

# The Family Justice Response to Domestic Abuse



**A Six Country Empirical Study of the  
Experiences of Survivors, Judges,  
Lawyers and Court Appointed Experts**

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# PART 01

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- Executive Summary and  
Recommendations

# Executive Summary

## Introduction

Domestic abuse is one of the most serious and pervasive forms of violence against women and girls and constitutes a violation of their human rights. Given the prevalence of domestic abuse in relationships,<sup>1</sup> and that separation from a perpetrator can be the most dangerous period for the victim, a focus of increasing concern for women's organisations and academics across Europe has been the dangers posed by post-separation contact to both adult and child victims (either as direct victims or as witnesses and including sexual abuse). The phenomena of domestic abuse perpetrators using family law proceedings as a tool to continue the abuse, and coercion has been demonstrated by a substantial body of research.

This not only facilitates the secondary traumatisation of victims of abuse but also implicates state institutions in its perpetuation, most particularly when access to children is mandated and custody of children is awarded to perpetrators, despite evidence of a history of domestic and/or sexual abuse. In recent years, it is apparent that the concept of 'parental alienation' in its many forms and iterations, has played a significant role in providing justifications for such outcomes which is causing widespread alarm and distress.

These issues are particularly concerning given that a number of international and regional mechanisms recognise the need to ensure that post separation access and custody, particularly where domestic violence is present, is subject to thorough risk assessment and that the wishes and feelings of children are heard when decisions are made by family courts as to what outcome represents the best interests of the child. As a result, post separation access and custody within the context of domestic abuse has been the subject of attention from GREVIO, the monitoring body of the Council of Europe Convention on preventing and combating violence against women and domestic violence (the Istanbul Convention)<sup>2</sup> and more recently the UN Rapporteur on Violence against Women and Girls<sup>3</sup> both noting the disproportionate and gendered impact of family law systems and procedures on victims of domestic abuse and their children.

Although some efforts have been made to try to advocate for legal and policy changes at individual State level this has been difficult to achieve without an evidence base. Moreover, producing such evidence is particularly challenging for NGOs who often struggle to provide basic services to victims of domestic abuse and may not have the necessary skills or resources. In addition, academic research in this area has been sporadic against the context of a challenging funding environment across Europe. Where it has taken place, it has concentrated on specific aspects of the family justice system, particularly the experience of survivors of violence, with the vast majority of this research being undertaken in the USA, Canada and the UK.

Whilst gaps exist in some jurisdictions, this research has reached a level of sufficient range and depth to demonstrate common areas of concern and patterns in how family law systems across the globe have dealt with such cases. These include: a culture of scepticism/disbelief towards those raising abuse; an inappropriate use of mediation in cases involving domestic abuse; a culture of contact at all costs and a presumption of shared custody even where evidence of abuse towards mothers and children exists; the link between domestic abuse and sexual abuse of children and a failure to provide adequate risk assessments. Of most concern has been the widespread adoption and operationalisation of the

<sup>1</sup> Globally 81,000 women and girls were killed in 2020, around 47,000 of them (58 per cent) died at the hands of an intimate partner or a family member, which equals to a woman or girl being killed every 11 minutes in their home. In 58 per cent of all killings perpetrated by intimate partners or other family members, the victim was a woman or girl. United Nations Office on Drugs and Crime (2021). Killings of women and girls by their intimate partner or other family members

Global estimates 2020.

<sup>2</sup> See Focus Section in the Third Annual Report from GREVIO 2022 at: <https://rm.coe.int/prems-055022-gbr-2574-rapportmultiannuelgrevio-texte-web-16x24/1680a6e183> This section was drafted by Professor Choudhry as a consultant for the Council of Europe.

<sup>3</sup> <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G23/070/18/PDF/G2307018>.

pdf?OpenElement Professor Choudhry assisted the Rapporteur in the preparation of this report.

concept of 'parental alienation' as a means of dismissing safety concerns, particularly towards mothers<sup>4</sup> who are often characterised as vengeful and/or delusional by courts and expert witnesses in this field.

Our research echoes many of these concerns and raises additional questions which are both specific to each jurisdiction and generic. It differs from previous research in this area in terms of undertaking empirical research across four key stakeholder groups within the family justice system: survivors, lawyers, judges and court professionals who provide information on the child/family to the court in order to provide a comprehensive overview of the experiences of survivors and attitudes of key actors that work within the family law system within six European countries. The countries were selected based on a series of factors: ratification of the Istanbul Convention and the European Convention on Human Rights (ECHR), geographical location, monitoring by GREVIO, the relative availability of data, academic and civil society engagement with the issue and the likelihood of success in terms of accessing the identified stakeholder groups based on established connections. The countries selected were: Bosnia & Herzegovina, England and Wales, France, Italy and Spain.

<sup>4</sup>See amongst others: M.S. Milchman, 'Misogynistic cultural argument in parental alienation versus child sexual abuse cases' *Journal of Child Custody*, 14 (4) (2017), pp. 211-233; J.B. Kelly, J.R. Johnston, 'The alienated child: A reformulation of parental alienation syndrome' *Family Court Review*, 39 (3) (2001), pp. 249-266;

J.S. Meier, S. Dickson 'Mapping gender: Shedding empirical light on family courts' treatment of cases involving abuse and alienation' *Law and Inequity: A Journal of Theory and Practice*, 34 (2) (2017), pp. 311-334 and M. Clemente, D. Padilla-Racero 'When courts accept what science rejects:

Custody issues concerning the alleged "Parental Alienation Syndrome"' *Journal of Child Custody*, 13 (2-3) (2016), pp. 126-133.

# Understandings of Violence

The vast majority of judges and court appointed experts that were interviewed had received training on domestic abuse in their workplace, whereas for most lawyers it depended upon whether they specialised in this area. However, training was not updated and was often left to local networks or individuals to organise for themselves. The lack of compulsory training is a particular concern for court appointed experts, outside of England and Wales and there was significant concern expressed in Italy around the lack of preparedness for the large scale reforms that were recently introduced.

Most professionals recognised the impact of domestic abuse on survivors. However, stakeholders reported that violence is often minimised as conflict and framed as a shared responsibility of the parties. There was also marked evidence, amongst some stakeholders, of a failure to understand that separation does not remove the risk of further abuse. This was particularly the case in England & Wales where pre separation abuse was repeatedly framed as ‘historical.’

There was a good level of awareness across the stakeholder groups about the dynamics of domestic abuse and the impact it has on children, even if the violence was not specifically directed at them. However, the findings illustrate that there is a general level of mistrust towards disclosures of domestic abuse as a ‘strategy’ to obtain legal aid and an overemphasis on ‘false allegations’ despite their evidenced rarity. Evidential concerns related to proving domestic abuse

were common across all jurisdictions and particularly, where there was no evidence of physical violence. The findings show that survivors’ testimony is often insufficient and corroborative evidence is required; usually a criminal conviction for domestic abuse.

Despite the fact that there was widespread agreement amongst stakeholders that the impact of experiencing domestic abuse on children was traumatic, the focus of the courts was on how contact could be maintained, and how any risks were to be managed, rather than whether contact should be allowed at all. This was particularly the case in England and Wales. Although the notion of ‘risk’ was evident across all jurisdictions, the presence of violence is not determinative of the final decision. Domestic abuse between adults was generally considered separate to the question of what was best for children, to be ‘in the past’ and relevant to proceedings solely in terms of the impact it has had on children.



# Experiences of the Justice System

The main expectation that survivors had of the family justice system and the professionals working in it, was that of protection. i.e. that measures would be taken to protect their children from further abuse. However, the experiences of the majority of survivors in the sample was the opposite; most survivors felt their children were left unprotected, with serious consequences in some cases. The majority of survivors also felt that their experiences of abuse were unheard and not taken into account, even where corroborative evidence existed. Others felt they were expressly shut down or put under pressure to negate their experiences of violence in order to progress the case.

Overall, across all jurisdictions, stakeholders reported that expert evidence was viewed as neutral and essential and that expert recommendations were usually followed by judges. There were, however, significant concerns raised, by both survivors and professional stakeholders, around the quality of court appointed expert reports, citing a lack of specialist knowledge, training and oversight.

There were a number of examples of stereotyping given across the jurisdictions and groups, the majority of which was based on gender and directed primarily at women, whom, it was felt, were more likely to submit false allegations of domestic abuse and withdraw their complaints. There was also evidence of stereotypes around class, and discrimination based on race, migrant status and religion.

Survivors across all jurisdictions felt that there are different expectations and standards applied to mothers and fathers. The consequences of these differences in standards was significant for mothers, who felt under huge pressure to comply with the notion of the 'ideal mother'; and to put aside their own experiences of abuse. Those who did not reach these standards felt heavily judged and criticised in terms of their ability to parent. There was also evidence of mothers being held responsible and accountable for the continuation of the child-father relationship.

There were also a number of examples, across the jurisdictions, of survivors being exposed to secondary victimisation during the proceedings. A large number of survivors, especially in France and Spain, reported that they were pushed towards reconciliation and blamed for the violence. Survivors across all jurisdictions reported feeling mistreated and bullied by professional stakeholders, particularly by court appointed experts.

Unsurprisingly, the emotional costs were high. Survivors across all jurisdictions talked about the trauma left in their lives by this experience, both in terms of the violence of their ex-partners, and the way in which stakeholders treated them during the legal process. Survivors also related the significant impact of the abuse and proceedings on their children. In the end, most survivors felt that their experiences had been made worse by engaging with the justice system.

# Barriers to Justice

Although there was some evidence of a good degree of cooperation in principle between the different stakeholders within the family justice system and between social services and criminal justice mechanisms, significant difficulties remain. Stakeholders reported a lack of coordination which resulted in family courts not being kept up to date with relevant criminal proceedings that were simultaneously being undertaken. In France, Spain and Italy there was a notable issue with communication between the family, child protection and criminal system, no doubt due to a lack of national oversight and protocols in place to facilitate it.

Workload was a major issue that affected the ability of professionals working within the family justice system, particularly those employed by the State. Judges across the jurisdictions reported being overloaded with the number of cases they had to manage and did not feel they had enough time to deal with them properly. In addition, stakeholders across all jurisdictions complained about the length of time that proceedings took to complete; the longest reported case was 18 years. Delays were also caused by the length of time court appointed experts were taking to complete their reports, in England & Wales the longest period was up to 26 weeks, in France over a year and in Spain there was generally a 10 month wait.

Despite the fact that all the jurisdictions have established a system for victims of domestic abuse to receive legal aid on either a free or means tested basis, the vast majority of survivors reported that they had no access to legal aid. A significant barrier to justice was the cost of legal advice and/or paying for expert reports, with many relying on family or taking on loans. Survivors who could not afford to pay for extra expert evidence, were not eligible for legal aid or could not afford a good lawyer, were simply denied a level playing field during court proceedings. Survivors who lived outside of cities and in rural locations were also at a significant

disadvantage in terms of accessing justice due to the lack of specialist services and the need to travel long distances to access the justice system or to comply with court orders.

The research project was undertaken during the Covid 19 outbreak which impacted significantly upon the experiences of survivors and professional stakeholder groups working in the family justice system. All the jurisdictions in the project implemented emergency measures such as the postponement of non-urgent hearings, the introduction of remote hearings by video/zoom or telephone call and social distancing when face to face hearings were resumed.

For survivors already separated from the perpetrator it was a mixed experience. Social distancing measures either intensified situations of conflict or gave some respite from having to comply with problematic visitation arrangements. In addition, it is clear that the legacy of Covid 19 remains; the interruption to the normal operation of the courts has had a detrimental impact on the publicly funded and legally aided sectors of the legal profession, worsening barriers for accessing legal representation. In addition, there has been a significant impact on the flow of cases through the courts and it may take several years before the backlog of criminal and family cases return to pre-pandemic levels.

# Parental Alienation

In general, there was a good degree of awareness of the concept across the jurisdictions and across the stakeholder groups and some knowledge of the widespread concern in the literature about its origin and usage with respect to victims of domestic abuse. However, an awareness that the term is problematic and/or prohibited did not result in the eradication of the concept and assumptions underpinning it. Stakeholders reported across the jurisdictions that the terminology used is irrelevant, the key issue, is the instrumentalization of the behaviours that are associated with parental alienation. Consequently, stakeholders reported evidence of the widespread and continued utilisation of the concept in all but name, and a perception that it explained certain behaviours, not excepted by allegations of domestic abuse.

Stakeholders were specifically asked if they had heard of the term, whether they believed it existed and what their understanding of it was. The terms used to describe their understanding of parental alienation were revealing, both in terms of the value judgments that were impliedly made about the alleged alienating parent and the vast array of behaviours that it covered. The vast majority of stakeholders who believed that parental alienation existed understood parental alienation as influencing the child negatively against the other parent. There was also a widespread belief amongst this group that it was predominantly mothers who engaged in it.

The findings also demonstrate evidence of the reformulations of the concept, particularly those that involved blaming mothers. Excepting Bosnia & Herzegovina, a good number of stakeholders across all jurisdictions commented on the frequent use of parental alienation in court and an increase in usage in recent years. Stakeholders also reported the widespread usage of the term by court appointed experts across all these jurisdictions.

# Human Rights

Although there was a general consensus amongst stakeholders across all groups and jurisdictions that human rights were relevant and helpful, they were viewed as background context rather than an active tool within proceedings. Moreover, a large number of stakeholders across the jurisdictions, acknowledged that the rights of survivors were rarely specifically cited by lawyers in their arguments, even though these rights were clearly relevant.

In England and Wales there was a general view amongst professional stakeholders that human rights law was reflective of good practice that was sufficiently provided for in domestic legislation. The use of human rights was therefore felt to be unnecessary. However, there was evidence of a lack of knowledge on its applicability amongst some lawyers and amongst the judiciary. For some lawyers, that meant that, depending upon which level of court they were before, making human rights arguments was largely pointless.

# Summary recommendations

## **1. Training**

Ensure that all professionals working in the family justice system receive training on the dynamics of domestic abuse, discrimination, gender stereotyping, secondary victimisation and the relevance of human rights law. This training needs to be compulsory, regularly updated and monitored (preferably by an independent body) to ensure that the content is up to date with peer reviewed and research. Training should also be conducted on a multi-sectoral basis to reduce the risk of silos and to encourage collaboration.

## **2. Professional Standards**

To ensure the maintenance of high professional standards, Government bodies should work with professional bodies to implement protocols concerning the specialisation of those working within the family justice system. This must require evidence of qualifications which include the study of the dynamics of domestic abuse. Professional standards must be subject to review and regularly updated.

## **3. Structural Change**

There must be greater collaboration between the various branches of the justice system to ensure that all the relevant information is before the court. This requires, the establishment of specialist courts and judges dealing with family law, however, with sufficient training and knowledge of domestic abuse. Family proceedings should not be completed in isolation of criminal or child protection proceedings that may be running in parallel and information must be shared in a timely manner. Unregulated experts must not be authorised to provide evidence in legal proceedings.

## **4. Resources**

To be effective a justice system must be adequately resourced. This includes ensuring that there are enough judges and court appointed experts to do their jobs well. It also means ensuring that financial barriers for survivors are removed by ensuring that legal aid is accessible and not out of reach for the majority. Justice must also be even and not dependent upon geography. This means ensuring that there are sufficient courts and personnel to deliver justice to survivors within a reasonable geographical distance. Finally, legal aid services should be well funded to ensure that survivors have access to the best specialist advice possible.

# PART 02

- Research Methods

# Research aims

The research aims to understand in each of the jurisdictions:

1. The experiences of survivors of the family justice system.
2. The role that key stakeholders in the family justice system: judges, lawyers and court appointed experts, play within this process and what their knowledge and understanding of the impact of experiencing domestic abuse is.
3. The structural, institutional, and cultural factors that impact upon access to justice for survivors within the family justice system.
4. The impact/importance, if any, of human rights law and policy in this area of the law.

# Method Selection

Qualitative methods allow for flexibility in terms of adapting to the different needs of participants and facilitate an understanding of human behaviours and experiences<sup>5</sup> and the conditions surrounding their planning and development. Moreover, such methods allow for reflexivity; for researchers to examine their personal beliefs and preconceived ideas, helping to prevent or decrease their impact on research participants.<sup>6</sup> Such methods often involve a smaller sample size, the aim is therefore to focus on depth, to uncover rich, complex, and high-quality data to understand participants' experiences and ways of thinking<sup>7</sup> rather than represent the entirety of any given community. Two types of qualitative methods were used: focus groups and semi structured interviews.

Focus groups allow participants to express their experiences and understanding of the world<sup>8</sup> and can also form a safe space to generate data, particularly from members of marginalized groups or those that are rarely heard and taken into consideration.<sup>9</sup> They are particularly apt in terms of working with a vulnerable population such as survivors of

domestic violence as they allow participants more control over the discussion via the perception of power in numbers, in that there are more participants than moderators.<sup>10</sup> Moreover, when working with sensitive topics once a participant shares their story, with people with similar experiences, this can facilitate a higher degree of confidence in others to also contribute, acting as an ice breaker.<sup>11</sup> Focus groups with survivors in this project took place both in person and online.

Semi structured interviews provide the space for interviewees to provide detailed descriptions and clarifications of the way in which they work and the reasoning which underpins their decision making, while providing enough flexibility to adapt to their specific style, the particularities of their role, and their culture. As such, interviews allow the opportunity to obtain a better understanding of the interviewee's experiences and their knowledge in terms of their daily work.<sup>12</sup> Interviews were therefore used for all participants who work within the family justice system and took place online.

<sup>5</sup> Guest, G., Namey, E. and Mitchell, M. (2013) *Collecting qualitative data* London: SAGE Publications, 2.

<sup>6</sup> Brown, A. (2010) 'Qualitative method and compromise in applied social research' *Qualitative Research* 10: 229-249. SAGE and Tracy, S. (2010) 'Qualitative Quality: Eight "Big-Tent" Criteria for Excellent Qualitative Research' *Qualitative Inquiry* 16: 837-851. SAGE.

<sup>7</sup> Kitzinger, J. 1995. 'Qualitative Research. Introducing Focus Groups' *BMJ* 311 (7000):299-302;

<sup>8</sup> Kitzinger note 7; Wilkinson, S. (1998) 'Focus Groups in Feminist Research: Power, Interaction, and the Co-construction of Meaning', *Women's Studies International Forum* 21(1): 111-126; Jowett, M., & O'Toole, G. (2006). 'Focusing researchers' minds: contrasting experiences of using focus groups in feminist qualitative research' *Qualitative Research*, 6(4), 453-472 and Barbour, R. 2007. *Doing Focus Groups*. London: SAGE Publications, 30.

<sup>9</sup> Kitzinger, note 7 and Richard, B., Sivo, S. A., Orłowski, M., Ford, R. C., Murphy, J., Boote, D. N., & Witta, E. L. (2021). *Qualitative Research via Focus*

*Groups: Will Going Online Affect the Diversity of Your Findings?* *Cornell Hospitality Quarterly*, 62(1), 32-45.

<sup>10</sup> Jowett and O'Toole, note 8.

<sup>11</sup> Kitzinger, note 7.

<sup>12</sup> Arksey, H. and Knight, P., (1999) 'Why interviews?' from Arksey, H. and Knight, P., *Interviewing for social scientists: an introductory resource with examples* pp.32-42, Thousand Oaks, Calif.; London: SAGE; Mason, J. (2002) 'Qualitative Interviewing' from Mason, J. *Qualitative researching* pp.62-83, London: SAGE and Rubin, H. & Ruben, I. (2005) 'Structuring the Interview' from Rubin, Herbert J. & Ruben, Irene S., *Qualitative interviewing the art of hearing data* pp.129-151, Thousand Oaks: SAGE Publications.

# Ethical Considerations

Our approach to research ethics was centrally informed by the WHO guidelines on the conduct of ethical research on Domestic violence<sup>13</sup> and approval was obtained from the Social Sciences and Humanities Interdivisional Research Ethics Committee at the University of Oxford. Throughout the research, the safety and well-being of survivors was paramount at all times and determined all project decisions. The project deals with sensitive topics and included the risk of re-traumatisation and emotional harm.

Therefore, measures were taken to decrease this risk as much as possible. Specialist organizations working with survivors of domestic violence in each country provided a trained professional to be present both in person and online in the focus groups as a further source of support during and after they were completed. For the in-person focus groups, the room was booked through the support person or institution and thus the safety of the participants was ensured. Given the sensitive and potentially triggering nature of the interviews we kept questions about experiences of violence to a minimum, though some research participants chose to share further information in the focus groups. All interviewers were women, and all survivors of violence were offered support and referral to specialist help if required. Survivors who had to travel for in person focus groups were offered compensation with respect to these expenses. No other economic compensation was offered.

<sup>13</sup>World Health Organisation (2001) Putting Women First: Ethical and safety recommendations for research on domestic violence against women. [Online] Available here: [https://apps.who.int/iris/bitstream/handle/10665/65893/WHO\\_FCH\\_GWH\\_01.1.pdf?jsessionid=32539973DF141947084618D5843D8D1E?sequence=1](https://apps.who.int/iris/bitstream/handle/10665/65893/WHO_FCH_GWH_01.1.pdf?jsessionid=32539973DF141947084618D5843D8D1E?sequence=1). Last Accessed 12 October 2022

# Confidentiality

Confidentiality was addressed both in the informed consent form which all participants signed and at the beginning of all interviews and focus groups. The confidentiality of research participants has been protected throughout the research process, from the planning, location and timing of the interviews to the use of anonymised and coded research databases and encrypted data storage and transfer. All personal data collected during the project is managed in accordance with the University's guidance and legal requirements. The transnational nature of the project involved working with additional people from different countries, such as moderators, interviewers and translators. All such individuals were required to sign a confidentiality agreement and any files that were shared was on an anonymized basis.

# Fieldwork

Fieldwork in all five jurisdictions took place from early 2022 to June 2023. Fieldwork was completed by January 2023 in the UK, by April 2023 in France and by June 2023 in Spain, Italy, and Bosnia & Herzegovina. All groups and interviews were conducted in the local language, by native speakers, aided by two additional postdoctoral researchers in France and Italy. Participants were asked the same questions in each jurisdiction with amendments made to reflect specific jurisdictional differences and concerns. After the focus group or interview ended, the audio file was transcribed and translated by a native or near native speaker of each language.

# Sampling

The sampling was purposive;<sup>14</sup> participants were selected based on their experiences as survivors of domestic violence that had been through family law proceedings, or as stakeholders, judges, lawyers and designated professionals who assist the court in its decision making who have dealt with cases involving domestic abuse. The requirements for survivors were to have had experience of family law proceedings in the relevant jurisdiction (which had ended) and to have had experienced domestic abuse.

The definition of domestic abuse used was that contained in the Istanbul Convention - "all acts of physical, sexual, psychological or economic violence that occur with the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim."

For interviewees, our aim was to interview 12 stakeholders of each group in each country; 36 stakeholders in each country in total. The criteria for these participants were experience of working in family law as a member of one of the stakeholder groups: a family judge, a family lawyer, a court appointed expert (psychologist, social workers etc) that assist family courts in their decision making.

# Recruitment

At the beginning of the project a survey was created for each participant group and in each language which provided information about the research project and the criteria for participation. The survey was sent to a variety of organisations, such as professional associations for courts, lawyers, psychologists and social workers. It was also shared with NGOs and on social media. The most effective way of contacting participants was the snowballing technique via the organizations and NGOs that worked locally with survivors and lawyers in each country.

Similarly, those lawyers would often provide contact with judges and psychologists or social workers because they worked in the same networks or were part of the same groups specifically dedicated to domestic violence and family law.

This meant, however, that most of the stakeholders had a specialist interest in this field and were connected to NGOs who support survivors or had collaborated in terms of producing guidance on best practice. It was rare to have a participant who did not have an interest in family law and domestic violence.

<sup>14</sup> Layder, D. (1998) *Social practice: Linking theory and social research*. London: SAGE and Guest, note 5.



# Final Numbers and Geographical Representation

Our aim was to recruit participants from as varied a geographical area as possible which was made easier by moving all interviews online as a result of the Covid 19 outbreak. A good amount of regional representation was therefore achieved across all stakeholder groups that were interviewed.

In terms of survivors, some focus groups were held in person and where held, each focus group was formed by people from the same area, focus groups were held in Madrid, Paris, Nottingham, Cardiff and London. In Bosnia & Herzegovina, focus groups were held in each entity in Sarajevo, in Tuzla and in Banja Luca and there was a roughly equal representation of each group of professional stakeholders across all three entities. All other focus groups took place online. Interviews with professional stakeholder groups all took place online.

Research participants are coded throughout this report with reference to jurisdictions and stakeholder groups as illustrated by the following examples: UKFG (England & Wales - Survivor); FRIL - (France - Lawyer); SPIJ (Spain - Judge); ITIO (Italy - Court Appointed Expert).

Jurisdictions	No. of Focus Groups Held for Survivors	No. of Survivors	No. of Judges	No. of Lawyers	No. of Court Appointed Experts
Bosnia & Herzegovina	3	27	10	12	10
England & Wales	4	16	9	8	9
France	3	13	1	10	3
Italy	3	12	8	10	3
Spain	3	19	6	12	7

# Limitations and challenges

It proved difficult to find research participants outside of England and Wales, despite real interest in the project from policy makers, contacts in professional organisations and NGOs in each country. Our conclusion is that this may be due to a lack of exposure to this type of sociolegal research and, to a certain degree, a lack of openness to it, particularly amongst some of the professional stakeholder groups. France was the most challenging jurisdiction in terms of recruitment and despite huge efforts only one judge agreed to participate; there was a real concern around anonymity, despite our assurances. Similarly, psychologists and social workers were also very difficult to reach. We felt this reflected the general lack of transparency around the crucial role of both stakeholder groups in this area of the law and some of the structural barriers uncovered in our analysis. Access to survivors was also challenging across the jurisdictions; some attrition occurred of numbers in this group due to a reluctance to talk about their experiences in front of other people and to be video recorded.

Most research participants were recruited via the snowballing technique using support organisations and professional, specialist networks. Given this, the survivors we spoke to were more likely to have already engaged help and support of some kind and the stakeholders were more likely to have a specialist interest or expertise in this area. As a result, compared to the general population groups that they represent; they were more likely to have a greater awareness and understanding of the issues. Moreover, the study does not seek to represent the entirety of experiences of survivors of domestic violence or of stakeholders who work in the field.

**It is important to underline therefore that broad generalizable representation is not the goal of focus groups and interviews, but rather to gather in-depth insights and opinions from a specific target group.**

## PART 02 Research Methods

# A Note on Bosnia & Herzegovina

After experiencing a very challenging environment in terms of recruitment, the decision was taken for a partner research organisation, funded by the Oak Foundation and experienced in qualitative research methods and working with domestic abuse survivors to carry out the data collection on the basis that they had established contacts and relationships with the relevant stakeholder groups. The local team therefore took responsibility for the recruitment, moderation, transcription and translation for focus groups and interviews. However, guidance was given by the UK research team in terms of

geographical location and sample size and the same interview and focus groups questions used by the Oxford research team were used here. The coding and analysis were completed by the Oxford research team using the English translation of all interviews and focus groups.

# A Note on England & Wales

This was the only jurisdiction in which the research team was required to apply for official approval to interview judges and court reporters. As a result, a formal and successful application was made to the Ministry of Justice, CAFCASS England and CAFCASS Wales. The recruitment of judges and court reporters was facilitated by sharing the participant survey with contacts in each organisation.

The legal profession in England and Wales is made up of barristers, solicitors and legal executives, all of whom can be authorised to provide legal advice and representation to survivors. When disputes need to be decided by the Family Court, depending on the type of case, they are dealt with, in order of ascending seniority, by either Family Panel Lay Magistrates or District Judge (Magistrates' court) or by a District, Circuit or High Court Judge. Family Panel Magistrates are members of the public who sit as magistrates in the Family Court.

Types of Judges	Magistrates	District	Circuit
Judges (England)	3	3	3
Judges (Wales)	0	2	1

Types of Judges	Barristers	Solicitors	Legal Executives
Lawyers (England)	3	3	3
Lawyers (Wales)	0	2	1

## COVID 19

Finally, the impact of covid 19 on the project was significant; waiting for guidance to update in each of the jurisdictions caused significant delays until the decision was made to turn all interactions to an online setting. The original plan was for all interviews and focus groups to be undertaken in person. However, due to the Covid 19 outbreak the fieldwork aspect of the project was significantly delayed and did not commence until 2021 and ended in 2023.

Delays were also caused by awaiting applications for ethical approval and formal approval to interview members of the judiciary and CAFCASS in the UK.

# PART 03

- The Research Locations and  
Research Context



# Bosnia & Herzegovina

## The Constitutional, Gender Equality and Human Rights Context

Bosnia and Herzegovina is characterised by a complex, multitiered system of government established as a result of the 1995 Dayton Peace Agreement,<sup>15</sup> following a three-year period of war. Under this agreement, two entities were established: the Federation of Bosnia and Herzegovina (FBiH) and Republika Srpska. Brčko District was established in 1999 as a self-governing administrative unit of the country, to reflect the multi-ethnic make-up of the district. While the Parliament and the Council of Ministers are established at the state level, the entities have broad powers, including legislative and executive authority; similarly, Brčko District appoints its own local government and can legislate. The FBiH is further characterised by 10 administrative units known as cantons – each with its own cantonal government – that can also legislate and adopt policies.

Finally, the fourth level of jurisdiction in Bosnia and Herzegovina are the municipalities, which also appoint their own local government. As a result any assessment of the effectiveness of the family justice system involves the evaluation of multiple, parallel and sometimes overlapping sets of policies and legislations, as well as an assessment of the extent to which co-ordination and equal levels of protection across the country.<sup>16</sup> The key laws that address violence against women at the state level are the Gender Equality Law and the Bosnia and Herzegovina Criminal Code, whereas at the entity and Brčko District level, the principal legislation are the laws on protection from domestic violence (the PDV laws),<sup>17</sup> the criminal codes, the criminal procedure codes and the family laws.<sup>18</sup> The PDV laws were adopted in

Republika Srpska and the FBiH, respectively, in 2012 and 2013 whereas the PDV law in Brčko District was adopted in 2018. The Constitution of Bosnia and Herzegovina<sup>19</sup> prohibits discrimination on any ground, including sex. It also provides that the ECHR and its protocols are directly applicable in Bosnia and Herzegovina and has legal precedence over other legislation. Bosnia and Herzegovina has also ratified the Convention on the Rights of the Child (CRC), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Istanbul Convention.

## The Prevalence of Domestic Violence

One research study showed that under half (48%) of women surveyed had experienced some form of abuse, including intimate partner violence, non-partner violence, stalking and sexual harassment, since the age of 15 and that men as intimate partners are the most frequent perpetrators of violence<sup>20</sup>. Suspended sentences are issued in almost 80% of the cases and between 10% (FBiH) and 18% (Republika Srpska) of perpetrators are sentenced to imprisonment.<sup>21</sup> Retrospective reviews of femicide cases are not conducted.<sup>22</sup>

<sup>15</sup> Office of the High Representative. (1995). General Framework Agreement for Peace in Bosnia and Herzegovina. Dayton Peace Agreement. Retrieved from <http://www.ohr.int/dayton-peace-agreement>

<sup>16</sup> GREVIO's (baseline) evaluation report on legislative and other measures giving effect to the provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention): Bosnia and Herzegovina (Paragraph 2). Council of Europe.

<sup>17</sup> Law on Protection of Domestic Violence in Republika Srpska, Official Gazette of FBiH, no. 94/16, 10/23., Law on Protection of Domestic Violence in Federation of Bosnia and Herzegovina, Official Gazette of FBiH, no. 20/13, 72/21., Law on Protection of Domestic Violence in Brcko District, Official Gazette of FBiH, no. 7/18.

<sup>18</sup> The Family Law of Federation of Bosnia and Herzegovina, Official Gazette of FBiH, no. 35/05, 31/14., The Family Law of Republika Srpska, Official Gazette of RS, no. 17/23, 27/24., The Family Law of Brcko District, Official Gazette of

BDBiH, no. 23/07.

<sup>19</sup> Constitution of Bosnia and Herzegovina, Bosnia and Herzegovina, Article II.

<sup>20</sup> Organization for Security and Co-operation in Europe. (2019). OSCE-led survey on violence against women: Bosnia and Herzegovina. Available at <https://www.osce.org/secretariat/423470>

<sup>21</sup> GREVIO's Report, n16, Paragraph 271.

<sup>22</sup> GREVIO's Report, n16, Paragraph 286.

# The Legal Response to Domestic Abuse

Domestic violence, at the entity and Brčko District levels it is defined both in the respective criminal codes<sup>23</sup> and the LPDV laws. As regards the FBiH, Article 222<sup>24</sup> of the Criminal Code defines domestic violence<sup>25</sup> in broad terms. Domestic violence is also defined under Article 7<sup>26</sup> of the FBiH LPDV law. In Republika Srpska domestic violence is defined under Article 190<sup>27</sup> of the Criminal Code and Article 6 of the

Republika Srpska PDV law. As regards Brčko District, domestic violence is defined under Article 218 of the Brčko District Criminal Code and Article 5 of the PDV law. However, the definition of domestic violence in the LDPVs in FBiH and Brčko District does not encompass current or former partners who have not shared a residence or if there is no joint child whereas the LDPV Republika Srpska does.

## The Family Law Framework

The term “parental responsibility,” has not been adopted in domestic family laws.<sup>28</sup> In the Family Law of the FBiH and the Family Law of Brčko District, the term ‘parental care’ is used, while in the Family Law of Republika Srpska (PZ RS), the term used is ‘parental right.’ The substance of these concepts is very similar to that of ‘parental responsibility.’ Parental care is defined as ‘a set of responsibilities, duties, and rights of parents aimed at protecting the personal and property rights and interests of the child,’ and it is exercised in the best interest of the child. Parental care is exercised jointly, by mutual agreement and equally. This rule applies when parents live together, and any exceptions are subject to legal regulation.

Under the family laws of Republika Srpska, the FBiH and Brčko District, prior to filing for divorce, spouses must undergo mediation/reconciliation if they have children under 18. In the FBiH, under Article 49 of the Family Law, mediation

is dispensed with only if both parties fail to take part in the mediation and do not justify their absence – it is therefore not dispensed with in cases of domestic violence. Under Article 50 of the same law, if the parties do not reconcile in the course of the mediation, the person/legal person who has been appointed as the mediator will endeavour to reach an agreement between the parties on custody and visitation rights. Under Article 150 if such an agreement is not reached between the spouses, or if this agreement is deemed to not correspond to the best interests of the child, the court will make the decision, based on an expert opinion provided by the Centre for Social Work, on what is in the best interests of the child and on information provided by all relevant institutions, including the police and the courts. Finally, under Article 145 the court, taking into account the agreement reached by the parents, decides on custody and visitation rights, including their withdrawal based on the best interests of the child. Article 154 of the same law specifies the

<sup>23</sup> Criminal Code of the Federation of Bosnia and Herzegovina (Official Gazette of the Federation of Bosnia and Herzegovina, 36/03, 37/03, 21/04, 69/04, 18/05, 42/10, 42/11, 59/14, 76/14, 46/16, and 75/17), Criminal Code of Republika Srpska (Official Gazette of Republika Srpska, 64/18, 15/21, 89/21, 73/23 and 9/24) and the Criminal Code of the Brčko District of BiH (Official Gazette of the Brčko District of BiH, 19/20) – consolidated version.

<sup>24</sup> Article 222 of the Federation of Bosnia and Herzegovina Criminal Code defines domestic violence as “the jeopardising of peace, physical integrity or mental health of a member of his/her family through violence, brazen or reckless behaviour”. It is sanctioned by a minimum sentence of a fine or a prison sentence, which ranges from one year to 15 years or longterm imprisonment, depending on whether aggravating circumstances apply (including, for example, the use of a weapon or the unintentional killing of a member of the family as a result of the conduct).

<sup>25</sup> Article 6 of the Federation of Bosnia and Herzegovina PDV law, the concept of family refers to: 1) marital and extramarital partners and their

children (joint or from previous partnerships); 2) blood relatives and relatives from the relationship of full adoption in the direct line, and in the collateral line concluding with the fourth degree; stepfather and stepmother; adoptee and adoptive parent from the relationship of incomplete adoption; relatives-in-law up to and including the second degree; 3) guardians; 4) former spouses and extramarital partners and their children (joint or from former partnerships) and their parents, including stepfather and stepmother. Extramarital partners are partners that have cohabited at least three years or less if a child was born.

<sup>26</sup> Under Article 7 of the Federation of Bosnia and Herzegovina PDV law domestic violence is defined as “the commission of physical, psychological, sexual or economic harm as well as threats or fear of physical, psychological, sexual or economic harm to another family member, including, inter alia, the use of force against the physical or psychological integrity of a family member; behaviour that could result in or cause danger of physical or psychological pain and suffering; intimidation, threats, blackmail or other forms of coercion; verbal attack, insults or other forms

of violent harassment; sexual harassment; stalking; the use of physical or psychological violence against children; forced isolation or limiting the freedom of movement of a family member”

<sup>27</sup> Article 190 of the Republika Srpska Criminal Code defines domestic violence as “the use of violence, threats of attack against life and body or by insolent or arrogant behaviour which violates the peace, physical integrity or mental health of a member of the family or family unit and thereby causes harm to their physical or psychological integrity”. It is punishable by a minimum sentence of a fine or a prison sentence, which ranges from a fine or imprisonment of up to 10 years, depending on whether aggravating circumstances apply (including, for example, if the conduct resulted in serious bodily injury or was committed against a child or in the presence of a child).

<sup>28</sup> Duman, D., Halilović, M., & Latifović, F. (2020). Analiza sudske prakse u porodičnim sporovima i preporuke za postupanje.

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instances in which custody is withdrawn from a parent, in cases where the parent (a) jeopardises the safety, health or the morals of the child by abusing his/her rights; (b) seriously neglects his/her duties; (c) abandons the child or fails to take care of the child; (d) fails to protect a child from the behaviour of the other parent or another person.

The court may adjourn the civil proceedings if the judge decides that a decision cannot be made before the decision is made in the criminal proceedings (Article 379.2 in FBiH, Article 379 in RS and Article 179 in BD). However, as noted by GREVIO, there is a lack of coordination between the two systems as the legislation does not require mandatory consultation between family courts and criminal courts to verify whether criminal proceedings for domestic violence are pending against the father of the victim's children or have been brought in the past. Moreover, data on the instances in which custody has been withdrawn or visitation has been limited on account of domestic violence are not available.<sup>29</sup>

In Republika Srpska and Brčko District the regulatory frameworks on custody and visitation decisions provided for under Articles 93 and 106 of the Republika Srpska Family Law are similar to that in the FBiH. Notably, in addition to mandatory mediation, under the law, parental rights are curtailed only in cases where the child is subject to direct violence (in cases of physical, psychological or sexual abuse) or neglect. However, in a survey carried out in 2020<sup>30</sup> among women victims of domestic violence with children, in only 13% of cases did the Centres for Social Work advise to partially terminate the perpetrators' parental rights, while

80% stated that it did not initiate such a procedure. The key concept present across the State, however, is the concept of the best interest of the child which is mainstreamed as is the prohibition of domestic violence.<sup>31</sup>

It is clear therefore, as indeed GREVIO noted,<sup>32</sup> that the current legal framework and practice on custody and visitation in the two entities and in Brčko District do not comply with the standards of the Istanbul Convention. First, the use of mandatory mediation, as decisive in determining custody and visitation rights, is fundamentally inappropriate in cases of domestic violence due to the existing power imbalance. Second, incidents of violence against a parent and witnessed by the child are not, according to the legal criteria, taken into account in decisions on custody and visitation and when assessing the best interests of the child. This is notwithstanding the fact that under Article 8 of the Republika Srpska PDV law, children who witness violence are considered victims. This may explain why the focus on proposing shared care by professionals rather than termination of custody or parental rights, regardless of whether it is in the best interest of the child.<sup>33</sup> Finally, under the FBiH Family Law, loss of custody can also be imposed on the parent that fails to prevent violence being perpetrated against the child. There is therefore a risk that the current legal framework penalises victims and paradoxically leads to their loss of child custody rather than the perpetrator.

