

The Istanbul Convention and the Legal Implications of a Possible Accession of the EU

Albena Koycheva



This training session is funded under the Rights, Equality and Citizenship Programme 2014-2020 of the European Commission.

Prevalence of violence against women in the EU

- ▶ 1 in 3 women - physical and/or sexual violence since the age of 15
- ▶ half of the women avoid certain places and situations for fear
- ▶ 1 in 20 women have been raped;
- ▶ 75 % of women in a professional job or in top management have experienced sexual harassment;
- ▶ 1 in 10 women has experienced sexual harassment or stalking through new technologies

see data at <http://fra.europa.eu/en/publication/2014/violence-against-women-eu-wide-survey-main-results-report>

- ▶ The cost of gender based violence in EU amounts to approximately 226 billion euros per year. The price of the continuing tolerance is paid both by the public and the private sector.

The gender based violence is seriously underreported

- ▶ Only around 30% of victims report the most serious incidents they have experienced.
- ▶ 1 in 4 women who do not report sexual violence to the police chooses not to do so because of shame
- ▶ 1 in 5 does not want anyone to know
- ▶ 1 in 10 believes the police could or would not do anything.

Of those who do report to the police, only about half are satisfied with the assistance received.

Violence against women as a concept in human rights law

- ▶ International legal documents - ICCPR, CEDAW Convention, etc.
- ▶ General Recommendations No. 19, 28 and 33 of the CEDAW Committee
- ▶ European Convention on Human Rights and Fundamental Freedoms and its Protocols
- ▶ The ECtHR case-law on cases of violence against women and domestic violence - articles 2, 3, 6(1), 8, 13 and 14 in conjunction with articles 2, 3 and/or 8
- ▶ The Inter-American Belém do Para Convention - 1994

What is gender based violence (GBV)?

- ▶ Gender-based violence is legally defined as
 - a brutal form of discrimination based on sex and gender
 - a violation of the victim's fundamental rights
 - both a cause and a consequence of inequalities between women and men.
- ▶ Gender-based violence is a pattern of behavior or a single act that happens everywhere, in every society and EU country, regardless of social background, whether at home, at work, at school, in the street or online.
- ▶ Not only does it affect women's health and well-being, but it can hamper women's access to employment, thereby negatively affecting their financial independence and the economy in general.

The Istanbul Convention

- ▶ The text of the Istanbul Convention was drafted by a group of experts - CAHAVIO, including representatives of all the 47 member states of the Council of Europe, the EU, Canada, USA, Mexico, Japan and the Holy See.
- ▶ **The Council of Europe Convention No, 210 on Prevention and Combating violence against Women and Domestic Violence** was
 - opened for signatures on May 11th, 2011 in Istanbul and
 - entered into force on August 1st, 2014
- ▶ As of April 5th. 2017 it has 44 signatures, 22 ratifications, 15 reservations, 4 objections.

Purposes of the Istanbul Convention - to prevent, protect, punish and compensate

Article 1

- ▶ *protect* women against all forms of violence, and *prevent, prosecute and eliminate* violence against women and domestic violence
- ▶ elimination of all forms of discrimination against women and promote substantive equality
- ▶ design a comprehensive framework, policies and measures for the protection of and assistance to all victims
- ▶ promote international co-operation

The Istanbul Convention:

- ▶ Preamble
- ▶ Text - detailed substantive law in Chapter V - articles 29 - 58
- ▶ **Explanatory report** - translated into national languages
- ▶ **Scope**
 - addresses all forms of VAW and DV (which affects disproportionately women);
 - applies in times of peace and in situations of armed conflict.

Definitions - article 3

- ▶ Violence against women - a *violation of human rights* and a *form of discrimination* against women ... *in public and in private life*
- ▶ Domestic violence
- ▶ Gender - shall mean the **socially constructed** roles, behaviours, activities and attributes that a given society considers appropriate for **women and men**
- ▶ Gender-based violence against women
- ▶ Victim
- ▶ Woman - including girls under the age of 18

State obligations and due diligence - article 5

- ▶ The states are responsible for the commission of such acts by - state authorities and private persons - and shall act in conformity with this obligation
- ▶ ... to *prevent, investigate, punish and provide reparation* for acts of violence covered by the scope of this Convention
- ▶ gender sensitive policies and measures; coordinated approach; financial and human resources; data collection and research

Prevention includes (articles 12 - 17):

