

A presentation for the Council of Europe Committee on Legal Co-operation in Strasbourg 30 October 2015
Dr. Herdís Kjerulf Thorgeirsdottir

I. Gender mainstreaming and de facto equality

It is an honour to be here to speak about the relationship between gender and law making – with the focus on gender mainstreaming; which is the need to involve a **gender perspective** when advising governments on law reform – as such an approach will improve the quality of any work and contribute to realizing substantive gender equality.

While most Council of Europe Member States are committed to equality de jure, the Council of Europe has also underlined the importance of **achieving de facto equality** in Europe and is itself taking steps to **embed gender mainstreaming** in all its various committees and organs.

All the CoE member states are parties to the Convention on the Elimination of all Forms of Discrimination Against Women (**CEDAW**), an international treaty adopted in 1979 by the United Nations General Assembly. This Convention goes beyond the concept of discrimination used in many national and international legal standards and norms. While such standards and norms **prohibit discrimination on the grounds of sex and protect both men and women** from treatment based on arbitrary, unfair and/or unjustifiable distinctions, the CEDAW Convention focuses on discrimination against women, **emphasizing that women have suffered, and continue to suffer** from various forms of discrimination because they are women.

Under this international bill of rights for women – as CEDAW is referred to – the states parties' obligation is to ensure that there is no direct or indirect discrimination against women in their laws and that women are protected against discrimination committed by public authorities, the judiciary, organizations, enterprise or private individuals in the public as well as the private spheres by competent tribunals as well as sanctions and remedies. States have the obligation to address prevailing gender relations and the persistence of **gender stereotypes that affect women** not only

through individual acts by individuals **but also in law**, and legal and societal structures and institutions.

Gender mainstreaming is globally accepted for promoting gender equality.¹ “Gender mainstreaming” is the process whereby a gender perspective is included from the earliest planning stages to final decisions on policy or implementation in a specific field.

For the Council of Europe, gender mainstreaming is “the (re)organisation, improvement, development and evaluation of policy processes, **so that a gender equality perspective is incorporated in all policies** at all levels and all stages, by the actors normally involved in policy-making.”²

Gender mainstreaming **is a a method** towards achieving gender equality but is, not in itself, a goal.

The concept of gender mainstreaming means that we must put on our **gender glasses to assess the impact of (gender neutral) legislation on women**. We must be aware of the fact that **their situation is from the start different** from the situation of men; we must take into account what we already know and find out what else we need to know. Then we take note of the results and use this knowledge in our work.

II. Obstacles to access to justice

Within the Council of Europe 47 member states there are widely persisting inequalities between women and men. As the Committee on Legal Co-operation (CDCJ) is tackling access to justice issues like “free legal aid standard setting” it is important to recognize how gender bias and stereotypes **result in unequal access of women and men to justice in the broadest sense of the term**.

The concept of access to justice covers contact with, entry to and use of the legal system. It is more than simply ensuring the

¹ Mainstreaming involves ensuring that gender perspectives and attention to the goal of gender equality are central to all gender legislation, policy development, implementation, research and projects.

² Gender Mainstreaming. Conceptual framework, methodology and presentation of good practices. Final Report of Activities of the Group of Specialists on Mainstreaming (EG-S-MS). Council of Europe. Strasbourg 1998.

efficiency of justice systems. Rather, it is about **ensuring the sensitivity and responsiveness of such systems to the needs and realities of women, as well as empowering them throughout the justice chain.** Reducing the impact of obstacles faced by women not only facilitates greater accessibility, but is also an essential step towards achieving **substantive gender equality.**³

CoE 2013 study⁴ shows that a **number of obstacles** limit women's opportunities to claim their rights in courts. These obstacles are linked to (1) Lack of awareness of procedures (2) Lack of financial resources and restrictions on the availability of legal aid (3) Emphasis placed on using out-of-court settlements procedures to ensure a swift end to the legal dispute, often leaving women at a disadvantage.

It has been revealed with regard to the judgments of the European Court of Human Rights in the field of gender equality that the **number of applications lodged by women** was lower than the number of complaints lodged by men.⁵ This fact indicates that women face obstacles in pursuing their rights at the international level and subsequently even more so at the national level.