# The Institutional Framework for Family Disputes and Assistance to Victims of Domestic Violence

In Bosnia & Herzegovina social welfare centres serve as the primary connecting point between victims and access to such services, whether by the centre itself or referral to another institution or NGO. As a result of the constitutional system, social policy and social protection are the responsibility of its two entities - the FBiH and the Republika

Srpska - and the Brčko District. In FBiH an additional 10 institutional systems exist which are established by the 10 cantons, albeit with some level of harmonisation with FBiH. The divided organizational structure of social protection without effective coordination mechanisms contributes to the ineffectiveness of the administration, insufficient coverage

<sup>29</sup> GREVIO's Report, n16, Paragraph 194.

<sup>30</sup> Ibid, page 27.

<sup>31</sup> Article 4 of the Family Law of FBiH, Article 15 of the Family Law of RS and the Article 3 of the Family Law of BD.

<sup>32</sup> GREVIO's Report, n16, paragraph 191.

<sup>33</sup> GREVIO's Report, n16, Page 96, Duman, D., Halilović, M., & Latifović, F. (2020). Analiza sudske prakse u porodičnim sporovima i preporuke za postupanje.



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of the system, and generates various forms of inequality based on the place of residence.<sup>34</sup>

Centres for social welfare have a key role under the LPDV legislation and the Family Law and operate at the level of local self-government units (cities or municipalities). Within the context of domestic violence these Centres, together with police, are tasked with acting as first responders in cases of domestic violence, provide psychosocial assistance to victims of domestic violence and information on the different types of support services available. They also required to assess risk factors for the victim and decide on referrals to domestic violence shelters. Additionally, they play a key role in the context of mandatory mediation where the victim has filed for divorce and in relation to custody/visitation decisions.

However, a number of reports<sup>35</sup> have found that these institutions have a limited capacity to provide assistance including for victims of domestic violence. Other issues have been raised, information provided by both governmental and non-governmental stakeholders to GREVIO<sup>36</sup> highlighted that Centres for Social Work and courts overwhelmingly interpret the best interests of the child as requiring joint custody and having contact with both parents, including in cases of domestic violence. This is concerning given, as GREVIO notes, the central role they play in divorce/parental rights decisions, their very limited training on domestic violence and their inability or unwillingness to identify and take into account risk factors and episodes of domestic violence in their assessments. They go on to note that staff in the Centres for Social Work view their role as principally aimed at reconciling the family, even in cases of domestic violence, and seldom inform courts of cases of domestic violence. This is despite the fact that neither entity strategy<sup>37</sup> makes any reference to this being an aim. Furthermore, when working with the family courts, Centres for Social Work do not conduct risk assessments or ask for the disclosure of risk-assessment and safety plans drawn up by law-enforcement agencies and/or other competent stakeholders in cases of domestic violence, with a view to taking them into account and determining the best interests of the child.

Concerns were also raised regarding the lack of measures in place to ensure that the exercise of visitation or custody rights does not jeopardise the rights and safety of the victim or of its children. Centres for Social Work generally encourage visitation of the child with the abusive parent in cases of domestic violence and that, if the child feels threatened, visitation takes place in their premises. Alarming, civil society reports that these occasions are frequently used by the perpetrator to exert power and control over the victim and, in one extreme case, to murder the victim.<sup>38</sup> GREVIO

was also informed that victims are threatened with having their children taken away when they do not comply with visitation obligations or when they refuse to undergo mediation and was concerned by information provided indicating several cases of domestic violence in which the child was removed from the mother and placed in foster care because she had failed to protect her child from the violence of the perpetrator.<sup>39</sup> As a result, it appears that the primary aim of law and practice in the country is at reconciling the family, even in cases of domestic violence. Women have also shared their testimonies of negative experience with social workers after reports of domestic violence, citing a lack of interest in allegations of domestic abuse and a prioritisation of the perpetrator's interests.<sup>40</sup>

In conclusion, there is limited training and guidance offered to those tasked with making decisions in the family courts, particularly those working in the Centre for Social Work. It is unsurprising therefore that GREVIO has called for specific provisions to be introduced in law to ensure that incidents of domestic violence against the non-abusive carer must be taken into account in the determination of custody and visitation rights and that all relevant professionals, especially staff from the Centres for Social Work and judges in family courts, are trained in the area of domestic violence and equipped with guidelines to enable them to discharge their obligation to ensure the safety of a victim and her children in any decisions taken.

<sup>34</sup> ILO Office for Central and Eastern Europe. (2022). *Issues in social protection in Bosnia and Herzegovina: Coverage, adequacy, expenditure and financing* (ISBN 978-92-2-036846-6 [web PDF], ISBN 978-92-2-036845-9 [print]). Budapest.

<sup>35</sup> Development of social services at the local level in Bosnia and Herzegovina. (2015). *Improving the provision of social service delivery in South Eastern Europe through the empowerment of*

*national and regional CSO networks.*

<sup>36</sup> GREVIO's Report, n16, paragraphs 192 and 193.

<sup>37</sup> Strategy for Combating Domestic Violence of Republika Srpska 2020-2024; Strategy for the Prevention and Fight against Domestic Violence in the Federation of BiH 2023-2027;

<sup>38</sup> GREVIO's Report, n16, paragraph 193.

<sup>39</sup> Ibid, paragraph 194.

<sup>40</sup> GREVIO's Report, n16, page 33, *Iskustva žena žrtava nasilja korisnica servisa u dobijanju podrške od centara za socijalni rad.* (2022). *Završni izvještaj – Bosna i Hercegovina and Iskustva žena žrtava nasilja korisnica servisa u dobijanju podrške od centara za socijalni rad, Završni izvještaj – Bosna i Hercegovina, 2020*

# Judicial Training

The PDV laws of Republika Srpska and Brčko District, contain the obligation to ensure continuous training on domestic violence for judges and prosecutors. A judicial bench book and a practice guide for cases of domestic violence for judges has thus been drafted by a panel of judges and civil society.<sup>41</sup> However, there is a lack of sufficient and sustained initial and in-service training of prosecutors and judges; initial training of judges and prosecutors in the FBiH and Republika Srpska addresses gender equality in judicial institutions and stereotypes but does not address violence against women. Moreover, in-service training is provided on a voluntary basis only, covering only some aspects of domestic violence and rape, as well as conflict-related sexual violence.<sup>42</sup>

## Legal Aid

As GREVIO notes in its report,<sup>41</sup> legal aid for victims of violence varies in scope and in eligibility requirements, depending on which canton, entity or district the victim resides. This results in an uneven provision of legal aid in the country and an extremely complex and fragmented legal and institutional framework. Moreover, there is no comprehensive data on the number of beneficiaries of free legal aid in general including those related to family proceedings. Most legal aid appears to be provided by NGOs despite their limited resources. Women in rural areas and migrant women facing particular challenges in accessing legal aid provided by the entity/cantonal legal aid offices, as these are primarily located in the principal cities. In addition, there is evidence of the extremely limited capacity of legal aid centres and the lack of training available on gender-based violence against women for lawyers assisting victims, who generally demonstrate a lack of understanding of the gendered nature of violence against women and of domestic violence.<sup>44</sup>

## The Voice of the Child

Legislation<sup>45</sup> across the three jurisdictions recognises the right of the child to freely express their opinion in accordance with their age and maturity unless it is determined that it is not in the best interest of the child. The child is also entitled to receive the necessary information to form their opinion and to receive advice on the potential consequences of their opinion being considered. Due attention must also be given to the child's opinion in all matters and proceedings concerning the child's rights and interests, considering the child's age and maturity. Decisions concerning the rights and interests of the child must state whether the child was allowed to express their opinion, the content of the child's opinion, and the reasoning behind the authority's stance on the opinion. If the child was not allowed to express their opinion, the court and competent authority must explain why. The child has the right to be informed through parents or guardians about the decision made in the proceedings where the child expressed their opinion.

In terms of representation, children who lack capacity must be represented by an adult. Article 150(1) of the Family Law of the FBiH provides that in cases of conflict between a child and their legal guardian's interests, the Court shall appoint a special representative to protect the child's interests. Article 140 of the Family Law of the Republika Srpska also allows for the Court to appoint a special representative in cases where a parent who would ordinarily act as the child's legal representative has conflicting interests to that of the child.

<sup>41</sup> See Judicial Bench book Consideration for Domestic Violence, Case Evaluation in Bosnia and Herzegovina, 2014

<sup>42</sup> GREVIO's Report, n16, paragraph 98.

<sup>43</sup> Ibid, paragraphs 308 – 313.

Ibid, paragraphs 308 – 313.

<sup>44</sup> UN Women Analysis of the Capacities for

the Implementation of the Council of Europe Convention of Preventing and Combating Domestic Violence and Violence against Women in the Police and Free Legal Aid Sector in Bosnia and Herzegovina, UN Women, 2019, p. 26.

<sup>45</sup> Article 125 of The Family Law of Federation of Bosnia and Herzegovina, Official Gazette of FBiH, no. 35/05, 31/14., Article 88 of the Family Law of

Republika Srpska, Official Gazette of RS, no. 17/23, 27/24. And Article 108 of The Family Law of Brčko District, Official Gazette of BDBiH, no. 23/07.



# France

The principle of non-discrimination is enshrined in the French constitution and prohibits discrimination with regard to criteria of sex, race, belief and trade union activity. Under Article 55 of the French Constitution, the ECHR is automatically incorporated into the domestic legal order and it is directly applicable. France has also ratified CEDAW, the CRC and the Istanbul Convention.

## The Prevalence of Domestic Violence

Domestic abuse is primarily carried out against women in France; 86% of victims of intimate partner abuse recorded in 2022 were women<sup>46</sup>. Available data indicate that, in France, psychological violence is just as widespread as physical violence: 65% of women victims of domestic violence report having suffered physical violence and 66% report having suffered rather or very significant psychological damage.<sup>47</sup> France also has one of the highest rates of murders linked to domestic violence in Western Europe; in 2022, 118 women were killed by their partners and twelve children were killed within family disputes.<sup>48</sup>

## The Legal Response to Domestic Abuse

Gender based violence in France is mainly addressed by the criminal law via the incremental introduction of a range of offences into the French Penal Code (Code Pénal) beginning in the early 1990's. As a result, physical violence, sexual violence, marital rape, psychological violence, moral harassment, forced suicide and cyberbullying are all

criminalised. The law has also evolved to include in the definition of 'couples' non-cohabiting partners and to include domestic abuse committed by an ex-partner as an aggravated offence. Various terminology is used across the legal texts and inter-ministerial plans to combat violence against women, however, there is an absence of a systematic recognition of the gender-based nature of violence against women and the structural link with historical power inequalities between women and men<sup>49</sup>. In addition, as with other jurisdictions, the criminal law views domestic violence as discrete and individual incidents rather than considering the cumulative effect of coercive control. As a result, French courts still consider physical acts as the highest degree of intensity and seriousness and a major risk factor for spousal homicide (Jouanneau and Matteoli, 2018).

## The Family law framework

Proceedings before Family Courts and before "juges aux affaires familiales"(JAF)<sup>50</sup> play a concrete role in the protection of victims of domestic abuse. In 2009, half of femicides committed in a domestic violence context occurred during fathers' visitations rights.<sup>51</sup> However, despite the prevalence of post-separation domestic violence, many women victims of domestic abuse share custody of their children with their abuser.<sup>52</sup> There is also evidence to suggest that where domestic abuse has taken place, custody is more likely to be shared than when no such allegations are made.<sup>53</sup>

<sup>46</sup> SSMSI, 'Les violences conjugales enregistrées par les services de sécurité en 2022', Info Rapide no. 28, November 2023. SSMSI data, database of victims of crimes and offences recorded by the police and gendarmerie in 2022.

<sup>47</sup> See La Lettre de l'Observatoire National des Violences faites aux Femmes - Les violences au sein du couple et les violences sexuelles en France en 2017, No. 13, November 2018, MIPROF, p. 16.

<sup>48</sup> Delegation for Victims - the Directorates of the National Police and the National Gendarmerie, 'Étude nationale sur les morts violentes au sein du couple en 2022', September 2023.

<sup>49</sup> GREVIO's (baseline) evaluation report on legislative and other measures giving effect to the provisions of the Council of Europe Convention

on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention): France, paragraph 7.

<sup>50</sup> There are two types of civil courts which can be involved after a separation, in relation to minor children. The children judge ("juge des enfants") is competent for civil and criminal matters regarding the educational support of a child, if her health, safety or morality are endangered, or if her upbringing is compromised. The family judge ("juge aux affaires familiales") is only competent in civil law, mostly regarding the separation of parents. In this instance, the JAF decides of the habitual domicile of the child, of the visitation rights and of accommodation with the other parent, and of a financial contribution to

the maintenance and education of the child. The JAF can also the children when determining their best interests if they decide it is relevant.

<sup>51</sup> Observatoire des violences envers les femmes de Seine Saint-Denis, « Mesure d'Accompagnement Protégé (MAP) Afin de permettre l'exercice du droit de visite dans un contexte de violences conjugales. » in Centre Hubertine Auclert (n 26) 52.

<sup>52</sup> In 2016, on a sample of 400 women who contacted the NGO SOS les mamans, which deal with domestic abuse, 15,3% had children in alternating residence after domestic violence.

<sup>53</sup> Gwénola Sueur, 'Focus Sur Les Violences Post-Séparation Par Gwénola Sueur' (Le blog de Manderley et d'Alex Vigne, 7 February 2018).

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### A. Parental responsibility - “autorité parentale”

Parental responsibility (“autorité parentale”)<sup>54</sup> and residence (“fixation de la résidence”) are two different concepts in France. Parental responsibility (PR) covers the rights and duties of each parent towards their child and the separation of parents, married or unmarried, does not, in principle, affect this. Accordingly, under Article 372-2 of the Civil Code, after separation, ‘each parent must maintain parental relationship with the child and respect his bounds with the other parent.’

Any disputes concerning the exercise of PR or residence are resolved by court order. Specific provisions limit the PR (or its exercise) of violent fathers in three ways.<sup>55</sup> First, a general provision allows Family Courts to take into account, any physical or psychological violence committed by one parent on the other<sup>56</sup> Second, when a child witnesses such violence committed by one parent on the other, the violent parent who is “manifestly endangering the security, health or morality of the child”<sup>57</sup> can be deprived from parental authority, without the need for a criminal conviction. Third where a criminal prosecution is taking place against a violent parent, the exercise of their parental authority, visitation and accommodation rights are suspended automatically, until the final decision of the JAF.<sup>58</sup>

However, the application of these provisions is poor and as GREVIO noted in its report, ‘the withdrawal of the perpetrator’s parental authority remains exceptional, even in the event of a final criminal conviction, despite the persistence of the danger to the mother and child.’<sup>59</sup> Violent fathers very often retain PR, as JAFs take rarely into consideration the danger of the father for the child and the mother after the separation,<sup>60</sup> and these provisions are very scarcely applied, in part due to a lack of coordination between criminal and civil procedures.<sup>61</sup> In addition, legal procedures concerning domestic abuse are often compartmentalised between criminal procedures, children judges<sup>62</sup>, and JAFs, which tend to hide to continuum of violence against children and mother even when domestic violence is proven. It can also lead to mothers being penalised by the removal of children by child protection services when domestic abuse is disclosed.<sup>63</sup> As a result there have been persistent calls for the more effective transmission of data between criminal and civil jurisdictions.<sup>64</sup>

Where PR has been removed, perpetrators of domestic abuse retain the right and obligation to monitor the maintenance and education of the child. Moreover, they

“must be informed of important choices regarding the latter’s life”<sup>65</sup> by the parent with exclusive PR. If this parent considers that the wellbeing of his child is compromised, he can bring the matter to the court. The implications for the continuation of coercive control using this right to information is obvious, however, it is rarely removed in practice.<sup>66</sup>

### B. Experts

There is no unified system for experts selected by the courts in terms of qualification and training. Before the Cour de Cassation a list of experts is drawn up every year and similarly, before Appellate Courts experts are appointed from a list drawn up by the Court of Appeal, after careful consideration of their applications. They are appointed by the court of appeal and the courts within its jurisdiction.<sup>67</sup> Each appellate Court draws its own list of experts. At a first instance family court, the judge may appoint an expert, usually a psychologist, from a Court of Appeal list within or outside his jurisdiction. He may also appoint a professional not on the list of experts, who must take an oath.

However, due to a shortage of psychiatrists and child psychiatrists, it is often difficult to recruit and train forensic experts. There is no explicit criteria for selection of experts and there is also no national professional association that represents experts who provide assistance to the family court. There are regional associations specialised for legal experts in psychology e.g. in Marseilles, the Association régionale des psychologues experts judiciaires). Psychologists are, however, subject to a general Code of Ethics, the principles and concepts of which are monitored by the Commission nationale consultative de déontologie des psychologues (National consultative commission on the ethics of psychologists).

### C. Joint custody (“garde partagée”) and visitation and accommodation right

The court’s decision as to custody is based on the paramount criterion of the child’s best interests and there is no presumption of joint custody. A number of factors are taken into consideration<sup>68</sup> including previous parental practice, the feelings expressed by the child and any duress or violence, physical or psychological, carried out by one parent upon the

<sup>54</sup> Article 373-2 et seq. of the Civil Code.

<sup>55</sup> In addition, since 2014, criminal judges must rule on the parental authority of a father convicted of violent crime or offense on the mother of her child, in order to protect the child. In practice, it is clearly not always the case.

<sup>56</sup> Article 373-2-11 §6 of the Civil Code.

<sup>57</sup> Article 378-1 of the Civil Code.

<sup>58</sup> Article 378-2 Civil code.

<sup>59</sup> GREVIO’s report, n49, paragraph 180.

<sup>60</sup> Centre Hubertine Auclert, ‘Mieux Protéger et Accompagner Les Enfants de Violences Conjugales’ (2018) 14.

<sup>61</sup> GREVIO’s report, n49, paragraph 180.

<sup>62</sup> ‘Rapport Alternatif de La CLEF Au Questionnaire Adressé à La France Pour Sa Première Évaluation Par Le Groupe d’experts Sur La Lutte Contre La Violence à l’égard Des Femmes et La Violence Domestique’ (2018) Shadow report 8.

<sup>63</sup> GREVIO’s report, n49, paragraph 181.

<sup>64</sup> Note 60.

<sup>65</sup> Article 373-2-1 of the Civil Code.

<sup>66</sup> Note 60.

<sup>67</sup> For instance, the list of experts who can be selected by the Court of Appeal of Paris is accessible here: [https://www.cours-appel.justice.fr/sites/default/files/2024-07/ANNUPARIS2024\\_0.pdf](https://www.cours-appel.justice.fr/sites/default/files/2024-07/ANNUPARIS2024_0.pdf)

other. judges may also provisionally order alternating residence, until the final order is made.<sup>69</sup> However, joint custody is often ordered by family judges, in cases where domestic abuse is alleged and despite concerns that the family courts are insufficiently cognisant of the risk of instrumentalization by perpetrators over their victims.<sup>70</sup> Several NGOs have thus called for joint custody to be excluded in cases involving domestic abuse.<sup>71</sup>

In cases of exclusive custody, the parent who does not reside with the child is usually granted visitation and accommodation rights, on the basis of Article 371-4 of the Civil Code, which provides the right of children to maintain personal relationships with both parents. Only serious grounds (“motif grave”) can limit the application of the provision,<sup>72</sup> although the law does not define the term further.

There are two measures available to the court if it is of the opinion that child visitation may present a danger. First, that visitation takes place in a designated area and witnessed by a trusted third-party or the representant of a qualified legal entity.<sup>73</sup> However, access to these provisions is only by a decision of a Family Judge, which can take months.<sup>74</sup> Moreover, these spaces are not uniformly accessible throughout the French territory, and the social workers employed in these spaces are neither equipped or trained to deal with instances of domestic violence. Second, the judge can adopt a “measure<sup>75</sup> of accompaniment under protection” (“mesure d’accompagnement protégé”) which ensures that children are escorted by an adult for visitation, in order to prevent further violence to the victim. This measure, which has been proven efficient has been limited in its geographical availability. As a result, GREVIO, has recommended that in situations where such facilities are not available or are deemed insufficient to ensure the safety of the mother and her children, judges should be able to deny visitation rights to the abusive parent on the basis of the serious grounds provided for in the law.

In addition, recent legislation has been adopted in order to strengthen the enforcement of judicial decisions on parental authority.<sup>76</sup> These instruments can consist of a financial periodic penalty (“astreinte”), a civil fine, or the recourse to public force to enforce the execution of a judgement of the JAF. However, as GREVIO noted in its report they do not provide for cases where a victim of domestic abuse refuses visitation to protect themselves or their children from an abusive parent.<sup>77</sup>

## D. Mediation

Prior to any ruling in the family court the judge can propose or require a mediation between parents.<sup>78</sup> However, following repeated criticism from NGOs<sup>79</sup> regarding the unsuitability and danger posed to victims of domestic abuse these provisions were modified in 2019 and 2020. Article 373-2-10 provides that judges cannot request a mediation where one parent declares themselves to be a victim of violence. However, research indicates that the use of mediation in such cases continues in practice.<sup>80</sup>

## E. Parental Alienation Syndrome (PAS)

The use of PAS has been specifically discouraged in France. The 5<sup>th</sup> interdepartmental plan on the fight against violence against women (2017-2019) recognises the unsoundness of PAS which has ‘never recognised by a scientific authority,’ and which ‘leads to the discredit of the voice of the mother, exceptionally of the father or of the child, and consequently negates her status as a victim by inverting the responsibilities.’<sup>81</sup> This was followed up in July 2018, with the publication of an informative note on the intranet of the Direction des affaires civiles et du Sceau which informed judges of the controversial and non-recognised nature of PAS.<sup>82</sup>

Nonetheless, concern has consistently been raised about the fears that victims of domestic abuse face of being accused of PAS and related concepts. Specifically, that women who are unsuccessful in their criminal complaints due to a lack of evidence can be accused by JAFs of maintaining a conflict and as a punishment, transfer the custody of the child to the parent.<sup>83</sup> Furthermore, as has been widely acknowledged, the diagnosis of PAS has been successfully used to undermine and discredit mothers who raise domestic abuse in family law proceedings.<sup>84</sup> One analysis of victims of domestic abuse demonstrated how PAS is mobilised by psychiatric professionals, whose expertise are then asked by the JAF.<sup>85</sup> Another analysis of 140 women who contacted the NGO SOS les Mamans, found that 12,5% of mothers who were not victims of domestic abuse had been accused of PAS whereas 32% of women who were victims of domestic abuse had been accused of PAS.<sup>86</sup> In addition, there is evidence of a change in strategy in response to the official position on PAS by the adoption of different terminology such as the concept of “intense” mothers (“mère fusionnelle”) and even the transfer of the application from one jurisdiction to another on the basis that it may be more receptive to the concept of parental alienation.<sup>87</sup>

<sup>68</sup> Articles 373-2 and 373-2-11 of the Civil Code

<sup>69</sup> Article 373-2-9 §1 of the Civil Code.

<sup>70</sup> GREVIO’s report, n49, paragraph 180.

<sup>71</sup> Amicale du Nid and others, ‘Evaluation de La Mise En Oeuvre de La Convention d’Istanbul de Lutte Contre La Violence à l’égard Des Femmes et La Violence Domestique - Rapport Des Associations Spécialisées’ (2018) 43. 2

<sup>72</sup> Article 373-2-1 of the Civil Code.

<sup>73</sup> Articles 373-2-1 and 373-2-9 of the Civil Code.

<sup>74</sup> Amicale du Nid and others n71.

<sup>75</sup> GREVIO’s report, n49, paragraph 182.

<sup>76</sup> Loi du 23 mars 2019.

<sup>77</sup> GREVIO’s report, n49, paragraph 183.

<sup>78</sup> Article 373-2-10 of the Civil Code.

<sup>79</sup> Coordination française pour le Lobby Européen des Femmes and Amicale du Nid and others, n71.

<sup>80</sup> Gwénola Sueur and Pierre-Guillaume Prigent, ‘Stratégies Discursives et Juridiques Des Groupes de Pères Séparés. L’expérience Française’ in Christine Bard, Mélissa Blais and Francis Dupuis-Déri (eds), *Antiféminismes et masculinismes d’hier et d’aujourd’hui* (1<sup>re</sup> édition, PUF 2019) 422.

<sup>81</sup> Ministère des familles, de l’enfance et des droits des femmes, « 5<sup>ème</sup> plan de mobilisation et de lutte contre toutes les violences faites aux femmes (2017- 2019) », 23 novembre 2016.

<sup>82</sup> Pierre-Guillaume Prigent and Gwénola Sueur, ‘À Qui Profite La Pseudo-Théorie de l’aliénation Parentale ?’ 2020/1 Délibérées.?

<sup>83</sup> Amicale du Nid and others, n71.

<sup>84</sup> Custody, violence against women and violence against children - Report of the Special Rapporteur on violence against women and girls, its causes and consequences, Reem Alsalem, 13th April 2023, A/HRC/53/36 A/HRC/53/36: Custody, violence against women and violence against children - Report of the Special Rapporteur on violence against women and girls, its causes and consequences, Reem Alsalem | OHCHR Professor Shazia Choudhry was the consultant for this report.

<sup>85</sup> Pierre-Guillaume Prigent and Gwénola Sueur, n82.

<sup>86</sup> Gwénola Sueur, n53.

<sup>87</sup> Pierre-Guillaume Prigent, n80.

### Training

The initial and in-service training for professionals coming into contact with women victims of violence is a legal obligation.<sup>88</sup> However, concern has been raised about the lack of initial and continuing training in the health sector<sup>89</sup> and the serious impact this has had on the quality of expert opinions rendered in family law proceedings, completed by psychiatrists untrained in violence against women and its traumatic consequences on child witnesses.<sup>90</sup> This has resulted in the non-recognition of violence suffered by children, as well as in the secondary victimisation of victims, particularly when the psychological state of children is attributed to “parental alienation syndrome.”<sup>91</sup>

The National School of Magistracy provides judges with compulsory initial training of two half days on the issue of domestic violence. The judicial handling of violence against women is a topic covered at the regional level as part of continuing training offered at the local level to law officers and relevant stakeholders. Remote access to a digital training kit on adapting one’s professional practice to address intimate partner violence has also been available to all law officers since 2019.<sup>92</sup> Other complementary training courses on more specific subjects, such as victim care last three days and are open to a wide audience of professionals from different sectors, however, they are optional and the number of judges who have accessed this training is relatively low. Crucially, there is no specific training for dealing with child victims and/or witnesses of domestic violence which is likely to have a negative impact on decisions regarding custody and visitation.<sup>93</sup>

### The Voice of the Child

Adulthood is reached at the age of 18, however, when a child reaches the age of capable le discernement<sup>94</sup> i.e., she has a sufficient degree of understanding (this age depends on the judge’s discretion)<sup>95</sup> she can seek authorisation from the court to be heard directly by the judge. This also provides her with the right to her own lawyer, the *avocat d’enfant*.<sup>96</sup> If the child has not reached this age then an the *administrateur ad hoc*<sup>97</sup> can be appointed to represent their views. There is also a general recognition that the child’s voice grows gradually with his or her age and generally, children are considered capable from the age of seven onwards.<sup>98</sup> Family court judges can take their decision alone, however, in cases where the judge feels they do not have sufficient expertise or there is an allegation that a child presents with a disorder, the judge can order a social investigation (by social workers or specialised associations for family issues) or designate an expert (either a psychiatrist or a psychologist) who is an independent professional. Such investigations provide another opportunity for child’s views to be represented.

### Legal Aid

Legal aid is provided under French law, on a means tested basis to cover legal costs on a full or partial basis and is automatically provided to victims of domestic abuse in relation to any urgent procedures prior to a verification by the family courts of their resources. Women who do not possess a residence permit cannot benefit from legal aid, unless they have already been granted a protection order. However, given the low-income thresholds the number of individuals who can benefit from legal aid are extremely low<sup>99</sup> and concern has been expressed that this could create excessive obstacles for victims who are unable to pay for the services of a lawyer to benefit from free legal assistance and legal aid.<sup>100</sup>

<sup>88</sup> Article 51 of Law No. 2014-873

<sup>89</sup> See Violence against women: a public health emergency, 10 March 2015, MIPROF.

<sup>90</sup> GREVIO’s report, n49, paragraph 106.

<sup>91</sup> Pierre-Guillaume Prigent and Gwénola Sueur, n82.

<sup>92</sup> Ninth periodic report submitted by France under article 18 of the Convention, due in 2020\* 17th March 2022 CEDAW/C/FRA/9

<sup>93</sup> GREVIO’s report, n49, paragraphs 112 and 113.

<sup>94</sup> Art. 388-1, fccand Art. 1182, fccp).

<sup>95</sup> Rongé J-L., “Réflexions: La Charte nationale de la défense des mineurs”, *Journal du droit des jeunes* 2008 (5), 45-46. doi: 10.3917/jdj.275.0042.

<sup>96</sup> Under Art. 388-1, French Code of Civil Procedure – see Avenard G., “Le droit de s’exprimer”, *L’école des parents* 2015 (4), 32-34.

<sup>97</sup> Defined as ‘a natural or legal person, appointed by a magistrate, who substitutes the parents in exercising the rights of the non-emancipated child, in the child’s name and place within the limited assignment entrusted to him’ (Fédération nationale des administrateurs ad hoc 2009: 10) Gouttenoire A., “Les modes de participation de l’enfant aux primordial judiciaires”, *Cahiers de la recherche sur les droits fondamentaux* 2006 (5), 59-64.

<sup>98</sup> Attias D., “Les nouveaux droits de l’enfant sont-ils compatibles avec sa protection et ne mettent-ils pas en danger l’autorité parentale?”, *Issu de Petites affiches* 2012 (50).

<sup>99</sup> Amicale du Nid and others, n71.

<sup>100</sup> GREVIO’s report, n49, paragraph 253.

<sup>101</sup> Corte Costituzionale, sentenza 348 and 349/2007; and sentenza n.80/2011; see also Ilario Boiano, *la violenza contro le donne nell’ordinamento Multilivello*, in *Femminismo e diritto Penale*, p 2; Francesca Capone, *Violence against Women: Assessing Italy’s Compliance with OSCE Commitments and the Current International Legal Framework, Security and Human Rights* 28(1-4) (2017) pp. 24-48.





Article 3 of the Italian Constitution enshrines the general principle of equality without distinction of sex, race, language, religion and political orientation, personal and social conditions. Italy has also ratified CEDAW, the CRC and the Istanbul Convention; and it has been held that under Article 117 of the Italian Constitution, domestic criminal and civil law must be integrated with international and supranational legal sources, in particular in regard to European law.<sup>101</sup>

## The Prevalence of Domestic Violence

A national survey carried out in 2019 showed that in some regions up to 50% of men considered violence in relationships acceptable, at least in certain circumstances<sup>102</sup> and in research undertaken by the European Commission, 39 % of people in Italy said they knew a woman within their area or neighbourhood who has been a victim of domestic violence.<sup>103</sup> Data on homicides, show that women are more frequently victims of manslaughters and murders committed by their partner or ex-partner; in 2023, 109 women had been murdered in Italy, of whom 90 were within the family or relationship sphere and 58 by their partner or ex-partner.<sup>104</sup> In terms of children, the first general report on Italy's 281 Anti-Violence Centres found that in 2017, 43,467 women contacted a centre and of those, 63% of them had children under 18.<sup>105</sup> Data shows increasing rates of child exposure to domestic violence against their mothers.<sup>106</sup> A national survey conducted in 2015 by the Italian independent authority for children and adolescents found that witnessing violence was the second most prevalent form of ill-treatment affecting children: approximately one in five children who suffer ill-treatment is a witness to family violence.<sup>107</sup>

## The Legal Response to Domestic Abuse

The Italian legal system does not include a clear definition of domestic violence. Moreover, the prevention of and fight against violence against women are excluded from both the National Strategy for Gender Equality 2021-2026 and the National Recovery and Resilience Plan. However, Art. 61 of the Criminal Code sets out a higher penalty for any act of domestic violence or against individual liberty and physical integrity committed in the presence of a child.<sup>108</sup> In addition, Article 572 of the Criminal Code, criminalises "ill-treatment in the family" which has recently been broadened to include the crime being committed in the presence of minors.<sup>109</sup>

The offence is commonly interpreted as applying also to former spouses and partners, regardless of any co-habitation. Furthermore, for violent conduct to qualify as ill-treatment, it must be characterised by the systematic nature of the violent conduct and by the criminal intent of causing physical and/or psychological harm to the victim and/or violating her dignity. Ill-treatment is therefore categorised as a crime of habitual nature and is subject to ex officio prosecution.<sup>110</sup> However, research has demonstrated that the courts' interpretation of 'habitual nature' depends on the ability of the victim to "tolerate" the violence, either by enduring years of a violent relationship without making a complaint or by defending herself.<sup>111</sup> As GREVIO noted in its report,<sup>112</sup> this interpretation not only overshadows the nature of domestic violence against women as a violation of their human rights, it has had a demonstrably negative impact on the investigative work of law-enforcement agencies in terms of understanding the nature and cycles of violence in intimate partnerships.

<sup>102</sup> National Strategy for Gender Equality 2021-2026, p. 5, ISTAT data 2019. Available at [www.istat.it/it/archivio/235994](http://www.istat.it/it/archivio/235994)

<sup>103</sup> European Union Agency for Fundamental Rights (2014). Violence against women: an EU-wide survey — Main results, Publications Office of the European Union, Luxembourg.

<sup>104</sup> Data available at *Omicidi volontari e violenza di genere* | Ministero dell'Interno.

<sup>105</sup> <https://www.osservatoriodiritti.it/2019/11/25/violenza-sulle-donne-2019-giornata-contro-la-violenza-dati-istat/>

<sup>106</sup> Italian National Institute of Statistics (ISTAT)

(2015). Available at: <http://www.istat.it/it/archivio/161716>.

<sup>107</sup> See *Indagine nazionale sul maltrattamento dei bambini e degli adolescenti in Italia, Autorità garante per l'infanzia e l'adolescenza, CISMAI, Fondazione Terre des Hommes Italia*, 2015.

<sup>108</sup> Modified with Law Decree 93/2013, converted in Law 119/2013; this was further modified by Art. 9 para. 1 Law 69/2019.

<sup>109</sup> Law No. 168 of November 24, 2023

<sup>110</sup> See also the definition of violence in Art. 3 of Law 119/2013, the law on femicide

<sup>111</sup> The criminal response to domestic violence – An enquiry into the practices of the Court of Milan in the field of ill-treatment of family members and co-habitants, C. Pecorella, P. Farina, 2018.

<sup>112</sup> GREVIO's (baseline) evaluation report on legislative and other measures giving effect to the provisions of the Council of Europe on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention): Italy, paragraphs 12 – 18.

# The Family Law Framework

In Italian law the concept of 'parental responsibility' (PR) (responsabilità genitoriale) was introduced in 2014<sup>113</sup> and consists of the duty to maintain, bring up, educate and provide moral support to children, with due regard to their capacities, inclinations and aspirations. PR is granted to married parents automatically, however, if they are not married, it is granted on the basis of parental acknowledgment. PR of both parents does not end following separation, dissolution, cessation of the civil effects, annulment and nullity of the marriage, however, it can be limited by the court where parents do not demonstrate sufficient capacity to take care of their children's upbringing and where a parent breaches or neglects his or her duties resulting in serious harm to the child, the court may order its withdrawal. A parent who does not exercise PR retains the right and duty to monitor the education, upbringing and living conditions of the child.<sup>114</sup>

In general, ordinary courts (tribunali ordinari) deal with PR issues, mainly in the context of separation and divorce proceedings (custody, placement, maintenance), while juvenile courts (tribunali per i minorenni) deal with requests for limitation and loss of PR (so-called *de potestate* proceedings). In some circumstances, ordinary courts may 'attract' juvenile courts' competence (*vis attractiva*).<sup>115</sup>

Although legislation allows for the granting of sole custody<sup>116</sup> joint custody is the norm and viewed as being in the best interests of the child. Figures from ISTAT reveal that in practice shared custody is applied in nearly 90% of such cases.<sup>117</sup> Domestic violence and child abuse are not mentioned in this legislation, and therefore there are no criteria to identify those cases where joint custody is contrary to the interest of the child.<sup>118</sup>

## A. Custody, Visitation Rights and Safety pre- Cartabia Reform

Although research has widely acknowledged that joint custody and co-parenting is unsafe when there is a history of domestic violence, courts still appear to be reluctant to restrict custody and contact with violent fathers.<sup>119</sup> It is possible to limit or withdraw PR where there is evidence of 'serious detriment to the child', this provision is rarely applied

because judges tend to look only at physical violence explicitly directed at the child, dismissing psychological and witnessed violence, even if criminal proceedings against the party abusing the minor's mother are in progress at the time or emergency measures have been applied.<sup>120</sup> The lack of recognition of violence, often minimized and euphemized as 'conflict', results in judges usually having the view that 'conflict' can be overcome in the future, underestimating the potential danger to both mother and children in the future management of relationships, and projecting and reinforcing the idea that parents should not be absent. In addition, the risk of post-separation violence is rarely assessed and/or often neglected, resulting in a judicial failure to protect women and children victims of violence.<sup>121</sup>

Concern has also been raised regarding the lack of alignment and coordination between the civil and juvenile courts with the criminal courts despite legislative provision explicitly providing for the sharing of information.<sup>122</sup> This has also impeded the protection of victims of domestic abuse, exacerbated by the fact that until the recent Cartabia Reform, there was no procedure in Italy to discriminate between cases of non-violent conflict between couples and those in which there is evidence of violence (complaints and/or reports).<sup>123</sup> Instead, in most cases, judges proceeded with taking the advice of experts or technical consultants Consulenti Tecnici d'Ufficio (CTU's) whose opinions on the best measures to be taken regarding parents' ability to parent do not take the existence of domestic violence into consideration<sup>124</sup> and often reduce instances of violence to situations of conflict and entirely dissociate considerations pertaining to the relationship between the victim and the perpetrator from those regarding the relationship between the violent parent and the child.<sup>125</sup> Moreover, despite the unequivocal ban on the use of parental alienation syndrome (PAS) by the Supreme Court<sup>126</sup> victims' claims of abuse by their partner are often dismissed on the grounds of PAS and mothers are blamed for their children's reluctance to meet their violent father.

As a consequence, certain civil courts and CTUs not only fail to detect instances of violence, but also ignore them<sup>127</sup> leading to the invisibility of gender-based and domestic violence in civil courts<sup>128</sup>. In a report published in May 2022, the Femicide Commission found that in 96% of separations involving violence against women, the courts did not consider violence relevant for child custody and in 54% of the cases, juvenile courts allowed unsupervised contact with violent fathers.<sup>129</sup> In addition, where parallel criminal proceedings are instituted, victims are pressured into meeting with perpetrators, despite the risks to their safety and to drop criminal charges against the perpetrator, on the assumption

<sup>113</sup> By the law reforming parenthood (Law No 219/2012) and Legislative Decree No 154/2013,

<sup>114</sup> Article 316 of the Civil Code.

<sup>115</sup> According to Art. 38 in 2013, the competence of juvenile courts is excluded pending – between the same parties and before an ordinary court – separation or divorce proceedings, or proceedings concerning parental responsibility of children born out of wedlock. In such cases, the ordinary court shall also have jurisdiction

in proceedings concerning the limitation or revocation of parental responsibility. See G. Buffone, 'Riparto di competenza tra T.O. e T.M. in materia di provvedimenti ablativi: iudicium finium regundorum della Cassazione' (2015) *Famiglia e Diritto* 653.

