

# 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>

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.

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.