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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,¹⁵ 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.¹⁶ 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),¹⁷ the criminal codes, the criminal procedure codes and the family laws.¹⁸ 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 Herzegovina¹⁹ 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 violence²⁰. Suspended sentences are issued in almost 80% of the cases and between 10% (FBiH) and 18% (Republika Srpska) of perpetrators are sentenced to imprisonment.²¹ Retrospective reviews of femicide cases are not conducted.²²

¹⁵ 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>

¹⁶ 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.

¹⁷ 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.

¹⁸ 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.

¹⁹ Constitution of Bosnia and Herzegovina, Bosnia and Herzegovina, Article II.

²⁰ 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>

²¹ GREVIO's Report, n16, Paragraph 271.

²² 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 codes²³ and the LPDV laws. As regards the FBiH, Article 222²⁴ of the Criminal Code defines domestic violence²⁵ in broad terms. Domestic violence is also defined under Article 7²⁶ of the FBiH LPDV law. In Republika Srpska domestic violence is defined under Article 190²⁷ 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.²⁸ 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

²³ 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.

²⁴ 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).

²⁵ 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.

²⁶ 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”

²⁷ 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).

²⁸ 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.²⁹

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 2020³⁰ 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.³¹

It is clear therefore, as indeed GREVIO noted,³² 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.³³ 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

²⁹ GREVIO's Report, n16, Paragraph 194.

³⁰ Ibid, page 27.

³¹ 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.

³² GREVIO's Report, n16, paragraph 191.

³³ 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.³⁴

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 reports³⁵ 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 GREVIO³⁶ 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 strategy³⁷ 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.³⁸ 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.³⁹ 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.⁴⁰

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.

³⁴ 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.

³⁵ 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.

³⁶ GREVIO's Report, n16, paragraphs 192 and 193.

³⁷ 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;

³⁸ GREVIO's Report, n16, paragraph 193.

³⁹ Ibid, paragraph 194.

⁴⁰ 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.⁴¹ 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.⁴²

Legal Aid

As GREVIO notes in its report,⁴¹ 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.⁴⁴

The Voice of the Child

Legislation⁴⁵ 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.

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

⁴² GREVIO's Report, n16, paragraph 98.

⁴³ Ibid, paragraphs 308 – 313.

Ibid, paragraphs 308 – 313.

⁴⁴ 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.

⁴⁵ 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 women⁴⁶. 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.⁴⁷ 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.⁴⁸

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 men⁴⁹. 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)⁵⁰ 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.⁵¹ However, despite the prevalence of post-separation domestic violence, many women victims of domestic abuse share custody of their children with their abuser.⁵² 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.⁵³

⁴⁶ 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.

⁴⁷ 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.

⁴⁸ 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.

⁴⁹ 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.

⁵⁰ 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.

⁵¹ 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.

⁵² 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.

⁵³ 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”)⁵⁴ 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.⁵⁵ First, a general provision allows Family Courts to take into account, any physical or psychological violence committed by one parent on the other⁵⁶ 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”⁵⁷ 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.⁵⁸

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.’⁵⁹ 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,⁶⁰ and these provisions are very scarcely applied, in part due to a lack of coordination between criminal and civil procedures.⁶¹ In addition, legal procedures concerning domestic abuse are often compartmentalised between criminal procedures, children judges⁶², 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.⁶³ As a result there have been persistent calls for the more effective transmission of data between criminal and civil jurisdictions.⁶⁴

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”⁶⁵ 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.⁶⁶

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.⁶⁷ 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 consideration⁶⁸ 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

⁵⁴ Article 373-2 et seq. of the Civil Code.

⁵⁵ 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.

⁵⁶ Article 373-2-11 §6 of the Civil Code.

⁵⁷ Article 378-1 of the Civil Code.

⁵⁸ Article 378-2 Civil code.

⁵⁹ GREVIO’s report, n49, paragraph 180.

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

⁶¹ GREVIO’s report, n49, paragraph 180.

⁶² ‘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.

⁶³ GREVIO’s report, n49, paragraph 181.

⁶⁴ Note 60.

⁶⁵ Article 373-2-1 of the Civil Code.

⁶⁶ Note 60.