Addressing the issue of women's access to justice is particularly relevant in the current context of financial and economic crises, where inequalities at all levels of society are on the rise and negatively impact women's lives. A **gender sensitive approach is needed to scrutinize the reduced legal aid** in many CoE member states in the wake of the financial crisis. It needs to be taken into account that the economic situation of women, in particular single mothers has deteriorated.⁶

³https://www.coe.int/t/dghl/standardsetting/equality/03themes/access_to_justice/GEC_2013_1_en%20rev_title.pdf

⁴https://www.coe.int/t/dghl/standardsetting/equality/03themes/access_to_justice/GEC_2013_1_en%20rev_title.pdf

⁵https://www.coe.int/t/dghl/standardsetting/equality/03themes/access_to_justice/GEC_2013_1_en%20rev_title.pdf

⁶http://www.unwomen.org/~media/headquarters/attachments/sections/csw/59/national_reviews/finland_review_beijing20.ashx?v=2&d=20140917T100730

III. The obligation to address harmful stereotypes (within the justice system as elsewhere)

Gender mainstreaming means incorporating a focus on stereotypes and stereotyping in legislation and its implementation. It is important to raise awareness of the issue of gender stereotyping and the countless ways **this practice harms women**.

Gender stereotypes are preconceived ideas whereby males and females are arbitrarily assigned characteristics and roles determined and limited by their sex.

Gender stereotyping presents a serious obstacle to the achievement of real gender equality and feeds into gender discrimination as stereotypes are often used to justify and maintain the historical relations of power of men over women as well as sexist attitudes which are holding back the advancement of women.

Many of the human rights treaty bodies have recognised that the rights to non-discrimination and equality – and through them, other rights and freedoms – contain an implied obligation to address harmful stereotypes and wrongful stereotyping.⁷

Article 5a of the Convention on the Elimination of Discrimination against Women (CEDAW) obliges States to eliminate discriminatory stereotypes based on socially constructed roles and attributes associated with gender.⁸

Judicial stereotyping is a common and pernicious barrier to justice. It affects women's right to a fair and just trial. Such stereotyping causes judges to reach a view about cases based on preconceived beliefs, rather than relevant facts and actual enquiry. This can have potentially wide-ranging consequences, not least for women victims and survivors of violence.⁹ It may, for instance, distort judges' perception of the facts, affect their vision of who is a 'victim', and influence their views about witness credibility.¹⁰

⁷ OCHR commissioned report: Gender Stereotyping as a Human Rights Violation.

⁸ See more at:

<http://www.ohchr.org/EN/NewsEvents/Pages/GenderStereotyping.aspx#sthash.Vt0fHCUU.dpuf>

⁹ Navi Pillay, 'Equality and Justice in the Courtroom', *Huffington Post*, 3 March 2014.

¹⁰ See Sections 3.2 and 4 below.

Ultimately, however, it compromises the impartiality and integrity of the justice system, which can, in turn, lead to miscarriages of justice and the revictimization of complainants.

Judges are not the only actors in the justice system that stereotype.

Law enforcement officials have, for example, been criticised for allowing stereotypes to influence investigations into reports of violence.¹¹ A report from GRECO, the Council of Europe Group of States against Corruption, which is currently looking into the nexus between gender and corruption and how the gender perspective would value its work mentions an example of **sexual harassment and abuse by police officers** in England which needs to be recognized “as a distinct area of corruption” to reduce occurrences.

Women are frequently subject to re-victimization because of stereotyping:

In a recent case before the ECtHR against Moldova the applicant, a young woman alleged that she had been a victim of a breach of Articles 2 and 8 of the Convention on account of the State’s failure to conduct a proper investigation into her allegation of having been raped.¹² The ECtHR in this case has been criticized for failing to tackle the domestic authorities’ reliance on rape myths; that rape does not occur in a social and political vacuum. The ECtHR does not address the fact that the applicant’s version of the facts were dismissed by the Prosecutor’s Office in Moldova on the grounds that she had used to date the man who later raped her, maintaining that she could have resisted had she really wanted to. **The ECtHR missed the opportunity to tackle the reliance on rape myths in the justice system of Moldova** and to reaffirm that rape (and other forms of sexual violence) are part of a broader picture of discrimination against women.

IV. Why Gender neutral legislation is not working

¹¹ See, e.g., *Isatou Jallow v. Bulgaria*, Communication No. 32/2011, UN Doc. CEDAW/C/52/D/32/2011 (2012), para. 8.6 (CEDAW); *Case of González et al. ('Cotton Field') v. Mexico*, Judgment of 16 November 2009 (Preliminary Objection, Merits, Reparations, and Costs), paras. 400-401 (Inter-American Court of Human Rights).

¹² I.P. v. the Republic of Moldova.