<sup>116</sup> Law 209/2012 and Legislative Decree 154/2013

<sup>117</sup> GREVIO's report, n112, paragraph 180.

<sup>118</sup> M. Feresin, N. Folla, S. Lapiere and P. Romito, *Family Mediation in Child Custody Cases and*

*the Concealment of Domestic Violence*, in Affilia, *Journal of Women and Social Work* 33(4) 2018, pp. 509-525.

<sup>119</sup> *Ibid.*.

<sup>120</sup> Implementation of the Istanbul Convention in Italy, Shadow Report of Women's NGOs, October 2018., p. 30.

<sup>121</sup> M Feresin, F Bastiani, L Beltramini and P Romito, *The Involvement of Children in Postseparation Intimate Partner Violence in Italy: A Strategy to Maintain Coercive Control?* Affilia:

that maintaining such charges prevents pacifying the family and reaching an agreed settlement on the issues of custody and visitation, in the name of such principles as the “friendly parent provision.”<sup>130</sup>

The consequences of not doing so can be significant; the widespread practice by civil courts of considering a woman who raises the issue of domestic violence as a reason for not attending the meetings and not agreeing to custody or visitation, as an “unco-operative” parent and therefore an “unfit mother” who deserves to be sanctioned caused GREVIO extreme concern.<sup>131</sup> Such sanctions vary: ranging from subjecting victims to mandatory therapeutic treatment or training sessions to enhance their parental skills and include limiting and/or depriving them of their parental rights. Women who have informed mediators of previous or current violent behaviours by the other parent,<sup>132</sup> are less likely to be granted sole custody, because they are assumed to be making false allegations in order to alienate their children from the other parent.<sup>133</sup>

Moreover, due to the use of judicial discretion in the absence of specific legislation that addresses the circumstances of violence in child custody cases, judges can follow problematic guidelines written by lobby groups e.g. the so-called Milan Protocol in 2012.

## B. The Cartabia Reform – the New System<sup>134</sup>

Brought in as a result of the findings of the Senate Femicide Commission<sup>135</sup> these reforms represent a major overhaul of the civil system by the establishment of the single court for persons, minors, and families<sup>136</sup> and the introduction of judicial oversight on the removal of minors by the State<sup>137</sup>. The reforms include an entire chapter dedicated to domestic and gender-based violence.<sup>138</sup>

The chapter sets out how judges are now empowered, in the preliminary stages of family law proceedings to make an immediate assessment of the risk and order an immediate response to allegations of violence (summary assessment with the possibility of ex officio measures). Communication between civil and criminal proceedings on the same case can also be implemented as well as the adoption of protective measures in relation to minors. By giving the judge a more central and active role through the exercise of greater ex officio powers,<sup>139</sup> the reform intends to guarantee a management of the trial aimed at avoiding secondary victimization<sup>140</sup> through the exclusion of family mediation and the forced attempts at conciliation in cases of allegation of violence.<sup>141</sup>

Journal of Women and Social Work 34(4) pp. 481-491, 2019.

<sup>122</sup> Law Decree No. 93/2013 introduced the duty of the prosecuting authority to inform juvenile courts of any pending criminal proceeding involving a crime of ill-treatment, aggravated sexual violence and/or stalking committed against a child or by the parent of a child against the other parent. Communication channels between criminal and civil/juvenile courts were further improved with the enactment of Law No. 69 of 19 July 2019.

<sup>123</sup> Precautionary measures, previous criminal convictions at first instance and the risks and concrete consequences of the re-victimization during a criminal procedure were not taken into consideration in civil proceedings, resulting in serious consequences of re-victimization of women and children. This discrepancy between the criminal and civil justice systems – whose objective, especially in regard to children, requires stringent time-keeping and rapid decisions in their supreme interest, has led the Court of Cassation to stress again the different objectives of the two: the criminal trial requires proof beyond reasonable doubt, whereas the civil trial only that it be more likely than not. <sup>123</sup> Cass., V Sez V, 5 May 2010, n. 29612.

<sup>124</sup> Report on the procedure of the civil court and the juvenile court concerning the custody of children in case of domestic violence p. 5.

<sup>125</sup> GREVIO's report, n112, paragraph 182.

<sup>126</sup> Cass., Sez. I, ord. 24.3.22, N. 9691 (il caso Massaro) issued by the Supreme Court (n. 9691/2022)

<sup>127</sup> GREVIO's report, n112, paragraph 182.

<sup>128</sup> Report from the Femicide Commission, June 2021 <https://www.senato.it/service/PDF/PDFServer/DF/361580.pdf>.

<sup>129</sup> <https://www.senato.it/service/PDF/PDFServer/DF/372013.pdf>. <sup>130</sup> GREVIO's report, n112, paragraph 182.

<sup>131</sup> Ibid at paragraph 185.

<sup>132</sup> M. Feresin, N. Folla, S. Lapierre and P. Romito, n118.

<sup>133</sup> Written by a recent lobby of 70 psychologists and child psychiatrists, proponents of Parental Alienation Syndrome. The document relies on systemic-relational theories which do not provide for the disparity of positions between the two individuals in a couple, but rather assumes parity, and uses methods of direct confrontation which are inadvisable between a victim and a perpetrator of domestic violence. Similarly, the Protocol of the Court of Brindisi, pressured by separated fathers' associations, is also based on this stereotypical vision of women which sees them as alienating and vindictive.

<sup>134</sup> Riforma Cartabia in Decreto legislativo 10 ottobre 2022 n.

150, 'Attuazione della legge 27 settembre 2021, n. 134, recante delega al Governo per l'efficienza del processo penale, nonché in materia di giustizia riparativa e disposizioni per la celere definizione dei procedimenti giudiziari'. However, the legislative decree 31/10/2022, n. 162, now L. 1999/2022 postpones on some issues the D.Lgs. 150/2022. ('Misure urgenti in materia di divieto di concessione dei benefici penitenziari nei confronti dei detenuti o internati che non collaborano con la giustizia, nonché in materia di termini di applicazione delle disposizioni del decreto legislativo 10 ottobre 2022, n. 150, e di disposizioni relative a controversie della giustizia sportiva, nonché di obblighi di vaccinazione anti SARS-CoV-2, di attuazione del Piano nazionale contro una pandemia influenzale e di prevenzione e contrasto dei raduni illegali').

<sup>135</sup> Commissione parlamentare di inchiesta sul femminicidio, nonché su ogni forma di violenza di genere (Delibera del Senato della Repubblica 16/10/2018, pubblicata nella G.U. n. 249 del 25/10/2018; proroga del termine con delibera del 5/2/2020, G.U. n. 32 dell'8/2/2020) (dal 23 marzo 2018 al 12 ottobre 2022); on 24 November 2022, the commission was re-established by the Senate (Delibera del Senato della Repubblica 24/11/22 for Legislatura 19<sup>a</sup> – Disegno di legge n. 93-338-353).

<sup>136</sup> introduced by art. 30 d.lgs.

149/2022 modifying 49-51 l. 12/41 and introducing art. 49 c. 1 d.lgs. 149/2022.

<sup>137</sup> Art. 1, comma 27, L. 206/202, modifies art. 403 c.c..

<sup>138</sup> Chapter III, Section I, Art. 473-bis.40-46 cpc

<sup>139</sup> Art. 473-bis-2, 3 e 9.

<sup>140</sup> Art. 47-bis70.

<sup>141</sup> Art.574-bis-42-43:

<sup>142</sup> Art. 1, para 3 e 30, L. 206/2021, modifies rt. 78 e 80 c.p.c.

<sup>143</sup> Art. 1, comma 34, l. 206/2021, modified by art. 4, comma 2, d.lgs. 149/2022 modifies art. art. 13-14 disp. att. c.c.

## PART 03 The Research Locations and Research Context

Special provisions have been established in terms of interviewing minors (see below) in addition to an expansion of the appointment of a special guardian to facilitate their separate representation.<sup>142</sup> There are also significant changes in terms of the mobility, specialisation, and appointment procedure for CTUs.<sup>143</sup> The latter will now require special technical expertise is required of domestic violence or violence against minors. However, given the scale of the reform, implementation will occur in three different phases: June 2022, February 2023 and 24 December 2024. All these reforms, except the introduction of the single court should have been in force during the fieldwork phase of the research.

### Training

National guidelines on best practices for the proper handling of cases of violence against women were issued by the Italian national self-regulatory body of magistrates (the High Judiciary Council) in 2009 and recently updated in 2018 following a judgment against Italy by the European Court of Human Rights.<sup>144</sup> A key feature of these guidelines is that only specialist and trained magistrates should be tasked with examining cases of violence against women. As a result, the High Judiciary Council offers, in cooperation with the National School of Magistrates, courses on gender-based violence of three to four days on a yearly basis to serving judges and prosecutors, as part of the compulsory in-service training delivered at national level. The High Judiciary Council also encourages district courts to organise training programmes at local level, however, practices vary from court to court and access to training is not ensured in a uniform manner.<sup>145</sup>

Moreover, recent proceedings have once again exposed the secondary victimisation experienced by victims of gender-based violence in their interaction with the courts. Reported incidents include biased remarks and arguments made by judges, and in one case the acquittal of the accused on account of the short duration of the assault.<sup>146</sup> Little information exists as to available initial training for other professionals such as lawyers, magistrates, psychologists and social workers, although it is clear that the issue of violence against women is addressed only in a limited number of graduate university courses, as well as in certain specialist master's degrees.<sup>147</sup> Some training is provided by women's NGOs provide on violence against women for law-enforcement officials, prosecutors, magistrates, social

workers and other relevant stakeholders but this is not on an adhoc basis.<sup>148</sup> The lack of proper understanding of gender-based violence and its effects on children among professionals working in social services has been noted as well as their tendency to minimize violence, and blame the victim for the difficult relationship between the violent father and the child. Moreover, 'without the appropriate training, many social workers feel unprepared and overwhelmed by the responsibility of handling situations of violence and advising on the best course of action.'<sup>149</sup>

The need for training has however, been recognised; as part of the National Strategic Plan on male violence against women 2021-2023, the National Observatory on violence against women and domestic violence, is currently developing guidelines on the training of professionals who come into contact with women victims of violence.<sup>150</sup> This intervention aims to identifying and disseminating univocal and shared definitions on the topic of violence, to strengthen awareness and ensure greater recognition of the phenomenon in all its forms, also from a prevention perspective.

### Legal Aid

Under Law No. 119/2013, any victim of ill-treatment, stalking, sexual violence and female genital mutilation is entitled to free legal aid on a non means tested basis. In civil law, however, the general conditions of entitlement to legal aid apply and there are no specific exceptions for victims of gender-based violence. Thus, only low-income women earning less than 12 000 euros per year may apply for legal aid. Reports provided to GREVIO<sup>151</sup> by women's organisations and lawyers specialising in the legal representation and defence of victims set out the barriers experienced by victims in accessing legal aid, including differences in courts' practice in calculating the aid and severe delays in disbursing legal aid which shift the economic burden of defence from the victim to the legal counsel and the women's organisations. In addition, victims who are temporarily housed by family members after seeking refuge from the violence are penalised because the income threshold for access to legal aid in civil proceedings is calculated taking into account the resources of the family.

Prior to the Catabria reforms, child participation in judicial proceedings before Italian courts differed according to whether the proceedings are in the juvenile courts<sup>152</sup> or ordinary courts.<sup>153</sup> Children have a right to be heard in all

<sup>144</sup> *Talpis v Italy*, 2 March 2017 (application no. 41237/14).

<sup>145</sup> GREVIO's report, n112, paragraphs 102 – 103.

<sup>146</sup> See the Communication to the Committee of Ministers from D.i.R.E. - Donne in rete contro la violenza (18/07/2022) in the case of J.L. v. Italy (Application No. 5671/16); see also La "palpata breve" non è reato, bidello assolto a Roma - la

Repubblica.

<sup>147</sup> GREVIO's report, n112, paragraph 105.

<sup>148</sup> *Ibid* at paragraph 55

<sup>149</sup> GREVIO's report, n112 at paragraph 55.

<sup>150</sup> The Italian authorities comments to the Report of the Commissioner for Human Rights of the Council of Europe, H.E. Dunja Mijatovic, June 2023.1680adae59 (coe.int)

<sup>151</sup> GREVIO's report, n112, paragraph 251.

<sup>152</sup> According to Arts. 330 and 336 c.c.

<sup>153</sup> According to Arts. 336 bis et seq. c.c.



matters and proceedings affecting him/her, and not only in divorce or separation proceedings. However, the right is limited to children of 12 years of age or over, or younger if they are capable of discernment.<sup>154</sup> The voice of the child can be heard via the direct participation of the child at a hearing or by three other indirect forms. The first, is by a professional, external to the court and independent from the child's family, who does not speak on behalf of the child, but helps the child in giving voice to his/her position when they experience difficulties in expressing their views to adults.

However, this has not been rolled out on a national basis.<sup>155</sup> The second, is by the appointment of an expert witness, on request by the CTU and the third, by the appointment of a guardian when both parents are deceased or, in general, when no one is exercising PR over the child.<sup>156</sup> Minors who witness domestic abuse albeit have also been recognised by as victims of a crime by the Supreme Court<sup>157</sup> as well as legislation.<sup>158</sup>

# The Voice of the Child

In terms of listening to minors, the Cartabia Reform has undertaken a systematisation of the different sets of rules previously scattered across the legal system and relocated them in the Procedural Code. As a result, they have finally been made complete and explicit; for example, in terms of the obligation for the judge to take into consideration minors' opinion (and properly justify any deviation from them), in terms of the possibility to nominate a special guardian for minors over the age of 14, and in terms of establishing new methods for listening to the minor. The latter requires the listening session to be video-recorded or, if that is not possible, audio-recorded and written.<sup>159</sup>

However, despite these provisions there is considerable evidence that children are not listened to, particularly when they have experienced domestic abuse. A 2022 report by the Parliamentary Commission of Inquiry into Illegal Activities Related to Family-Based Communities Receiving Minors (Foster Care Commission) showed how courts often fail in their duty to establish whether or not children under 12 have the capacity to be heard.<sup>160</sup> As a result, their views are often ignored, even when they report sexual abuse in the family.<sup>161</sup> Moreover, there is concerning evidence that children who refuse to see their fathers because of experiencing domestic violence, are being removed from their mothers into the care of the perpetrator, particularly where parental alienation has been alleged.<sup>162</sup>

According to the Foster Care commission, Italian authorities carried out at least 232 such removals in so called 'high conflict' cases in 2021,<sup>163</sup> despite no such legislative authority; forced removal of minors applies only in cases where a child is at risk of abandonment or death and in where social services deem there is 'necessity and urgency.' However, in the cases the commission was able to examine in detail, 'necessity and urgency; was never present. Moreover, prior to the Cartabia reforms such removals took place without any judicial oversight. The report argues therefore that children are being subjected to physical and psychological violence by Italian institutions, such as traumatizing forced removals, inadequate attention paid to their physical health in foster homes, and the courts' failure to take their wishes into account.

<sup>154</sup> Law No. 219/2012 Article 315 bis c.c. Subsequently, Legislative Decree No. 154/2013 13 introduced a new and more specific framework regarding the admissibility and the requirements for the hearing of the child, contained in Articles 336(2), 336 bis and 337 octies (1) c.c., confirming the age threshold of 12 years, with children under this age only being heard if their capacity of discernment is assessed. They also contain further indications on the modalities of the hearing, as well as on the cases in which the judge may refuse to hear the child.

<sup>155</sup> See V. Calcaterra, 'L' advocacy nella tutela minorile. Prime esperienze italiane del lavoro del portavoce professionale' (2016) *Minorigiustizia* 155; J. Boylan et al., 'Cos'è l' advocacy nella tutela minorile. Guida per educatori e assistenti

sociali', Erickson, Trento 2011. The first Italian pilot projects on the institution of independent advocacy professionals were carried out in 2013 in the area of Varese, through a project that saw the implementation of case advocacy interventions at the request of child protection services. Case advocacy interventions were carried out at the request of the Juvenile Court of Milan, the Ordinary Court of Varese and, to date, a request for the activation of advocacy services has also been received from the Juvenile Court of Turin.

<sup>156</sup> Art. 348(3) c.c.

<sup>157</sup> Cass., Sez. VI, 23 febbraio 2018, n. 18833.

<sup>158</sup> Art. 9 of Law 69/2019 and Art. 61 para. 11 quinquies of the Penal Code.

<sup>159</sup> Art. 473-bis-4, 5, 6, 8

<sup>160</sup> Commissione Parlamentare di Inchiesta Sulle Attività Illecite Connesse Alle Comunità Di Tipo Familiare Che Accolgono Minori (istituita con legge 29 luglio 2020, n. 107) XVIII Legislatura - Camera dei deputati - Documenti "

<sup>161</sup> Parliamentary Commission of Inquiry into Femicide and Other Forms of Violence against Women, April 2022. <https://www.senato.it/service/PDF/PDFServer/DF/372013.pdf>

<sup>162</sup> Commissione Parlamentare di Inchiesta, n160.

<sup>163</sup> However, this might be an underestimate, as Italy's then Interior Minister Luciana Lamorgese and several municipalities refused to cooperate with data requests.



# Spain



Article 14 of the Spanish Constitution recognises the general principle of non-discrimination; this has recently been extended by the passage of a comprehensive law to promote equal treatment and combat discrimination in 2022.<sup>164</sup> This law includes new grounds of discrimination such as birth, race or ethnic origin, sex, religion or belief, age, disability, sexual orientation or identity, gender expression, illness and health status, serological situation, genetic features, language, socioeconomic status or any other condition or personal situation. Article 10.2 of the Spanish Constitution requires that constitutional fundamental rights be interpreted 'in conformity' with the Universal Declaration on Human Rights and other human rights treaties ratified by Spain. Spain has ratified CEDAW, the ECHR, the CRC and the Istanbul Convention.

## The Prevalence of Domestic Violence

According to the results of the Macroencuesta de Violencia contra la Mujer<sup>165</sup> in 2019, 32.4% of women aged 16 and over living in Spain have experienced gender-based violence (GBV) at some point of their lives, with 10.8% having been abused by their intimate partner or ex-partner in the 12 months prior to the survey. Separation does not reduce GBV; around 52% of victims of GBV in 2023 were divorced, separated or in the process of separation, or had ended their relationship.<sup>166</sup> The majority of victims of GBV are women; in 2022 89% of the people murdered by a current or former partner were women<sup>167</sup> and 58 women were murdered in 2023.<sup>168</sup> Forty nine children have been murdered as a result of intimate partner violence against their mothers since 2013.<sup>169</sup>

In the absence of official data before 2013, and relying on newspaper articles, one piece of research<sup>170</sup> estimated the number of children murdered from 2008 to 2015 at 41, with 11 of the crimes (27%) were committed during contact with the alleged or proven perpetrator of the abuse on the children's mothers.

## The Legal Response to Domestic Abuse

Organic Law 1/2004 was considered a groundbreaking piece of legislation as it established a comprehensive and rights-based approach to male intimate partner violence against women. It was based on three main pillars: prevention, protection and rehabilitation of the victim, and prosecution of gender-based violence. The term "gender-based violence" was then narrowed to describe violence perpetrated by men against women, or against women's family or relatives who are underaged, with whom they have or have had an intimate relationship, whether or not they live or have lived together. Organic Law 1/2004 modified several articles of the Criminal Code to include aggravated types of injuries in cases of gender-based violence. It also introduced crimes for mild coercion [coacciones leves] and minor threats [amenazadas leves] in the context of gender-based violence.

Organic Law 1/2004 also provided for the establishment of specialist VAW courts [juzgados de violencia sobre la mujer] with jurisdiction over civil and criminal law matters in relation to intimate partner violence. Specialist VAW courts hold preliminary hearings for more crimes such as homicide, abortion, injuries, against freedom, sexual liberty, privacy, honor, crimes against family rights and duties, and deal with minor offences, grant protection orders and decide on related civil law matters, including divorce and post-

<sup>164</sup> Law 15/2022.

<sup>165</sup> Macrosurvey of Violence against Women 2019 (igualdad.gob.es)

<sup>166</sup> National Institute for Statistics Press Release: Statistics on Domestic Violence and Gender Violence (SDVGV) . Year 2023. (ine.es)

<sup>167</sup> General Council of the Judiciary f 20231226 Informe sobre víctimas mortales de la violencia

de género 2022.pdf

<sup>168</sup> <https://violenciagenero.igualdad.gob.es/violenciaEnCifras/victimasMortales/fichaMujeres/>

home.htm (latest data accessed on 8th October 2023), [https://violenciagenero.igualdad.gob.es/violenciaEnCifras/victimasMortales/fichaMujeres/2023/VMortales\\_2023\\_09\\_11.pdf](https://violenciagenero.igualdad.gob.es/violenciaEnCifras/victimasMortales/fichaMujeres/2023/VMortales_2023_09_11.pdf)

<sup>169</sup> <https://violenciagenero.igualdad.gob.es/violenciaEnCifras/boletines/>

[boletinMensual/2023/docs/Principales\\_datos\\_julio\\_2023.pdf](boletinMensual/2023/docs/Principales_datos_julio_2023.pdf), data as of July 2023,

<sup>170</sup> Galvis Doménech, M. J., & Garrido Genovés, V. (2016). Menores, víctimas directas de la violencia de género. Boletín Criminológico, (22).

separation contact arrangements. However, although there should be at least one specialist VAW court per territorial jurisdiction [partido judicial], under the law, according to data by the CGPJ there are only 114 of these specialised courts for a total of 431 jurisdictions (less than 25%)<sup>171</sup> and only 58,6% of women have access to one of these specialized courts.<sup>172</sup>

With a view to compensating for the limited implementation of the above provision, 350 courts of first instance [juzgados de primera instancia e instrucción] and courts of inquiry [juzgados de instrucción] have been given competence in this matter and 32 criminal courts [juzgados de lo penal] have specialised in gender-based violence.<sup>173</sup> Furthermore, where an allegation of gender-based violence is raised in a civil court, judges and legal professionals are obliged to investigate it promptly and to report it to a court with competence in gender-based violence if supporting evidence is found. Organic Law 1/2004 also provided for the establishment of comprehensive forensic assessment units [unidades de valoración forense integral] comprising psychologists, social workers and other professionals who can provide high-quality forensic evidence to assist judges in their safety and risk assessments. However, according to data from the Ministry of Justice, there are only 24 of these units for a total of 114 courts (also less than 25%).<sup>174</sup>

As competences in the area of preventing and combating VAW are shared between the central and regional levels of

government, the central framework of Organic Law 1/2004 is complemented by a range of regional laws. The latter nevertheless take differing approaches to the issue, which results in a mixed picture of the level of prevention, protection and prosecution of the different forms of this violence across the country. In some regions the comprehensive approach to prevention, protection and prosecution set out in Organic Law 1/2004 is applied to a wider range of forms of this violence, while in others it is limited to intimate partner violence. This may also create real legal uncertainty about access to protection and assistance for victim/survivors of gender-based violence.<sup>175</sup>

Children who see, hear or otherwise experience the effects of the violence against their mothers are legally recognized as victims of gender-based violence in their own right.<sup>176</sup> Organic Law 1/2004 was further modified in 2021 to expand the meaning of gender-based violence to include the violence perpetrated against underaged relatives of the victims for the purpose of causing harm to the woman (vicarious violence [violencia vicarial]).<sup>177</sup> The protection of minors in these circumstances has also been strengthened by Organic Law 8/2021 on the comprehensive protection of children and adolescents from violence,<sup>178</sup> and through the jurisprudence of the Supreme Court which has interpreted the aggravating circumstance of perpetrating gender-based violence in the presence of minors to also include cases where minors are not directly/physically present but are able to notice or perceive the situation of violence.<sup>179</sup>

## The Family Law Framework

Parental responsibility ('patria potestad')<sup>180</sup> in Spain is legally vested in parents with respect to minors, and this includes all the rights and obligations of parents towards their children, including the obligation to care for, maintain, and educate them. The terms 'guarda' and 'custodia' refer to the ordinary day-to-day care and decision making in relation to children. When partnership breakdown occurs, it must be decided whether the 'guarda' and 'custodia' of the children, as part of the PR should be granted to one parent individually or exclusively, or whether it should be conferred jointly on both parents depending on the best interest of the children.<sup>181</sup>

In any event, PR will continue to be shared by both parents unless the courts decide otherwise, in accordance with the principle of parental co-responsibility.

In terms of the appointment of experts, civil procedures rules establish that the only criteria to be appointed as a judicial expert (perito) is to have an official title related to the expertise required. They also provide for academies or cultural and scientific institutions that study the relevant subject to be called as experts to produce a report<sup>182</sup> However, criminal procedure rules<sup>183</sup> provide that there are two types of experts: those with official titles and those without but who have expertise or experience in the area required. Both these types of experts are accepted for civil and criminal matters. Each January the Judicial Clerk of the relevant court asks different professional associations, or analogous entities such as academies or cultural or scientific institutions, to send a list of their members willing to act as

<sup>171</sup> These data are available at <https://www.poderjudicial.es/cgpj/es/Temas/Violencia-domestica-y-de-genero/Directorio-de-Juzgados-de-Violencia-y-Oficinas-de-ayuda/Juzgados-de-Violencia-sobre-la-mujer/Juzgados-de-Violencia-sobre-la-Mujer>

<sup>172</sup> These data are available at <https://www.poderjudicial.es/cgpj/es/Temas/Violencia-domestica-y-de-genero/Directorio-de-Juzgados-de-Violencia-y-Oficinas-de-ayuda/Juzgados-de-Violencia-sobre-la-mujer/Juzgados-de-Violencia-sobre-la-Mujer>

<sup>173</sup> <https://www.poderjudicial.es/cgpj/es/Poder-Judicial/En-Portada/Asi-funcionan-los-juzgados-de-Violencia-sobre-la-Mujer>

<sup>174</sup> These data are available at <https://www.mjusticia.gob.es/es/institucional/organismos/medicina-legal-ciencias/unidades-de-valoracion-forense-integral>

<sup>175</sup> Cabrera Mercado & Carazo Liébana, 2010

<sup>176</sup> Ley Orgánica 8/2015, de 22 de julio, de Modificación del Sistema de Protección a la Infancia y a la Adolescencia,

<sup>177</sup> Ley Orgánica 8/2021, de 4 de junio, de protección integral a la infancia y la adolescencia frente a la violencia, disposición final 10

<sup>178</sup> Ley Orgánica 8/2021, de 4 de junio, de protección integral a la infancia y la adolescencia frente a la violencia, art 29.

<sup>179</sup> STS 1378/2018; STS 2420/2023, Sala de lo Penal

[confirming the interpretation of STS1378/2018].

<sup>180</sup> Established in Article 154 of the Civil Code.

<sup>181</sup> Spanish national law of 15/2005

<sup>182</sup> Article 340 Law on Civil Procedure.

<sup>183</sup> Article 457 The Law on Criminal Procedure.

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judicial experts. However, membership of this list is decided by a raffle. For experts without official titles, the Judicial Clerk will use a list that trade unions, associations or relevant entities, with at least 5 members, provide them and to create this list the Clerk will follow the same process. Provision is also made to limit who may be appointed an expert on the basis of a conflict of interest<sup>184</sup> Parties can agree and appoint their own experts.<sup>185</sup> These experts do not, however, need to be registered in any association of judicial experts. In terms of the process of decision making in relation to custody and visitation, this is ultimately the decision of the judge, however, judges tend to follow the recommendations in the reports in the vast majority of cases.<sup>186</sup>

There are a number of ways in which judges are given the authority to suspend, limit or otherwise regulate the exercise of parental rights of parents who have been abusive towards their spouses or children. The criminal offences most relevant to intimate partner and intergenerational domestic violence<sup>187</sup> all allow judges to bar perpetrators from exercising their parental rights as part of a criminal sentence,<sup>188</sup> and the suspension or limitation of parental authority as a (pretrial) protective measure.<sup>189</sup> Under new provisions passed in 2021<sup>190</sup> judges in criminal law proceedings for a protection order may suspend, visitation and communication rights with a child where there is evidence that the child has witnessed or suffered domestic violence. In addition, Organic Act 1/2004 on Comprehensive Protection Measures on Gender-based Violence, recently amended in 2022<sup>191</sup> allows judges to suspend parental authority, guardianship or custody of alleged perpetrators of intimate partner violence<sup>192</sup> and to suspend or regulate the visiting rights of alleged perpetrators.<sup>193</sup> Moreover, civil law prohibits joint custody where a parent is subject to criminal proceedings for domestic violence<sup>194</sup> and further legislation passed in 2021<sup>195</sup> has made it a general rule that suspension of visiting rights will take place when there is an ongoing case of intimate partner violence, and it is only when the alleged perpetrator convinces the judge that there is no risk, that visiting rights will be re-established. Previously, the main rules was the adopting of visiting rights, unless there was a risk of violence against minors.

Children have the right to have their best interests assessed and considered in all actions and decisions concerning them.<sup>196</sup> Protecting children from the risk of violence or abuse by their parents is one of the principles stated in the criteria set out in Organic Law 1/1996 by which courts should be guided in the assessment of children's best interests, as well as the main objective of Organic Law 8/2021. The latter provides for further measures to ensure the safety of children, including by amending the Civil Code to reinforce judges' ability of suspending parental authority [patria

potestad], custody or visits and communication in cases of violence to avoid a risk for the minor, or harms in the minors family or third persons.

Nonetheless, data from the General Council of the Judiciary show that there has been an increase in the application of these provisions<sup>197</sup> although the overall percentages are still low given the scale and prevalence of domestic abuse.<sup>198</sup> In 2023, the total suspensions of visiting rights amounted to 12.75% of the total of civil measures adopted, the suspension of custody and/or guardianship to 7.80%, and the suspension of parental authority [patria potestad] amounted to 1.30%.<sup>199</sup> Civil courts, and at times specialist VAW courts, rarely apply available legal measures to ensure the safety of women and children by limiting or suspending custody and visitation rights in divorce/separation cases. Shared custody and extensive visiting rights are often granted to convicted perpetrators, although Spanish civil law bans shared custody in cases where a parent is subject to criminal proceedings for domestic violence. Visiting rights and arrangements are frequently ordered or maintained despite evidence of violence and abuse provided by children themselves or professionals.<sup>200</sup>

Research reveals that victim/survivors of gender-based violence come under considerable pressure in legal proceedings<sup>201</sup> to prove that they are not fabricating allegations of abuse and that the violence that they have been through is real<sup>202</sup> This is particularly the case with non-physical abuse, including psychological, emotional and economic violence.<sup>203</sup> Numerous studies have also identified how gender-based violence is minimised, downgraded to parental conflict, denied altogether or associated with alcohol and drug abuse, mental disorders or family and personal issues.<sup>204</sup> This paves the way for men to deny the violence by claims of mutual violence,<sup>205</sup> leading to some judges, prosecutors and lawyers<sup>206</sup> to promote mediation as a form of dispute resolution, although it is expressly prohibited in cases of intimate partner violence by Organic Law 1/2004<sup>207</sup> Stereotypes associated with gender-based violence also persist in courts and professionals, who tend to see only recent, severe physical violence as sufficient evidence.<sup>208</sup> Studies have also found that father-child relationships are sometimes prioritised over the protection of children and their mothers from harm, placing them at heightened risk of further violence by the same perpetrator.<sup>209</sup> There is also significant evidence that contact at child contact centre's is often unsafe and used by fathers for the perpetration of continued violence.<sup>210</sup>

<sup>184</sup> Article 343 of LEC

<sup>185</sup> Article 335.1 LEC

<sup>186</sup> Gómez, F. and Soto, R., 2015. El trabajador social de la Administración de Justicia española en los procesos de rupturas matrimoniales. *Estudios Socio-Jurídicos*, 17(2), 197-232.

<sup>187</sup> Articles 171, 172 and 173 of the Criminal Code.

<sup>188</sup> As does Article 55 of the Criminal Code for perpetrators ordered to serve a custodial sentence of 10 years or more – irrespective of the

nature of the offence.

<sup>189</sup> Article 544 of the Criminal Procedural Code

<sup>190</sup> Law 8/2021 amended article 544 ter.7 of the Law on Criminal Procedure (Ley Enjuiciamiento Criminal) Yet, upon petition of the party, and taking into account the best interest of the minor and the evaluation of the father-child relation, these rights may be granted. It is important to note that the suspension of these rights does not require that the minor has directly witnessed violence, but has perceived it in any way, such

as by noticing or perceiving a situation of conflict through other senses such as hearing or other senses (case of the Supreme Court (STS) 188/2018, 18th of April; STS 452/2019, of 8th October).

<sup>191</sup> The adoption on September 2022 of Organic Law 10/2022 on the Comprehensive Guarantee of Sexual Freedom, amended Article 66 Organic Law 1/2004 on the Comprehensive Protection Measures against Gender-based Violence to also strengthened the protection of children of



## A. Parental Alienation

In Spain the use of parental alienation is explicitly prohibited by national legislation;<sup>211</sup> whilst some autonomic legislation on gender based violence explicitly include the concept of parental alienation as a manifestation of institutional violence against women.<sup>212</sup> Guidance has also been issued by the General Council of the Judiciary<sup>213</sup> against its usage. However, these efforts do not seem to have brought about change.

Research reveals a widespread perception among courts and professionals that mothers opposing contact are alienating and accordingly raise false allegations of gender-based violence.<sup>214</sup> There is also evidence of here courts withdrawing custody or visiting rights from women victims of intimate partner violence who do not comply with visitation orders because of their fears<sup>215</sup> resulting in this being raised formally with the Spanish Government by the UN Rapporteur on Violence against Women.<sup>216</sup> Moreover,

even if no reference is made to PAS, the ideology which forms the basis of this theory continues to permeate professional practice. Advocates of PAS have been able to avoid criticism of this alleged syndrome by downplaying its seriousness, giving it new names such as condicionamiento, instrumentalización, interferencia, manipulación or preocupación mórbida and expressing ideas and theories of PAS in other forms including parenting coordination and family meeting points.<sup>217</sup> Some of this terminology can also be found in the jurisprudence; descriptions of the mothers as celosas, vengativas, mentidoras, sobreprotectoras, manipuladoras, con motivaciones espurias.<sup>218</sup> PAS is also included in psychological reports, expert reports or other reports which are then considered as proven facts by the courts.<sup>219</sup> A recent report on parental alienation<sup>220</sup> found that the concept, or euphemisms of it, were mostly used after there has been a report of gender-based violence or of sexual violence committed against the minors.

women victims of intimate partner violence, by providing that judges shall order the suspension of visiting stay, relation or communications rights, unless if taken into account the best interest of the child these need to be established.

<sup>192</sup> Article 65.

<sup>193</sup> Article 66.

<sup>194</sup> Article 92, paragraph 7, of the Spanish Civil Code.

<sup>195</sup> In June 2021, Organic Law 8/2021 on the Comprehensive Protection of minors and Adolescents from violence (Ley Orgánica 8/2021, de 4 de junio, de protección integral a la infancia y la adolescencia frente a la violencia) was approved. This law amended article 158 of the Civil Code to allow judges to suspend, as a precautionary measure, the custody, visiting and communications rights to remove the minor from any danger or avoid prejudices from their family or third persons. <https://elderecho.com/suspension-regimen-visitas-casos-violencia-excepciones>

<sup>196</sup> Article 2 of Organic Law 1/1996 on the Legal Protection of Minors, the Partial Amendment to the Civil Code and the Civil Procedure Rules (Organic Law 1/1996), as amended by Organic Law 8/2015.

<sup>197</sup> This is a consequence of the adoption of Organic Law 8/2021 on the Comprehensive Protection of Minors and Adolescents from Violence, particularly due to the amendment to the Law on Criminal Procedure. <https://www.poderjudicial.es/cgpj/es/Poder-Judicial/En-Portada/Las-victimas-de-la-violencia-machista-aumentaron-un-10-89-por-ciento-en-el-segundo-trimestre-del-año-y-las-denuncias--45-743-en-total--un-12-33-por-ciento>

<sup>198</sup> GREVIO's (baseline) evaluation report on legislative and other measures giving effect to the provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention): Spain, paragraph 198.

<sup>199</sup> <https://www.poderjudicial.es/cgpj/es/Temas/Estadistica-Judicial/Estudios-e-Infornes/Violencia-sobre-la-Mujer/>

<sup>200</sup> GREVIO's report, n198, paragraphs 199 and 200.

<sup>201</sup> Casas Vila, G. (2017). D'une loi d'avant-garde contre la violence de genre à l'expérience pénale des femmes: Le paradoxe espagnol? [From a pioneering law against gender violence to women's experiences of the criminal justice system: The Spanish paradox?]. *Champ Pénal/*

Penal Field, 14; Sección española de Amnistía Internacional. (2012). ¿Qué justicia especializada? A siete años de la Ley Integral contra la Violencia de Género: Obstáculos al acceso y obtención de justicia y protección [What specialist justice? Seven years on from the comprehensive law against gender-based violence: Obstacles to accessing and getting justice and protection]. *Amnistía Internacional España*.

<sup>202</sup> Casas Vila, *ibid*.

<sup>203</sup> Bodelón González, E. (2014). Violencia institucional y violencia de género [Institutional violence and gender violence]. *Anales de la Cátedra Francisco Suárez*, 48, 131–155.

<sup>204</sup> Albertín Carbó, P., Cubells Serra, J., Peñaranda Cólera, M. C., & Martínez Martínez, L. M. (2020). A feminist law meets an androcentric criminal justice system: Gender-based violence in Spain. *Feminist Criminology*, 15(1), 70–96; Bodelón González, n203; Casas Vila, n201; Heim, D. (2014). Acceso a la justicia y violencia de género [Access to justice and gender violence]. *Anales de la Cátedra Francisco Suárez*, 48, 107–129; Reyes Cano, P. (2018). La vulneración de los derechos fundamentales de los menores en un contexto de violencia de género: Una realidad a considerar en las políticas públicas [The infringement of fundamental children's rights within a context of gender based violence: A reality to keep in mind within public policies]. *Revista Vasca de Administración Pública*, 112, 245–289; Schmal Cruzat, N., & Camps Costa, P. (2008). Repensando la relación entre la ley y la violencia hacia las mujeres. Una aproximación a los discursos de los/las agentes del ámbito judicial en relación a la ley integral de violencia de género en España [Rethinking the relationship between law and violence against women. An approach to the juridical agents' discourses in relation to the integral law of gender-based violence]. *Psicoperspectivas*, 7, 33–58.

<sup>205</sup> Albertín Carbó et al., n204 and Casas Vila, n204.

<sup>206</sup> Schmal Cruzat and Camps Costa's, n204.

<sup>207</sup> Albertín Carbó et al., n204.

<sup>208</sup> Bodelón González, n203; Calvo García & Mesa Raya, 2013; Casas Vila, n201; Schmal Cruzat & Camps Costa, n204..

<sup>209</sup> Calvo García, M., & Mesa Raya, C. (2013). Menores víctimas de violencia de género en Aragón 2010-2012 [Child victims of gender-based violence in Aragón 2010-2012]. *Instituto Aragonés de la Mujer & Laboratorio de Sociología Jurídica*, Universidad de Zaragoza; Gómez Fernández, I. (2018). Hijas e hijos víctimas de la

violencia de género [Children of victims of gender-based violence]. *Revista Aranzadi Doctrinal*; Reyes Cano, n204.

<sup>210</sup> Ayllon Alonso, E., Orjuela López, L., & Román González, Y. (2011). En la violencia de género no hay una sola víctima. Atención a los hijos e hijas de mujeres víctimas de violencia de género [There is no single victim in gender-based violence. Support for children of victims of gender-based violence]. *Save the Children* Reyes Cano, n204.