⁶⁷ 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

other. judges may also provisionally order alternating residence, until the final order is made.⁶⁹ 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.⁷⁰ Several NGOs have thus called for joint custody to be excluded in cases involving domestic abuse.⁷¹

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,⁷² 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.⁷³ However, access to these provisions is only by a decision of a Family Judge, which can take months.⁷⁴ 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 “measure⁷⁵ 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.⁷⁶ 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.⁷⁷

D. Mediation

Prior to any ruling in the family court the judge can propose or require a mediation between parents.⁷⁸ However, following repeated criticism from NGOs⁷⁹ 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.⁸⁰

E. Parental Alienation Syndrome (PAS)

The use of PAS has been specifically discouraged in France. The 5th 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.’⁸¹ 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.⁸²

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.⁸³ 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.⁸⁴ One analysis of victims of domestic abuse demonstrated how PAS is mobilised by psychiatric professionals, whose expertise are then asked by the JAF.⁸⁵ 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.⁸⁶ 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.⁸⁷

⁶⁸ Articles 373-2 and 373-2-11 of the Civil Code

⁶⁹ Article 373-2-9 §1 of the Civil Code.

⁷⁰ GREVIO’s report, n49, paragraph 180.

⁷¹ 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

⁷² Article 373-2-1 of the Civil Code.

⁷³ Articles 373-2-1 and 373-2-9 of the Civil Code.

⁷⁴ Amicale du Nid and others n71.

⁷⁵ GREVIO’s report, n49, paragraph 182.

⁷⁶ Loi du 23 mars 2019.

⁷⁷ GREVIO’s report, n49, paragraph 183.

⁷⁸ Article 373-2-10 of the Civil Code.

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

⁸⁰ 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^{re} édition, PUF 2019) 422.

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

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

⁸³ Amicale du Nid and others, n71.

⁸⁴ 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.

⁸⁵ Pierre-Guillaume Prigent and Gwénola Sueur, n82.

⁸⁶ Gwénola Sueur, n53.

⁸⁷ 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.⁸⁸ However, concern has been raised about the lack of initial and continuing training in the health sector⁸⁹ 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.⁹⁰ 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.”⁹¹

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 2019.⁹² 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.⁹³

The Voice of the Child

Adulthood is reached at the age of 18, however, when a child reaches the age of capable le discernement⁹⁴ i.e., she has a sufficient degree of understanding (this age depends on the judge’s discretion)⁹⁵ 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*.⁹⁶ If the child has not reached this age then an *administrateur ad hoc*⁹⁷ 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.⁹⁸ 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 low⁹⁹ 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.¹⁰⁰

⁸⁸ Article 51 of Law No. 2014-873

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

⁹⁰ GREVIO’s report, n49, paragraph 106.

⁹¹ Pierre-Guillaume Prigent and Gwénola Sueur, n82.

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

⁹³ GREVIO’s report, n49, paragraphs 112 and 113.

⁹⁴ Art. 388-1, fccand Art. 1182, fccp).

⁹⁵ 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.

⁹⁶ 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.

⁹⁷ 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.

⁹⁸ 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).

⁹⁹ Amicale du Nid and others, n71.

¹⁰⁰ GREVIO’s report, n49, paragraph 253.

¹⁰¹ 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.¹⁰¹

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 circumstances¹⁰² 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.¹⁰³ 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.¹⁰⁴ 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 18.¹⁰⁵ Data shows increasing rates of child exposure to domestic violence against their mothers.¹⁰⁶ 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.¹⁰⁷

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.¹⁰⁸ 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.¹⁰⁹

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.¹¹⁰ 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.¹¹¹ As GREVIO noted in its report,¹¹² 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.

¹⁰² National Strategy for Gender Equality 2021-2026, p. 5, ISTAT data 2019. Available at www.istat.it/it/archivio/235994

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

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

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

¹⁰⁶ Italian National Institute of Statistics (ISTAT)

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

¹⁰⁷ 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.

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

¹⁰⁹ Law No. 168 of November 24, 2023

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

¹¹¹ 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.