- ▶ Changes in the social and cultural patterns of behavior... eradicating prejudices, customs, traditions and all other practices based on the idea of inferiority of women or stereotyped roles
- ▶ Measures should be specific and flexible
- ▶ ...ensure that culture, custom, religion, tradition or so-called "honour" shall not be considered as justification for any acts of violence
- ▶ Education and training of professionals
- ▶ Preventive intervention and treatment programmes
- ▶ Involvement of the private sector and media

Protection and support - articles 18 - 28

- ▶ Protection of victims from any further violence
- ▶ Multi-agency effective coordinated approach, including state agencies and civil organizations
- ▶ Victim centered approach, focused on the human rights and the needs of the victims + assessment of the relationship between the victim and the perpetrator, children, social environment
- ▶ Victim support services - especially for the victims of sexual violence and for the children
- ▶ Available information and administrative support
- ▶ Confidentiality rules and obligation to report to the competent authorities that a serious act has been committed

Substantive law - articles 29-48

- ▶ Effective civil lawsuits and remedies against the
 - Perpetrator of the violent act, and
 - State authorities that have failed in their duty to take necessary preventive measures
- ▶ Right of the victims to claim compensation - from the perpetrator; state compensation;
- ▶ Custody, visitation rights and safety of the victims - the history of violence should be taken into account (risk assessment and safety planning, safety at first)
- ▶ Forced marriages - procedures for their dissolution or annulment should be facilitated and without undue financial and administrative burden on the victims

Substantive law - crimes

- ▶ Article 33: ...the *intentional conduct of seriously impairing a person's psychological integrity through coercion or threats* is criminalized
- ▶ Article 34: **Stalking** ... the intentional conduct of repeatedly engaging in threatening conduct directed at another person, causing her or him to fear for her or his safety, is criminalized (appearance, following in the real and in the virtual world, unwanted communication, vandalizing property, leaving subtle traces, targeting pets, setting up false identities, spreading untruthful information); it is a pattern of behavior, a chain of repeated serious acts, targeted at the victim only and instilling in the person a sense of fear (if taken alone these acts might not always amount to a criminal act)
- ▶ Physical violence - all forms.

Criminalization of sexual violence and rape - article 36

- ▶ Consent must be given voluntarily as the result of the person's free will assessed in the context of the surrounding circumstances.
- ▶ Parties shall ... ensure that the provisions of paragraph 1 also apply to acts committed against former or current spouses or partners as recognized by internal law.

Specific requirements:

- ▶ Unacceptable justifications (mitigating circumstances) - based on culture, custom, religion, tradition, or the so-called "honor" - article 42;
- ▶ The offenses ... shall apply irrespective of the nature of the relationship victim - perpetrator - article 43]
- ▶ Jurisdiction - article 44
- ▶ Sanctions - including deprivation of liberty which can give rise to *extradition*; monitoring and *supervision* of the convicted persons; withdrawal of *parental rights*
- ▶ Aggravating circumstances - article 46
- ▶ Sentences passed by another party
- ▶ Prohibition of mandatory alternative dispute resolution processes or mediation - article 48

Special requirements - protective measures

- ▶ The human rights of the victim - risk assessment and risk management - esp. the lethality risk
- ▶ Emergency **barring orders**, restraining or protection orders - articles 52 and 53, and protective measures - art. 56
- ▶ Access to legal aid, including free legal aid
- ▶ Continuing the cases even if the victim withdraws the complaint for offences under art. 35 - 39 - *ex parte* and *ex officio*
- ▶ *Reasonable statute of limitation*, esp. for the offenses under articles 35 - 39
- ▶ Residence status, gender based asylum claims, non-refoulement (in countries where their life is at risk)

Who will make sure that state parties are living up to their obligations?

- ▶ The Istanbul Convention monitoring mechanism: a two-pillar system
- ▶ an independent expert body, the Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), which is initially composed of 10 members and will subsequently be enlarged to 15 members following the 25th ratification; adopts its own Rules of Procedure
 - Monitoring the implementation of the Convention
 - May adopt Recommendations on the themes and concepts of the Convention
- ▶ a political body, the Committee of the Parties, which is composed of representatives of the Parties to the Istanbul Convention; Rules of Procedure
 - Follows up on GREVIO reports and conclusions
 - Adopts recommendations to the Parties concerned

Monitoring procedures

- ▶ Country-by-country evaluation procedure
- ▶ Inquiry procedure
- ▶ National Parliaments are involved - article 70 - as they are
 - Invited to participate in the monitoring of the measures taken for the implementation of this Convention
 - GREVIO's concluding reports shall be submitted to the Parliaments
- ▶ The Parliamentary Assembly of the Council of Europe shall be invited to regularly take stock of the implementation of this Convention

What is the EU doing?