<sup>211</sup> Organic Law 8/2021 calls for the establishment of measures to avoid that theories without scientific support, such as parental alienation, could be taken into consideration by courts.

<sup>212</sup> Ley 17/2020, de 22 de diciembre, de modificación de la Ley 5/2008, del derecho de las mujeres a erradicar la violencia machista (Cataluña), Art 5, para 6; Ley 1/2022, de 3 de marzo, de segunda modificación de la Ley para la Igualdad de Mujeres y Hombres, art 50v (País Vasco)

<sup>213</sup> Consejo General del Poder Judicial, 2016. Guía práctica de la Ley Orgánica 1/2004, de 28 de diciembre, de medidas de protección integral contra la violencia de género. Madrid: Consejo General del Poder Judicial.

<sup>214</sup> Casas Vila, G. (2020). Parental alienation syndrome in Spain: Opposed by the government but accepted in the courts. *Journal of Social Welfare and Family Law*, 42(1), 45–55.; Federación de Asociaciones de Mujeres Separadas y Divorciadas, 2009; Observatorio contra la Violencia Doméstica y de Género, (2016).

<sup>215</sup> Reyes Cano P. (2018). Menores y violencia de género: nuevos paradigmas, Universidad de Granada.

<sup>216</sup> AL ESP 3/2020 and AL ESP 6/2021.

<sup>217</sup> Casas Vila, n214; Federación de Asociaciones de Mujeres Separadas y Divorciadas, 2009; Delegación del Gobierno contra la Violencia de Género, 2023)

<sup>218</sup> Delegación del Gobierno *ibid*.; Clemente, M. and Padilla-Recero, D., 2016. When courts accept what science rejects: custody issues concerning the alleged "parental alienation syndrome". *Journal of child custody*, 13 (2-3), 126–133.

<sup>219</sup> Delegación del Gobierno, n217.

<sup>220</sup> Delegación *ibid*.

### B. Family meeting points (puntos de encuentro familiar)

The purpose of these points is to ensure supervised visitation or to facilitate compliance with visitation regimes, for example by mothers who are under a protection order because of GBV. However, many concerns have been raised over the level of staffing, quality of interventions and the general ability of these meeting points to guarantee the physical and psychological safety of children (and their mothers) and to recognise and/or address signs of violence or its long-term impact on children. Not all professionals are sufficiently trained to handle visits by children to fathers who have been abusive, and to reflect any impacts in the reports they draw up. Neither is there a general obligation to inform the judicial authorities when they detect children who are exposed to parental physical and psychological abuses during a visit.<sup>221</sup> In addition these services are frequently contracted out to entities that do not place a gendered perspective of intimate partner violence at their centre. This has resulted in mothers having their custody rights withdrawn on the basis of reports by family meeting points because they have been considered to be uncooperative or alienating<sup>222</sup> and places them at heightened risk of secondary victimization.<sup>223</sup>

## Training

Judicial training is provided from a variety of sources.<sup>224</sup> The Judicial School provides several initial training courses with content on violence against women (VAW) to trainee judges. The Organic Law on the Judiciary, amended by Organic Law 5/2018,<sup>225</sup> also provides that all selection tests for admission and promotion within the judiciary or the state prosecutor's office shall incorporate study measures designed to combat VAW and the application of those measures within the field of judicial function, as well as study of how to interpret and apply the law with a gender perspective. Additional training is mandatory for members of the judiciary who work in courts for criminal matters specialising in intimate partner violence or in criminal or civil sections specialising therein. However, as noted by GREVIO, training on related post-traumatic stress disorder and its effect on testifying in court is not routinely offered to judges. In terms of continuing professional development, online courses on intimate partner violence are offered to judges and completion of the online course on VAW and domestic violence developed by the Council of Europe HELP Programme is now mandatory for all incoming judges. In addition, Organic Law 5/2018 makes the successful participation in specific training on gender bias and stereotypes and VAW a condition for specialisation in this area<sup>226</sup> however, for those judges who do not wish to serve on specialist VAW courts, in-service training on VAW remains optional.<sup>227</sup>

In terms of other professionals involved in the family justice system there are scant details available. Social service provision is the responsibility of the autonomous communities and thus characterised by high levels of local autonomy. As a result, the types of VAW that social services in the different autonomous communities are mandated and equipped to respond to vary significantly.<sup>228</sup> Moreover, the function and integration of psychologists who provide reports in family decisions into the legal procedure is not regulated by the State<sup>229</sup> and little if any detail is available on the training they receive on GBV. The training provided to professionals employed at the family meeting points also falls within regional competence, however, given that the national and regional ombudspersons have recommended that they should receive systematic training on intimate partner VAW, there are clearly concerns about their level of competence.<sup>230</sup>

<sup>221</sup> GREVIO's report, n198, paragraph 203.

<sup>222</sup> Ayllon Alonso et al., n210; Casas Vila, n214.

<sup>223</sup> Picontó Novales, T. (2018). Los derechos de las víctimas de violencia de género: Las relaciones de los agresores con sus hijos [The rights of victims of gender violence: The aggressor's relationships with their children]. *Derechos y Libertades*, 39, 121–156.

<sup>224</sup> GREVIO's report, n198, paragraph 94

<sup>225</sup> Article 310.

<sup>226</sup> Article 312.

<sup>227</sup> GREVIO's report, n198, paragraph 96.

<sup>228</sup> As specified in Article 148.1.20 of the Spanish Constitution and as accepted by the respective Statutes of Autonomy see GREVIO's report, n198, paragraphs 141 and 143.

<sup>229</sup> Casas Vila, n214.

<sup>230</sup> GREVIO's report, n198, paragraph 203.

### Legal Aid

For victims of intimate partner violence, free legal aid is available under Organic Act 1/2004 on Integrated Protection Measures against Gender-based Violence. Article 20 enables their legal representation prior to the formal act of pressing charges and in all administrative procedures that ensue as a

direct or indirect result of the violence. Victims of any of the other forms of VAW may obtain legal aid under the Statute of Victims (Article 16) and under Law 1/1996 on Free Legal Assistance (Article 3), if they earn less than twice the minimum income in Spain.

### The Voice of the Child

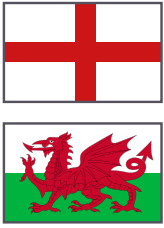
Article 9 of Organic Law 1/1996 enshrines the right of children to be heard in court proceedings which affect them. In cases of violence, including gender-based violence. Organic Law 8/2021, reinforces the right of children victims of violence, including gender-based violence, to be heard without an age limit in all judicial and administrative proceedings. This is also set out in the Civil Code, under Article 92. Courts and professionals are therefore required to consider the wishes, perceptions and feelings of the children concerned in the light of their emotional and intellectual maturity and understanding. There is no minimum age for children to participate in proceedings, but those over the age of 12 are presumed in law to be old enough to participate in court proceedings where they have an interest. A good practice guidance for courts and professionals was also recently produced by the CGPJ on questioning victim/survivors of gender-based violence, including minors.<sup>231</sup>

Despite these provisions, several studies have demonstrated that judges and legal professionals often lack experience and training in working with children, especially with child victim/survivors of gender-based violence.<sup>232</sup> This is compounded by evidence gathered by GREVIO<sup>233</sup> of the persistent assumption among judges, and some professionals within family services, that children who express fear of their father because they were witness to the abuse of their mother have been manipulated by their mothers. Children's rights to express their opinion and participate in decisions relevant to their lives are thus not being properly respected in courts.

<sup>231</sup> Observatorio contra la Violencia Doméstica y de Género. (2022).

<sup>232</sup> Besteiro de la Fuente, Y. (2011). Informe del Grupo de Trabajo de Investigación sobre la Infancia Víctima de la Violencia de Género [Report of the Research Working Group on Child Victims of Gender-based Violence]. Observatorio Estatal de Violencia sobre la Mujer; Gómez Fernández, I. (2018). Hijas e hijos víctimas de la violencia de género [Children of victims of gender-based violence]. Revista Aranzadi Doctrinal, 8.

<sup>233</sup> GREVIO's report, n198, paragraph 200.



# England & Wales

The UK consists of a devolved system of government. The Senedd Cymru (Welsh Parliament) has authority over various 'devolved' matters, including education, health, and local government but is subject to UK wide legislation in all other areas. The UK Parliament and UK Government hold 'reserved powers' across the whole of the UK which includes foreign policy and constitutional matters.

Protection against discrimination is derived from the Equality Act 2010 on the basis of protected characteristics: age, gender reassignment, being married or in a civil partnership, pregnancy or maternity leave, disability, race including colour, nationality, ethnic or national origin, religion or belief, sex and sexual orientation. The UK has also ratified CEDAW, the CRC and the Istanbul Convention. The ECHR has been directly incorporated into domestic law via the Human Rights Act 1998 (HRA). Under Section 6 of the HRA, public authorities (such as courts and tribunals) must not act in a manner which is incompatible with the Act. Further, under Section 3 of the HRA, courts are required to interpret all legislation 'so far as is possible to do so' in a manner which is compatible with Convention rights, even when an action is a private one between two individuals. As a result, judges must give effect to the Children Act 1989 and the Children and Families Act 2014 — two key pieces of legislation governing family law — in a way that is compatible with the rights contained in the HRA.

## Prevalence of Domestic Violence

According to a recent statement from National Policing,<sup>234</sup> Violence Against Women and Girls (VAWG) has reached epidemic levels in England and Wales, in terms of its scale, complexity and impact on victims; 400,213 domestic abuse-related offences were police recorded between April 22 - March 23. This equates to 37% of all VAWG offences.<sup>235</sup> In the 12 months up to March 2023, 1 in every 6 homicides were domestic abuse related.<sup>236</sup> Across a three-year dataset

between 2020 and 2023, the Domestic Homicide Project<sup>237</sup> found a total of 242 domestic abuse related deaths including: 93 suspected victim suicide following domestic abuse; 80 intimate partner homicides and 11 child deaths. In 41% of the reviews there were dependent children (aged under 18) living in the household at the time of the homicide.

## The Legal Response to Domestic Abuse

Domestic abuse (DA) is dealt with in the criminal law by the offence of 'coercive control'<sup>238</sup> and a number of existing offences against the person.<sup>239</sup> Coercive control specifically addresses the continuous and repeated patterns of violence that tend to define the experiences of victims.<sup>240</sup> Most recently, the Domestic Abuse Act 2021 has placed the definition of DA on a statutory footing and broadened the understanding of domestic abuse to include non-physical forms of abuse, such as coercive control, emotional abuse, and economic abuse.<sup>241</sup> In addition, children are deemed to be victims of DA if they see, hear, or experience the effects of abuse and they are related to the victim or offender.<sup>242</sup> The act also introduced measures to protect victims, such as prohibiting cross-examination of victims by their abusers in family courts and establishing Domestic Abuse Protection Orders (DAPOs), which provide victims with tailored protection from their abusers and established the office of the Domestic Abuse Commissioner, responsible for driving improvements in the response to domestic abuse and monitoring the implementation of the act.

Civil remedies for protection are contained in the Family Law Act 1996, whereas further civil and criminal remedies can be found in the Protection from Harassment Act 1997, the Sexual Offences Act 2003 and the Forced Marriage (Civil Protection) Act 2007.

<sup>234</sup> Violence Against Women and Girls (VAWG) National Policing Statement 2024 1 July 2024 Call to action as VAWG epidemic deepens (npcc.police.uk)

<sup>235</sup> STRA forthcoming end of 2024 - Bespoke data collection across all forces of police recorded crime in 2023/24 to inform an assessment on the threat of Violence Against Women and Girls Home Office.

<sup>236</sup> Office for National Statistics. (2023). Homicide in England and Wales: year ending March 2023.

<sup>237</sup> Domestic Homicide Project - VKPP Work

<sup>238</sup> Section 76 and 77 (1) of the Serious Crime Act 2015.

<sup>239</sup> Offences against the Persons Act 1861.

<sup>240</sup> Stark, E., 2007. Coercive control—men's entrapment of women in everyday life. Oxford: Oxford University Press.

<sup>241</sup> Section 1(3) of the DA Act 2021.

<sup>242</sup> Section 3 of the DA Act 2021.

<sup>243</sup> Section 4 of the Children Act 1989

<sup>244</sup> Section 1 of the Children Act 1989

<sup>245</sup> Section 18 of the Victims and Prisoners Act 2024.

<sup>246</sup> This is referred to as 'the welfare principle' and is contained in section 1(1) of the CA.

<sup>247</sup> Family Proceeding Rules 3.8.

<sup>248</sup> Cafcass' functions and powers are set out in the Criminal Justice and Court Services Act 2000.

<sup>249</sup> See the Children Act 2004, Part 4 and para 13 of Schedule 3 to that Act

<sup>250</sup> A Section 7 report.

<sup>251</sup> Re C [2023] EWHC 345 (Fam).

<sup>252</sup> See, for example, Cafcass & Women's Aid, Allegations of domestic abuse in child contact cases (2017) at <https://www.cafcass.gov.uk/2017/07/25/cafcass-womens-aid-collaborate-domestic-abuseresearch/?highlight=womens%20aid>;

<sup>253</sup> See H. Saunders, Twenty-nine Child Homicides: Lessons still to be learnt on domestic violence and child protection (Bristol: Women's Aid



# The Family Law Framework

Parental responsibility (PR) is distinct from legal parentage and is defined by the Children Act 1989 (CA 1989) as “all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and [their] property.”<sup>243</sup> It is possible for someone to have PR for a child without being their legal parent, and for a legal parent to not have PR. Where there is a dispute between those who have parental responsibility, the court can be asked to decide the issue. When a court makes any decision about a child’s upbringing its “paramount consideration” is the child’s welfare.<sup>244</sup> The extent to which a person can exercise their PR generally diminishes as a child gets older and ceases when a child reaches 18 years of age. PR may be acquired in a number of ways; a child’s birth mother automatically acquires PR from birth. This is also the case for fathers and second female partners if they are married or in a civil partnership with the child’s mother. Unmarried partners do not automatically have PR but they can acquire it in several ways, including by being registered on the child’s birth certificate. It is also possible for non-parents to acquire PR. Where a child’s father or other parent acquired PR through other means than marriage or civil partnership it can be brought to an end by a court order. The court can also restrict a person’s PR by making an order that in some way limits their rights in relation to the child without terminating their parental responsibility completely.

The suspension of a parent’s PR can also now occur where they are convicted of the murder or manslaughter of their child’s other parent.<sup>245</sup>

The key domestic legislation is the CA 1989 which applies in both England and Wales in addition to the Family Procedure Rules 2010, supplemented by Practice Directions to the court on matters of procedure. The child’s welfare must be the court’s paramount consideration in any decision that a court makes about their upbringing.<sup>246</sup> When assessing the child’s welfare for the purposes of making, varying, or discharging an order under section 8 of the Children Act, the court must have regard to all the circumstances of the case and in particular to the non-exhaustive list of factors in section 1(3) of the Children Act, known as the welfare checklist.

There is no automatic right to contact between a child and parent. However, section 1(2A) of the CA 1989 requires the court to presume that the involvement of each parent in their child’s life will further the child’s welfare, unless there is evidence to suggest that the involvement of that parent in the child’s life would put the child at risk of suffering harm.

The court also has the power under section 91(14) of the

Children Act to make an order to prevent an individual from making further applications without first seeking the permission of the court, where it finds that it is necessary to do so. Section 10 of the Children and Families Act 2014 requires that before making a “relevant family application” a person must attend a family Mediation Information and Assessment Meeting (MIAM) to consider the suitability of mediation or other ways of resolving their dispute. Evidence of domestic abuse is, however, an exception.<sup>247</sup>

The Children and Family Court Advisory and Support Service (Cafcass) is a statutory body.<sup>248</sup> Its functions in respect of Wales are discharged by Cafcass Cymru<sup>249</sup> and include giving advice to the court<sup>250</sup> about any application made and communicating the wishes and feelings of the child during proceedings. After an application for a child arrangements order is made, Cafcass or Cafcass Cymru conduct safeguarding checks or enquiries to identify any risks to the child that the court should be aware of. In addition, permission can be sought by either party to the proceedings to introduce expert evidence, the instruction of whom should be on a case-by-case basis. The court must, however, carefully examine the qualifications and expertise of any psychologist who is not registered with a professional body.<sup>251</sup>

## A. Issues Raised in the Literature

Research has demonstrated that a large proportion (at least 50 per cent) of child contact cases in England and Wales take place within a context of allegations of domestic abuse.<sup>252</sup> There is also substantial evidence of the significant risks to victims and their children associated with post separation contact, including an alarming number of homicides.<sup>253</sup> Unfortunately, the legal response to this issue has largely been inadequate; and has recently been termed ‘a cycle of failure.’<sup>254</sup> A large volume of research<sup>255</sup> has demonstrated a worrying focus on maintaining contact with the non-resident parent at the expense of the minimisation of domestic violence and the safety of victims within the family courts. Even in cases of proven domestic violence, applications for direct contact are very rarely refused; the most common final outcomes continue to be for direct, unsupervised contact.<sup>256</sup> This is largely due to a ‘contact at all costs’ culture where the welfare principle has been interpreted to mean a strong presumption towards contact with both parents and a perception that contact should not be given up on unless there are particularly compelling reasons.<sup>257</sup> There is also evidence of a poor understanding of domestic abuse and

Federation of England, 2004); Women’s Aid, Nineteen Children Homicides: What must change so children are put first in child contact arrangements and the family courts (Bristol: Women’s Aid, 2016) and Women’s Aid, Child First: a call to action one year on (Bristol: Women’s Aid, 2017)

<sup>254</sup> See A. Barnett, F. Kaganas and R. Hunter, ‘Introduction, Contact and Domestic Abuse’ (2018)

40 Special Issue of the Journal of Social Welfare and Family Law 401.

<sup>255</sup> For a comprehensive overview see the Literature Review prepared for the Ministry of Justice Harm Panel Report in 2020 Domestic abuse and private law children cases (publishing.service.gov.uk)

<sup>256</sup> Ibid.

<sup>257</sup> Elizabeth Dalgarno, Sonja Ayeb-Karlsson, Donna Bramwell, Adrienne Barnett, Arpana Verma, Health-related experiences of family court and domestic abuse in England: A looming public health crisis, Journal of Family Trauma, Child Custody & Child Development, 10.1080/26904586.2024.2307609, 21, 3, (277-305), (2024).

## PART 03 The Research Locations and Research Context

coercive control amongst the judiciary and legal professionals.<sup>258</sup> This cultural shift towards contact at all costs is without doubt due in some part to the success of the father's rights movement in the UK<sup>259</sup> which claims that fathers are disadvantaged by a family law system that favours mothers in child contact disputes and that, either in not awarding fathers sufficient contact or in failing to enforce contact orders, courts fail to operate in the best interests of the child and therefore contribute to societal breakdown. What is particularly striking is the successful employment of human rights/rights narratives in doing so; mothers, however have been unable to harness human rights discourse to the same effect.<sup>260</sup> This has occurred despite the publication of 'good practice' guidelines for the judiciary<sup>261</sup> and specific practice directions (PD12J)<sup>262</sup> which included the requirement to hold a fact-finding hearing on disputed allegations of domestic violence to ensure an adequate risk assessment for the safety of the child and resident parent before, during and after contact. As a result, the Ministry of Justice established an expert panel review into how the family courts deal with the risk of harm to children and parents in private law children cases involving domestic abuse and other serious offences in 2020.<sup>263</sup> However, the resulting recommendations are yet to be fully implemented,<sup>264</sup> although some progress has been made e.g. the piloting of 'pathfinder courts'<sup>265</sup> and the establishment of the Family Court Monitoring and Reporting Mechanism Pilot.<sup>266</sup> More recently, the Domestic Abuse Commissioner issued a report in 2023<sup>267</sup> which called for urgent and wide-reaching reform to ensure children's safety in the Family Court and identified the following major issues for survivors of domestic abuse going through private family law children proceedings: a lack of holistic support; a culture of disbelief; the minimisation of domestic abuse; the absence of the voice of the child; and the harmful effects current practice has on children.

### B. Parental Alienation

Although the courts initially declined to recognise 'parental alienation syndrome',<sup>268</sup> it was subsequently reframed as 'parental alienation' by its proponents, and began to feature in England and Wales case law,<sup>269</sup> despite the lack of scientific and evidential basis of its existence.<sup>270</sup> This is largely due to the proliferation of the instruction of parental alienation 'experts' instructed in cases who refer to discredited theories and recommend transfers of residence from mothers to fathers, as well as therapy for 'alienated' children and 'alienating' parents.<sup>271</sup> It is unsurprising therefore that fears of false allegations of parental alienation being raised have made it more difficult for victims of domestic abuse to disclose their experiences to the courts,<sup>272</sup> exacerbated by specific legal advice not to do so.<sup>273</sup>

The use of experts in the Family Court is governed by Practice Direction 25B and there is currently no requirement for an expert to be regulated by an external regulatory or supervisory body; rather, a case-by-case approach is taken. Concerns have been raised about this procedure in relation to the qualifications and quality of expertise and particularly around the use of experts in parental alienation.<sup>274</sup> One study<sup>275</sup> analysing 126 expert psychological reports from family law proceedings found that the quality of the reports was extremely variable with two thirds rated 'poor' or 'very poor.' There was also evidence of unqualified experts being instructed to provide 'expert' psychological opinion.

In addition, the use of the concept is nonetheless widespread amongst professionals working in the family justice system; a cursory google search results in numerous examples of chambers, law firms and psychologists providing advice on how to diagnose parental alienation which provides continued legitimacy to its operation.

Although Cafcass no longer uses the term 'parental alienation' the term 'alienating behaviours' is utilised.<sup>276</sup> They do,

<sup>258</sup> Birchall, J. and Choudhry, S. (2018) "What about my right not to be abused?" Domestic abuse, human rights and the family courts, Bristol: Women's Aid; Choudhry, S. (2019), When Women's Rights are Not Human Rights – the Non-Performativity of the Human Rights of Victims of Domestic Abuse within English Family Law. *The Modern Law Review*, 82: 1072-1106; Ministry of Justice (June 2020), *Assessing Risk of Harm to Children and Parents in Private Law Children Cases: Assessing Risk of Harm to Children and Parents in Private Law Children Cases* (publishing.service.gov.uk) and the Domestic Abuse Commissioner's Report, *The Family Court and domestic abuse: achieving cultural change* July 2023 DAC\_Family-Court-Report\_2023\_Digital.pdf (domesticabusecommissioner.uk)

<sup>259</sup> Choudhry, S. (2019), n258.

<sup>260</sup> Ibid.

<sup>261</sup> Lord Chancellor's Advisory Board on Family Law, Children Act Sub-Committee, *Guidelines for good practice on parental contact in cases where there is domestic violence*, (London: TSO, 2001). Re L, V, M, H (Contact: Domestic Violence) [2000] 4 All ER 609; Re H-N and Others (Children) (Domestic Abuse: Finding of fact hearings) [2021]

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<sup>262</sup> Practice Direction 12J (PD12J) 2008; PD12J was revised in 2010, in April 2014 to include inserting a new, broader definition of 'domestic violence' focusing on coercive control,

<sup>263</sup> Ministry of Justice (June 2020), *Assessing Risk of Harm to Children and Parents in Private Law Children Cases: Assessing Risk of Harm to Children and Parents in Private Law Children Cases* (publishing.service.gov.uk)

<sup>264</sup> Ministry of Justice (May 2023), *Assessing Risk of Harm to Children and Parents in Private Law Children Cases - Implementation Plan: delivery update*. See also Women's Aid publication - *Two-Years-Too-Long-2022-Accessible-Version.docx* (live.com)

<sup>265</sup> Welsh government (3 March 2022), *North Wales Family Court pilots new approach for supporting separated families who come to court* | GOV.WALES Ministry of Justice (8 March 2022), *Pioneering approach in family courts to support domestic abuse victims better* - GOV.UK (www.gov.uk).

<sup>266</sup> Domestic Abuse Commissioner, (2021) *Improving the family court response to domestic*

*abuse Proposal for a mechanism to monitor and report on domestic abuse in private law children proceedings* *Improving-the-Family-Court-Response-to-Domestic-Abuse-final.pdf* (domesticabusecommissioner.uk)

<sup>267</sup> Domestic Abuse Commissioner, 2023 *The Family Court and domestic abuse: achieving cultural change*

<sup>268</sup> Butler-Sloss LJ noting in Re, L, V, M and H (children) 2000, that the term was not recognised in either the American or international classifications of disorders, nor generally recognised in psychiatric or allied child mental health specialities - Mercer, Drew (2021), *Challenging Parental Alienation: New Directions for Professionals and Parents* (Routledge, London; New York)

<sup>269</sup> Adrienne Barnett (2020), *A genealogy of hostility: parental alienation in England and Wales*, *Journal of Social Welfare and Family Law*, 42:1, 18- 29.

<sup>270</sup> Custody, violence against women and violence against children - Report of the Special Rapporteur on violence against women and girls, its causes and consequences, n84.

however, note that 'FCA's (family court advisors) are mindful that an allegation of alienating behaviour can be used as a counter-allegation to an allegation of domestic abuse.' A research review commissioned by Cafcass Cymru noted that 'there is no commonly accepted definition of parental alienation and insufficient scientific substantiation regarding the identification, treatment and long-term effects...'<sup>277</sup>

The Family Justice Council is currently carrying out a review into the use of expert witnesses in the Family Court full guidance due to be published in 2023<sup>278</sup> and has published interim guidance highlighting issues of conflicts of interest in expert assessments where allegations of alienating behaviours had been made. This is in addition to further guidance from the President of the Family Division<sup>279</sup> and the FJC/BPS<sup>280</sup> which both underline the importance of robust psychological approaches to inform therapeutic recommendations in the opinion given.

## Training

The Lord Chief Justice, the Senior President of the Tribunals, and the Chief Coroner have statutory responsibility for judicial training,<sup>281</sup> Judicial training in domestic abuse, is included in family law and criminal courses run by the Judicial College. All judges must complete their induction training before they can hear such cases. In addition, digital training has been made available on domestic abuse for all family judges<sup>282</sup> which addresses recent caselaw, the Harm Report and the Domestic Abuse Act, including compulsory one day training on domestic abuse for judges.<sup>283</sup>

Following the publication of the Ministry of Justice's Expert Panel on Harm in the Family Courts, Cafcass England have introduced a mandatory Domestic Abuse and Learning Development Programme<sup>284</sup> and following completion of this, each officer will now have a Domestic Abuse Personal

Learning Plan in place aimed at improving practice. In addition, input will be provided from a specialist NGO SAFELIVES, for 12 months to improve the response to domestic abuse. Cafcass Cymru has developed specific guidance for officers on domestic abuse<sup>285</sup> and arranged for 'Safe & Together Institute'<sup>286</sup> to provide organisation wide introductory training to all Cafcass Cymru social workers and has a representative from Welsh Women's Aid on secondment with them for two years.

## Legal Aid

The Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPO) removed most private family law issues from publicly funded legal advice. Legal Aid is thus only available for private family law cases for those who can provide the necessary evidence that they have experienced or are at risk of experiencing domestic violence.<sup>287</sup> As with all applications for legal aid, the applicant must satisfy the means and merits tests. If a party is not eligible for legal aid and does not obtain their own legal representation, they may represent themselves during the proceedings, and are referred to as a 'litigant in person.' Where the child is made a party to the proceedings (in which case the child's representation will be publicly funded but not that of the other parties unless they are eligible in their own right).

However, much of the available research reports that the evidence requirements have impaired access to legal aid, to varying degrees, for victims of domestic violence in private family proceedings.<sup>288</sup> As a result, not all domestic abuse victims are able to obtain legal aid for family law proceedings<sup>289</sup> and will either have to defend themselves as litigants in person or, if they are not confident enough to do so, feel obliged to allow contact at the risk of their own safety and that of their children.

<sup>271</sup> Barnett 2020, n269.

<sup>272</sup> Ministry of Justice (June 2020), n263.

<sup>273</sup> Birchall, J. and Choudhry, S. (2018) and Choudhry, S. (2019), n258.

<sup>274</sup> Association of Clinical Psychologists (December 2021), The Protection of the Public in the Family Courts, The Protection of the Public in the Family Courts (acpuk.org.uk); President of the Family Division (2021), President's Memorandum: Experts in the Family Court, Letterhead Template (judiciary.uk); Family Justice Council (2022) Interim Guidance in relation to expert witnesses in cases where there are allegations of alienating behaviours – conflicts of interest, Experts in the Family Court and Re C [2023] EWHC 345 (Fam).

<sup>275</sup> Ireland, J. L. (2012). Evaluating expert witness psychological reports: Exploring quality. University of Central Lancashire

<sup>276</sup> 'Alienating behaviours' | Cafcass

<sup>277</sup> Review of research and case law on parental alienation, Commissioned by Cafcass Cymru (2018) review-of-research-and-case-law-on-parental-alienation.pdf (gov.wales)

<sup>278</sup> Family Justice Council (2022) Interim Guidance in relation to expert witnesses in cases where

there are allegations of alienating behaviours – conflicts of interest, Experts in the Family Court.

<sup>279</sup> The President of the Family Division's Memorandum on the use of experts in the family court (October 2021) Letterhead Template (judiciary.uk)

<sup>280</sup> Psychologists as expert witnesses in the Family Courts in England and Wales: Standards, competencies and expectations (judiciary.uk)

<sup>281</sup> Under the Constitutional Reform Act 2005, Courts and Enforcement Act 2007, and Coroners and Justice Act 2009 respectively.

<sup>282</sup> Written questions and answers - Written questions, answers and statements - UK Parliament and Sir Andrew McFarlane (October 2021), Supporting Families in Conflict: There is a better way. Supporting Families in Conflict Jersey (judiciary.uk)

<sup>283</sup> Ministry of Justice (May 2023), Assessing Risk of Harm to Children and Parents in Private Law Children Cases - Implementation Plan: delivery update.

<sup>284</sup> Domestic Abuse Practice Improvement Programme | Cafcass

<sup>285</sup> Guidance for Cafcass Cymru practitioners

about children experiencing domestic abuse | GOV.WALES

<sup>286</sup> This has been endorsed by the Domestic Abuse Commissioner's Office and the CEO of Welsh Women's Aid.

<sup>287</sup> See Regulation 33 of LASPO, which lists the types of evidence that the Legal Aid Agency will accept to grant legal aid in these circumstances.

<sup>288</sup> See F. Syposz, 'Research Investigating the Domestic Violence Evidential Requirements for Legal Aid in Private Family Disputes' Ministry of Justice, 2017 at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/719408/domesticviolence-legal-aid-research-report.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/719408/domesticviolence-legal-aid-research-report.pdf).

<sup>289</sup> See the survey conducted by Rights of Women, 'Evidencing Domestic Violence, Nearly 3 years On' December 2015 and the three earlier surveys on the same issue conducted in 2012, 2013 and 2014 at <http://rightsofwomen.org.uk/policy-and-research/research-and-reports/>

# The Voice of the Child

Section 1<sup>290</sup> of the CA 1989 places an obligation on the court to have regard to the 'ascertainable wishes and feelings of the child concerned (considered in light of his age or understanding).' The Family Procedure Rules,<sup>291</sup> set out the ways in which a child's view may be communicated to the judge. First, by way of a Cafcass officer providing a report.<sup>292</sup> Second, by the child to writing a letter to the court. Third, in limited circumstances the child can be made party to the proceedings. Here a Guardian is appointed to represent the best interests of the child and they will in turn instruct a solicitor for the child to convey the child's wishes to the judge. [59] Finally, by the judge meeting with the child, in accordance with approved Guidance<sup>293</sup> to ensure that the child fully understands the process and feels they are participating in it.

However, these methods are only available once proceedings have begun. The Family Procedure Rules directly prevents Cafcass or Cafcass Cymru from meeting with children before the first hearing. As a result, if settlement is reached at first hearing there is no mechanism available for children to have their wishes and feelings directly heard.<sup>294</sup> In addition, recent research<sup>295</sup> conducted using Cafcass data from England and Wales shows that even where proceedings have commenced, child participation is at a worrying low level; in almost half of the private law cases studied, there was no indication that the children concerned participated in their case. In England, two-fifths of children aged ten to 13 and a greater proportion of older teenagers had not formally participated in the court proceedings; a similar pattern was seen in Wales.

<sup>290</sup> Practice Direction 12B.

<sup>291</sup> In England, the court may order Cafcass to prepare a section 7 report (or addendum). In Wales this is called a Child Impact Analysis report. These investigate and report on matters relating to the welfare of the child, which would include a family court adviser (FCA) meeting with the child, where appropriate, according to their age, maturity and preference.

<sup>292</sup> Practice Direction 16A

<sup>293</sup> Family Justice Council Resources and Guidance - Courts and Tribunals Judiciary

<sup>294</sup> See the report by the Family Justice Data Partnership, 2024 Uncovering private family law: How often do we hear the voice of the child? (russell-cooke.co.uk)

<sup>295</sup> See the report by the Family Justice Data Partnership, 2024 Uncovering private family law: How often do we hear the voice of the child? (russell-cooke.co.uk)

The study used Cafcass and Cafcass Cymru, anonymised, population-level administrative

data on all children involved in a private family law children case that included a section 8 application and started between 1 January and 31 December 2019 – 62,732 children in England and 4,293 children in Wales.

# PART 04

## -Understandings of Domestic Abuse

'.. the training isn't there. But training is all about listening, it's about humility and looking for evidence.... I did my training on my own... In reality, it's on the job. And my real training was Emma, one of my clients. I drew an experience from them... And then, one day, I had a kind of revelation and I'm not saying that I understood everything, but it made me understand a number of things, namely ambivalence' (FRIL2).



## PART 04 Understandings of Domestic Abuse

Domestic abuse is neither a uniform phenomenon nor a static condition, but varies in form, frequency and severity,<sup>296</sup> and can manifest as physical, psychological, emotional, economic and coercive and controlling abuse.<sup>297</sup> Coercive control has been recognised as particularly useful to recognise the impact of domestic abuse as it combines four broad strategies, which may be used individually or at the same time: physical violence, intimidation, isolation and control, that in combination form 'a sustained pattern of behaviours'.<sup>298</sup> It is important to recognise that these tactics are, however, developed for the particular survivor; coercive control is not a one-size-fits-all model for understanding domestic abuse. This has, in turn, made the concept of coercive control difficult to translate into legal and policy responses which has led to an over reliance on expert testimony from psychologists and psychiatrists often employing a trauma based perspective.<sup>299</sup> This risks coercive control being heard in the legal process in reductionist and deterministic ways to flatten and (re)define their nuanced anticipatory responses to violence<sup>300</sup> as simply trauma. What is needed instead, it is argued, is a recognition that survivors are responding to and resisting violence, not trauma.<sup>301</sup>

Domestic abuse can start, continue and increase in severity on and after separation. Coercive and controlling behaviour by the perpetrator during the relationship is the main predictive factor for post-separation domestic abuse.<sup>302</sup> In addition, the dynamics of domestic abuse change over the course of a relationship and separation may lead to new ways to perpetuate abuse. More recently, the phenomena of perpetrators engaging in 'legal systems abuse'<sup>303</sup> to 'hunt, battle, and play' with their victims through law has also been

raised in the literature<sup>305</sup> and particularly within the context of child custody proceedings, where gendered assumptions around mothering, fathering, and domestic abuse provide fertile ground for abusive and controlling behaviours to flourish.<sup>306</sup> Tactics include deliberately prolonging the court process in order to intimidate and wear down the victim-survivor into agreeing to orders which are not necessarily in their best interests or that of their children.<sup>307</sup> Domestic abuse has been characterised in three main ways: coercive controlling violence, violent resistance, and situational couple violence.<sup>308</sup> The differences among the types, it has been argued, are defined by the interpersonal dynamics that produce the violence rather than the nature of the violence. Coercive controlling violence and violent resistance are produced and shaped by the dynamics of power and control, whereas situational couple violence is rooted in the dynamics of conflict management.<sup>309</sup>

As a result, the context of abuse cannot be determined by looking at violent incidents in isolation. Rather, the context of abuse can only be determined by a careful analysis of the nature of the relationship in which the violence is enacted and/or embedded.<sup>310</sup> Consequently, it is not enough for legal actors to simply identify domestic abuse. They must delve deeper to understand the specific nature and context of domestic abuse that is occurring in each individual case and the variations in the ways in which domestic abuse is enacted and experienced at multiple points in time within individual families and by the children whose interests the court is charged to protect.<sup>311</sup> In short, they must determine who is doing what to whom and to what effect.<sup>312</sup> Otherwise, they run the risk of misjudging the reality of what is going on and a failure to protect victim-survivors.

<sup>296</sup> Loretta Frederick, Questions About Family Court Domestic Violence Screening and Assessment, 46 Fam. Ct. Rev. 523 (2008) Joan Kelly & Michael P. Johnson, Differentiation Among Types of Intimate Partner Violence: Research Update and Implications for Interventions, 46 FAM. CT. REV. 476 (2008).tta Frederick, Questions About Family Court Domestic Violence)

<sup>297</sup> Stark, E. (2007). Coercive control: How men entrap women in personal life. Oxford University Press. Stark, E. (2013). Coercive control. In N. Lombard & L. McMillan (Eds.), Violence against women: Current theory and practice in domestic abuse, sexual violence and exploitation (pp. 17–33). Jessica Kingsley.

<sup>298</sup> Coy, M., Perks, K., Scott, E. and Tweedale, R. (2012) Picking up the pieces: domestic violence and child contact. London: Rights of Women.

<sup>299</sup> Sheehy, E. (2018). Expert evidence on coercive control in support of self-defence: The trial of Teresa Craig. Criminology & Criminal Justice, 18(1), 100–114. <https://doi.org/10.1177/1748895817733524>

<sup>300</sup> Johnstone, L., Boyle, M., with Cromby, J., Dillon, J., Harper, D., Kinderman, P., Longden, E., Pilgrim, D., & Read, J. (2018). The power threat meaning framework: Towards the identification of patterns in emotional distress, unusual experiences and troubled or troubling behavior, as an alternative to functional psychiatric diagnosis. British Psychological Society.

<sup>301</sup> DeKeseredy, W. S., Dragiewicz, M., & Schwartz,

M. (2017). Abusive endings: Separation and divorce violence against women. Oakland, CA: University of California Press. Douglas, H. (2021). Women, intimate partner violence, and the law. Oxford University Press

<sup>302</sup> For a comprehensive overview of the research on this see pages 16-21 of the MOJ Literature Review, n255.

<sup>303</sup> Martha R. Mahoney, Legal Images of Battered Women: Redefining the Issue of Separation, 90 MICH. L. REV. 1, 65 (1991).

<sup>304</sup> Tolmie, J., Smith, R., & Wilson, D. (2024). Understanding Intimate Partner Violence: Why Coercive Control Requires a Social and Systemic Entrapment Framework. Violence Against Women, 30(1), 54-74.

<sup>305</sup> Reeves, E., Fitz-Gibbon, K., Meyer, S., & Walklate, S. (2023). Incredible Women: Legal Systems Abuse, Coercive Control, and the Credibility of Victim-Survivors. Violence Against Women, 0(0).

<sup>306</sup> Elizabeth V., Gavey N., Tolmie J. (2012). "... He's just swapped his fists for the system." The governance of gender through custody law. Gender & Society, 26(2), 239–260.

<sup>307</sup> Laing L. (2017). Secondary victimization: Domestic violence survivors navigating the family law system. Violence Against Women, 23(11), 1314–1335

<sup>308</sup> Joan Kelly & Michael P. Johnson, Differentiation Among Types of Intimate Partner Violence: Research Update and Implications for Interventions, 46 FAM. CT. REV. 476 (2008)t2308)

<sup>309</sup> Ibid.