¹¹² 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 2014¹¹³ 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.¹¹⁴

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*).¹¹⁵

Although legislation allows for the granting of sole custody¹¹⁶ 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.¹¹⁷ 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.¹¹⁸

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.¹¹⁹ 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.¹²⁰ 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.¹²¹

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.¹²² 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).¹²³ 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 consideration¹²⁴ 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.¹²⁵ Moreover, despite the unequivocal ban on the use of parental alienation syndrome (PAS) by the Supreme Court¹²⁶ 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 them¹²⁷ leading to the invisibility of gender-based and domestic violence in civil courts¹²⁸. 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.¹²⁹ 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

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

¹¹⁴ Article 316 of the Civil Code.

¹¹⁵ 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.

¹¹⁶ Law 209/2012 and Legislative Decree 154/2013

¹¹⁷ GREVIO's report, n112, paragraph 180.

¹¹⁸ 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.

¹¹⁹ *Ibid.*.

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

¹²¹ 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.”¹³⁰

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.¹³¹ 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,¹³² 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.¹³³

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 System¹³⁴

Brought in as a result of the findings of the Senate Femicide Commission¹³⁵ these reforms represent a major overhaul of the civil system by the establishment of the single court for persons, minors, and families¹³⁶ and the introduction of judicial oversight on the removal of minors by the State¹³⁷. The reforms include an entire chapter dedicated to domestic and gender-based violence.¹³⁸

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,¹³⁹ the reform intends to guarantee a management of the trial aimed at avoiding secondary victimization¹⁴⁰ through the exclusion of family mediation and the forced attempts at conciliation in cases of allegation of violence.¹⁴¹

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

¹²² 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.

¹²³ 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. ¹²³ Cass., V Sez V, 5 May 2010, n. 29612.

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

¹²⁵ GREVIO's report, n112, paragraph 182.

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

¹²⁷ GREVIO's report, n112, paragraph 182.

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

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

¹³¹ Ibid at paragraph 185.

¹³² M. Feresin, N. Folla, S. Lapierre and P. Romito, n118.

¹³³ 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.

¹³⁴ 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').

¹³⁵ 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^a – Disegno di legge n. 93-338-353).

¹³⁶ introduced by art. 30 d.lgs.

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

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

¹³⁸ Chapter III, Section I, Art. 473-bis.40-46 cpc

¹³⁹ Art. 473-bis-2, 3 e 9.

¹⁴⁰ Art. 47-bis70.

¹⁴¹ Art.574-bis-42-43:

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

¹⁴³ 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.¹⁴² There are also significant changes in terms of the mobility, specialisation, and appointment procedure for CTUs.¹⁴³ 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.¹⁴⁴ 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.¹⁴⁵

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.¹⁴⁶ 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.¹⁴⁷ 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.¹⁴⁸ 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.'¹⁴⁹

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.¹⁵⁰ 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 GREVIO¹⁵¹ 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 courts¹⁵² or ordinary courts.¹⁵³ Children have a right to be heard in all

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

¹⁴⁵ GREVIO's report, n112, paragraphs 102 – 103.

¹⁴⁶ 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.

¹⁴⁷ GREVIO's report, n112, paragraph 105.

¹⁴⁸ *Ibid* at paragraph 55

¹⁴⁹ GREVIO's report, n112 at paragraph 55.

¹⁵⁰ 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)

¹⁵¹ GREVIO's report, n112, paragraph 251.

¹⁵² According to Arts. 330 and 336 c.c.

¹⁵³ 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.¹⁵⁴ 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.¹⁵⁵ 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.¹⁵⁶ Minors who witness domestic abuse albeit have also been recognised by as victims of a crime by the Supreme Court¹⁵⁷ as well as legislation.¹⁵⁸

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.¹⁵⁹

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.¹⁶⁰ As a result, their views are often ignored, even when they report sexual abuse in the family.¹⁶¹ 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.¹⁶²

According to the Foster Care commission, Italian authorities carried out at least 232 such removals in so called 'high conflict' cases in 2021,¹⁶³ 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.

¹⁵⁴ 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.

¹⁵⁵ 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.

¹⁵⁶ Art. 348(3) c.c.

¹⁵⁷ Cass., Sez. VI, 23 febbraio 2018, n. 18833.

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

¹⁵⁹ Art. 473-bis-4, 5, 6, 8

¹⁶⁰ 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 "

¹⁶¹ 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>

¹⁶² Commissione Parlamentare di Inchiesta, n160.

