and penalties in cases of non-compliance.
- Proper budget allocations should be made for the adequate enforcement of gender-sensitive laws.

SELECTED REFERENCES FOR FURTHER READING

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The second of the **ABC** series, the **ABC for a Gender Sensitive Legislation** aims to bring insight into, stimulate debate about, and inspire a critical review of legislation through the prism of gender equality. It aspires to become a tool for change and a reference for legislators, lawyers and other legal practitioners, policy-makers, as well as human rights activists, grassroots organizations, and local communities.

We hope as well that this **ABC** will make for useful reading for journalists, teachers, academics, students, and any member of the broader public who takes an interest in legislation.