<sup>310</sup> Maryse Rinfret-Raynor et al., Violences Envers les Femmes: Réalités Complexes et Nouveaux Enjeux dans un Monde en Transformation (Presses Universitaires de l'Université du Québec 2014).

<sup>311</sup> Nancy Ver Steegh et al., Look Before You Leap: Court System Triage of Family Law Cases Involving Intimate Partner Violence, 95 MARQ. L. REV. 955, 969 (2012).

<sup>312</sup> Loretta Frederick, Questions About Family Court Domestic Violence Screening and Assessment, 46 FAM. CT. REV. 523 (2008)

## Training on Domestic Abuse

The vast majority of judges and court appointed experts that were interviewed had received training on domestic abuse in their workplace, whereas for most lawyers it depended upon whether they specialised in this area or worked in an organization that specialised in working with survivors of domestic violence. Some judges, most lawyers and some

court appointed experts who participated in this research sought training voluntarily, in some cases it was the only training they had, while in some other cases it was on top of the institutional training previously received. However, given that most the stakeholders participating in this study were usually connected to institutions that worked with survivors or had an interest in this research topic, this latter group may not be representative of the wider population of stakeholders.

## Most stakeholders have received some form of training on Domestic Abuse

Who Received Workplace Training on Domestic Abuse:

	Judges	Lawyers	Court Applied Experts
Bosnia & Herzegovina	9	8	5
England & Wales	8	2	9
France	0	1	0
Italy	6	3	1
Spain	5	3	4

Additional Training Taken Voluntarily:

	Judges	Lawyers	Court Applied Experts
Bosnia & Herzegovina	4	1	3
England & Wales	2	5	1
France	1	6	3
Italy	4	2	1
Spain	3	8	5



### The Content of the Training

In Spain, UK and Bosnia & Herzegovina the training received was felt to be focused on procedure and had had no great impact on their practice, for BIO6: 'My training was to take the entire law and regulation, my colleague, and then learn through the job and work process. I can't remember everything, but I attended two seminars related to domestic violence cases. But it could be more spectacular if I could learn something useful at work. So, in that regard, very little and weak training' (BIO6). UKIO9 talked about how Cafcass was focused on the implementation of guidelines rather than seminars or practical training on why the guidance had been issued and the underpinning values. As a result, some Cafcass officers considered this as training and some others did not.

In Bosnia & Herzegovina the local collaboration network of each court had a direct impact on judicial training. Some judges in Bosnia & Herzegovina and in England & Wales<sup>313</sup> commented on how they had received training on the dynamics of domestic abuse through collaboration with NGOs, and other agencies and organization who worked specifically with survivors of domestic violence. More detail was not generally provided in the interviews, however, a few interviewees used concepts that clearly demonstrated knowledge of the literature on domestic abuse such as 'cycle of violence' (FRIO4), abusers being 'charming' (UKIJ3, UKIO2) or the unknown number of cases that never reach the justice system when it comes to domestic violence (BIJ2, BIJ9, BIL11, BIL7).

### The Lack of Compulsory Training

The lack of compulsory training on domestic abuse was brought up by and reflected upon by professional stakeholders, particularly in Spain<sup>314</sup> and France<sup>315</sup> '..the training isn't there. But training is all about listening, it's about humility and looking for evidence.... I did my training on my own... In reality, it's on the job. And my real training was Emma, one of my clients. I drew an experience from them... And then, one day, I had a kind of revelation and I'm not saying that I understood everything, but it made me understand a number of things, namely ambivalence' (FRIL2). Moreover, when training is not mandatory, those who most need it are the least likely to attend: 'The training offered by the Council of the Judiciary, which is continuous training, is not compulsory for judges of violence, So of course, this is a problem, because in the end the judges in these courses on violence are always the same people, the same colleagues, you know those of us who are more aware, more aware' (SPIJ5).

A large range of professional stakeholders in Italy felt that there was not enough specialist training on domestic abuse.<sup>316</sup> The lack of specialisation in gender-based violence for court appointed experts was also an issue 'courses or examinations where gender-based violence is discussed do not exist in training courses, except in the last years in the university training. Within the centres we follow many trainees coming from the university, many trainees who have graduated in psychology and who have never heard about gender violence. Therefore, it is missing in the professional training' (ITIO3).

In Spain, the training of psychosocial teams varied according to geographical location and did not appear to have any national oversight. Some psychologists reported having had frequent training and updating seminars, but most of the sample did not.<sup>317</sup> In England & Wales, Cafcass England and

<sup>315</sup> BIJ2, BIJ3, BIJ4, BIJ5, BIJ8, UKIJ3, UKIJ4, UKIJ5, FRIJ1, FRIL1, FRIL4, FRIL6, FRIL8, FRIO1, FRIO2, FRIO4.

<sup>316</sup> (ITIJ2, ITIJ3, ITIJ4, ITIJ7, ITIL10, ITIL3, ITIL4, ITIL5, ITIL7, ITIO2, ITIO3).

<sup>317</sup> SPIO1, SPIO2, SPIO3, SPIO4, SPIO5, SPIO6, SPIO7.

Cafcass Wales made specific provision for training of Cafcass officers and published information about their policies and guidelines on domestic abuse.

Stakeholders who had received training were conscious of the need for this to be updated; some judges in Bosnia & Herzegovina and in England & Wales<sup>318</sup> commented that training on domestic abuse was not updated enough and that it happened 'a long time ago' (UKIJ4). There was also a general perception across the jurisdictions that the training received by lawyers, judges and psychosocial services was insufficient and not enough was known about the dynamics of domestic violence regardless of how much training they had themselves received.<sup>319</sup> This was a particular concern in Italy,<sup>320</sup> 'Unfortunately there are a lot of lawyers who carry out their work across many sectors i.e. they are not specialised and on the family they are terrible, really there is no empathy, there is no sensitivity, there is no ability to understand the right of the child, they do not understand when they have to stop..' (ITIJ4). This criticism was also directed towards the judiciary: 'The Superior Council of the Magistracy boasts of the fact that it is organising an event close to 25 November... Magistrates in Italy who deal with organised crime or the Mafia are prepared, they know the phenomenon and they know the Mafia phenomenon and all the dynamics that exist. Why not also know the phenomenon of violence? Because it is not a question of regulations. They are there. The problem is their application because if you don't know the phenomenon, if you don't know the dynamics of violence then those rules can hardly be applied correctly and to protect women and children' (ITIL3).

A particularly concerning issue that was brought up by professional stakeholders in Italy was the lack of training and therefore preparedness for the Cartabia reforms. The vast majority stated that they had received very little or no training on the new procedures and had no idea when the reforms were going to be implemented or indeed how. There were particular worries around how the required specialisation of CTU's would be enabled given the existing problems relating to a lack of specialism: 'in my opinion, at the moment, looking in our small territory, I do not know who could really do the CTU in these cases and who really has specific training. In my opinion only a few will have it. Then no specialisation training courses have been organised perhaps

in the meantime, or at least I haven't heard of any' (ITL10) and quality: 'CTU are not many, and those who do exist are often very young, perhaps those who are just starting out, or those who, precisely because they are not good, don't have a private clientele, and so they throw themselves into the public sector' (ITIJ4). It was widely acknowledged that the scale of the reform would require a significant commitment of resources which did not appear to be there: 'it is a reform that the legislator has done somewhat at zero cost, especially in terms of structural and economic resources. Therefore, it is clear that, especially from the point of view of the structure of this family court, if the human resources, judges, administrative staff, social services, also in the function of prevention of the problems of minors, are not adjusted, the problem will remain, a shadow to be managed' (ITIJ6). The vast majority of these reforms were meant to have been implemented during the time period that the research was undertaken. There was a considerable amount of scepticism therefore that the reforms would indeed be implemented effectively and on time.<sup>321</sup>

There was a widespread awareness of the lack of specialised training for professional stakeholders amongst survivors, who, felt that they, had had to suffer the consequences: 'If they know about domestic violence, they don't use anyway, even those who say, they're specialist, they're crap, as well... when you see the lawyer, they say, yes you can do this, and that, big tiger. And as soon as you in front of the judge, meow, their voice changes' (UKFG1B). For others it meant having to frequently change lawyers until they found someone who did have specialist knowledge of domestic abuse; SPFG1A had five different lawyers, whereas SPG2A had '8 lawyers. In eight years, because each process takes a different lawyer, and they take so long to give you the lawyer that nobody knows.' It was rare for survivors to find a lawyer that they felt positive about, and when that did happen it was not because of their expertise on domestic abuse, but rather that they had put in the effort (UKFG3A) or had correctly managed their expectations. 'To be fair, she was very good. She did represent me. She did manage my expectations, in terms of, when I asked her, which way do you think is going to go? And she said, I really don't know. Like when, when we came to the fact-finding, she was open, don't bother with the coercive or financial. pick out the worst violent ones. You'd be more stronger on those ones.' (UKFG2B)

<sup>318</sup> BIJ10, BIJ2, BIJ5, UKIJ4, UKIJ5.

<sup>319</sup> BIL1, BIO1, UKFG2A, UKFG2C, UKIJ5, UKIJ7, UKIL1, FRIJ1, FRIL2, FRIL3, FRIL4, FRIL7, FRIO2, ITIJ2, ITIJ3, ITIJ4, ITIJ7, ITIL10, ITIL3, ITIL4, ITIL5, ITIL7, ITIO2, ITIO3, SPFG1A, SPFG2D, SPIJ3, SPIJ5, SPIL3, SPIL7, SPIL9, SPIO2, SPIO7.

<sup>320</sup> ITIJ1, ITIJ2, ITIJ3, ITIJ4, ITIJ5, ITIJ6, ITIJ7, ITIJ8, ITIL3.

<sup>321</sup> ITIJ2, ITIJ6, ITIJ7, ITIJ8, ITIL1, ITIL10, ITIL2, ITIL3, ITIL4, ITIL5, ITIL6, ITIL7, ITIL9, ITIO2, ITIO3.

### Understandings of Domestic Abuse Amongst Professionals

Most professionals across the three groups interviewed, recognised the impact of domestic abuse and the trauma and damage it can cause to victim-survivors. There was also recognition that domestic abuse can manifest in different ways. In terms of characteristics, perpetrators were often described as men, although there was some recognition, particularly from lawyers that women could be violent against men (BIL10, BIL7, FRIL1).

In terms of the prevalence of domestic abuse in family law cases most professionals referred to domestic abuse as a frequent factor in their cases,<sup>322</sup> with a perception that it was on the increase in Italy (ITIJ5, ITIJ6 and ITIL8).

### Perceptions on Causation

Stakeholders across all the professional groups and jurisdiction linked domestic abuse to drugs and alcohol or to mental health issues. Other explanations offered included environmental factors such as education, violence and childhood traumas and parental relationships. Cultural explanations were particularly prominent in Italy and Spain with external cultures being blamed (as in the case of ITIJ4 and ITIJ6 who commented on domestic abuse prevalence in non-Italian cultures), as well as national ethno-religious cultural norms. ITIL7, for example, focused on the catholic culture in the country whereas others referred to a combination of patriarchy and machismo that they felt was present in their society: In Spain, a number of participants<sup>323</sup> saw it as a social issue, SPIO2 described it as 'based on a socio-cultural model based on patriarchal and macho culture'. On a similar line, BIJ3 and BIL2 thought that domestic abuse is the result of toxic masculinity.

### Violence minimized as a 'conflict'

A number of stakeholders reported evidence of the minimisation of domestic abuse as simply 'relationship conflict' or 'bad behaviour' or a bad reaction to separation,<sup>324</sup> a couple's crisis: 'We lost the criminal trial, he was acquitted the judge was able to tell me "it's ok, these are things can happen in a couple in crisis", and he was acquitted' (ITFG1A) or a bad reaction to the breakup: 'yes, yes, the situation in which both partners have mishandled the break-up. This is very frequent, more frequent, at least in our city, than cases of gender violence, that you are mistreated because of the macho idea of being a woman, but rather because of the bad management of the break-up, of not knowing how to deal with it' (SPIO1).

Moreover some stakeholders saw these 'conflicts' as the responsibility of both parties, for example: 'Some mothers, I believe, know darn well that, the children will not be harmed in any way, because when I look at domestic abuse, I do not see a devil and an angel. Often the dynamics within the relationship are where things build up and build up and build up, and it takes two to argue, doesn't it?' (UKIL7).

SPII6 in Spain shared their view on domestic violence cases: '...it is very rare that someone is completely right and the other is wrong...] what I can say is that in 20 years of this I have never seen anyone who is absolutely right and the other who is wrong, never. And if you ask me and in criminal matters, it doesn't happen either. No, he hit me on the head, I was in a dark alley, but what were you doing in a dark alley. Well, I was going to buy something, that's what I was going to buy, well, I was going to buy a joint, you know what I mean? In other words, all the cases that I have had to deal with in my life and that I have seen from the outside and in all the cases that I have seen, all of them, each party had their share of involvement.'

<sup>322</sup> UKIJ5, UKIJ8, UKIL4, UKIL8, UKIO4 BIJ10, BIJ8, BIO1, BIO6, BIO7, ITIL9 and ITIO1..

<sup>323</sup> SPIJ5, SPIL10, SPIL11, SPIL7, SPIL8 and SPIO7.

<sup>324</sup> BIL7, UKIL7, FRIL8 SPIL6, SPIL8, SPIO1, SPIO5.

# The relevance of time

There was evidence of a good understanding from stakeholders about the need to consider the relationship as a whole, rather than episodes of violence when determining if domestic abuse has taken place. (UKIJ5, UKIL1 and UKIO5). UKIL1 pointed out how it is essential to focus on showing the pattern of violence in court instead of focusing on episodic events, as these will not be considered relevant and an act of violence: 'sometimes you get potential lists of allegations from, from victims, from your client, that say, he banged on my door. Well, if that is a pattern of behaviour that's coercive controlling behaviour, yes, that, that may well be relevant to determine. If it's just, you know, three years ago, he banged on my door. Well, we're not, the court's not going to hear that.' There was also recognition that survivor-victims often endure domestic abuse for long periods of time before coming forward. SPIJ5 added that 'according to data from the Observatory of Gender and Domestic Violence, it takes an average of 9 years to report'.

However, there was marked evidence of a failure to understand that separation of the couple does not automatically remove the risk of domestic abuse. This was particularly evident in England & Wales where there was repeated reference to the notion of domestic abuse as 'historical', if it occurred prior to the separation and therefore irrelevant in terms of whether the court should take it into account when making its decision. For UKIJ1, longer relationships were more credible, 'you haven't actually got a long relationship with domestic violence in it.' For UKI2 there is not much point in talking about events that happened years ago: 'you know, say the relationship, started in 2012 and then to 2022, and then, you make the obvious point, well, you say these things happened, started in 2012, and you had your first child in 2014, your second in 2017, and third in 2019. So, I'm afraid I do then wonder, to what extent, those earlier matters are relevant.'

# Types of Violence

Stakeholders across all jurisdictions talked mainly about physical and psychological violence; other forms of violence were rarely mentioned. There was also agreement, even amongst those who were aware of other types of abuse, that cases involving physical violence received priority as it was

easier and faster to prove, while any other abuse would require more evidence (SPIL5 and SPIL9). In England & Wales the differences in the type of abuse could make a difference according to which type of judge and court the case was in front of: This perception was also shared by many survivors: 'They don't see coercive control. They do not see it. It's like invisible to them' (UKFG1A); 'Cafcass does not see financial abuse.' (UKFG4C). In France, lawyers demonstrated a wider awareness about the various forms of abuse, providing different examples of what this could imply, such as pulling hair, hitting and punching, or hematomas and injuries, strangulation or aggression in general. Psychological violence was also mentioned, such as receiving abusive texts, financial abuse and humiliation, 'you are nothing, you are not good at anything' (FRIL3) Sexual violence and marital rape were also mentioned.

# An awareness of how victims of domestic violence are trapped in abusive relationships

There was a good level of awareness across the stakeholder groups about the factors that can trap victim-survivors in the relationship. A common element mentioned by lawyers in all jurisdictions except England & Wales, is that survivors of domestic violence feel shame and guilt for the abuse they have lived, which makes it harder for them to report it and exit.<sup>325</sup> Other stakeholders, particularly in Bosnia & Herzegovina, emphasised how common it is for survivors to go back to their abusers whilst emphasising that this was part of the dynamics of abuse. In Bosnia & Herzegovina and in Spain, stakeholders highlighted how it is common for survivors to withdraw their reports once in court.<sup>326</sup> The consequence of this is that the cases cannot move forward, are dropped or filed and lead nowhere.

<sup>325</sup> BIL5, BIO8, FRIL1, FRIL4, ITIL8, SPIJ1, SPIL10, SPIL11, SPIL2, SPIL4 and SPIL5.

<sup>326</sup> BIJ2, BIJ3, BIJ4, BIL7, BIL8, BIO5, SPIJ2, SPIJ5, SPIL10

## PART 04 Understandings of Domestic Abuse

In France the most common factor mentioned was control (FRIJ1, FRIL2, FRIL4, FRIL6, FRIO1), manipulation (FRIL2, FRIL7, FRIO4), conflicts of loyalty (FRIL2, FRIO2) and jealousy (FRIL10). Other elements discussed were religion (FRIL3), the 'cycle of violence' (FRIO4), the lack of support networks (FRIL3 and FRIL6) (ITIJ4), and the economic situation of the victim (FRIL3, FRIL4 and FRIL6). In Spain, SPIJ2 and SPIL10 identified an emotional dependency between victims and abusers, which would lead survivors to reject protection orders (SPIJ2).

### Violence harms children

Stakeholders in all groups expressed the view that domestic abuse creates trauma for children, even if the violence was not specifically directed at them. Some stakeholders talked about the specific consequences of witnessing abuse in terms of altering children's development (UKIJ6, UKIO1, UKIO7) or potentially becoming violent in the future towards others<sup>327</sup> and themselves.<sup>328</sup> SPIO6 said 'they can present many problems, from anxiety problems, depression problems, problems of school failure, problems of violent and aggressive behaviour, in other words, it is documented and sometimes there is a pathological link with the father.' Spain was the country that provided the most detail in terms of the consequences for children.

As a result, some stakeholders held the view that maintaining contact between children and a violent parent is dangerous and damaging. FRIJ1 provided an example of a father with whom it was impossible to work, and thus they had to suspend all contact: 'So I pointed out to him that the alternating residence, on the day of my decision, if I follow your demands, ceases and from one day to the next, you will never see your children again. That's what you want. He said yes [...] with a father like that, you can't work. He always kept on fucking up and tried to harm the mother.' A large portion of stakeholders in England & Wales and in Spain, agreed that if there is a risk of violence to the child, there should be no contact at all.<sup>329</sup>

### Beliefs Around the Instrumentalization of Domestic Abuse

A common view expressed by professionals and mainly lawyers was the view that women report domestic abuse as a strategy to win the case in court or to obtain benefits such as legal aid<sup>330</sup>. Moreover, some stakeholders expressed the view that if a report of violence is viewed as strategic it was more likely to be perceived as fake (BIO9, FRIL3, FRIL7, FRIL8, SPIJ2, SPIL7). ITIL2 highlighted that where a criminal case against a perpetrator was unsuccessful or had been dismissed, the disclosure of domestic abuse is automatically understood as false, and thus an instrumentalization of it.

There was also evidence of a general mistrust towards disclosures of domestic abuse amongst some stakeholders in Spain (SPIO4, SPIO5): 'I've come across allegations of possible sexual abuse of a girl who had been in a meeting point for two years. But where are you going to rape her? Here in front of me. And the father was under search to be captured. Imagine that. Things happen' (SPIO5). SPIL6 simply believed that if indeed a case was filed, it was automatically a false accusation. Consequently, there was an overemphasis amongst some stakeholders of the likelihood that survivors were simply making false allegations, despite the fact that such allegations are rare<sup>331</sup>. UKIJ1, together with UKIJ2, UKIL1 and UKIL7 highlighted the need to be wary of false allegations. SPIL8 held the view that there should be a general presumption of mistrust towards survivors' reports of violence because false allegations were underreported: 'The data on false reports are minimal, but it is also true that the data on false reports are those that end up in a house in which a situation of false reporting is reported and the person who filed the false report is convicted.'

<sup>327</sup> UKIJ5, UKIJ6, UKIJ9, ITIJ1, SPIJ5, SPIL5, SPIO2, SPIO6.

<sup>328</sup> SPIL12, SPIL5, SPIO2, SPIO5, SPIO7.

<sup>329</sup> UKIJ8, UKIJ9, UKIL1, UKIL3, UKIO1, UKIO2, UKIO3, UKIO4, UKIO6, UKIO8, UKIO9, SPIJ2, SPIL12, SPIJ5, SPIL5, SPIO2.

<sup>330</sup> BIL7, BIO7, BIO9, UKIJ1, UKIJ8, UKIJ9, UKIL2, UKIL3, UKIL5, FRIJ1, FRIL1, FRIL2, FRIL3, FRIL4, FRIL6, FRIL7, FRIL8, FRIL9, FRIO2, ITIL9, ITIO2, SPIJ2, SPIL10, SPIL2, SPIL7, SPIL8, SPIL9, SPIO4, SPIO5, SPIO7.

<sup>331</sup> For example, in the UK, according to the metropolitan police website, in 2021 there were 71,984 recorded cases of domestic abuse with female victims. That same year, the recorded cases flagged as false allegations by females were 15 (<https://www.met.police.uk/foi-ai/metropolitan-police/d/february-2022/false-allegations-in-domestic-violent-cases-from-2018-to-2021/>)



## Understandings of Domestic Abuse in the Legal Process

### Evidential Concerns

Evidential concerns related to proving domestic abuse were common across all groups of stakeholders and jurisdictions and particularly, where there was no evidence of physical violence. A number of stakeholders brought up how non-physical abuse was dealt with in: 'When you have no other evidence, apart from her statement, it ends with an acquittal. [...] of course the court cannot rely on the statement alone, and if she has medical documents with photos of injuries, if she has a neighbour who saw it, if she has any of her close relatives that she was I saw how she came, what kind of condition she was in, and there we already have a conviction, but only on the basis of her testimony, and when she changes her testimony, very rarely, but very often, it happens that in the end there is an acquittal' (BIJ4). One survivor related her experience: 'I did try to report gender violence, but the police did not take the report..., the policeman who attended me told me that there had to be a corpse or a forensic medical report and that I had gone on my feet to talk about psychological abuse and that it was my word against his and that. And that it was better not to report it' (SPFG3B). It is clear therefore how such attitudes towards non-physical abuse can have a huge impact upon family law proceedings, where evidence of criminal law convictions was often crucial in family law proceedings to corroborate claims of domestic abuse. Consequently, most participants only mentioned physical violence when discussing how domestic abuse could be proven to have taken place; other types of abuse were rarely mentioned at all. In addition, most comments about the type of evidence needed came from judges, lawyers and survivors themselves, however psychologists and social workers had less to say in this regard, these two groups of stakeholders saw their role as building part of the evidential picture.

The way in which the abuse is presented at court also had an impact beyond the evidence presented and the type of abuse in discussion. 'There are cases in which the lawyer when introducing the case simply says "the woman has suffered violence" in very general terms without specifying whether it is economic violence, psychological violence, physical violence, violence carried out in front of the children. It is not only a problem of proof, it is really a problem of how the violence is presented, so in these cases it sometimes happens

that the question is only, let's say, presented to the judge a little bit to impress him, but it is not then enriched by any detail' (ITIJ2).

Moreover, when physical violence is in the picture, psychological violence and its impact is erased. This is particularly worrying, given that coercive control is a predictive factor for post separation abuse, and was picked up by SPIL5: 'If a woman makes a complaint and says that she has been suffering from psychological abuse for 10 years. But she's been punched today. If we don't look into the psychological abuse, there's going to be a Durge, which is a procedure, an urgent procedure, a speedy trial for the, for the punch. And I would say but isn't she telling that he has suffered 10 years of psychological abuse? That needs to be investigated, no, that needs to be delved into. If you don't insist on that, there will probably be a speedy trial for the punch, he'll get a fine or a restraining order and that's it'.

What is clear, is that for most stakeholders, across all jurisdictions, survivors' testimony is insufficient on its own to demonstrate domestic abuse had taken place; corroborative evidence is required. Survivors also referred to their testimony not being enough:

'She told me to withdraw the complaint and not to ask for psychologists or anything like that. Why not? They were useless. And that I couldn't prove that he had hit me. I had no visible blows, with my two children tucked up in my bed' (SPFG2A). In Italy, survivor ITFG1D shared how the presence of an external witness (a security guard in the street) was key and guaranteed the survivor was believed. The need for survivors to demonstrate credibility in court in terms of their behaviour and demeanour was also underlined by a number of stakeholders in terms of its evidential impact<sup>332</sup>. In contrast, a large number of survivors stated that in their cases, testimony from the alleged perpetrator often did not require any corroboration at all and any claims were taken at face value.<sup>333</sup>

Criminal convictions for domestic abuse was reported as the best form of corroboration and regarded as key to victims being believed in the family court, which could sway the final decision in their favour.<sup>334</sup> In addition, videos, photographs, messages and witness evidence were all regarded as crucial in terms of proving that the abuse took place.<sup>335</sup> Thus, if survivors can 'show' the abuse they are more likely to be believed.

<sup>330</sup> BIL7, BIO7, BIO9, UKIJ1, UKIJ8, UKIJ9, UKIL2, UKIL3, UKIL5, FRIJ1, FRIL1, FRIL2, FRIL3, FRIL4, FRIL6, FRIL7, FRIL8, FRIL9, FRIO2, ITIL9, ITIO2, SPIJ2, SPIL10, SPIL2, SPIL7, SPIL8, SPIL9, SPIO4, SPIO5, SPIO7.

<sup>331</sup> For example, in the UK, according to the metropolitan police website, in 2021 there were 71,984 recorded cases of domestic abuse with

female victims. That same year, the recorded cases flagged as false allegations by females were 15 (<https://www.met.police.uk/foi-ai/metropolitan-police/d/february-2022/false-allegations-in-domestic-violent-cases-from-2018-to-2021/>)

<sup>332</sup> UKIL3, UKIL5, ITIJ1, SPIJ6, SPIL12, SPIL7.

<sup>333</sup> UKFG1A, UKFG1F, UKFG2A, SPFG1D, SPFG1F, SPFG2E, SPFG2C, SPFG3A, SPFG3G.

<sup>334</sup> BIJ2, BIJ6, BIL1 and BIL6 BFG3C and BFG3G, UKIJ6, UKIJ8, UKIL8 and UKIO1, FRIJ1 and FRIL7 ITFG3B a ITIJ3, ITIJ4 and ITIL7.

<sup>335</sup> BFG1B and BFG2I UKIO7, FRIJ1, FRIL1 and FRIL6 SPFG2C SPFG3F SPIJ3, SPIL7 and SPIL8 BFG1B.



### Understandings of Violence and Abuse in Relation to Children

# The Best Interests of the Child Are Always Served By Contact

Overall, there was a general sense across jurisdictions, and particularly amongst lawyers of the presumption that the best interests of the child were served by prioritising contact with the non-resident parent (usually the father) with insufficient attention being paid to whether contact was actually in the best interests of a particular child.<sup>336</sup> This was echoed by a large number of survivors.<sup>337</sup> The factors that were capable of rebutting this presumption, as described by stakeholders, were mainly related to parents engaging in 'bad' behaviour in front of children, such as drinking or consuming drugs.<sup>338</sup>

Despite the fact that there was widespread agreement amongst stakeholders that the impact of experiencing domestic abuse on children was traumatic, the focus of the courts was nonetheless on how contact could be maintained, and any risks being managed, rather than whether contact should be allowed at all.<sup>339</sup> This was particularly evident in England & Wales<sup>340</sup> UKIL2 summarise the widespread opinion of interviewees: 'what you want is a piece of paper that sets out what the bottom line for child arrangements is.'

As UKIJ2 pointed out: 'the idea therefore that you can't have contact is wrong. It's a question of how can you have contact?'

A good example of the lengths to which some judges are willing to go to allow contact can be found in the information shared by BIJ8: 'First of all, it is very important to delineate whether the violence was also against children to determine the method of contact with the children by the abuser [...] So we have a situation where we organize contacts with a parent who abuses children in such a way that they see each other at the center for social work in the waiting rooms at the center for social work. That the contact is maintained with

the presence of a family member and yes, this is exactly what it means, depending on what kind of abuse it is and whether the father can be left, that is, the mother can be left alone with the child or not, that is, we also make some periods, means the sentence can vote on the entire 1 page because of that way of contacting from some kind of adjustment to precise determination, when, how, at what time, with announcement, in what space? If they are small children, if there is any violence, it can be organized somewhere in a playroom in some public space, so that the children are not left alone with that father, and still have contact.'

For UKIJ7, the key point was 'to ensure that they get back in the best possible way, that is safe for them and allows them to flourish, and enjoy what they can have with each parent, it is appropriate'. For most lawyers in Bosnia & Herzegovina (BIJ1, BIJ8, BIO2 and BIO7), it was essential to protect children's best interest to keep a sense of home, of being together with both parents. This was often framed as a question of parental rights. For BIJ10, for example, 'it is a parent's right to have contact', while BIL12 commented 'even though there was violence against women and violence happened in front of children, most often, the centers for social work decide that the visitation must be carried out.'

This approach was also evident in France (FRIJ1, FRIL4, FRIL7, FRIL8) and Spain, where the visitation setting was not appropriate, judges rely on meeting points as a safer way to establish contact (SPIJ1, SPIJ2, SPIJ3, SPIL12 and SPIL7) The point made by many stakeholders was that this demonstrated that the need to avoid breaking the bond between father and child was a strong influence on decision making in Spain.<sup>341</sup> There was a strong focus on how this 'risk' could be mitigated by different ways of keeping contact, such as safeguarded visits (UKIJ4), meeting points in Spain<sup>342</sup> a third

<sup>336</sup> BIL12, FRIL10, ITIJ5, ITIL1, ITIL10 and ITIL5.

<sup>337</sup> BFG2F, BFG2E, BFG2I and BFG3G, UKFG1A, UKFG1E, UKFG2A, UKFG3C, UKFG4B, FRFG3A, SPFG1C, SPFG2D and SPFG2E.

<sup>338</sup> BIJ1, BIJ3, BIJ4, BIJ7, BIL11, BIO1, BIO7, UKIL3, SPIJ1, SPIJ3, SPIJ4 and SPIO7.

<sup>339</sup> FRIJ1, FRIL4, FRIL7, FRIL8.

<sup>340</sup> UKIJ1, UKIJ2, UKIJ3, UKIJ4, UKIJ6, UKIJ7, UKIJ8, UKIL1, UKIL2, UKIL4, UKIL8, UKIO2 and UKIO3.

<sup>341</sup> SPIJ1, SPIJ2, SPIJ3, SPIL4, SPIL12, SPIL5, SPIO1, SPIO3, SPIO4.

<sup>342</sup> SPIJ1, SPIJ2, SPIJ3, SPIL4, SPIL11, SPIL12, SPIL7, SPIL5, SPIL8, SPIL9.

person mediating the visits (FRIJ1, FRIO1, SPIJ1, SPIJ2), protected meetings (ITIO1), indirect contact through letters or cards (UKIJ6), or with the support of therapy for the father (UKIJ8, SPIJ4). In Italy, there is also an emphasis on fixing the relationship between the child and both parents,<sup>343</sup> where some stakeholders discussed the importance of the abusive parent showed willingness to change (ITIJ3, ITIJ8 and ITIL2).

# The Voice of the Child

Across all jurisdictions there was an underlying consensus that children who are too young have a limited understanding of what is happening and should not be involved in the legal process. Consequently, most jurisdictions had decided upon a certain age above which children could and should be heard. In Bosnia & Herzegovina, 10 years of age was an acceptable starting point, though BIJ1, for example, set the age at 16 years old. In England and Wales, in line with the legal position, a specific age was not discussed: UKIJ1: 'the views of a 14-year-old are going to be much more influential in the case than the views of a 4-year-old'. In France, the one judge that was interviewed set the age at eight years old, whereas in Italy the consensus was that they need to be at least over 12 years of age or to prove their discernment. In Spain stakeholders agreed that, in accordance to the law, it was from 12 years but sometimes, if they seem mature enough, they will be heard before then. However, stakeholders went on to describe the reality in practice; some judges do not follow these mandatory rules and do not talk to children, (SPIJ3) whereas others stated that children were indeed heard, but their views were simply dismissed (SPIJ5 and SPIL3). The role of the children's guardian was regarded as being particularly helpful in terms of advocating for children to be heard in England and Wales (UKIJ4, UKIL5, UKIL7, UKIO2) although there was recognition that children's wishes are not always considered and do not necessarily influence the result (UKIL4, UKIL5, UKIO1, UKIO2).

In France, unlike in other jurisdictions there was no guarantee that the children's views would be sought. One lawyer pointed out that children are only heard if they ask themselves to be heard (FRIL9), and FRIL3 discussed how it depended upon the practice of an individual court in terms of whether they seek the views of the children. However, when views are sought, some lawyers thought that they played a key role in the decision being made by the court (FRIJ1 and FRIL10).

There was also concern that the participation of children should be limited in order to avoid the risk of revictimization<sup>344</sup> which is why psychosocial team interviews are recorded and/or they are conducted in a Gesell room. The wishes and needs expressed by children were identified as key in the decision making by judge SPIJ1. In Italy, children being heard was described as their 'rights in the case' ITIJ1). However, concern was expressed across the jurisdictions about the lack of training and competence on the part of the judiciary to take evidence directly from children. As a result, there was an over reliance on using the reports of psychologist, social workers or any other experts that work in support of the courts as the representation of the child's wishes.<sup>345</sup>

The majority of survivors across all the jurisdictions felt that their children's interests were taken into account because they were too young or that their expressed views were dismissed and their thoughts on the violence and contact were not considered. The exceptions were in cases where the courts respected the children's views that they did not want to continue with visitations with their father,<sup>346</sup> or when the children spoke in favour of fathers and against mothers.<sup>347</sup>

# Decision making – the role of risk

The notion of 'risk' was evident across all jurisdictions; the safety of the children meeting with their father was key in the consideration of custody and contact.<sup>348</sup> There was evidence of a marked reluctance to consider the relevance of past domestic abuse as indicative of future risk amongst lawyers in England & Wales (UKIO6). There was also some recognition that risk could not be assumed to be absent in cases where contact had been agreed and that such agreements could be due to coercion. As a result, these judges made a point of observing the interactions between the parties before them, before making the order (ITIJ1, ITIJ2). Other professionals were alert to the possibility of manipulation and parental alienation, considering them both to increase the future risk for children (SPIJ1, SPIJ2, SPIL12, SPIL7 and SPIO5). Judges in France, Italy and Spain referred to the level of violence as an indicator of risk (FRIJ1, ITIJ1, ITIJ4, SPIJ2, SPIJ6).

In terms of custody decisions, most professionals felt that it was awarded to the parent viewed as best able to take care of the child (FRIL10 SPIJ3, SPIJ4 and SPIL7), however, this did not

<sup>343</sup> ITIJ8, ITIL2, ITIL3, ITIL6, ITIL7, ITIL9 and ITIO1.

<sup>344</sup> SPIJ1, SPIJ3, SPIJ5, SPIL9, SPIO2, SPIO3.

<sup>345</sup> BIJ2, BIJ4, BIJ5, BIJ6, BIJ8, BIJ9, BIL10, UKIJ1, UKIJ3, UKIJ7, UKIJ8, UKIL1, UKIL2, UKIL4, UKIL5, UKIO1, UKIO2, UKIO3, UKIO4, UKIO5, UKIO6, UKIO7, UKIO8, UKIO9, FRIJ1, FRIL3, FRIL4, FRIO1, FRIO4, ITIJ2, ITIJ5, ITIJ6, ITIJ8, ITIL1, SPIJ1, SPIJ2,

PSIJ3, SPIJ4, SPIJ6, SPIL8, SPIO1, SPIO6, SPIO2, SPIO3, SPIO4.

<sup>346</sup> BFG1I, BFG2I, BFG3I, FRFG2A, ITFG1D, ITFG2D, ITFG2B, SPFG2D.

<sup>347</sup> FRFG2C, ITFG1C, ITFG2C, SPFG2B, SPFG2D, SPFG2A, SPFG3D.

<sup>348</sup> BIJ1, BIJ9, BIO8, UKIJ4, UKIJ7, UKIJ8, UKIL1,

UKIL3, UKIL8, UKIO1, UKIO2, FRIJ1, FRIL4, FRIL7, FRIL8, FRIL10, FRIL9, FRIO1, FRIO2, ITIJ1, ITIL2, ITIL1, ITIL6, SPIJ1, SPIJ2, SPIJ4 and SPIO1.

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exclude violent parents, ITIJ1 and UKIO1 provided examples of cases where children were left with the father despite the violence, because he was considered better at taking care of them. Staying with an abuser was also considered as evidence of an ability to protect children and was acknowledged as playing against many mothers in this position in court (ITIJ4, ITIJ5, ITIL3).

# The Presence of Violence Is Not Determinative of the Final Decision

Stakeholders across all jurisdictions expressed the view that the mere presence of violence was not always determinative of the final decision<sup>349</sup> BIL1 provided a good summary of stakeholders' viewpoint on this regard: 'starting violence does not automatically lead to interference with the exercise of parental rights, which would be crazy if that were the case. At the end of the day, at least that's how it should be from my practice. I say it is so. Then, whether the violence was directed exclusively towards the partner or both towards the partner and the child, only towards the child.'

The impact of violence was considered in three main ways. First, if the violence is against the other parent some stakeholders in Bosnia & Herzegovina, and especially in England & Wales and in Italy considered this as a separate issue that was not relevant to the question of contact with the children.<sup>350</sup> In the words of BIJ9: '[as long as] they are not a danger to the kid, that is ok'. The main issue is the relationship between the parent and child.

ITIL9 commented: 'It very much depends on the sense and form of the violence, because we have to demarcate the situation that there can be violence in the family, but violence between spouses, and that the abuser did not also abuse the children. It doesn't have to be a bad father, that is, a bad mother, so it shouldn't be, and yes, we should really keep insisting that it's only a woman. So we have those situations where the relationship between husband and wife is threatened to such an extent that there is violence, but

between the two of them, and that violence was not suffered by the children in the sense of physical violence, not even verbal, except for the stress they suffer watching their parents how they fight.'

Second, domestic abuse is considered to be in the past and irrelevant to the current proceedings, this was a particularly prevalent view in England & Wales, where multiple references were made to abuse being 'historic'.<sup>351</sup> As a result the emphasis was placed on parents being responsible and their ability to many to coparent, regardless of the violence and 'conflicts' from the past. Thirdly, the impact and seriousness of the abuse is assessed based solely on the impact it has had on children:<sup>352</sup> ITIJ4 commented, when talking about what they consider when making decisions in these cases, that 'It depends on type of violence, impact, if it has stopped and how children feel' (ITIJ4). Similarly, In Spain some judges and lawyers (SPIJ3, SPIJ5, SPIL1, SPIL3, SPIL6) also highlighted the need to assess the seriousness and the impact on children before any decision making. For example: 'I believe that we have to weigh up the interests at stake in each of the cases. For example, a single episode of gender violence linked to domestic violence, in which the parents have hit each other, is not the same as a situation of habitual abuse. A situation in which the father has insulted the mother by text message without the child witnessing it is not the same as situations in which the child constantly witnesses how the father controls the clothes, the mother's clothes' (SPIJ3).

<sup>349</sup> BIJ1, BIJ8, BIL1, BIL10, BIL2, BIL3, BIO10, UKIJ4, UKIJ5, UKIJ6, UKIJ8, UKIL2, UKIL3, UKIL4, UKIL5, UKIO1, SPIJ2, SPIJ5, SPIL12, SPIL3 and SPIO4.