¹⁶³ 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 2022.¹⁶⁴ 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 Mujer¹⁶⁵ 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.¹⁶⁶ The majority of victims of GBV are women; in 2022 89% of the people murdered by a current or former partner were women¹⁶⁷ and 58 women were murdered in 2023.¹⁶⁸ Forty nine children have been murdered as a result of intimate partner violence against their mothers since 2013.¹⁶⁹

In the absence of official data before 2013, and relying on newspaper articles, one piece of research¹⁷⁰ 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-

¹⁶⁴ Law 15/2022.

¹⁶⁵ Macrosurvey of Violence against Women 2019 (igualdad.gob.es)

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

¹⁶⁷ General Council of the Judiciary f 20231226 Informe sobre víctimas mortales de la violencia

de género 2022.pdf

¹⁶⁸ <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

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

boletinMensual/2023/docs/Principales_datos_julio_2023.pdf, data as of July 2023,

¹⁷⁰ 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%)¹⁷¹ and only 58,6% of women have access to one of these specialized courts.¹⁷²

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.¹⁷³ 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%).¹⁷⁴

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.¹⁷⁵

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.¹⁷⁶ 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]).¹⁷⁷ 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,¹⁷⁸ 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.¹⁷⁹

The Family Law Framework

Parental responsibility ('patria potestad')¹⁸⁰ 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.¹⁸¹

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 report¹⁸² However, criminal procedure rules¹⁸³ 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

¹⁷¹ 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>

¹⁷² 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>

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

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

¹⁷⁵ Cabrera Mercado & Carazo Liébana, 2010

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

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

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

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

[confirming the interpretation of STS1378/2018].

¹⁸⁰ Established in Article 154 of the Civil Code.

¹⁸¹ Spanish national law of 15/2005

¹⁸² Article 340 Law on Civil Procedure.

¹⁸³ Article 457 The Law on Criminal Procedure.

PART 03 The Research Locations and Research Context

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 interest¹⁸⁴ Parties can agree and appoint their own experts.¹⁸⁵ 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.¹⁸⁶

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 violence¹⁸⁷ all allow judges to bar perpetrators from exercising their parental rights as part of a criminal sentence,¹⁸⁸ and the suspension or limitation of parental authority as a (pretrial) protective measure.¹⁸⁹ Under new provisions passed in 2021¹⁹⁰ 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 2022¹⁹¹ allows judges to suspend parental authority, guardianship or custody of alleged perpetrators of intimate partner violence¹⁹² and to suspend or regulate the visiting rights of alleged perpetrators.¹⁹³ Moreover, civil law prohibits joint custody where a parent is subject to criminal proceedings for domestic violence¹⁹⁴ and further legislation passed in 2021¹⁹⁵ 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.¹⁹⁶ 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 provisions¹⁹⁷ although the overall percentages are still low given the scale and prevalence of domestic abuse.¹⁹⁸ 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%.¹⁹⁹ 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.²⁰⁰

Research reveals that victim/survivors of gender-based violence come under considerable pressure in legal proceedings²⁰¹ to prove that they are not fabricating allegations of abuse and that the violence that they have been through is real²⁰² This is particularly the case with non-physical abuse, including psychological, emotional and economic violence.²⁰³ 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.²⁰⁴ This paves the way for men to deny the violence by claims of mutual violence,²⁰⁵ leading to some judges, prosecutors and lawyers²⁰⁶ to promote mediation as a form of dispute resolution, although it is expressly prohibited in cases of intimate partner violence by Organic Law 1/2004²⁰⁷ Stereotypes associated with gender-based violence also persist in courts and professionals, who tend to see only recent, severe physical violence as sufficient evidence.²⁰⁸ 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.²⁰⁹ 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.²¹⁰

¹⁸⁴ Article 343 of LEC

¹⁸⁵ Article 335.1 LEC

¹⁸⁶ 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.

¹⁸⁷ Articles 171, 172 and 173 of the Criminal Code.

¹⁸⁸ 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.

¹⁸⁹ Article 544 of the Criminal Procedural Code

¹⁹⁰ 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).