- ▶ **Rights of the victims** - respectful treatment and recognition, protection, support, access to justice and compensation and restoration at the expense of the perpetrator or by the State, support for the family members of the deceased victims, access to victim support, review decision not to prosecute, specialist support services

The Directive [2012/29/EU](#) establishing minimum standards on the rights, support and protection of victims of crime - adopted on 25 October 2012, entered into force on 15 November 2012, to be transposed by 16 November 2015

- ▶ Awareness raising;
- ▶ Training of judiciary, police and law-enforcement personnel
- ▶ Facilitates exchange of good practices and finding common solutions among the Member States
- ▶ Works to eliminate female genital mutilation

Some legal implications of a possible EU accession to the Istanbul Convention

- ▶ Precedence - EU has acceded to the UN Convention on the Rights of the People with Disabilities in 2010
- ▶ Considerations of requirements that must be fulfilled and the solutions to be created concern new areas and perspectives in EU law
- ▶ The implementation would be in the spheres of the shared competence.

Conceptual differences

EU law - uses the terms "men and women" and "sex discrimination"
 - soft law and funding policies

IC - uses the terms "gender", "violence against women", "domestic violence"
 - is a legally binding document

Binding EU law

- ▶ Directive 2011/99/EU on the European protection order and Directive 2011/93/EU on combating the sexual abuse and sexual exploitation of children and child pornography setting minimum requirements on Member State legislation.
- ▶ The Victims' Directive 2012/29/EU sets minimum requirements for the Member States regarding issues that are highly relevant to the Istanbul Convention,
- ▶ Regulation No. 606/2013 on mutual recognition of protection measures in civil matters pays attention to gendered violence.

Competence of the EU to accede to the Istanbul Convention

- ▶ The EU mandate for accession, which is possible only within the limits of the EU's general competence to conclude international agreements on its own behalf. Under Article 216(1) TFEU, the EU has external competence to conclude international agreements where Treaties or legally binding EU act so provide, where the agreement is necessary to achieve one of the objectives referred to by the Treaties, or is likely to affect common rules or alter their scope.
- ▶ Combating the crimes of violence and establishing gender equality are clearly defined as EU objectives.
- ▶ According to Article 216(2) TFEU agreements concluded by the EU are binding to all the EU institutions and to its Member States. The member states will also be bound by the EU policies for the implementation of Istanbul Convention together with their own obligations deriving from the ratification.

Competence of the EU to combat discrimination

- ▶ There is a strong EU competence on eradicating discrimination based on certain grounds including sex and gender.
- ▶ Article 19 TFEU allows EU action to combat discrimination
- ▶ Article 157(3) of the TFEU allows measures to ensure equal opportunities and equal treatment of men and women in matters of employment and occupation;
- ▶ Article 157(4) TFEU further provides for the possibility of positive action for the underrepresented sex.

Other competences and roles of EU

- ▶ Competence of the EU in the area of criminal law
- ▶ Competence in judicial cooperation in matters of criminal law and mutual recognition of judgments and judicial decisions
- ▶ EU role in training judiciary and police
- ▶ EU soft law and introducing policies and measures

Main challenges - legal arguments

- ▶ The limited EU competence in the area of criminal law is stated as the main legal argument against the EU accession.
- ▶ The process of signing and ratifying is at different stages for the EU Member States.
- ▶ There is already a big number of reservations made by states that have ratified the Istanbul Convention.
- ▶ Substantial financial commitment is required - by the national governments and at EU level (upon possible accession).
- ▶ Constant lack or insufficiency of specialist services for the victims, especially for victims of sexual violence.
- ▶ Many difficulties with the implementation of the provisions for victims - migrants and asylum seekers - residence permit and administrative rules and procedures.
- ▶ Sexual history evidence protection provisions is sporadic.

Other challenges:

- ▶ Other objections are based on
 - fears for the fate of the traditional society based on the cultural affirmation that gender is strictly and always binary;
 - the tendency of the traditionalist approach to justify sexism;
 - undermining violence against women and domestic violence (against women and children);
 - diverging understandings of what constitutes a family;
 - non-recognition of gender equality;
 - reluctance to challenge the traditional gender roles through education and awareness raising.

Thank you for
your attention!