<sup>350</sup> BIL1, BIJ9, ITIJ1, ITIJ7, ITIL3, ITIL5, ITIL8, ITIL9, UKIJ1, UKIJ7, UKIL3, UKIL4, UKIL7.

<sup>351</sup> UKIL1, UKIL3, UKIL4, UKIL5, UKIL7, UKIL8, FRIL8, ITIL9.

<sup>352</sup> BIJ4, BIJ7, BIJ8, BIL1, UKIJ2, UKIJ4, UKIJ6, UKIJ8, UKIL2, UKIL3, UKIL5, UKIO1, ITIJ1, ITIJ3, ITIJ4, ITIJ5, ITIL9, SPIJ1, SPIJ2, SPIJ4, SPIL12, SPIL7 and SPIO5.

# The Experiences of Survivors

In most of the cases in the sample, perpetrators of abuse received visitation rights. In some cases, these visits were supervised (BFG2E, FRFG1D, ITFG1A) and significantly reduced (BFG3F, FRFG3F, FRFG3C, ITFG1C), but still took place. In others, despite being awarded visitation the fathers did not comply (BFG1I, BFG2A, BFG3C, ITFG3A, SPFG2C).

It was also common for children to resist having contact with the fathers and refuse the visitations.<sup>353</sup> Others talked about visitation being dependent upon successful participation in a perpetrator programme and how they felt this minimised their experiences of abuse:

'She put an addendum report in to say, he is a danger to her, he needs supervised contact until he does this perpetrator programme. And that's when we were with the Circuit Judge, and she was really good, in saying to him, well, you're not going, getting unsupervised contact until you do this programme. And therein lies, then it all goes downhill from there, because once he's done the Mickey Mouse DAPP and he's ticked the boxes, it's like, right, okay, and, here's your custody, like they'd stopped listening...'(UKFG3A).

There were many examples across all jurisdictions, excepting Bosnia & Herzegovina, of cases of survivors losing the custody of the children to the perpetrator, with a few also losing all contact with their children for a period of time (ITFG2A, SPFG2E and SPFG2D all lost contact with their children for four years for example). This was most common in Spain, followed by Italy. In these two countries, plus one example in England & Wales, there were also cases of custody being removed and placed in institutional care (UKFG1F, ITFG3B, SPFG3C, SPFG3D). the most common result excepting Bosnia & Herzegovina and Italy was shared custody between the survivor and their abusers.<sup>354</sup>

<sup>353</sup> BFG1I, BFG2G, BFG2A, BFG3I, UKFG1C, UKFG4D, UKFG4B, FRFG2B, FRFG2C, FRFG3C, FRFG3A, ITFG1A, ITFG2D, ITFG3D, ITFG3A, SPFG1D, SPFG2E, SPFG3C.

<sup>354</sup> UKFG1E, UKFG2A, UKFG4C, UKFG4D, UKFG4A, FRFG1C, SPFG1B, SPFG2B, SPFG2E, SPFG2C, SPFG3A, SPFG3B, SPFG3F.

# Summary

The vast majority of judges and court appointed experts that were interviewed had received training on domestic abuse in their workplace, whereas for most lawyers it depended upon whether they specialised in this area or worked in an organization that specialised in working with survivors of domestic violence. The content, however, could be procedural in focus and this was generally not thought to be useful. In addition, training was not updated sufficiently, and there was clearly not enough national oversight and organisation; training was often left to local networks or individuals to organise for themselves. Despite this some evidence of an understanding of the dynamics of domestic abuse was in evidence, but that could be due to the sample being largely self-selected in terms of interest in the topic.

The lack of compulsory training is a particular concern for court appointed experts, outside of England and Wales and there was significant concern expressed in Italy around the lack of preparedness in general for the large-scale reforms that were recently introduced.

Most professionals across the three groups interviewed, recognised the impact of domestic abuse and the trauma and damage it can cause to survivors. There was also recognition that domestic abuse can manifest in different ways. However, the findings demonstrate that violence is often minimised as conflict and a shared responsibility of the parties. Although there was evidence of a good understanding about the need to consider the relationship as a whole, rather than episodes of violence when determining if domestic abuse has taken place, there was marked

evidence of a failure to understand that separation of the couple does not automatically remove the risk of domestic abuse, particularly in England & Wales where there was repeated reference to the notion of domestic abuse as 'historical.'

In terms of understandings of domestic abuse, there was a good level of awareness across the stakeholder groups about the factors that can trap victim-survivors in the relationship and that domestic abuse creates trauma for children, even if the violence was not specifically directed at them. However, a common view expressed by professionals and mainly lawyers was the view that women report domestic abuse as a strategy to win the case in court or to obtain benefits such as legal aid. In addition, the findings illustrate a general mistrust towards disclosures of domestic abuse amongst some stakeholders and an overemphasis on 'false allegations' despite their evidenced rarity.

Evidential concerns related to proving domestic abuse were common across all groups of stakeholders and jurisdictions and particularly, where there was no evidence of physical violence. The findings show that survivors' testimony is insufficient on its own and corroborative evidence is required, usually criminal convictions for domestic abuse.

Despite the fact that there was widespread agreement amongst stakeholders that the impact of experiencing domestic abuse on children was traumatic, the focus of the courts was nonetheless on how contact could be maintained, and any risks being managed, rather than whether contact should be allowed at

all. This was particularly the case in England and Wales. Although the notion of 'risk' was evident across all jurisdictions, the presence of violence is not determinative of the final decision. Finally, the impact of violence was considered in three main ways: violence between parents was considered separate to the question of what was best for children, domestic abuse is considered to be in the past and irrelevant to the current proceedings and the impact and seriousness of the abuse is assessed based solely on the impact it has had on children.

Thirdly, the impact and seriousness of the abuse is assessed based solely on the impact it has had on children:<sup>308</sup> 'It depends on type of violence, impact, if it has stopped and how children feel' (ITIJ4). Similarly, In Spain some judges and lawyers (SPIJ3, SPIJ5, SPIL1, SPIL3, SPIL6) also highlighted the need to assess the seriousness and the impact on children before any decision making. For example:

'I believe that we have to weigh up the interests at stake in each of the cases. For example, a single episode of gender violence linked to domestic violence, in which the parents have hit each other, is not the same as a situation of habitual abuse. A situation in which the father has insulted the mother by text message without the child witnessing it is not the same as situations in which the child constantly witnesses how the father controls the clothes, the mother's clothes' (SPIJ3).

# PART 05

## - Experiences of Justice

'they try to demand that even when they realise there is a problem of violence, they demand that women and mothers immediately overcome their fears, their difficulties in relating to men, and that they immediately overcome them for the sake of the children, because the important thing is that the children are guaranteed a father figure, regardless of whether or not the father is adequate to carry out his role'  
(ITIL5)



## PART 05 Experiences of Justice

The research context set out in Part 2 of this report for each jurisdiction demonstrates that survivor victims across all jurisdictions experience a number of common concerns during contact with the family justice system. This includes the phenomena of domestic abuse perpetrators using family law proceedings as a tool to continue their abuse and coercion, experiences of secondary traumatisation, the views of children not being heard, visitation and custody being granted to perpetrators despite evidence of a history of domestic and/or sexual abuse and a general minimisation of experiences of domestic abuse due to perceptions of gender discrimination and/or the use of unscientific concepts such as 'parental alienation.' Research<sup>355</sup> has also demonstrated that female victim-survivors are often implicitly understood and responded to as "entrepreneurial subjects" who are responsible for failing to make reasonable life choices in order to achieve safety for themselves or their children. Before moving on to outlining the main findings in relation to experiences of justice in the project it is worth setting out what justice means.

Justice is a broad concept which has received much attention, particularly in terms of the development of theoretical models of justice, of which there are many.<sup>356</sup> However, whilst there is much theoretical and conceptual work on justice there is very little research on the meanings of justice for victims-survivors of, and practitioners in the field of, gender-based violence.<sup>357</sup> What has emerged from this research is that justice is not limited to a formal or even informal criminal/civil outcome. It implies freedom and safety, relates to recovery, becoming politicised and helping others.<sup>358</sup> Nonetheless, procedural justice matters, the four key elements of which have been summarised as "whether there are opportunities to participate (voice); whether the authorities are neutral; the degree to which people trust the motives of the authorities; and whether people are treated with dignity and respect during the process."<sup>359</sup> These elements will be of particular relevance to the following overview of the experiences of survivors in the research project.

### An Expectation of Protection

The main expectation that survivors had of the family justice system and the professionals working in it was that of protection. i.e. that measures would be taken to protect their

children from further abuse. 'We hope that justice will hear us and keep them [children] safe' (FRFG3C) 'What I believed, what I was convinced, was that my daughter would be protected' (SPFG3B) However, the experiences of the majority of survivors in the sample was the opposite; most survivors felt their children were left unprotected with serious consequences in some cases. SPFG1C's child was left in the care of the father, during which the child was burned by accident and required 27 surgeries to deal with the injuries. One of SPFG1B's children is wheelchair bound and in the weeks in which the father is in charge, 'my son in wheelchair has been covered in poo.' 'I thought that Cafcass would be there to support my children, to be a voice for my children. And they weren't' (UKFG1C).

Survivors also expected that the evidence they provided would be objectively assessed and taken into account in terms of the final decision, however, they felt that the evidence was not given the time and attention it deserved. In ITFG3A's case the CTU made mistakes in the report, and even after evidence was presented to them, refused to fix such mistakes. Others felt that the evidence was disregarded because the outcome had been predetermined FRFG1D, FRFG1C, ITFG3C) 'Everything was proven, but nobody cares.' (BFG1A).

### Shutting Down Discussions and Negating the Violence

The majority of survivors across all jurisdictions reported that they felt that their experiences of abuse went unheard and were not taken into account even where corroborative evidence existed.<sup>360</sup> Moreover, when they tried to raise it, either during the court hearing or with court experts they were expressly shut down. 'And he [the judge] said, I do not want to hear about abuse. I am not interested. Do you understand how many people say that in my courtroom?' (UKFG1A). In ITFG1B's case, the judge said: 'the criminal cases do not concern me.' In France FRFG3A said, 'the psychologist who came to my home scolded me in front of the children, saying that I had no right to provide her with as much

<sup>355</sup> Gore, A. (2022). Gender, homicide, and the politics of responsibility: Fatal relationships. Routledge.

<sup>356</sup> Such as community justice, economic/financial/distributive justice, effective / affective justice, interactional justice, parallel justice, social justice and therapeutic justice /jurisprudence

<sup>357</sup> Research Output, [https://research.information.bris.ac.uk/ws/portalfiles/portal/188884551/Outputs\\_outcomes\\_and\\_impact.pdf](https://research.information.bris.ac.uk/ws/portalfiles/portal/188884551/Outputs_outcomes_and_impact.pdf), p 3

<sup>358</sup> Ibid at page 13.

<sup>359</sup> Natalie Byrom (2019), Developing the Detail: Evaluating the Impact of Court Reform in England and Wales on Access to Justice, 19.

<sup>360</sup> BFG1E, BFG1A, UKFG1A, UKFG1E, UKFG2C, UKFG2A, UKFG3B, UKFG4D, FRFG1F, FRFG1D, FRFG3D, ITFG2D. ITFG3B, SPFG1B, SPFG1F, SPFG3G, SPFG3D, SPFG3E SPFG1E, SPFG2E, SPFG3B.

information and documents as I did, and that it was her job to form an opinion without them. Besides, she hadn't even seen them anyway. [...] it was still surprising to be rejected and be told off.' In Italy ITFG2D described her experience with the CTU as 'I couldn't talk and I couldn't say what was going on at home, what the problems were, which wasn't a simple misunderstanding between mum and dad, that is, it wasn't a simple disagreement about things that were important, but there was something else. I was hushed every time I was trying to explain what the real problems were.'

Others recollected experiences that demonstrated a lack of respect for their safety and dignity: 'every time I have gone to hearings I have been forced to sit and wait in the courtroom next to my abuser. I have never been allowed to be accompanied, I have not been allowed to speak in the courtroom, which has always surprised me very much, because I have always addressed the court with all the respect and I have asked your Honour, please, can I speak? And they have shut me up in a bad way. No, no, no, no, you shut up, I don't want to hear anything..' she [the judge] spoke about me at all times with the opposing lawyer as if in the third person, in other words, as if I wasn't there, as if I were there, in an empty chair' (SPFG2C). This was also common in England & Wales: where UKFG3B, related how the Cafcass officer in her case 'gave me no eye contact, nothing, even when I'm trying to show her my scars, she, like, didn't care.'

A number of survivors across the jurisdictions were put under pressure to negate their experiences of violence in order to progress the case, in UKFG4A's case the judge asked her to back down on her case, adding: 'we can't progress with contact until you back down. Um, actually, you know what, I've just come up with an idea, what we'll do is we'll adjourn the non-molestation, so we can proceed with doing a section 7.' In the case of FRFG3C reported that the expert tried to provide an alternative explanation to her report of sexual assault on her children: 'They said to me, "Maybe your daughters, excuse me, maybe your daughters watched a porn film at their dad's place". In Italy, ITFG3B shared how her CTU, tried to convince her she was mistaken about what had happened to her: 'I told the episode in which he at night wanted at all costs have sexual intercourse with me (but I did not) and he punched me on the head, all night like that... and the CTU told me "Ah, punches? That was not punching with meanness, it was to wake you up". I was shocked "Punching the head was not done with meanness? Definitely not with love!" [The CTU replied] "well, of course not even with love but they weren't punches"...from here the CTU went on like that.' In Spain, SPFG3A and SPFG3H were told they were

projecting their own personal experience of abuse on their children, thereby invalidating what the children reported themselves.

Survivors across all jurisdictions also reported that they did not feel that they were believed, even where corroborative evidence existed such as a medical report relating to injuries (SPFG2C). This was particularly the case with court appointed experts (UKFG4C UKFG2B FRFG1C, ITFG3A, ITFG3B). These points were underlined by a number of professional stakeholders, who reflected on how this was not the starting point of the proceedings; UKIJ5 acknowledged that survivors probably experience most of the process as 'unfair' as they are being 'challenged' for what 'they know happened to them'. While in France FRIL9 referred to the problem between survivors' expectations and what the justice system can give them: 'women who are victims, no matter how many times you tell them that it's a losing proposition, they still want you to get it. And that can be very complicated for them.' UKIL2 also referred to survivors not being believed: 'You don't necessarily come away with the sense of having been believed. Because most disputes about children are after the relationship has ended. And so, it's the argument, well, even if, even if what you're saying is right, it doesn't mean he shouldn't see his children'. In France, FRIO1 commented 'In a more general way, I have the impression that the victims' word is not very well heard, I talk about a lot of situations where the victims do not go to the justice system because they are not welcomed, are not heard, are not correctly taken care of'. SPIJ5 reflected the greater harm that these experiences could do to in terms of the confidence in the system itself 'I always say that a victim of gender-based violence. I don't know if she remembers the sentence or the order that the judge gave her, but I assure you that what she doesn't forget, and I have had the chance to deal with associations of resilient women, with many women's associations, is how they were treated by the judicial system and they don't forget that.'

# The Use of Additional Expert Evidence

Overall, across all jurisdictions, stakeholders reported that expert evidence was viewed as neutral and essential; expert recommendations were usually followed by judges. In Bosnia & Herzegovina, for example, the reports of the centre of social work were presented as having a high impact.<sup>361</sup> Survivors in Bosnia & Herzegovina reported that when the additional expert report supported them, their chances improved, whereas, if they were not believed in these reports their credibility was questioned to the point of being called 'crazy' and 'hysterical' (BFG2B, SPFG3H). In England and Wales, Cafcass reports have a huge impact, with most judges and some lawyers believing that Cafcass officers fulfil an essential role,<sup>362</sup> although concerns were raised around raised concerns around reliability and a lack of 'quality.' (UKIL5, UKIJ7 and UKIL9) The majority of the survivors, however, reported bad experiences with Cafcass compounded by the weight that the reports hold. There was only one survivor who said that the recommendations of the Cafcass report were not followed by the judge, with the result in her favour (UKFG1D).

In terms of external evidence both judges and lawyers in England and Wales highlighted police reports (UKIJ6, UKIJ9, UKIL1, UKIL4, UKIL8), and medical records (UKIJ1, UKIJ4, UKIJ6, UKIL4, UKIL8) as having significant weight. In France medical certificates (FRIL1, FRIL3, FRIL6, FRIL7, FRIL8, FRIL9) and psychological and psychiatric assessments (FRIL1, FRIL3), were identified as important evidence, in addition to the results of social services enquiries (FRIJ1, FRIL4, FRIL6 and FRIL8) FRIJ1 adding that 'is very rare that I don't follow the recommendations of the social investigator or the psychologist.' The general opinion of

French, Italian and Spanish survivors was that experts are biased, and it is a biased system overall, particularly when they were instructed by the opposing party (FRIL1 SPIL5 and SPIL6).

In Italy, most stakeholders considered that the CTU report carried the most weight, with the courts usually following the recommendations. However, the majority had negative opinions about them. Lawyers talked about the general lack of credibility, professionalism and expertise, ITIL2 gave an example of a case that she had been involved in which required a particular expertise in terms of assessing the child's wishes and feelings, only to discover that the CTU that had been appointed was a sports psychologist. A number of judges and lawyers held the view that there were very few CTU's that they felt could do a good job in their area and had the requisite expertise (ITIL2 ITIJ4 ITIJ5, ITIO2).

A large number of professional stakeholders<sup>363</sup> agreed that the psychosocial team recommendations are not binding on the judge: 'it is simply one more piece of evidence,' (SPIJ6) and there was some experience of the court going against the recommendation of the psychosocial team (SPIJ1, SPIJ5 and SPIO1). However, the reality was that psychosocial team reports held a lot of weight in terms of the final decision.<sup>364</sup> Similarly, institutional reports, from schools (SPIJ1), meeting points (SPIJ5, SPIL8, SPIO1), medical (SPIL7, SPIO1), and psychologists (SPIL1) are considered as valuable evidence. However, survivors SPFG3G, SPFG3H, SPFG3A, pointed out that psychosocial or medical reports are indeed strong evidence, but only when they are against survivors and support the perpetrator; in their experience it was not so much about

the evidence presented but who presents the evidence.. In domestic violence cases, SPIJ1 said she had more trust in the psychologist's report than that of a social worker.

In terms of additional expert evidence, in England & Wales, where concerns have been raised in the use of unregulated experts, UKIJ2 complained that there is a lack of additional expertise beyond Cafcass and that it is hard to find. According to UKIL5 and UKIO1, the expert's selection is guided by their CV. UKIL5 added that expertise requires more than a degree.

In Italy, external experts were viewed favourably, ITIJ1, ITIJ6, ITIJ8, ITIL1 and ITIL9 having a general good opinion and generally because they felt that CTUs are not credible. Some lawyers had a small group of external experts that they felt they could trust (ITIJ4, ITIJ5 and ITIJ7) and tended only to appoint them: '[I have] my four or five experts whom I consider particularly good and whom I keep for complex situations, so I always appoint them.'

In Spain stakeholders talked less about this, as it was more common for them to simply raise their concerns with the existing court appointed expert report rather than bring in extra expert evidence.<sup>365</sup> This tactic had worked for some stakeholders as the recommendation of the psychosocial team was then not followed (SPIJ1, SPIJ5 and SPIO1).

In France there was a general shortage of court appointed experts (FRIL9, FRI01, FRI02). The court list system was not a guarantee of quality and expertise, as there are no controls or checks in place: 'Among the experts there are some reports from experts who don't pick up on everything my

<sup>361</sup> BIJ1, BIJ10, BIJ4, BIJ9, BIL10, BIL11, BIL2, BIL5, BIL6, BIO2.

<sup>362</sup> UKIJ1, UKIJ2, UKIJ3, UKIJ4, UKIJ5, UKIJ9, UKIL2, UKIL4, UKIL5.

<sup>363</sup> SPIJ1, SPIJ3, SPIJ6, SPIL7, SPIL9, SPIO1, SPIO3, SPIO4, SPIO6 and SPIO7.

<sup>364</sup> SPIJ1, SPIJ2, SPIJ4, SPIJ5, SPIJ6, SPIL1, SPIL10, SPIL12, SPIL2, SPIL3, SPIL5.

<sup>365</sup> SPIJ1, SPIJ3, SPIJ6, SPIL7, SPIL9, SPIO1, SPIO3, SPIO4, SPIO6 and SPIO7.

client says. Everything the little girl says and clearly have a bias and generally say: "Yes, the mother had experienced sexual violence herself, she transposes it onto her daughter" and puts aside the father completely.' (FRIL6). To this, we can add FRIL10's comment on how they

only 'see the children for a quarter of an hour', summarising that their work 'it's crap'. Moreover, FRIL3 and FRIL6 felt that court appointed experts do not know enough about domestic violence, especially not physical violence. Concerns were also raised around court

appointed experts pushed survivors towards mediation and other similar procedures, despite the presence of domestic abuse (FRIJ1 and FRIL3).

# Stereotyping and Discrimination

## A. Stereotyping

There were a number of examples of stereotyping from professional stakeholder across the jurisdictions and groups, the majority of which was based on gender and directed primarily at women. First, in terms of who is more likely to submit false allegations of domestic abuse: 'I would say that they are women. They are much more subtle, much more forged, for example, what happens through practice, especially when a woman decides to leave a marital-extramarital union. If she found a new partner, she will never admit it, she will come with violence by reporting violence' (BIO7).

Second, in terms of the idea that most survivors will reconcile with their ex-partners so it was not worth the efforts to work on these cases.<sup>366</sup> In Bosnia & Herzegovina and in Spain there was a widespread belief that abuse complaints would be withdrawn.<sup>367</sup> Such attitudes demonstrate a lack of knowledge and understanding around the dynamics of domestic abuse and the barriers which make it difficult for women to exit an abusive relationship.

Third, there was evidence of stereotyping based on class, particularly in England

& Wales, in France and Spain: 'A lot of the people who we see in the Family Court, are people who are, emotionally undeveloped, shall I say. They work on raw emotion, rather than reason. And therefore there is an element of, there's, there's a, there's a kind of, I hate the word class, but there's a category of people, who we see quite often, those who perhaps don't work, people who've opted for a benefit lifestyle, people who are involved in alcohol, drug abuse, which they don't see as abuse, it's just a lifestyle choice. We have a predominance of people from there, and they don't have highly academic backgrounds, they don't have particularly strenuously brain-based employment'(UKIJ7). Or as SPIL9 said: 'it also depends on education, respect. On each family. Which are not always the same'. In France this stereotype was presented in a different way by FRIL7, who highlighted how it might be 'difficult to understand that a woman doctor is a victim of domestic violence.'

## B. Gender Discrimination

Survivors and stakeholders in Italy raised their experiences of judgemental attitudes because of how they dressed.

ITFG3B related how she felt she had been judged for how she dressed in comparison with her abuser: 'I was denigrated as a woman and a social worker wrote that in a video call I was posing in a bikini in front of my ex-husband to provoke him. I was veiled accused of being a woman of ill repute. Of not looking like a victim'

This was corroborated by ITIL10 'there is no doubt that if a woman arrives, for example, dressed in a very flamboyant manner, or in any case not sufficiently, let's say, worn out by the situation of violence, she might not be believed, or there might be a prejudice against her'. FRI04 commented on how women are usually treated as 'hysterical' and 'nitpickers' at court, whereas others talked directly about sexist prejudice against women (FRIL2, FRIL6, FRIL7). ITFG3C felt that women are considered as 'crazy menstruators.'

In Spain the majority of survivors felt punished simply for speaking against men a felt discriminated for being women:<sup>368</sup> 'I have felt how the prosecutor (she) spoke to me with anger when they imposed the shared custody. She talked to me with contempt. That's something that is noticeable in the recording and that my procurator and

<sup>366</sup> BIJ10, BIJ2, BIJ3, BIJ4, BIJ5, BIL6, BIL8, BIO2, BIO3 and BIO6.

<sup>367</sup> BIJ2, BIJ3, BIJ4, BIL7, BIL8, BIO5, SPIJ2, SPIL1, SPIL10, SPIL11, SPIL12.

<sup>368</sup> SPFG1E, SPFG1A, SPFG2E, SPFG3B, SPFG3A, SPFG3H, SPFG3D.

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my lawyer then mentioned. There was animosity against me. There was harshness. The way in which she questioned me with such a serious expression, while she smiled to my ex-husband' (SPFG1B). UKIL3 talked about a female district judge in her area 'who is notorious for being misogynist.'

Differences in treatment between men and women were also evident during the court process. 'When my ex was

having his time in the box, they didn't rush it. They went, everything went so slowly, and they allowed him to express everything. And when it came to me, it was very quick. Like, I wasn't allowed to express myself, I wasn't allowed to go into details' (UKFG3B) 'And so when I started talking, the judge told me no, no, no, madam, it's good with you, please, I need to talk to the gentleman. So, she doesn't give me the opportunity to express myself' (FRFG3D). Survivors

also pointed to differences in how displays of emotion were treated during the court process: SPFG2E pointed out: 'when a father cries, come on, whatever they say goes. It doesn't matter how many times we cry, does it?'

### C. Other Types of Discrimination

Some survivors felt that they had been discriminated against during the process because of their skin colour (UKFG2A). It was clear that foreign nationals were at a significant disadvantage because of language difficulties but also because of stereotyping directed towards their nationality and/or religion. FRFG3D and ITFG1A discussed how everything was harder for them as they were not a French or Italian or because they could not take a psychological test in English, their native language, despite the test being originally in English (ITFG3D). Discriminatory attitudes were

also in evidence from professional stakeholders in France, who provided examples of a Moroccan family (FRIL6) when discussing violence, or who stated that French society is not prepared to accept the violence from foreign communities (FRIL4). Other stakeholders demonstrated a level of awareness of discrimination towards migrant communities (ITIJ4), towards women with disabilities and against people with mental health issues (ITIO1 and SPIO4) and particularly those that were Muslim (FRIL10 and FRIL4).



# The Construction of Motherhood and Fatherhood

A key aspect of patriarchal thought is the authority of the father as the symbolic origin of male privilege. As such, parenting is conceptualized as a significant dimension of male experience which can be illustrated in the burgeoning fathers' rights movement which valorises the role of the father and 'fathers' rights.' However, these claims stand in direct contrast to the overwhelming and enduring reality that even where children are parented jointly it is women take on the vast majority of parenting tasks<sup>369</sup> and are held to a higher standard of responsibility when doing so, often to impossible levels: 'good mothers are nurturing, responsive, sensitively attuned to their children's needs, constantly available, selfless, self-sacrificing and protective'.<sup>370</sup> Moreover, feminist theory has long established the links between patriarchal values and violence against which is rooted in hierarchical gendered structures; gendered stereotypes and inequalities. Taken together it is unsurprising that the mother-child relationship is often a key aim for perpetrators who intentionally try to undermine, distort and disrupt it in order to achieve power and control within the family.<sup>371</sup> When domestic abuse takes place, it is mothers who are often the focus of the State in terms of their ability to protect the children from the father perpetrator and, at the same time, to sustain the father-parent relationship.<sup>372</sup> Moreover, mothers experiencing domestic abuse are often negatively judged through normative paradigms of 'good motherhood', even when evidence

shows they are acting to protect their child and enhance their safety in very difficult circumstances.<sup>373</sup> It has been argued therefore that damaging discourses of the 'good mother' as fully responsible for their children animate persistent discourses of mother-blame and should be understood as a gendered driver of domestic and family violence.<sup>374</sup>

The research revealed a number of examples of such attitudes, survivors across all jurisdictions expressed that there are different expectations on mothers and fathers when it comes to childcare duties. Their overall perception of fatherhood is that fathers can do as they want, as they are free from expectations, judgement, and consequences: 'the father, no matter how little he does, is fantastic. And the mother is so disregarded, because that's what she has to do' (SPFG2D). This was the case where both parents held parental responsibility and therefore equality in terms of making significant decisions relating to the children: 'I said, oh, I've applied for these schools. And then the judge said to me, why didn't you tell him that he had to apply for schools? And I said, because he's their dad (laughs), he should know that they're going to start school, like, and he said, well, you know, don't you think you had a responsibility to let him know?' (UKFG4D). This was also reflected in France: 'when you're in the system, there are a lot of things that are ultra sexist, for example, when the mother has to prove that she's been to all the parent-teacher meetings and when she

needs to buy the cream that she has all the time at the doctor's when she needs it, but not too much. On the other hand, the father, we don't ask him anything' (FRIL6).

Some stakeholders explained that these differences in expectation was a result of the continuation of a patriarchal culture: 'Italy actually being a conservative country and therefore the idea that the stereotype that women are wives and mothers and are the primary subjects of care, that in reality they care for their husbands, children and parents, and that they are the true social shock absorber of Italy unfortunately persists. If you were to read the acts of my counterparts, you would realise that there is a view of women that is extremely traditional. And of course we are still a modern country, but the attempt to take us back to the fireplace, as they say, is always just around the corner' (ITIL7). Patriarchal notions of the importance of the role of the father in the family were evident, despite evidence of the perpetration of domestic abuse: 'She (the judge) told me "your son, because you took away a father from him will become - pardon the very derogatory term that I do not like - she used this term: a faggot and a junkie, because you took a father away from him"' (ITFG1B).

The consequences of these differences in standards were significant for mothers, who felt

<sup>369</sup> Organisation for Economic Co-operation and Development (OECD) (2014) OECD Factbook 2014: Economic, Environmental and Social Statistics. Paris: OECD Publishing. Available at: <https://doi.org/10.1787/factbook-2014-en>.

<sup>370</sup> Elizabeth V, Gavey N, Tolmie J (2010) Between a rock and a hard place: Resident mothers and the moral dilemmas they face during custody disputes. *Feminist Legal Studies* 18(3): 253–274.

<sup>371</sup> See literature review, n255, Section 5.2.

<sup>372</sup> Marianne Hester, *The Three Planet Model: Towards an Understanding of Contradictions in Approaches to Women and Children's Safety in Contexts of Domestic Violence*, *The British Journal of Social Work*, Volume 41, Issue 5, July 2011, Pages 837–853.

<sup>373</sup> Ateah C, Radtke L, Tutty L, et al. (2019) *Mothering, guiding, and responding to children:*

A comparison of women abused and not abused by intimate partners. *Journal of Interpersonal Violence* 34(15): 3107–3126.

<sup>374</sup> Maher, J., Fitz-Gibbon, K., Meyer, S., Roberts, S., & Pfitzner, N. (2021). *Mothering through and in Violence: Discourses of the 'Good Mother'*. *Sociology*, 55(4), 659–676.



## PART 05 Experiences of Justice

under huge pressure to comply with the notion of the ideal mother: 'I have done everything not to lose my children. This is a very important thing for the mother: to work, to behave well and do her job ..'(ITFG1D). There was a real fear that if they did not come up to standard that this would be used against them in the proceedings: 'What you can't even imagine is how hard it is for each of us to get up in the morning, to simply get out of bed and go to work because we can't take sick leave, because that is also used against us, because we are not fit to look after our children, our daughters and our sons. We have to make a superhuman effort to get out of bed in order to keep the house clean because they come to search us'(SPFG2E). Others reported being put under pressure to put aside their own experiences of abuse from the perpetrator and to put their children first; a good mother suppresses any sense of trauma 'they try to demand that even when they realise there is a problem of violence, they demand that women and mothers immediately overcome their fears, their difficulties in relating to men, and that they immediately overcome them for the sake of the children, because the important thing is that the children are guaranteed a father figure, regardless of whether or not the father is adequate to carry out his role'(ITIL5). Moreover, such expectations are often imposed upon mothers without any help or institutional support in terms of their own recovery (BFG1).

Survivors also reported that mothers who did not reach these standards are heavily judged and criticised in terms of their ability to parent: 'when she then arrives before the magistrate she is so closed in on herself or so destroyed that the magistrate then begins to doubt whether she is an adequate mother to keep her child'(ITIL1). ITIO2

actively recognised a prejudice against mothers in this regard: 'from the cases I have intercepted is that there is a prejudice against the mother, the parent, but a prejudice from all points of view. The woman who suffers violence and does not report it: There is a risk that she is not a parent capable of protecting.' This often resulted in mothers being threatened with the removal of their children 'It was constantly, I will take your children, you are this kind of mother' (BFG1D).

There was also evidence of mothers being held responsible and accountable for the continuation of the child-father relationship and indeed their parenting: 'Because I was a woman, and it was my duty to make sure he knew how to raise his children, or what they needed at different ages in their life.' (UKFG4D). There was, however, no corresponding expectations in relation to fathers towards the mother-child relationship:

'The fundamental prejudice. The first thing that it is always blamed on the mother is the responsibility that the father performs his parental role correctly.... the woman is always asked what she does to make the relationship between father and child work, also based on the negative prejudice about male parenting which is that a man cannot be capable of being a good father if you don't have someone behind you to enable you to do that. There is never the same enquiry with regard to the father: how does he contribute to the mother's relationship with her children. It is a prejudice that is not always unspoken but which can be read in the remarks made, for example, to mothers compared to those made to fathers. We applaud if a father accompanies his children to school...it is taken for granted that the mother has to take care of the children's

schooling'(ITIO3). These double standards in terms of the evaluation of male and female parenting was acknowledged by a number of stakeholders, particularly in Italy, 'There's no magnifying glass on fathers, in my opinion' (ITIL10).

# Secondary Victimization

Secondary victimization 'occurs when a victim of crime feels they have been subjected to inadequate, insensitive or inappropriate treatment, attitudes, behaviour, responses and/or practices by criminal justice and social agencies that compound their original trauma.'<sup>375</sup>

Such actions are not limited to overt actions that are consciously undertaken. They can also include the routine production of unresponsive practices by legal staff who do not harbour ill will or bias.<sup>376</sup> Crucially, secondary victimization, can also concern outcomes, such as the loss of trust in judicial authorities.<sup>377</sup> How victims of domestic abuse are treated within family law proceedings can thus have far reaching consequences in terms of confidence in the justice system as a whole, particularly in terms of the likelihood of engaging with it again.

Unfortunately, there were a number of examples, across the jurisdictions of this type of behaviour. A large number of survivors, especially in France, reported that they were pushed towards reconciliation and blamed for the violence.<sup>378</sup> ITFG3B was told by the judge that, 'He was justified in his way of being, in his violence, because I was not that welcoming to him, I did not understand him and did not make him feel appreciated' FRFG1F, whose ex-husband committed suicide and killed three policemen in the process was told that 'it was my fault because if he'd had his daughter this would have not happened.' When the ex-partner of UKFG2B became aggressive in court: 'The judge obviously told him off, to calm down, and then looked at me, and said, you've created this circus.'

Survivors across all jurisdictions reported feeling mistreated and bullied by professional stakeholders, particularly, court appointed experts.<sup>379</sup> In England & Wales survivors described coercion (UKFG1D, UKFG1F), being victim blamed (UKFG1A, UKFG2A, UKFG3C, UKFG4B), and even threatened by their Cafcass officer (UKFG1D, UKFG1B, UKFG4C) In Italy, ITFG2B reported being threatened by the judge in her case: 'The judge said once in one of the meetings in advance that he would put him in a group home. If I was not cooperating, she would put him in a group home and so on'. Aggression from stakeholders was a particular problem in Spain which included being called a 'parasite' in her hearing by the judge (SPFG2C). There was also evidence of cruelty: 'they always told me that I was no longer a mother, that I should get used to the idea that I was no longer a mother, that I should tell myself that my children never loved me, and they said very, very strong things to me' (SPFG3D). As a result, many survivors felt as if their position as the victim had been reversed, they were treated as the offender instead (SPFG1D and SPFG2E).

Professional stakeholders in Italy recognised that a number of stereotypes guided judges' decisions, in which women are seen as vindictive (ITIJ3) and blamed for a failure to protect in not leaving earlier (ITIL10, ITIO3, ITIJ5, ITIL1, ITIL2, ITIL3). This also included being blamed for their children not wanting to see their father. The general levels of aggression towards survivors in Spain was also acknowledged by stakeholders, who referred to this behaviour as constituting

institutional violence against women and therefore secondary victimisation (SPIJ2, SPIJ5, SPIL5 and SPIL8 SPIJ5).

<sup>375</sup> Gekoski A, Adler JR, Gray JM (2013) Interviewing women bereaved by homicide: Reports of secondary victimization by the criminal justice system. *International Review of Victimology* 19(3): 307–329.

<sup>376</sup> Martin PY, Powell RM (1994) Accounting for the 'second assault': Legal organizations framing of

rape victims. *Law and Social Inquiry* 19: 853–890.

<sup>377</sup> Orth U, Maercker A (2004) Do trials of perpetrators retraumatize crime victims? *Journal of Interpersonal Violence* 19(2): 212–227.

<sup>378</sup> BFG1A, BFG1E, BFG3A, BFG3E, UKFG2B, UKFG4D, UKFG4A, UKFG4C, FRFG1F, FRFG1A, FRFG1C, FRFG2B, FRFG2C, FRFG2A, FRFG3C,

FRFG3B.

<sup>379</sup> FRFG2A, FRFG2B, FRFG2C, ITFG1B, ITFG2A, ITFG3B, ITFG3C, SPFG1B, SPFG1C, SPFG1E, SPFG2C, SPFG3A, SPFG3E.

# The Emotional Cost of Engagement

Survivors across all jurisdictions talked about the trauma left in their lives by this experience, both in terms of the violence of their ex-partners, and the way in which stakeholders treated them during the legal process. They talked about their own personal trauma and how this manifests as a constant fear, both for the wellbeing and future for them and their children. Survivors recounted how they suffered from anxiety and panic attacks; depression (BFG1B, UKFG3B, SPFG2E, SPFG2A, SPFG3H), a lack of trust in the justice system and related institutions and a change in the behaviour of their children. Others related their anger about how they had been treated,<sup>380</sup> their sense of isolation (FRFG2A), of feeling punished (FRFG3B, FRFG3A), tortured,<sup>381</sup> and stressed.<sup>382</sup> Others were left exhausted (SPFG2E, SPFG2A), whereas others had developed illnesses,<sup>383</sup> which included losing their hair (SPFG1A) and insomnia (SPFG2A). The majority also discussed how they felt that they had also suffered from a high degree of social stigma.

Survivors also related the impact of the abuse and proceedings on their children. This included children abandoning activities they used to love (such as playing the violin for BFG2A), losing their childhood (SPFG1C, SPFG1A), rejecting their mothers and being aggressive towards them,<sup>384</sup> problems in school (BFG1B, BFG2F, BFG3D, UKFG2C, SPFG1B), PTSD, fear and panic attacks (BFG2I, UKFG1E, SPFG2E, SPFG3C), general behavioural issues (UKFG4C) and the inability to express themselves, (FRFG1C). Others related how their children had completely changed (ITFG1A, ITFG1B, ITFG2D), had nightmares (FRFG2C) or felt it was their fault because of what they had said to the CTU (ITFG2A and ITFG1B). The vast majority of the children of survivors were also left with mental health issues such as depression and anxiety.

## A loss of faith in Justice

*'There is a completely appalling dichotomy between when you discuss with a lawyer, for example a lawyer from the CDFF who will explain to you the law which is extremely well done, on which you can rely. And in fact, justice does not apply the law at all. So here is. I no longer believe in democracy. I have the impression of being in a dictatorship, in a State of non-law in fact'* (FRFG2A).

Survivors were very aware of what the law and policy was in their respective jurisdictions and when these procedures were not followed. SPFG3B described how she: 'received orders in which the text of something written by the other party's lawyer was copied and pasted' There were a number of cases where the lack of professionalism reached the point of an official complaint, particularly in England & Wales:<sup>385</sup> 'I ended up doing a complaint to Cafcass about her, because she was awful. She tried to get into my therapy, if you like, she wanted to know what we talked about, and she threatened me with taking me back to court, if she couldn't get that information, so she was effectively coercively controlling me, trying to get me, so I was in the same room having mediation with her, Cafcass do not do mediation, I found out, when I did the complaint' (UKFG1D).