¹⁹¹ 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;²¹¹ whilst some autonomic legislation on gender based violence explicitly include the concept of parental alienation as a manifestation of institutional violence against women.²¹² Guidance has also been issued by the General Council of the Judiciary²¹³ 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.²¹⁴ 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 fears²¹⁵ resulting in this being raised formally with the Spanish Government by the UN Rapporteur on Violence against Women.²¹⁶ 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.²¹⁷ Some of this terminology can also be found in the jurisprudence; descriptions of the mothers as celosas, vengativas, mentidoras, sobreprotectoras, manipuladoras, con motivaciones espurias.²¹⁸ PAS is also included in psychological reports, expert reports or other reports which are then considered as proven facts by the courts.²¹⁹ A recent report on parental alienation²²⁰ 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.

¹⁹² Article 65.

¹⁹³ Article 66.

¹⁹⁴ Article 92, paragraph 7, of the Spanish Civil Code.

¹⁹⁵ 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-visitacion-casos-violencia-excepciones>

¹⁹⁶ 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.

¹⁹⁷ 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>

¹⁹⁸ 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.

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

²⁰⁰ GREVIO's report, n198, paragraphs 199 and 200.

²⁰¹ 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*.

²⁰² Casas Vila, *ibid*.

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

²⁰⁴ 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.

²⁰⁵ Albertín Carbó et al., n204 and Casas Vila, n204.

²⁰⁶ Schmal Cruzat and Camps Costa's, n204.

²⁰⁷ Albertín Carbó et al., n204.

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

²⁰⁹ 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). Hijos e hijas víctimas de la

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

²¹⁰ 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.

²¹¹ 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.

²¹² 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)

²¹³ 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.

²¹⁴ 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).

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

²¹⁶ AL ESP 3/2020 and AL ESP 6/2021.

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

²¹⁸ 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.

²¹⁹ Delegación del Gobierno, n217.

²²⁰ 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.²²¹ 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 alienating²²² and places them at heightened risk of secondary victimization.²²³

Training

Judicial training is provided from a variety of sources.²²⁴ 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 5/2018,²²⁵ 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 area²²⁶ however, for those judges who do not wish to serve on specialist VAW courts, in-service training on VAW remains optional.²²⁷

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.²²⁸ Moreover, the function and integration of psychologists who provide reports in family decisions into the legal procedure is not regulated by the State²²⁹ 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.²³⁰

²²¹ GREVIO's report, n198, paragraph 203.

²²² Ayllon Alonso et al., n210; Casas Vila, n214.

²²³ 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.

²²⁴ GREVIO's report, n198, paragraph 94

²²⁵ Article 310.

²²⁶ Article 312.

²²⁷ GREVIO's report, n198, paragraph 96.

²²⁸ 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.

²²⁹ Casas Vila, n214.

²³⁰ 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

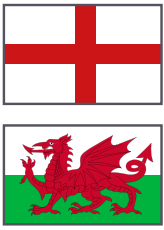
Article 9 of Organic Law 1/1996 enshrines the right of children to be heard in court proceedings which affect them. In cases of violence, including gender-based violence. Organic Law 8/2021, reinforces the right of children victims of violence, including gender-based violence, to be heard without an 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.²³¹

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.²³² This is compounded by evidence gathered by GREVIO²³³ 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.

²³¹ Observatorio contra la Violencia Doméstica y de Género. (2022).

²³² 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.

²³³ 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 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,²³⁴ 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.²³⁵ In the 12 months up to March 2023, 1 in every 6 homicides were domestic abuse related.²³⁶ Across a three-year dataset

between 2020 and 2023, the Domestic Homicide Project²³⁷ 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'²³⁸ and a number of existing offences against the person.²³⁹ Coercive control specifically addresses the continuous and repeated patterns of violence that tend to define the experiences of victims.²⁴⁰ 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.²⁴¹ 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.²⁴² 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.

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

²³⁵ 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.

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

²³⁷ Domestic Homicide Project - VKPP Work

²³⁸ Section 76 and 77 (1) of the Serious Crime Act 2015.

²³⁹ Offences against the Persons Act 1861.

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

²⁴¹ Section 1(3) of the DA Act 2021.

²⁴² Section 3 of the DA Act 2021.

²⁴³ Section 4 of the Children Act 1989

²⁴⁴ Section 1 of the Children Act 1989

²⁴⁵ Section 18 of the Victims and Prisoners Act 2024.