It is for precisely the above reason that women's and human rights groups in India opposed gender neutral rape laws that were to make it possible to charge women with such offences. They emphasized the reality of rape, an act of violence that must be seen in the context of deeply entrenched power inequalities between men and women in Indian society. They reasoned that gender neutral provisions only strengthen those already powerful, silencing the victim and that the police and legal system are part of this inequity and bias against women, evident in the huge impunity for rape in India. Recommending gender neutral rape laws made a mockery of this reality. Given the current odds against women securing justice, the gender neutrality of accused in sexual violence laws would have a deep chilling effect on women's ability to even file complaints.¹³

In the CEDAW Committee's view, a purely formal, legal or programmatic approach is not sufficient to achieve women's **de facto equality with men**, which the Committee interprets as substantive equality. The CEDAW Convention requires that **women be given an equal start** and that they be empowered by an enabling environment **to achieve equality of results**. It is not enough to guarantee women treatment that is identical to that of men. Rather, biological as well as socially and culturally constructed differences between women and men must be taken into account. Under certain circumstances, **non-identical treatment of women and men will be required** in order to address such differences.

It is for the above reason that Gender neutral legislation and legislation that has not been assessed for its gender impact may lead to systemic inequalities that are often unintended.

Gender mainstreaming legislation is called for in times of financial crisis, growing inequality where poverty, reduced legal aid and escalated stereotypes threaten the rule of law and respect for the human rights of women. In such circumstances gender neutral legislation amounts to little and such legislation often appears like a **fig leaf hiding the stark-naked reality of unfair** and ongoing discrimination.

¹³ <http://kafila.org/2013/03/08/gender-just-gender-sensitive-not-gender-neutral-rape-laws/>

V. Positive obligations and fig leaves

Gender equality is considered a corner stone in modern welfare Nordic societies who are considered to rank highest with regard to de facto gender equality – yet we are far from having reached equality. Women rank way behind regarding power, wealth and equal pay for jobs of same value.

The European Convention on Human Rights has had an impact on the reform of Nordic Constitutions, like Finland and Iceland with the aim of guaranteeing not merely formal but substantive equality – so that rights would not only be theoretical but practical and effective.

The **Icelandic Constitution** as amended in 1995 entails a general prohibition of discrimination in Article 65 (1) where everyone shall be equal before the law and enjoy human rights irrespective of **sex**, religion, opinion, national origin, race, colour, property, birth or other status.

Moreover, second paragraph of this provision provides: Men and women shall enjoy equal rights in all respects – a substantive approach calling for positive measures to promote **equality of opportunity and de facto equality**.

In Iceland like in all other European countries the gender based pay gap, where women are receiving on average 18% lower pay than men for jobs of equal value, remains a constant. At the current rate parity will not be reached for another 80 years. An attempt to abolish pay secrecy, which enables employers to discriminate on the basis of gender came with an amendment when a new paragraph was added to the wage equality clause in the Gender Equality Act in 2008 stipulating that, “workers shall at all times, upon their choice, be permitted to disclose their wage terms”.

If one reads this clause with **gender glasses** it is evident that in a workplace where men are higher paid it is highly unlikely that someone will disclose such a privileged position to a lower paid woman colleague.

VI. Put on the gender glasses to strike at the root of the problem

This is an example where a provision appears to enhance the guarantee of equal pay yet becomes a **fig leaf** hiding the unfair situation of gender based pay discrimination yet giving the impression that there is no pay secrecy – and hence maintaining the unfair situation.

This is why putting on the gender glasses is essential to assess the adverse effects of gender neutral legislation. Gender mainstreaming as a tool is like putting on **gender glasses**¹⁴ to avoid being gender blind and missing the gender dimension.

An American professor who did not have his gender glasses on asked a Burmese man why women, after centuries of following their men, now walk ahead. The Burmese man said there were many unexploded land mines since the war.

So the Burmese women that have gotten killed by accidentally stepping on landmines when looking for firewood in the vicinity of their homes were walking ahead of the men for all the wrong reasons.

Gender neutral laws are detrimental to women who are everywhere still struggling for equality because such laws fail to tackle the deeper implications of gender injustice – the unexploded landmines hidden underground.

Gender neutral laws fail striking at the root of gender discrimination. Adopting the method of gender mainstreaming is necessary to find the root causes of gender inequality in an attempt to fix it.

¹⁴ http://www.coe.int/t/DGHL/STANDARDSETTING/EQUALITY/07genderbudgeting/Documents/Gender%20Glasses_en.pdf