The result of these failed expectations was that most participants 'don't expect anything' and thus they are 'not going to report anymore.' (UKFG1B). Or worse, that a greater damage to them and their children was caused by the justice system and the legal procedure they had to go through: 'The whole experience was torture following from the previous mistreatment, and well, I speak a bit for all of us, we felt in our homes, our houses and far from what we thought, that we were going to find a solution and our lives would become easier, we found ourselves surrounded by a whirlwind and we have ended up even more tortured' (SPFG1A). This idea of 'torture' was widely present in the Spanish focus groups, as was the view that they wish they had never reported in the first place and would not recommend other survivors to rely on the justice system at all: 'I have been 11 years in this. If I could go back, I wouldn't report it. Come on, to any woman that comes to me and tells me I have this support, I would say don't report, because now you have one problem, you report it and now you have 50 thousand more' (SPFG1D).

<sup>380</sup> BFG3B, UKFG2A, UKFG4A, FRFG1C, FRFG1A, FRFG2C, FRFG3A, ITFG3A, SPFG1B, SPFG1C.

<sup>381</sup> SPFG1A, SPFG1C, SPFG1D, SPFG2E, SPFG3H, SPFG3B.

<sup>382</sup> ITFG2A, ITFG1B, ITFG2C, ITFG2B, ITFG2D, ITFG3B, ITFG3C, ITFG3D.

<sup>383</sup> BFG1A, SPFG1A, SPFG1E, SPFG2A, SPFG3H, SPFG3A.

<sup>384</sup> BFG3B, UKFG2A, UKFG4A, FRFG1C, FRFG1A, FRFG2C, FRFG3A, ITFG1A.

<sup>385</sup> UKFG1C, UKFG1D, UKFG2C, UKFG3A, UKFG4C, UKFG4A.

### Summary

The main expectation that survivors had of the family justice system and the professionals working in it was that of protection. i.e. that measures would be taken to protect their children from further abuse. However, the experiences of the majority of survivors in the sample was the opposite; most survivors felt their children were left unprotected with serious consequences in some cases. The majority of survivors across all jurisdictions also reported that they felt that their experiences of abuse went unheard and were not taken into account even where corroborative evidence existed. Others felt they were expressly shut down or put under pressure to negate their experiences of violence in order to progress the case.

Overall, across all jurisdictions, stakeholders reported that expert evidence was viewed as neutral and essential and that expert recommendations were usually followed by judges. There were, however, significant concerns raised, by both survivors and professional stakeholders, around the quality of court appointed expert reports, citing a lack of specialist knowledge and training.

There were a number of examples of stereotyping from professional stakeholder across the jurisdictions and groups, the majority of which was based on gender and directed primarily at women, whom, it was felt, were more likely to submit false allegations of domestic abuse and withdraw their complaints. There was also evidence of stereotypes around class and other types of discrimination, based on race, migrant status and religion.

Survivors across all jurisdictions expressed that there are different expectations on mothers and fathers when it comes to childcare duties. The consequences of these differences in standards were significant for mothers, who felt under huge pressure to comply with the notion of the ideal mother and to put aside their own experiences of abuse, to put their children first. Moreover, those who did not reach these standards felt heavily judged and criticised in terms of their ability to parent. There was also evidence of mothers being held responsible and accountable for the continuation of the child-father relationship.

Unfortunately, there were a number of examples, across the jurisdictions of this type survivors being exposed to secondary victimisation during the proceedings. A large number of survivors, especially in France, reported that they were pushed towards reconciliation and blamed for the violence. Survivors across all jurisdictions reported feeling mistreated and bullied by professional stakeholders, particularly, court appointed experts.

Unsurprisingly, the emotional costs were high. Survivors across all jurisdictions talked about the trauma left in their lives by this experience, both in terms of the violence of their ex-partners, and the way in which stakeholders treated them during the legal process. Survivors also related the impact of the abuse and proceedings on their children. More crucially, the result of these failed expectations of justice was that most participants felt that their experiences had been worse by engaging with the justice system.

<sup>386</sup> SPFG1A, SPFG1C, SPFG1D, SPFG2E, SPFG3H, SPFG3B.

# PART 06

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## - Barriers to Justice

'I think, you know, I know this isn't what you're looking at in terms of, things, but, you know, in any given day, I could have 5 private law cases, effectively back-to-back, 3 in the morning, 2 in the afternoon. You just, sometimes well you just haven't been able to get into a case sufficiently well enough to do justice to it' (UKIJ3)

## PART 06 Barriers to Justice

The research contexts for each of the jurisdictions in Part 2 set out a number of challenges to justice that have been raised in the literature. Some of those challenges have been demonstrated from the research findings in the preceding chapters and relate to deeply embedded cultural behaviours within the family justice system which are particularly problematic for victims of domestic abuse. Our research also revealed that a number of systemic challenges which have

significantly impacted upon the ability of the family justice system in each of the jurisdictions to respond effectively to victims of domestic abuse.

# Co-operation between institutions

Although there was some evidence of a good degree of cooperation in principle between the different stakeholders within the family justice system and between social services and criminal justice mechanisms, significant difficulties remain. Stakeholders reported a lack of coordination which resulted in family courts not being kept up to date with relevant criminal proceedings that were simultaneously being undertaken.<sup>387</sup> Delays in getting the information relating to criminal law procedures were cited and particularly to court appointed experts, tasked with reporting to the family court (UKFG4D). In England & Wales, the police were cited as particularly problematic in this regard, despite the procedures being in place to share information. A number of stakeholders reported that information was often not sent in time which delayed the proceedings; the police regularly took up to ten weeks to respond, if at all: <sup>388</sup> 'I think there's very strict and kind of rigid systems in place, which I understand. ..I don't know, sometimes, if you don't ask for exactly the right sort of thing, in the right way, at the right time, you wouldn't necessarily get that information' (UKIO8). On a similar note, UKIO9 said:

'the police won't just send us information because we request it. It has to be done formally, through the court.'

In France, Spain and Italy there was a notable issue with communication between the family, child protection and criminal system, no doubt due to a lack of national oversight and protocols in place to facilitate it. Survivors related how, the family courts operated in isolation of other proceedings despite being informed that they had occurred or were ongoing. It was common for family courts to make no attempts to obtain this information and proceed with the case without taking this information into account.<sup>389</sup> This perception was also shared by professional stakeholders (ITIJ5, ITIL1, ITIL6 and ITIO2), which according to ITIO2, might be because 'the criminal trial is long', and thus it may not be finished in time for the civil case to consider the criminal evidence or sentence. However, there was also evidence of some collaboration, albeit it very much depended upon local practice.<sup>390</sup> 'There is a lack of coordination, that is, a lack of coordination between the courts and

the other bodies involved [...] in the end it depends on goodwill, not because we have someone or a system that allows us to coordinate everything, ideally I would be able to access these reports directly, not having to keep reminding them over and over again' (SPIJ1).

<sup>387</sup> BIJ1, BIJ3, BIJ8, BIL12, BIL2 and BIO6, BIJ9, BIO6, BIO6.

<sup>388</sup> UKIJ3, UKIJ6, UKIJ7, UKIJ8, UKIL1, UKIL5, UKIO3, UKIO5 and UKIO8, UKIJ7

<sup>389</sup> FRFG1A, FRFG2A and FRFG3C, FRIL2, ITFG1B, ITFG2D, ITFG2B, SPFG1E, SPFG1A, SPFG3C.

<sup>390</sup> ITIO3, SPIJ1, SPIL11 SPIO3, SPIO6 and SPIO7.



Workload was a major issue that affected the ability of professionals working within the family justice system, particularly those employed by the State. Understaffing was raised as a particular concern (BIL1, BIO1, BIO2, BIO6): ‘Yes, a lot could and should be done, and it could all function better. Unfortunately, it seems that we’re all burdened too much by it. We’re saturated; what can I tell you? We need more supervision; there are few workers, much work, many applications, and scarce resources’ (BIO6).

In England & Wales, there was widespread recognition from a range of professional stakeholders about the strain that Cafcass was under which then led to delays: ‘the problem we’ve got at the moment is Cafcass are overstretched. I would say that, but instead of getting reports in, say, you know, 10 weeks, it might be sort of 14 weeks’ (UKIJ2). Judges were also overloaded with the number of cases they had to manage and did not feel

they had enough time to deal with them properly: ‘I think, you know, I know this isn’t what you’re looking at in terms of, things, but, you know, in any given day, I could have 5 private law cases, effectively back-to-back, 3 in the morning, 2 in the afternoon. You just, sometimes while you just haven’t been able to get into a case sufficiently well enough to do justice to it’ (UKIJ3). This was exacerbated by the increase in litigants in person in England & Wales, caused by the removal of legal aid for family law cases: ‘You know, that’s the biggest challenge I would say, is litigants-in-person. And a suggestion that that saves money. I just don’t believe that saves money. All it means, is the court hearings take longer, and there are more court hearings’ (UKIJ8).

In Spain, judges discussed their high work volume and feeling ‘saturated (SPIL3)’. Those who did not work in the specialist violence courts felt it was worse for them as they had to cover a variety of areas. However, judges who

worked in the specialist courts were not immune to high workloads either (SPIJ1, SPIJ3, SPIJ5, SPIJ6). These stakeholders shared how this impacted upon their capacity to perform and the speed in which they were expected to deal with the cases: ‘The problem of justice in Spain is the saturation of work, we have a brutal workload. So, of course, I understand that in judicial districts where you have one and they are mixed, i.e. they deal with first instance, they deal with instruction, they deal with violence, where at the same time that you have a boat with 25 immigrants, a drug operation, you have a family trial where there is violence against women. No, they cannot have the dedication that I can have’ (SPIJ1). These working conditions clearly had a knock-on effect on lawyers who felt that they were not given a sufficient amount of time during the proceedings to represent their clients effectively<sup>391</sup> ‘They don’t give us the time to talk to the victims properly’ (SPIL1).

## Length of the process

Stakeholders across all jurisdictions in all countries complained about the length of time that procedures took. Survivors in Bosnia & Herzegovina talked about processes lasting over four years to reach a sentence (BFG1B, BFG1A, BFG3H), BFG1F mentioned eight years, while BFG2G talked about ten years of wait. This was corroborated by professional stakeholders.<sup>392</sup> In Italy, survivors gave examples of cases taking more than seven years to complete (ITFG1D and ITFG2B) and in Spain taking up to 14 years (SPFG1A) and 11 years for SPFG1D. Most survivors in Italy and Spain complained about waiting for lengthy periods for their

cases to complete which prolonged the stress for themselves and their children. In France both survivors<sup>393</sup> and professional stakeholders (FRIJ1, FRIL2, FRIL4, FRIO2), brought up the length of proceedings, with one case taking over eight years to end (FRFG1D).

A good deal of these delays were exacerbated by the length of time it took for court appointed experts to produce their reports, an issue which was raised in four out of five of the jurisdictions. In England & Wales, where family law proceedings involving children are subject to the ‘no delay principle’ there were a large

number of survivors who experienced considerable delays in the conclusion of their cases due to delays in receiving Cafcass reports (UKFG2C, UKFG3A UKFG4D) and corroborated by a large number of professional stakeholders<sup>394</sup> who reported that they were taking about 18 weeks (UKIO7) and 26 weeks (UKIJ8). In France, expert reports were reported as taking over a year to be completed (FRIL3, FRIL9, FRIJ1) whereas in Spain the backlog of cases for psychosocial teams varied according to each jurisdiction, from two months to a year (SPIO1) or generally a 10 month wait SPIJ6.

<sup>391</sup> SPIL3, SPIL5, SPIL7, SPIL10, SPIO1, SPIL1.

<sup>392</sup> BIJ1, BIJ2 BIJ3, BIJ9, BIL1, BIL2, BIL3, BIL9, BIO2, BIO6.

<sup>393</sup> FRFG1E, FRFG1F, FRFG1A, FRFG1D, FRFG2A, FRFG3A, FRFG3C, FRFG3D.

<sup>394</sup> UKIJ2, UKIJ3, UKIJ5UKIJ6, UKIJ7, UKIJ9 UKIL2, UKIL5, UKIL8, UKIL7 UKIO2, UKIO3 UKIO4, UKIO5, UKIO6, UKIO9.

# The Limited Availability of Legal Aid

Despite the fact that all the jurisdictions in the project have established a system for victims of domestic abuse to receive legal aid on either a free or means tested basis the vast majority of survivors reported that they had no access to legal aid. This was either because it was hard to access or the salary requirements were too low; in Italy, for example the threshold for legal aid is less than 11,000 euros a year. As a result, most survivors had to pay for legal assistance which, given the length of time proceedings took became prohibitively expensive. UKFG2A spent £63,000, whereas UKFG2C spent over £100,000. In France, it was even higher, FRFG1A spent more than 300,000 euros, whereas FRFG1D spent 340,000 euros. In Spain, survivors spent from 18,000 euros (SPFG3H) to 50,000 euros (SPFG3C), to 80,000 euros (SPFG3A). The economic impact was significant: 'I've always had to pay lawyers, I've spent. I'm in debt, I have loans with all the banks. In other words, I owe everything'(SPFG3B). Dealing with costs of this magnitude exacerbated what was already an economically precarious position post separation and left them struggling to cover their and their children's basic needs. It also affected their ability to pay for the costs of maintaining contact with their

children, FRFG3A had to cover travel expenses to keep in contact with the children or complying with preexisting commitment; FRFG3B had to pay rent in Paris and the mortgage of the house where her ex-partner lives. Many relied on family to help them with the costs such as ITFG2C and SPFG1B. A significant added cost came from Instructing experts which was often necessary, to counter the poor quality of reports from the court appointed experts: 'the average cost of a technical consultancy is about 4/5 thousand euros so at least 2,500 euros per person, plus you have to pay your consultant. The range of expenses for a consultant varies from 2,000 up to 8/10 thousand euros' (ITIL2). ITIJ1 also did the maths: 'in Italy, I don't know if you know, there's an annual income of 11,000 euro, that is, under 11,000 euro, one can have legal aid, and even with a simple job, if you earn 12,000 euro, one cannot afford to pay tens of thousands of euro for the trial'.

It is clear from the responses above that, the main barrier to justice was the costs of either getting legal advice and/or paying for expert reports, with many relying on family or taking on loans. Survivors who could not afford to pay for extra expert evidence, were not eligible for legal aid or could not afford

a good lawyer, were simply denied a level playing field during court proceedings as SPIO7 commented, 'good lawyers are expensive.' This was a particular issue in England and Wales where, there are large numbers of parties who are representing themselves. This had a number of serious consequences for victims who did not understand the rules of evidence or know how to navigate the process sufficiently to demonstrate that the abuse took place. One example given was a failure to introduce evidence for a fact-finding hearing that was easy to obtain such as mobile phone messages, something UKIJ10 referred to 'as bleeding obvious.' The same judge related how self-representing parties put an additional burden upon judges that they were not able to fulfil 'you're becoming a participant in and most judges don't have a trial background.. we are asked to cross examine and we aren't trained for this.' The answer, in this particular judge's area was to appoint a Children's Guardian for the child as that would ensure that a barrister would be appointed who could undertake these tasks instead. However, this was not always possible and depended upon local practice.

## Geographical Barriers

Survivors who lived outside of cities and in rural locations were at a significant disadvantage in terms of accessing justice. This was often due to the lack of availability of specialist services for domestic abuse victims and the need to travel long distances to access the justice system or to comply with court orders. BIJ8 commented that there were simply no legal aid services available in smaller towns. ITFG1A

had to travel twenty or thirty kilometres to bring the girls to her ex partners house which was monitored by social services. SPFG1B and SPFG1D both had to regularly travel 30km to maintain contact with their children Spanish stakeholders also pointed out how there are few specialized courts and that they are concentrated in bigger cities. This required survivors to travel in from surrounding locations: 'in

Spain we currently have 106 exclusive courts, but we have 431 judicial districts, which means that exclusive courts are less than 25% of those that there should be'(SPIJ5). SPIO1

also commented on how 'When I started working in this field, as there was nothing, I was the first psychologist here in my city, which is a small city.'

# A Lack of Information About the Legal Process

Survivors across all jurisdictions complained about how hard it was for them to understand the legal process and how they did not receive enough explanation of the legal process they are living. In FRFG1E words, the process is 'messy.' UKFG2A complained she had 12 different judges and never understood why, whilst UKFG3B shared that she went through a fact-finding, not aware that she was having one. Professional

stakeholders acknowledge that this was a problem and agreed that survivors have limited knowledge of the law.<sup>395</sup> This also extended to a lack of awareness around complaints procedures with many survivors in Italy complaining that they had no idea how to complain about stakeholders' performance. (ITFG1B, ITFG2B, ITFG3A, ITFG3D).

## Covid

The research project was undertaken during the Covid 19 outbreak which impacted significantly upon the experiences of survivors and professional stakeholder groups working in the family justice system. All the jurisdictions in the project implemented emergency measures such as the postponement of non-urgent hearings, the introduction of remote hearings by video/zoom or telephone call and social distancing when face to face hearings were resumed. Inevitably the preparedness of courts was dependent upon the existing infrastructure with considerable variations occurring at the local level. Across all jurisdictions, an exception to the suspension of proceedings was made for cases involving the protection of minors. For lawyers and court appointed experts this also meant working remotely (using video or telephone calls) when taking

instructions from clients or speaking to family members, including children. For survivors already separated from the perpetrator it was a mixed experience. Social distancing measures either intensified situations of conflict or gave some respite from having to comply with problematic visitation arrangements.

The legacy of Covid 19 on the justice system remains; the interruption to the normal operation of the courts has had a detrimental impact on the publicly funded and legally aided sectors of the legal profession, worsening barriers for accessing legal representation. In addition there has been a detrimental impact on the flow of cases through the courts and it may take several years before the backlog of criminal, and family returns to pre-pandemic levels. The human cost of the backlog can be measured in part by defendants being

held on remand in prison for longer, litigants and is that victims are waiting even longer for justice, and with a greater likelihood of evidence being lost or forgotten during the lengthier waits for a hearing.<sup>396</sup> In short, Covid 19 worsened the existing position in many countries, which as the findings of this research has demonstrated were already struggling to cope with the provision of effective procedural justice.

These issues were reflected in the research findings. First, delays caused by Covid 19 and the subsequent lengthening of the judicial process was reported across all jurisdictions and stakeholder groups: 'cases that had started before two or even the end of 2019, at the beginning of 2020 they are still not resolved. So it was horrendous'(SPIL8). Stakeholders in Bosnia & Herzegovina, France, Italy and

<sup>395</sup> BIJ3, BIJ4, BIJ9, BIL11, BIO2, UKIJ2, UKIJ3, UKIJ4, UKIJ6, UKIJ8, ITIO2, SPIL2, SPIL7, SPIO3.

<sup>396</sup> See 'The Functioning of the Courts in the Covid 19 Pandemic' OESC Report, 2020 469170.pdf (osce.org) the report of the House of Lords Select Committee on the Constitution HL Paper 257, 2021 257.pdf (parliament.uk)

## PART 06 Barriers to Justice

Spain also talked about how the courts stopped all work, suspending all or most activities, with the exception of the most serious cases Covid meant losing face-to-face interaction, which was damaging for court assessments. Other stakeholders reflected on how the change in procedures affected the conduct of the cases. A number of participants in England & Wales felt strongly that interactions between the court, assisting institutions and the parties should always be face-to-face (UKIJ1, UKIJ7, UKIL2, UKIO1, UKO16). This was because they felt that something tangible was lost in the switch to online, phone or written communication, particularly in terms of assessing witness evidence (UKIJ1, UKIL2, UKIL5). UKIJ4 commented on phone interventions: 'we all had to learn how to deal with court hearings by video, or by telephone, telephone's never really very good, actually. We can't see each other. We don't know when someone's stopped talking, or whether they've just made a gap. There's no visual cues to assist us.' In Spain, for example, participants complained about how the masks took a lot of the communication away (SPIJ6, SPIL11, SPIL12, SPIO7). As a result, some participants decided to go back to working face to face in court as soon as they were allowed.<sup>397</sup> Italy was the only country that moved to written submissions as an option, and this was not positively valued by stakeholders (ITIJ4, ITIL2, ITIL4, ITIL7). In the words of ITIL4: 'Unfortunately we had a lot of dealings in written form not via web. Often the written form was not easy to make the judge understand it.'

Conversely, participants in England & Wales perceived remote interactions as working very well in raising no issues in terms of complying with the requirements of procedural justice.<sup>398</sup> In the words of UKIJ4: 'if I focus on video, COVID, was a very steep learning curve about how to deal fairly with cases by video. And I think we, I think we came out the other side. And my view is, that whereas perhaps not as, as good as an in-person hearing, I think

it's, I think video hearings, provided the party has the right equipment. And, has an appropriate place to engage from. I think they are perfectly Article 6 compliant.'

The research findings also demonstrated the impact of Covid 19 on visitation. One particular effect was the reduction in visitation which for some participants felt like the deliberate instrumentalization of the pandemic: ITIL3 commented: 'There were many appeals from fathers who couldn't see their children' and (UKIL7) felt that mothers used covid as an excuse to stop contact. However, this was not limited to fathers, a good number of survivors in Spain experienced a significant reduction and withdrawal of visitation with their children (SPFG1D, SPFG2E, SPFG3H). 'I had two hours every 15 days, and those two hours, because of COVID were lowered to one hour. I was seeing them one hour every 15 days, one year like that, with the excuse of COVID, and one videocall' (SPFG1D). Whereas for SPFG3H her hours were reduced from eight a month in a meeting point to four hours a month. There were also some survivors who lost contact with their children for a while, SPFG1D did not see her children for three months before a new agreement was reached. SPFG1C lost complete contact with her child during the entirety of the lockdown, as the father lived in a different city and SPFG3D did not see her child for more than one year. Indeed the closure of meeting points was raised by a number of participants (SPIJ1, SPIJ3, SPIJ5) which resulted in 'those children didn't see their parents' (SPIL5).

Others felt that Covid 19 meant that proceedings were rushed and concluded without a sufficient consideration of the evidence. In France, FRFG1C shared how in her case the court made a hasty decision to conclude the case during Covid 19 outbreak by deciding to award shared custody and without making the necessary checks concerning the violence that she and the children had

experienced. Whereas in the case of ITFG1B, in Italy, she lost custody of her children because she vaccinated them when the father was against it.

There were also tangible benefits, mainly around an increase in the sense of safety and security felt by survivors who could give evidence from the comfort of their own homes without having to risk interaction with their ex partners (UKFG2A) which was also something professional stakeholders thought was a positive benefit of the new arrangements<sup>399</sup> (UKIJ4). 'On the issue of special measures, it was made very much easier, because, of course, no one was in the same room. And, if they both were able to come in by video, you could turn your camera off. It actually made a lot of the of the, of the ability to participate on an equal footing, very much easier.' These arrangements were also acknowledged as creating greater flexibility in the working arrangements of professional stakeholders, who did not have to travel to visit families in person (UKIO3), or to appear in courts all over the country (UKIL7 and ITIL6). This also had the knock-on effect of making things cheaper for clients (UKIL7) 'I don't have to find the courts; I don't have to check if I've got the right parking money. All that stress is taken away, stripped away. The client doesn't have to pay for travel, or travel time. So, their fee is less.' As a result, some professional stakeholders moved their interactions permanently online (FRIO2, FRIO4, ITIJ5, ITIL6, ITIO2) and built on technology that was created for the pandemic in order to improve services for victims of domestic abuse (SPIL5). 'We, with the service for the victims of Tivoli for example have transformed the service online precisely to make it more accessible. Apps were created that allowed contact to be made online, for instance YOUNPOL... that the State Police also created to help reporting through a transmission to the operations centres. MYTUTELA an app useful in cases of persecution that allows the recording of the material received via mobile phone. The systems and strategies have improved' (ITIO2).

<sup>397</sup> UKIJ1, UKIJ4, UKIL2, ITIJ4, ITIJ5, ITIJ7.

<sup>398</sup> UKIJ2, UKIJ4, UKIJ8, UKIL4, UKIL7, UKIO3, UKIO9

<sup>399</sup> UKIJ2, UKIJ3, UKIJ4, UKIJ6, UKIJ8, UKIL4, UKIL5, UKIL7, UKIL8, UKIO2, UKIO4, UKIO5, UKIO6, UKIO7, ITIL6, ITIL8, ITIO1

### Summary

Although there was some evidence of a good degree of cooperation in principle between the different stakeholders within the family justice system and between social services and criminal justice mechanisms, significant difficulties remain. Stakeholders reported a lack of coordination which resulted in family courts not being kept up to date with relevant criminal proceedings that were simultaneously being undertaken. In France, Spain and Italy there was a notable issue with communication between the family, child protection and criminal system, no doubt due to a lack of national oversight and protocols in place to facilitate it.

Workload was a major issue that affected the ability of professionals working within the family justice system, particularly those employed by the State. Understaffing was raised as a particular concern in England & Wales; there was widespread recognition from a range of professional stakeholders about the strain that Cafcass was under which then led to delays. Judges across the jurisdictions were also overloaded with the number of cases they had to manage and did not feel they had enough time to deal with them properly. Unsurprisingly therefore, stakeholders across all jurisdictions except England & Wales complained about the length of time that proceedings took to complete; the longest reported case was 18 years. Delays were also caused by the length of time court appointed experts were taking to complete their reports, in England & Wales the longest period was up to 26 weeks, in France over a year and in Spain there was generally a 10 month wait SPIJ6.

Despite the fact that all the jurisdictions in the project have established a system for victims of domestic abuse to receive legal aid on either a free or means tested basis the vast majority of survivors reported that they had no access to legal aid. It is clear that a significant barrier to justice is the costs of either getting legal advice and/or paying for expert reports, with many relying on family or taking on loans. Survivors who could not afford to pay for extra expert evidence, were not eligible for legal aid or could not afford a good lawyer, were simply denied a level playing field during court proceedings.

Survivors who lived outside of cities and in rural locations were at a significant disadvantage in terms of accessing justice. This was often due to the lack of availability of specialist services for domestic abuse victims and the need to travel long distances to access the justice system or to comply with court orders.

The research project was undertaken during the Covid 19 outbreak which impacted significantly upon the experiences of survivors and professional stakeholder groups working in the family justice system. All the jurisdictions in the project implemented emergency measures such as the postponement of non-urgent hearings, the introduction of remote hearings by video/zoom or telephone call and social distancing when face to face hearings were resumed.

For survivors already separated from the perpetrator it was a mixed experience. Social distancing measures either intensified situations of conflict or gave some respite from having to comply with problematic visitation arrangements. The legacy of Covid 19 on the justice system remains; the interruption to the normal operation of the courts has had a detrimental impact on the publicly funded and legally aided sectors of the legal profession, worsening barriers for accessing legal representation. In addition there has been a detrimental impact on the flow of cases through the courts and it may take several years before the backlog of criminal, and family returns to pre-pandemic.

# PART 07

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## - Parental Alienation

'at least in my experience, I have never encountered a court request... the use of SAP as a name, but we have been asked that the child's rejection of the father figure is studied and explained at a forensic level. So we would explain it with the reality of the family, but the term that was used was that we should explain the child's rejection of the paternal figure.' SPIO2



## PART 07 Parental Alienation

The concept of parental alienation was created by Richard Gardner, a now discredited psychologist, who claimed that children alleging sexual abuse during high conflict divorces were suffering from 'parental alienation syndrome,' (PAS) caused in turn by the vendetta of the mother who brainwashing them into believing and contributing to allegations of abuse against their father.<sup>400</sup> Key to the success of this concept was that the more the child rejected the relationship, the more 'evidence' of the alienating syndrome was observed. PAS theory thus recasts abuse claims as false tools for alienation, thereby inherently dissuading evaluators and courts from serious consideration of whether abuse has actually occurred.<sup>401</sup>

Gardner's theory and background has, however, been comprehensively criticised for its lack of empirical basis, its circularity and for his own problematic beliefs around sexual abuse.<sup>402</sup> The syndrome has been dismissed by the American Medical Association, the American Psychiatric Association (APA), the American Psychological Association as lacking supporting empirical or clinical evidence and it is not included in the Diagnostic and Statistical Manual of Mental Disorders or the International Classification of Diseases. In 2020 it was removed by the World Health Organization from the International Classification of Diseases (ICD-11) and the European Association for Psychotherapy considers that the

terms and concepts of 'PAS' and 'PA' are unsuitable for use in any psychotherapeutic practice on the basis 'that there is a high risk and potential of PAS/PA concepts to be used in a manner allowing for violence against children and their mothers to remain undetected, and/or contested, since it ignores essential aspects of child welfare and the gender-based nature of domestic violence.'<sup>403</sup>

Moreover, the legitimate and well-founded critiques of Gardner and PAS have not led to a reduction in the use of his ideas but rather a reformulation. This has involved acknowledging the criticisms of Gardner as an individual and PAS as a 'syndrome' and moving away from using the term PAS due to distinguish it from 'parental alienation' as a set of behaviours which can include any evidence of a negative reaction from a child towards a parent. This works against victims of domestic abuse as the 'evidence' of alienation often falls squarely within the range of expected reactions to the abuse: a reluctance to further contact due to fear and trauma on the part of the child and mother and a strong desire from mothers to protect their children from further abuse and trauma.<sup>404</sup> Focussing on behaviours also enables various terms to be employed to operationalise essentially the same concept and tactics suggested by Gardner such as 'high conflict disputes' or 'parental manipulation' and a marked trend in using the ideas underpinning PAS from a child focused perspective,

such as 'the alienated child,' 'child alienation' or a 'parent child relational problem'<sup>405</sup> to argue that this is a form of coercive control being exercised by the abused parent over the child.

In 2019 international and human rights mechanisms dealing with violence against women and girls and that form part of the EDVAW platform, criticized the use of the concept of PA<sup>406</sup> and since then, both collectively and separately. In April 2022, both MESECVI and the Special Rapporteur on Violence Against Women stated that "the use of PAS against women in cases where they denounce gender-based violence against their daughters and sons is part of a continuum of gender-based violence and could invoke the responsibility of the States for institutional violence."<sup>407</sup> In 2023, the UN Rapporteur on Violence against Women and Girls issued a report<sup>408</sup> to the Human Rights Council which underlines that the use of the unfounded and unscientific concept of parental alienation is highly gendered as it is predominantly used against mothers. The report goes on to note that "parental alienation' and related pseudo-concepts are embedded and endorsed in legal systems across jurisdictions, including amongst evaluators tasked with reporting to family courts on the best interest of the child. This has led some Governments to oppose its use and/or the issuance of judicial guidance, as set out above in Part 2. Parental alienation is therefore to be regarded as 'pseudoscience'

<sup>400</sup> Gardner, R.A. (1992a). *The Parental Alienation Syndrome: A Guide for Mental Health and Legal Professionals*. Cresskill, NJ: Creative Therapeutics. Gardner, R.A. (1992b). *True and False Accusations of Child Sex Abuse*. Cresskill, NJ: Creative Therapeutics.

<sup>401</sup> Meier, J., 2020. U.S. child custody outcomes in cases involving parental alienation and abuse allegations: what do the data show? *Journal of Social Welfare and Family Law*, 42 (1).

<sup>402</sup> See Richard Warshak, "Bringing Sense to Parental Alienation: A Look at the Disputes and the Evidence" (2003) 37:2 *Fam LQ* 273; Janet R Johnston & Joan B Kelly, "Commentary on Walker, Brantley, and Rigsbee's (2004) 'A Critical Analysis of Parental Alienation Syndrome and Its Admissibility in the Family Court'" (2004) 1:4 *J Child Custody* 77 [Johnston & Kelly, "Commentary on Walker et al"]; Carol S Bruch, "Parental Alienation Syndrome and Parental Alienation: Getting

It Wrong in Child Custody Cases" (2001) 35:3 *Fam LQ* 527 [Bruch, "Getting It Wrong"]; Carol S Bruch, "Parental Alienation Syndrome: Junk Science in Child Custody Determinations" (2001) 3:3 *Eur JL Ref* 383; Richard Bond, "The Lingering Debate Over the Parental Alienation Syndrome Phenomenon" (2008) 4:1/2 *J Child Custody* 37; Lenore EA Walker, Kristi L Brantley & Justin A Rigsbee, "A Critical Analysis of Parental Alienation Syndrome and Its Admissibility in the Family Court" (2004) 1:2 *J Child Custody* 47; Lenore E Walker & David L Shapiro, "Parental Alienation Disorder: Why Label Children with a Mental Diagnosis?" (2010) 7:4 *J Child Custody* 266; Joan S Meier, "A Historical Perspective on Parental Alienation Syndrome and Parental Alienation" (2009) 6:3/4 *J Child Custody* 232 [Meier, "A Historical Perspective"]; Janet R Johnston & Joan B Kelly, "Rejoinder to Gardner's 'Commentary on Kelly and Johnston's 'The Alienated Child: A

Reformulation of Parental Alienation Syndrome'" (2004) 42:4 *Fam Ct Rev* 622; Michele A Adams, "Framing Contests in Child Custody Disputes: Parental Alienation Syndrome, Child Abuse, Gender, and Fathers' Rights" (2006) 40:2 *Fam LQ* 315.

<sup>403</sup> Statement on Parent Alienation Syndrome (PAS) - EAP (europsyche.org)

<sup>404</sup> See Jennifer Hoult, "The Evidentiary Admissibility of Parental Alienation Syndrome: Science, Law, and Policy" (2006) 26:1 *Child Legal Rts J* 1 at 18ff.

<sup>405</sup> As outlined by the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (4th ed.)

<sup>406</sup> See EDVAW Platform Statement [https://www.ohchr.org/sites/default/files/Documents/Issues/Women/SR/StatementVAW\\_Custody.pdf](https://www.ohchr.org/sites/default/files/Documents/Issues/Women/SR/StatementVAW_Custody.pdf), 2019

<sup>407</sup> <https://www.ohchr.org/sites/default/files/documents/issues/women/sr/2022-08-15/Communique-Parental-Alienation-EN.pdf>

however, despite this being widely acknowledged, the use of the theory has gained considerable traction and is being used to considerable successful effect to negate allegations of domestic and sexual abuse within family court systems on a global scale.<sup>409</sup> Evidence of the permeation of PAS and related

concepts has been demonstrated in the literature review for each of the jurisdictions addressed in this project in Part 2 and this chapter will address how, if at all, the concept came up in our findings.

# Awareness of the Concept

In general there was a good degree of awareness of the concept across the jurisdictions and across the stakeholder groups. There also appeared to be some knowledge of the widespread concern in the literature about its origin and usage with respect to victims of domestic abuse (SPIJ3, SPIJ5, SPIL3 and SPIL4): 'Parental alienation was created by a man, Gardner, a misogynist at the time, who the only thing he does is try to divert attention towards the mother when children, when they don't want to be with a father, is because the father, because the father creates rejection, not because the mother tells him that children are the ones' (SPIL5). One survivor, SPFG3C commented that its use was specifically rejected by the court in her case: 'It was also made clear that SAP was pseudo-science and that I could not be labelled as SAP.' A large number of stakeholders did not regard it as a 'syndrome' or indeed a 'diagnosis' (UKIJ6 and UKIJ3) and that it should not be referred to as such. In

France, the only judge interviewed pointed out how parental alienation 'is a theory that is clearly contested. Criticised in any case. We were told to be wary of it because some professionals tend to apply it to cases that do not fall under that process', and thus, even though she believed that it exists and it's necessary anyway to examine it', they stated 'it is better not to use the term or to be very careful before doing so'. Other stakeholders in France also rejected the use of the concept (FRIL4, FRIL6, FRIL7, FRIL8, FRIO4) and did not feel comfortable talking about it (FRIJ1, FRIL2, FRIL3, FRIO2). FRIL6 stated: 'for me, it's a term that makes me shudder,' while FRIL7 said that in her city it is not used at all: 'No, they are completely against it. We've moved on.' FRIL3 talked of judges they knew that 'absolutely does not want to enter into this debate'. FRIL9 added that they have never seen it used in an order as judges reject the concept. In Italy, a good number of

judges and lawyers agreed the terms should not be used, referencing that the Supreme Court had ruled that it is not a 'scientific' term,<sup>410</sup> although ITIL4 and ITIL9 admitted that it was often used in the past. In Spain, a large number of stakeholders said that they had never used the term (SPIJ1, SPIJ3, SPIJ6, SPIL10, SPIL3) and that it should not be used at all.<sup>411</sup> Parental alienation was variously referred to as 'forbidden' (SPIJ4), 'prohibited' (SPIL2), 'not scientific' (SPIL1) that should 'not be taken into consideration', (SPIJ5) and that 'has finally been banned' (SPIL1). SPIO, stated that 'It is forbidden to us, well no, it is forbidden in court to use it. I mean, they scold us.'

<sup>408</sup> Custody, violence against women and violence against children - Report of the Special Rapporteur on violence against women and girls, its causes and consequences, n84.

<sup>409</sup> Ibid.

<sup>410</sup> ITIJ1, ITIJ2, ITIJ4, ITIJ8, ITIL1, ITIL2, ITIL4, ITIL5, ITIL6, ITIL8, ITIL9.

<sup>411</sup> SPIJ1, SPIJ3, SPIJ4, SPIJ5, SPIL1, SPIL11, SPIL2, SPIL3, SPIL4, SPIL5, SPIL6, SPIL7, SPIO1, SPIO2, SPIO3.

# Parental Alienation in All But Name

However, an awareness that the term is problematic and/or prohibited has not resulted in the eradication of the concept and the assumptions underpinning it. There was a widely held view across the jurisdictions that although the term/concept itself is irrelevant, the key issue, is the behaviours that are usually associated with it (UKIJ3, UKIJ6, UKIL1, UKIL5), with UKIL1 recognising that the concept itself can actually be 'less helpful'. This attitude would explain the widespread evidence of the continued utilisation of the concept in all but name and a perception that it explained certain behaviours which were not excepted by allegations of domestic abuse. SPIO7 commented how the concept does not exist, but the behaviours do, in their own words: 'Parental alienation as such obviously doesn't exist, okay? But what is called, let's say, a father's bitchiness. A mother's bitchiness. It exists. It exists. I've seen cases of instrumentalization of children'. Others felt that parental alienation can be unintentional and unconscious as well.<sup>412</sup>

There was evidence of a widespread belief that it was mothers who engaged in parental alienation. According to BIL12, parental alienation is 'mothers urging them [children] to behave like that, and it's the mothers' fault that the children don't want to see their fathers', whilst BIJ7 referred to it as 'when the mother influences the children against the father'. According to UKIJ7 this could be the result of 'the mother trying to make herself more heroic, I suppose. I'm looking after you, I'm your carer, I'm this, he does nothing, he might turn up every now and again, he doesn't do this, and he, you know, think back, he hit me, he did this, he did that.' Whereas for UKIJ5 it has more to do with mothers as the 'abused' parent: 'mum will alienate, so let's say mum's the, the abused, the non-abusive parent, the survivor-victim. She will often alienate, because she's reinforcing what the children have seen or heard.'

This perception of mothers as the main responsible for parental alienation was also present in France, as FRIJ1 stated: 'He talks like his mother. And as a result,

he hates his father', whereas FRIL9 commented: 'it's often even more the mothers, who will eventually use the child and succeed in lobotomising him.' In Italy ITIL1 mentioned how '[we use] symbiotic mother, functional relationship, alliance pact or the mother is not able to contain her own emotional states and responds to them by conditioning the child' and ITIJ5 commented how it is often used by the mother in 'retaliation against the father.' SPIL7 felt that it was as a result of identifying with the mother's distress after separation: 'They are experiencing the grieving process of their mothers and not that of the fathers and therefore they align themselves in favour of the mother in some way and protect them, they blame the father in many situations.' It is also of note that Spain was the only jurisdiction where parental alienation was specifically referred to as being used to keep the children apart from the mother. (SPFG1C and SPIO6).