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

²⁴⁷ Family Proceeding Rules 3.8.

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

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

²⁵⁰ A Section 7 report.

²⁵¹ Re C [2023] EWHC 345 (Fam).

²⁵² 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>;

²⁵³ 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.”²⁴³ 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.²⁴⁴ 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.²⁴⁵

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.²⁴⁶ 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.²⁴⁷

The Children and Family Court Advisory and Support Service (Cafcass) is a statutory body.²⁴⁸ Its functions in respect of Wales are discharged by Cafcass Cymru²⁴⁹ and include giving advice to the court²⁵⁰ 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.²⁵¹

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 abuse²⁵². 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.²⁵³ Unfortunately, the legal response to this issue has largely been inadequate; and has recently been termed ‘a cycle of failure.’²⁵⁴ A large volume of research²⁵⁵ 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.²⁵⁶ 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.²⁵⁷ 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)

²⁵⁴ 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.

²⁵⁵ 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)

²⁵⁶ Ibid.

²⁵⁷ 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.²⁵⁸ 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 UK²⁵⁹ 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.²⁶⁰ This has occurred despite the publication of 'good practice' guidelines for the judiciary²⁶¹ and specific practice directions (PD12J)²⁶² 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 2020.²⁶³ However, the resulting recommendations are yet to be fully implemented,²⁶⁴ although some progress has been made e.g. the piloting of 'pathfinder courts'²⁶⁵ and the establishment of the Family Court Monitoring and Reporting Mechanism Pilot.²⁶⁶ More recently, the Domestic Abuse Commissioner issued a report in 2023²⁶⁷ 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',²⁶⁸ it was subsequently reframed as 'parental alienation' by its proponents, and began to feature in England and Wales case law,²⁶⁹ despite the lack of scientific and evidential basis of its existence.²⁷⁰ 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.²⁷¹ 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,²⁷² exacerbated by specific legal advice not to do so.²⁷³

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.²⁷⁴ One study²⁷⁵ 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.²⁷⁶ They do,

²⁵⁸ 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)

²⁵⁹ Choudhry, S. (2019), n258.

²⁶⁰ Ibid.

²⁶¹ 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]

EWCA Civ 448

²⁶² 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,

²⁶³ 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)

²⁶⁴ 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)

²⁶⁵ 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).

²⁶⁶ 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)

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

²⁶⁸ 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)

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

²⁷⁰ 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...'²⁷⁷

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 2023²⁷⁸ 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 Division²⁷⁹ and the FJC/BPS²⁸⁰ 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,²⁸¹ 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 judges²⁸² which addresses recent caselaw, the Harm Report and the Domestic Abuse Act, including compulsory one day training on domestic abuse for judges.²⁸³

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 Programme²⁸⁴ 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 abuse²⁸⁵ and arranged for 'Safe & Together Institute'²⁸⁶ 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.²⁸⁷ 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.²⁸⁸ As a result, not all domestic abuse victims are able to obtain legal aid for family law proceedings²⁸⁹ 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.

²⁷¹ Barnett 2020, n269.

²⁷² Ministry of Justice (June 2020), n263.

²⁷³ Birchall, J. and Choudhry, S. (2018) and Choudhry, S. (2019), n258.

²⁷⁴ 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).

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

²⁷⁶ 'Alienating behaviours' | Cafcass

²⁷⁷ 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)

²⁷⁸ 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.

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

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

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

²⁸² 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)

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

²⁸⁴ Domestic Abuse Practice Improvement Programme | Cafcass

²⁸⁵ Guidance for Cafcass Cymru practitioners

about children experiencing domestic abuse | GOV.WALES

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

²⁸⁷ 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.

²⁸⁸ 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.

²⁸⁹ 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 1²⁹⁰ 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,²⁹¹ 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.²⁹² 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 Guidance²⁹³ 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.²⁹⁴ In addition, recent research²⁹⁵ 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.

²⁹⁰ Practice Direction 12B.

²⁹¹ 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.

²⁹² Practice Direction 16A

²⁹³ Family Justice Council Resources and Guidance - Courts and Tribunals Judiciary

²⁹⁴ 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)

²⁹⁵ 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.