## Defining Parental Alienation

Stakeholders were specifically asked if they had heard of the term, whether they believed it existed and what their understanding of it was. The terms used to describe their understanding of parental alienation were revealing, both in terms of the value judgments that were impliedly made about the

alleged alienating parent but also the vast array of behaviours that it covered. Many stakeholders used the term 'manipulation' (UKIL2, UKIJ2, UKIL4). UKIL4 used the term 'weaponised' to refer to how children are 'used' by the alienating parent. In France, FRIL2 referred to children being

'instrumentalized' in the conflict. In Spain, manipulation and 'influence' were also directly linked to parental alienation.<sup>413</sup> with SPIL6 using the term 'indoctrination.' The vast majority of stakeholders understood parental alienation as influencing the child negatively against the other parent.<sup>414</sup>

<sup>412</sup> UKIJ1, UKIJ2, UKIJ5, UKIL4, UKIL5, FRIL9, SPIL12, SPIL7, SPIL8.

<sup>413</sup> SPFG2E, SPIJ2, SPIJ3, SPIL10, SPIL12, SPIL4, SPIL8, SPIL9, SPIO4, SPIO5, SPIO6, SPIO7.

<sup>414</sup> UKIJ1, UKIJ2, UKIJ4, UKIJ5, UKIJ6, UKIL1, UKIL3, UKIL5, UKIL7, UKIL8, UKIO2, UKIO3, UKIO4, UKIO8, ITIJ4, ITIJ5, ITIJ7, ITIL2, SPIL4, SPIL7, SPIL8, SPIL12, SPIO1.

UKIJ1, described it as ‘badmouthing the other parent’, an understanding that was shared by UKIJ5 and UKIJ8. While UKIJ4 defined it as to ‘minimise the role of the other parent in the child’s life.’ ITIJ7 talked about as ‘obstructing behaviour’ instead.

Other explanations or definitions provided: ‘taking children away from their parents’ (BIJ10) and ‘Kidnapping’ (BIL11), but also ‘Emotional and general separation of the relationship, where did the disconnection between one parent and child come from’ (BIL1) and to ‘prevent communication’ between the children and the other parent (BIO1). In England & Wales, parental alienation was understood as a parent preventing the children from having

contact with the other parent without a good reason (UKIJ8, UKIL1, UKIL3, UKIO9), or coming directly from the child, when they ‘reject the parent without justification’ (UKIL7), which was also described in Italy by ITIJ1, ITIL10 and ITIJ3 and by SPIJ2 in Spain as an ‘unfounded rejection.’ For others it was when one of the parents does not promote the relationship with the other parent (UKIO4, UKIO5, UKOI7, UKIO9). This understanding could include not talking about the other parent and not actively encouraging the child to have a permanent relationship with the other parent, although UKIO9 also recognised that not promoting their relationship could be an appropriate response after abuse.

Stakeholders across all jurisdictions expressed the strong view that parental alienation harms children.<sup>415</sup> This included giving them false memories about the other parent.<sup>416</sup> UKIJ7 and UKIJ9 considered it as a form of coercive control and in Italy, and in Spain, stakeholders referred to parental alienation as ‘a conflict of loyalties’ (ITIJ7, ITIL9, SPFG2E, SPIJ2, SPIL7) that could lead to ‘children vomiting before seeing the father’ (SPIJ3).

## Reformulations of PA

Reformulations of the concept, particularly those that involved blaming mothers have been raised in the research literature and this was also in evidence in our findings. In England & Wales, UKFG1D was accused of ‘parentification,’ UKFG3C of ‘parental annihilation’ whilst UKFG3A was told ‘it’s the mother’s fault, subconsciously, even though she’s maybe not saying anything, subconsciously.’ In France two survivors were accused of ‘instrumentalization’ (FRFG1A and FRFG3A) and in Italy, ITFG2B had ‘mother’s bubble’ used to express how she ‘didn’t cooperate and was obstructive’. ITFG3A was referred to as a ‘distancing mother’ who was ‘alienating’ and ‘manipulative,’ while ITFG3C was told was she ‘does not legitimate the father’. In Spain, survivors reported the following terms used in their cases to imply parental alienation: ‘the hindrance of the filial paternal bond’ (SPFG1F), ‘instrumentalization’ and ‘parentification’ (SPFG1A, SPFG2B, SPFG3C), ‘gatekeeping’ (SPFG3A and SPFG3C), ‘manipulation’ (SPFG3C).

Professional stakeholders also used similar terms, as set out above, when defining parental alienation, however, Italy provided the greatest number and variety of reformulations of parental alienation, such as ‘malevolent mother’ (ITIJ2), or ‘the behaviours assumed by a parent that can condition or influence the children’s reaction’ (ITIJ4). Other terms used are ‘obstructing behaviour’ (ITIJ7), ‘belittling’ the other parent (ITIL1), ‘mother’s hostile behaviour’ as hindering the father-child relationship (ITIL10), ‘symbiotic mother’ (ITIL2) and ‘manipulation’ (ITIO2). It should be added that these terms were used by these stakeholders to describe what they have seen and witnessed but does not necessarily mean that they support or approve of such terminology. For example, the same judge that shared the term ‘malevolent mother,’ ITIJ2, also added: ‘but I repeat, everything that does not have a generally recognised solid scientific basis.’ This was also the case in Spain where a large number of professional stakeholders mentioned that ‘manipulation’ is the most commonly used term,<sup>417</sup> followed by

terms such as ‘influence’ (SPIJ4, SPIL3, SPIO1), ‘instrumentalization’ (SPIL7, SPIO2, SPIO7), ‘interference’ (SPIO1, SPIO3, SPIO6) or ‘rejection of the father figure’ (SPIO2). SPIJ5, provided different examples of when they have seen, as a judge, parental alienation being replaced by other terms: ‘I’ve seen a lot of judgements where they don’t use the term parental alienation syndrome, but they use parental interference, gatekeeping. There is another term that they call it a morbid disorder’ (SPIJ5).

<sup>415</sup> BIJ2, BIO1, UKIJ3, UKIJ5, UKIJ7, UKIJ9, UKIL1, UKIL2, UKIL4, UKIO1, FRIL1, ITIJ1, SPIL6, SPIL9, SPIO5, SPIO7.

<sup>416</sup> UKIO5, UKIO7, UKIO8, ITIJ1, SPFG1E, SPFG2E, SPIJ2, SPIO1, SPIO3, SPIO5, SPIO7.

<sup>417</sup> SPIJ1, SPIJ2, SPIJ3, SPIJ6, SPIL10, SPIL2, SPIL3, SPIL5, SPIO5 and SPIO6.

# Use of Parental Alienation in Court

Bosnia & Herzegovina had the least amount of references to the use of parental alienation; none of the survivors referred to it at all. The general view amongst stakeholders was that it was not a concept that was in usage in the country (BIL12, BIL7 and BIO5) and many had not heard the term at all.<sup>418</sup>

In England & Wales, a good number of stakeholders commented on the frequent use of parental alienation in court,[2] many times as a 'corollary, as a counterargument to abuse' (UKIJ6, UKIO6 and UKIO8). According to UKIL4: 'it can often be used tactically. Again, it tends to go, or it can go with domestic abuse, one party will allege domestic abuse, and the other party will allege parental alienation, and then it's kind of a lock, lock horns on that'. While UKIL5 said to use it when they go for the father's side. Moreover, according to UKIL3 and UKIO3 the term is so overused that it became hard to identify the 'real' cases. UKIJ10 stated its use 'was rife' and that its use had increased in the last two to three years in his area due to 'a lot more academic discussion about it,' however, the same judge was not aware of any criticism of the concept from academics or practitioners, 'I would say that there is pretty much mainstream acceptance that it exists,' and that 'I don't think it's any more prevalent in cases of domestic abuse.' In the words of UKIL3: 'These have become sort of buzzwords in layman's understanding of the family law, and it does make identifying issues where there are sincere cases of parental alienation that much look difficult.' The level of acceptance that parental alienation exists is such that some courts will appoint a Children's Guardian in cases where it has been alleged UKIO2. 'I've undertaken courses which have included parental alienation, so I'm aware of, some of the, child protection theory...in cases of parental alienation, it's not unusual to appoint a guardian to assist, because, it's quite common for the child to be

displaying quite significant behavioural reactions to whatever is going on in the household. So it's very often that you get a guardian, which adds additional expert credibility to the expert evidence' (UKIJ4).

Consequently, two judges (UKIJ3 and UKIJ4) shared that they have concluded that there was parental alienation in some cases. UKIJ3 recalled the experience in more detail:

'Have I seen cases, whereby the evidence has drawn me to conclude, that a parent has sought to influence a child, with a view to distancing the child from the other parent? Yes, I have, and I have made findings to that effect [...] whether you want to term it as parental alienation or whether you want to term it as a father causing harm to a child, by seeking, by seeking to put in place in there, a factual pattern which bore no, resemblance to reality, it doesn't really matter. My personal perception is the tag is what we get lost in here, it's the behaviour that's actually the thing we need to keep focused on' (UKIJ3).

There were, nevertheless, a few stakeholders who said that parental alienation is rarely used (UKIJ8, UKIL8, UKIO7). According to UKIJ8, it is used in no more than 20% of cases.

In France, FRIL1 mentioned it is a 'very trendy' concept amongst lawyers, which was echoed by FRIL4,FRIL9 and FRIO4, who had all seen the concept used at court by other lawyers, whilst emphasizing how they disagree with it. FRIL6 reported that they had heard the term being used by judges as well although FRIL9 said the term is never used in verdicts. FRIO2 commented how it is a forbidden term in France as it is 'not recognized by the psychiatric classifications.' According to ITIJ1, ITIL1 and ITIO2, the use of parental alienation in courts is a growing issue in Italy which, according to ITIJ7, is common to find it in cases where no allegations of domestic abuse are made, although

ITIJ4 and ITIJ8 reported that it is not used on verdicts. In Spain, lawyers SPIL12, SPIL2, SPIL6, SPIL9 and members of the psychosocial team SPIO2, SPIO3 and SPIO5 stated parental alienation was 'unfortunately' (SPIO2) often used in court. Whilst SPIL7, SPIO4, SPIO6 and SPIO7 commented how judges usually ask the psychosocial team to assess if there is parental alienation in a case or not.

In Spain, there was recognition that parental alienation was not referred to officially in court, and especially in verdicts as it would lead to appeals (SPIL11). Instead, it was being referred to using different terminology, as outlined above (SPIL1, SPIL4, SPIO1 and SPIO2) SPIO2 admitted that 'at least in my experience, have never encountered a court request. The use of SAP as a name, but we have been asked that the child's rejection of the father figure is studied and explained at a forensic level. So we would explain it with the reality of the family, but the term that was used was that we should explain the child's rejection of the paternal figure.'

<sup>418</sup> BIJ4, BIJ5, BIJ6, BIL2, BIL3, BIL5, BIL6, BIL8, BIO3, BIO4 and BIO6.

<sup>419</sup> UKIJ1, UKIJ3, UKIJ5, UKIJ6, UKIJ9, UKIL12, UKIL3, UKIL4, UKIO3, UKIO6, UKIO8.



# The Use of Parental Alienation by Court Appointed Experts

There appeared to be widespread usage of the term by court appointed experts according to stakeholders and jurisdictions. In England & Wales, a number of participants confirmed that in their experience Cafcass had referred to parental alienation in their reports.<sup>420</sup> Moreover, six out of the nine Cafcass officers interviewed confirmed that they have a tool for parental alienation:<sup>421</sup> 'you use it with a guide, which is the 'Children's resistance and refusal to spending time with a parent' guide' (UKIO6). This tool has since been replaced by guidance on 'alienating behaviours.' UKIJ10 commented on how Cafcass was 'very good on it...we have one...who was a leading academic on parental alienation and is now a Cafcass officer.'

In Italy, a number of stakeholders reported that CTUs often used the

term (ITIJ2, ITIL10, ITIL5). Moreover, ITIL5 complained about the work and professionalism of a CTU as they 'completely distorted her [the child] statements, saying that she was induced, therefore she had been influenced by the mother' which had negatively impacted on the case. In Spain, a number of lawyers agreed that the psychosocial team refers to parental alienation in their reports (SPIL12, SPIL7, SPIL8, SPIL9). According to SPIL7 this is because the judge specifically refers the case for a specific examination of whether parental alienation is a factor in the case 'What they [judges] normally do is to refer to an examination so that the psychologists or the psychosocial team can assess it.' This was corroborated by psychosocial team members that were interviewed reported, such as SPIO4 who said judges asked about it, or

SPIO6 who said it was one of the things they had to assess. SPIO7 referred to it in more detail: 'there are times when you are asked if the child is being instrumentalised, if there is parental alienation syndrome, etc., we don't usually make a pronouncement. It is true that there are times when it is possible, the judge really asks for it, which is the object of the expert opinion, to see if the child is alienated, if the children are influenced by maternal or paternal presence. And we do that.' SPIO5 admitted using the term. Moreover, according to survivor SPFG2E, psychosocial teams also have a tool to assess parental alienation called 'Balora.'

## Summary

In general there was a good degree of awareness of the concept across the jurisdictions and across the stakeholder groups. There also appeared to be some knowledge of the widespread concern in the literature about its origin and usage with respect to victims of domestic abuse. However, an awareness that the term is problematic and/or prohibited did not result in the eradication of the concept and assumptions underpinning it. There was a widely held view across the jurisdictions that although the term/concept itself is irrelevant, the key issue, is the behaviours that are usually associated with it. This attitude would explain the widespread evidence of the continued utilisation of the concept in all but name and a perception that it explained certain behaviours which

were not excepted by allegations of domestic abuse. In addition, there was evidence of a widespread belief that it was mothers who engaged in parental alienation.

Stakeholders were specifically asked if they had heard of the term, whether they believed it existed and what their understanding of it was. The terms used to describe their understanding of parental alienation were revealing, both in terms of the value judgments that were impliedly made about the alleged alienating parent but also the vast array of behaviours that it covered. The vast majority of stakeholders understood parental alienation as influencing the child negatively against the other parent.

Reformulations of the concept, particularly those that involved blaming mothers have been raised in the research literature and this was also in evidence in our findings. Bosnia & Herzegovina had the least amount of references to the use of parental alienation; none of the survivors referred to it at all. The general view amongst stakeholders was that it was not a concept that was in usage in the country. In England & Wales, France, Italy and Spain a good number of stakeholders commented on the frequent use of parental alienation in court and an increase in usage in recent years. There also appeared to be widespread usage of the term by court appointed experts according to stakeholders across all these jurisdictions.

<sup>420</sup> UKIJ1, UKIJ9, UKIL8, UKIO1, UKIO2, UKIO4..

<sup>421</sup> UKIO1, UKIO2, UKIO4, UKIO6, UKIO8, UKIO9.



# PART 08

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## - The Impact of Human Rights

'Rarely. Article 8 of the Convention? very rarely I'm a bit allergic to international law. But no, It happened to me in a case but very rarely because I think French law is good enough to protect, so I admit I don't think about it. I admit I don't think about it.'  
(FRIL4)

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A number of international and regional mechanisms recognise the need to ensure that post separation visitation and custody, where domestic violence is present, is subject to thorough prior risk assessment and that the wishes and feelings of children are heard when family courts decide what outcome represents the best interests of the child. There has also been a substantial degree of concern and engagement on the nexus between custody and access cases, violence against women and children and a widespread acknowledgement of the abuse of the concept of parental alienation and related concepts. This engagement has resulted in a substantial body of recommendations, case law and positive obligations in this regard.

In its General Recommendation No. 33 of 2015 on women's access to justice, the Committee on the Elimination of Discrimination Against Women (the Committee) recognized that stereotypes and gender prejudices in the judicial system impede access to justice and may particularly affect women, victims and survivors of violence;<sup>422</sup> under Article 5 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), States have an obligation to ensure that gender stereotyping is addressed and dealt with adequately. The Committee has also made it clear that it is the state's responsibility to "appropriately address the consideration of the specific needs of women and children in determining child custody in cases involving gender-based violence in the domestic sphere,"<sup>423</sup> by adopting "measures to ensure that domestic violence is a factor to be systematically considered in child custody decision."<sup>424</sup> Moreover, in 2014, the Committee recommended that any history of domestic violence and abuse must be considered when determining visitation schedules to ensure that these do not endanger women or children.<sup>425</sup> More recently on Italy<sup>426</sup> whilst noting 'the decision by the

Supreme Court calling into question the validity of the so-called "parental alienation syndrome" theory and its repudiation by the Italian Psychology Society and the Ministry of Health, the Committee stated that it was 'concerned that.. the concept continues to be used as the basis of psychological reports by experts in child custody proceedings.' Most importantly, the Committee has consistently recognised the implications of such practices for the human rights of women and children victims of violence and the need to prioritise those over the rights of perpetrators in such proceedings. In its 2017 update to General Recommendation 19 of 1991, the Committee expressly included this issue, stating that "[P]erpetrators or alleged perpetrators' rights or claims during and after judicial proceedings, including with respect to property, privacy, child custody, access, contact and visitation, should be determined in the light of women's and children's human rights to life and physical, sexual and psychological integrity, and guided by the principle of the best interest of the child."<sup>427</sup>

Regional human treaties have also specifically addressed this issue. Article 31 and Article 45 of the Istanbul Convention require judicial authorities to not issue contact orders without taking into account incidents of violence against the non-abusive carer as much as against the child itself and to impose sanctions which are 'effective, proportionate and dissuasive.' In its monitoring activity to date, GREVIO has described at length and brought to light state parties' strengths and weaknesses in the implementation of these articles with regard to victims of domestic abuse and decisions made on custody and visitation, and in particular, the widespread use of 'parental alienation' as a means of minimising evidence of domestic abuse.<sup>428</sup> Furthermore, the European Convention on Human Rights has recognised that domestic violence and the impact of it

upon both women and children comes within the scope of Articles 2,3, 8 and 14 of the Convention.<sup>429</sup> It has also held that labelling mothers as 'uncooperative parents' or threatening them with liability for child abduction for refusing to allow contact between their children and a father, where that father is a perpetrator of violence was a breach of their rights to family life under Article 8 of the Convention.<sup>429</sup>

Such issues also directly concern the rights of children. Article 12 of the United Nations Convention on the Rights of the Child provides for the child who is capable of forming his or her own views the right to express those views freely in all matters affecting them and for their views being given due weight in accordance with their age and maturity. It also provides that for this purpose, the child shall be provided the opportunity to be heard in any judicial and administrative proceeding affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law. Article 19 provides that the right for the child should be protected from all forms of physical or mental violence, injury, abuse, or maltreatment, including sexual abuse, while in the care of parents. Where it occurs, the failure to address intimate partner violence and violence against children in custody rights and visitation decisions is a form of violence against women and their children and a violation of the human rights to life and security that could amount to torture. It also violates the best interest of the child legal standard.

<sup>422</sup> CEDAW/C/GC/33.

<sup>423</sup> CEDAW/C/CRI/CO/7, para. 43(a).

<sup>424</sup> CEDAW/C/FIN/CO/7, 39(c).

<sup>425</sup> Gonzalez Carreño versus Spain (2014)

<sup>426</sup> Concluding observations on seventh periodic report of Italy (CEDAW/C/ITA/7 paras 51 and 52.

<sup>427</sup> See Committee on the Elimination of Discrimination against Women, General Recommendation No. 35 on gender-based

violence against women, updating general recommendation No. 19, 40(b), U.N. Doc. CEDAW/C/GC/35 (2017).

<sup>428</sup> See the Focus section of the 3rd General Report on GREVIO's Activities, January – December 2021 available at: 3rd General Report on GREVIO's activities - Istanbul Convention Action against violence against women and domestic violence (coe.int)

<sup>429</sup> *Opuz v. Turkey*, judgment of 9th June 2009, paragraph 132; *Kurt v Austria* ECHR 15th June 2021.

*I, M and Others v Italy*, application no. 25426/20) ECHR 10th November 2022.

# Specific Human Rights Claims are Unnecessary

There was a general consensus amongst stakeholders across all groups and jurisdictions that human rights were relevant and helpful.<sup>431</sup> However, they were viewed as more of a background context: 'it's inculcated in everything I do in the family law court'. (UKIJ6), rather than as specific rights claims: 'We never go so far as to say ah well, this is one of the human rights of the European Convention on Human Rights or this kind of thing, not at all. You don't have to go beyond that for the magistrate to understand that it's part of the woman's right, the parent's right, the father's right' (FRIL1). According to a number of professional stakeholders,<sup>432</sup> human rights are always part of the judicial process and kept in mind as 'Every court would take that into account, because of the right to family life, and the right for a fair trial, so it's always going to be considered. Although I don't think it's specifically documented on every, on every order, but I'm sure that, you know, that is going to be part and parcel of, of, of each case that's taken into account' UKIL8. Similarly, UKIO3 commented: 'I think if you unpicked what we were writing, you could, you could draw out the Articles, but I don't think we, we're as good as the court at specifically identifying where we've addressed human rights.'

A large number of stakeholders across the jurisdictions, however, acknowledged that the rights of survivors were rarely argued for specifically by lawyers in their arguments, even though these rights were clearly relevant.<sup>433</sup> Where human rights arguments were made, they

were only in the most serious cases<sup>434</sup> or raised specifically by litigants in person in England and Wales (UKIJ4, UKIL4 and UKIJ5). There was evidence from some stakeholders that human rights are being cited in judgements<sup>435</sup> and particularly the rights of children in Spain (SPIJ1 and SPIL9). However, others felt that human rights did not need to spelt out to the court as everyone involved was aware of their applicability: 'they are cited by default, they are cited because it looks good in a lawsuit. This is my personal opinion, but there is no need to say that everyone has parents, everyone has siblings, everyone has nieces and nephews, everyone has children, everyone has a partner. There are things that fall under their own weight and then there are articles of the law that can take into account certain realities and foresee certain consequences'(SPIL6).

In England and Wales there was a general view amongst professional stakeholders that human rights law was reflective of good practice that was sufficiently provided for in domestic legislation: 'I think, it's not about claiming them, but it's rather about whether they are the most helpful argument to run, because, so they underlie everything we're doing anyway, as does the welfare best practice from the Children Act..' (UKIL5). As a result, there seemed to be a general consensus amongst professional stakeholders that human rights law did not have any real impact<sup>436</sup> with UKIJ1 unsure that the Human Rights Act 'adds very much at all.' He went on to say that 'if they

repealed the HRA tomorrow, would it make any difference to the substantive children law? No, it wouldn't.' This sentiment was echoed by UKIL4: 'It (the HRA) doesn't necessarily add much to the debate, because from my perspective, the Children Act is pretty comprehensive in dealing with that, and the Practice Directions and things like that, the Article 8 is well respected within what the Children Act is putting forwards.'

FRIL4 had similar views when asked if they cited human rights law: 'Rarely. Article 8 of the Convention? very rarely I'm a bit allergic to international law. But no, it happened to me in a case but very rarely because I think French law is good enough to protect, so I admit I don't think about it. I admit I don't think about it.' SPIL11 summed up their view as: 'Domestic law is more than enough.' Views such as these may of course be well founded, if domestic law regularly incorporates developments in international human rights law and legal professionals receive regular updates and training. However, our findings in relation to the quality and regularity of such training, set out above does not indicate that this is the case.

Another explanation for the antipathy towards human rights law could also be due to a lack of knowledge on its applicability. The comments of two very experienced lawyers who considered themselves specialists in family law provide an example of the poor level of knowledge amongst some legal practitioners. When asked if they used the HRA in their family law practice,

<sup>430</sup> I.M. and Others v Italy 10th November 2022, see also *Bevaquca v Bulgaria* 12th June 2008.

<sup>431</sup> UKIJ2, UKIJ4, UKIJ5, UKIJ6, UKIJ7, UKIL5, UKIL8, UKIO1, UKIO3, UKIO5, UKIO8, UKIO9, ITIJ1, ITIL10, SPIJ1, SPIJ3, SPIJ6, SPIL5, SPIL6, UKIO3 and UKIO5, for example, commented how they are implicitly always there, even if not directly.

<sup>432</sup> BIJ5, UKIJ8, UKIL2, UKIO2, UKIO6, FRIL10, FRIL6, ITIJ1, ITIJ3, ITIJ5, ITIJ8, ITIL10, ITIL3, ITIL4, ITIL5, ITIL7, ITIO1.

<sup>433</sup> BIJ2, BIL1, BIL12, BIL6, UKFG2C, UKFG2A, UKIJ2, UKIJ3, UKIJ4, UKIJ5, UKIJ6, UKIJ7, UKIL3, UKIL4, UKIL5, UKIL7, UKIL8, UKIO3, UKIO5, UKIO7, UKIO9, FRIJ1, FRIL1, FRIL4, FRIL7, FRIL8, FRIL9, ITIJ2, ITIJ3, ITIJ4, ITIL1, ITIL3, ITIL5, ITIL6, ITIL7, ITIL8, ITIL9, SPFG3C, SPIJ1, SPIJ5, SPIL1, SPIL10, SPIL11, SPIL3, SPIL4, SPIL5, SPIL9 SPIO1, SPIO3, SPIO7.

<sup>434</sup> BIJ4, BIL1, BIL10, BIL6, BIL9 UKIL2, UKIL4,

UKIL7.

<sup>435</sup> UKIJ4, UKIJ5, UKIJ6, UKIJ9, FRIL2 and FRIL3.

<sup>436</sup> UKIL1, UKIL4, UKIL7, UKIO9, FRIL4, ITIJ2, ITIL7, SPIJ1, SPIJ3, SPIJ5, SPIL11, SPIL2, SPIL3, SPIL1.

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both were unaware of the courts duty under section 6 of the HRA as a public authority and that it therefore applied to private law proceedings: 'What's the obligation of the state when mum and dad disagree about contact and mum says there was domestic violence in the relationship? I mean, I, in my public law work, Article 8 figures all the time. The proportionality of what's proposed and so on. And I suppose if you see the court as the state actor, the proportionality of what the court is proposing might be something that one could deploy in relation to respective orders, but there's no duty on the state to protect individual mothers or fathers from domestic, from domestic abuse' (UKIL2). UKIL3 stated that 'they're not relevant. The state isn't intervening' and that they only came up in her public law work.

No. Well, it's not the states intervening. It's the, these are private individuals. So, they're not, the Article 8 isn't invoked.'

Other legal professionals pointed to a varying lack of knowledge on human rights law amongst the judiciary, which, depending upon which level of court they were before, rendered human rights arguments largely pointless: 'You wouldn't make it [reference human rights] in front of magistrates because they wouldn't understand. It would go completely over their heads. Most district judges wouldn't be interested. Circuit judges would take an interest in it. But. You know, the only, the only arguments I think you would, the only types of cases you would get traction with an Article 8 argument, are cases where we're talking about,

severing contact between a, you know, a parent, normally a dad, and the kids, or, or, where/well (not sure), we're only going to do indirect contact' (UKIL1).

# Human Rights Arguments Are More Helpful to Fathers

When human rights were acknowledged as being specifically relevant in family law it was usually in relation to men's rights or fathers' rights, which is consistent with the literature set out above. In Bosnia & Herzegovina emphasis was placed in the need to respect and protect the rights of the 'accused' (BIJ2, BIL2). Moreover, according to BIL2, 'They are called especially when defending the perpetrator. All the rights in criminal proceedings that he has, the right to life, the right to freedom, everything that you deny him because of the relationship with the victim, he has the

right to fight for his rights'. Examples of perpetrators using human rights as part of their case strategy were provided by survivors: in the case of BFG1B her abuser complained about his human rights to refuse an assessment.

Stakeholders UKIL1, UKIL2 and UKIL4 considered that there is more use made of article 8 by those representing the father in a hearing, which UKIL4 described is an 'exhausting' practice. Similarly, psychologists and social workers in Spain shared their concerns about men's or the fathers' rights, the

importance of the presumption of innocence and ensuring a fair trial that does not favour mothers (SPIO1, SPIO4, SPIO6, SPIO7). For example, SPIO4 reflected: 'We see cases here where you say where the rights of this man are being left. The person denounced in terms of gender violence, as a human being. Where does that leave him?' while SPIO1 said: 'I think that men are unprotected [laughs] compared to women' when asked about the relevance of human rights.

# Usage and Reference of Specific Articles of the European Convention on Human Rights

Despite the lack of specificity of human rights claims in family law proceedings, there was nonetheless a good knowledge of the applicability of article 2 to cases involving domestic abuse in Bosnia & Herzegovina, where it was referred to by five judges and two lawyers. Bosnia & Herzegovina<sup>437</sup> was the country where it was mentioned the most, even if only to point out how they are rarely part of the hearings, 'Right to life, is that what you mean? We have and directly refer to human rights conventions, it is directly incorporated into our first system, the right to life, the right of children, we have and we always refer to it'. Unfortunately, it was the opposite in England and Wales, with only two references. UKIL4 stated that they would not plead them, and UKIO7 seemingly unaware of their applicability: 'I can't ever think of human rights being linked with, with domestic abuse. It should be, should be, you know, right to, right to live, (small laugh). In Spain the right to life was understood as relevant and basic, forming part of the domestic legislation, which did not therefore require a direct reference at court: '[it] is implicit.... If you, for example, say no with a protection order, because there is a risk to the life or liberty of this person, it already refers to that, doesn't it? Or if, for example, you say no, it is because there are indications of the commission of a crime of injury in the area of violence against women. Well, then it is implicit that the woman's right to life has been affected, right?' (SPIJ3).

Article 3, was mentioned only 15 times in total across the jurisdictions and

stakeholder groups and mainly in recognition of the right rather than something that was addressed or applicable in court proceedings. 'I haven't. I'm finding it difficult to think of an example when I might. I mean, I guess Articles 2 and 3 could potentially be relevant, but I can't see that it would be necessary, particularly, to plead them, especially not in the kinds of cases that we're dealing with day-to-day. Perhaps if you were taking something to the Court of Appeal, then you might add a human rights argument onto an argument, for the child arrangements orders. But in terms of the day-to-day practice, it's not something I would plead'(UKIL4).

'I am here to protect the victim, which is a right that has the right to life, to physical integrity, to moral integrity. No? of course they are there, they are always there. That is the basis. But I don't see it as if it were something that is a standard bearer, in other words, we cannot be standard bearers in the fight for human rights. I don't see that kind of discourse or that kind of impulse that you see in certain actions, either from the social services, from, from, from, from the equality departments, either at a local level or at an autonomous level, that discourse is not there, it's not there. Obviously, this is what I am telling you, that at the end of the day all the resolutions have their ultimate basis in a constitution. A Constitution that declares that of course, that declares that the 49<sup>th</sup> Convention on Human Rights is part of our legal system' (SPIL11).

Although Article 6 was not referred to very often, it was clearly regarded as fundamental to procedural justice and as a result, needed to be properly protected (UKIJ4, UKIL7, UKIO6) with a need to balance the right to fair trial of both the accused and the rights of the victim (ITIJ4).

Article 8 was the most mentioned of all the articles that were explicitly talked about by the participants in this research,<sup>438</sup> with 117 mentions overall. It was predominantly viewed as the right of a parent to see their child: 'It cannot be cancelled because it is the parent's right to have contact. (though it can be supervised and restricted)' (BIJ10).

'So in terms of human rights, we know, we always kind of consider that this child should have a relationship with their parent. And that's where you know, parental alienation, I think that again, we consider that, that sometimes there's absolutely no reason why this child has not seen the parent. And that's when we say it's emotionally abusive, because, you know that child, that parent should be in that child's life'(UK101).

'The question of parenting needs to be discussed in another field because the child's right to have a balanced relationship with both parents remains. If the Father a is convicted of ill-treatment, there are ways, however - see protected meetings - to maintain the relationship if functional' (ITIL9).

<sup>437</sup> BIJ1, BIJ10, BIJ5, BIJ6, BIJ7, BIL11, BIL3.

<sup>438</sup> (BIJ10, BIJ2, BIL1, BIL12, BIO7, ). BIJ10, BIJ6, BIJ8, BIL8, UKIJ1, UKIJ2, UKIJ3, UKIJ4, UKIJ6, UKIJ7, UKIJ8, UKIJ9, UKIL1, UKIL2, UKIL3, UKIL4, UKIL5, UKIL7, UKIL8, UKIO1, UKIO2, UKIO3, UKIO4, UKIO5, UKIO7, UKIO8, FRIJ1, FRIL2, FRIL4, ITIJ8,

ITIL9, ITIO1, SPFG1F, SPFG1C, SPFG1E, SPFG1D, SPIJ1, SPIJ2, SPIJ4, SPIL1, SPIL12, SPIL3, SPIL4, SPIL5, SPIL7, SPIO1, SPIO3, SPIO4.

## PART 08 The impact of human rights

'I am establishing a suspension of a visiting regime. Likewise, I am affecting a fundamental right, such as the right to family life. We are always touching everything; we are touching the essence of the family. [...] it is very sad, very sad, very sad when you see that there will be no filial paternal bond, because it is impossible, because you can no longer work with that child, because so much time has passed, the issue has become so entrenched' (SPIJ1). Some stakeholders regarded it as the most important right (SPIL12 and FRIJ1). Survivors, however, particularly in Spain (SPFG1F, SPFG1C, SPFG1E, SPFG1D), felt that this interpretation of the right was mainly used for the benefit of fathers: 'Is the child who has the right to have a relationship with their father and what they want to be saying is that is the father who has the right to have these visitations with his son'(SPFG1E). This was corroborated by UKIL1 who admitted that they had indeed instrumentalized article 8 in this manner: 'Article 8 arguments on both sides of the coin. I have employed, to be honest, more Article 8 arguments if I'm

for the person who, they're trying to prevent contact with. So if I'm for the dad, in that sense. You know, you're thinking about Article 8 in the sense of whether you're trying to stop the contact with this person and that engages their Article 8 right and the child's Article 8 right.'

The use of article 8 from the point of view of parents rather than children was also noted and criticised by some stakeholders (BIL12, UKIJ4, UKIL3, UKIO2, UKIO4). 'You very often get an absent parent saying, I have a right, to see my child. And I respond by agreeing, that, you do have a right, but if, but the right but the child has rights too, to be able to have a family life free of risk of harm, and harm. And where there is a conflict between the child's rights and the parent's rights, the child's right must prevail'(UKIJ4). This was also underlined by a large number of survivorss who felt that the rights of their children had been forgotten and not considered in the legal proceedings same as theirs:<sup>439</sup> 'It is true that the rights of parents are important, but they should never, never, never, never,

never be above the rights of children' (SPIL2).

Finally, Article 14 was the least referenced in the entire fieldwork, with only 4 mentions (UKIJ3, TIL10, SPIL3, SPIL8), and, again only as part of a list of rights that survivors possessed but that were not ever claimed directly in court: 'Well, of course. Conceivably, there are. If you think about Article 14, potentially. But have I ever had a case whereby something, something like that's been argued, no, I haven't. Certainly not sitting as a judge'(UKIJ3).

# Human Rights in Theory But Not In Practice

Perhaps unsurprisingly, a good number of survivors felt that human rights law was not implemented in practice (SPFG1A) or respected (SPFG2E, SPFG1A, SPFG2D, SPFG3B) and (SPFG3E) 'It seems to me an important thing to emphasise: the Istanbul Convention is never applied. Because this fact that violence is systematically excluded from civil law is something that goes directly against the Istanbul Convention but in a way that is very declared' ITFG3B This sentiment was echoed by professional stakeholders such as ITIL1, ITIL7, SPIL11 and SPIO6

all of whom felt that there is no respect for human rights at court even if they were briefly quoted at court (SPIJ1): 'It is true that we mention the right of minors in the lawsuit itself, but I think it is a standard request, that is to say, a request that you slip into the lawsuit but that is not argued and that I think is not generally taken into account' (SPIL7).

Indeed this mechanical citation of human rights furthered a perception that human rights law had little or no impact on decision making:<sup>440</sup> 'they

closed the proceedings without giving me the right to make my final submissions, without giving me the right to express my views through translators. the right of protection, the right to family'(FRFG1A).

Survivors also raised their experiences of a negative attitude from professional stakeholders to any attempts made to arguments made on their behalf on human rights grounds. 'If a litigant-in-person writes their own position statement, and they've got, you know, they put Article 8 or Article 6, the judge

<sup>439</sup> UKFG1A, UKFG2B, UKFG4C, ITFG1B, ITFG1A, ITFG1B, ITFG2A, ITFG3D, SPFG1A, SPFG1C, SPFG1B, SPFG1E, SPFG2C, SPFG2E and SPFG2D.

<sup>440</sup> UKFG1A, UKFG2A, UKFG4C, FRFG2A, FRFG1A, ITFG1B, ITFG2A, ITFG3D, SPFG1A, SPFG2C, SPFG2D.



says, Article 8 or Article 6, what do you know about it? You know, we deal with, you know, the real things in this court.... a judge will turn their nose if you mention them' (UKIL7). In some cases judges pretended not to hear when human rights and the Istanbul Convention was raised in relation to their cases in court (ITFG1B and ITFG1A). UKFG4C's attempt to raise her human rights with her solicitor and Cafcass officer was 'just brushed under the carpet.' The exception appeared to be Italy, where a number of survivors

gave example of their lawyers specifically referencing the Istanbul Convention and human rights in their cases to good effect (ITFG1A, ITFG3C, ITFG3A). ITFG1B shared how her lawyer referencing the Istanbul Convention actually helped in her case: 'Then the judge wrote in one of the last orders that mediation is not possible, precisely out of respect for the convention. So by naming it so much, we got the ban on mediation.'

### Summary

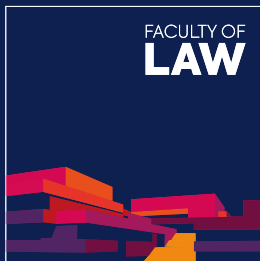
There was a general consensus amongst stakeholders across all groups and jurisdictions that human rights were relevant and helpful. However, they were viewed as more of a background context.

A large number of stakeholders across the jurisdictions, however, acknowledged that the rights of survivors were rarely argued for specifically by lawyers in their arguments, even though these rights were clearly relevant. In England and Wales there was a general view amongst professional stakeholders that human rights law was reflective of good practice that was sufficiently provided for in domestic legislation. As a result, there seemed to be a general consensus amongst professional stakeholders that human rights law did not have any real impact. Views such as these may of course be well founded, if domestic law regularly incorporates developments in international human rights law and legal professionals receive regular updates and training. However, our findings in relation to the quality and regularity of such training, set out above does not indicate that this is the case.

Another explanation for the antipathy towards human rights law could also be due to a lack of knowledge on its applicability, which was evident in some interviews. Other legal professionals pointed to a varying lack of knowledge on human rights law amongst the judiciary, which, depending upon which level of court they were before, rendered human rights arguments, largely pointless. When human rights were acknowledged as being specifically relevant in family law it was usually in relation to men's rights or fathers' rights, which is consistent with the literature set out above.

In terms of the specific human rights that were mentioned by stakeholders, Article 8 was, unsurprisingly, the most commonly encountered. Articles 2, 3 and 14 were the least mentioned as was Article 6, although there seemed to be a clear commitment to the idea of fairness as a fundamental right for both parties, particularly that of fathers. It was also clear from comments made by survivors that there was a good understanding of the applicability of human rights law, even if expressed in colloquial terms.

Survivors also raised their experiences of a negative attitude from professional stakeholders to any attempts made to arguments made on their behalf on human rights grounds. Perhaps unsurprisingly, therefore, a good number of survivors felt that human rights law was not implemented in practice. It was difficult not to conclude that human rights law had had little effect in the everyday practice of the family courts across the jurisdictions.



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