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**GENDER EQUALITY COMMISSION  
(GEC)**

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**FEASIBILITY STUDY  
EQUAL ACCESS FOR WOMEN TO JUSTICE**



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**EXECUTIVE SUMMARY:**

This feasibility study is based on case studies from Austria, Finland, Portugal and Sweden<sup>1</sup>. It points out a number of obstacles which limit women's opportunities to claim their rights in court. These obstacles are linked to:

- Lack of awareness of available procedures;
- Lack of resources and restrictions on the availability of legal aid;
- Emphasis placed on using out-of-court settlement procedures to ensure a swift end to the legal dispute, often leaving women at a disadvantage;
- Gender neutral legislation and legislation that has not been assessed for its gender impact may also lead to systemic inequalities that are often unintended;
- Gender bias in courts and among law enforcement officials, in particular when it comes to certain groups of women such as minority women, disabled or rural women, is another reason why women find it hard to pursue justice;
- Fear, shame and cultural and/or religious barriers.

These case studies point towards many areas that offer room for improvement to ensure women's access to justice and allow us to come forward with the following preliminary observations and proposals:

***i. Need to tackle the negative impact of gender-neutral legislation in particular by:***

- Ensuring that gender impact assessments are systematically conducted in the formulation of legislation as a means to countering the intended or unintended negative impact of laws on women;
- Tackling stereotypes, gendered attitudes and bias;
- Establishing capacity building notably training initiatives on gender equality, women's rights and anti-discrimination for professionals involved at all levels of the justice chain, in order to tackle discriminatory attitudes and ensure the correct and fair implementation of legislation;
- Ensuring that the justice chain is "gender-responsive";
- Reducing attrition in the justice chain;
- Promoting an equal representation of women in legal and law enforcement professions, at all hierarchical levels and especially in fields where women are under-represented;
- Encouraging increasing number of women legislators/parliamentarians to optimise chances for legal reform to expand women's rights.

***ii. Importance of reducing gender-specific barriers to access to justice in particular by:***

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<sup>1</sup> The feasibility study is based on research carried out by four experts identified by the members of the GEC (3) and CEPEJ (1): Mr Antonio Casimiro FERREIRA, Professor, Scientific Co-Coordinator of the PhD Programme on "Law, Justice and Citizenship", the University of Coimbra, Portugal, Ms Birgitt HALLER, the Institute of Conflict Research, Vienna, Austria, Ms Sonia HULDEN, Judge at the Administrative Court of Goteborg, (Sweden) and Ms Kevät NOUSIAINEN, Professor of Comparative Law and Legal Theory, Turku, Finland.

- Ensuring that eligibility criteria for legal aid are formulated on the basis of gender considerations so as to take into account the diverse realities of women's lives;
- Addressing the power dynamics between men and women in alternative dispute resolution processes to ensure the rights of women are respected and their voices and concerns heard;
- Providing "one-stop" legal aid facilities and structures;
- Creating special service providers (gender desks/women's police stations);
- Considering setting up specialised courts;
- Considering acceptance, in certain cases, of collective actions including at the level of the European Court of Human Rights;
- Taking special measures at the legal or practical level in order to address the needs of particularly vulnerable women and enhance their access to justice;
- Developing and broadly disseminating practical information targeted at the general public on women's legal rights, legal mechanisms and available services, including by carrying outreach or community-based awareness-raising activities

**iii. Need to tackle gaps in research and data collection for instance by:**

- Improving data collection disaggregated by sex at all levels: crime statistics, police statistics, court records of lower and higher level courts, use of legal aid, use of alternative dispute resolution processes;
- Enabling a qualitative analysis of case law in all areas of law to identify a possible gender bias in the application of the law and identify ways to overcome such bias; Carrying out more qualitative research on the effects of alternative dispute resolution processes for women both in criminal and civil law as well as labour disputes.

## BACKGROUND TO THE FEASIBILITY STUDY

An initial compilation of European Court of Human Rights judgments in the field of equality between women and men, carried out by the Steering Committee for Equality between Women and Men (CDEG) in 2006<sup>2</sup>, showed that the number of judgments concerning gender equality, in which applications were lodged either by women or by women together with men was 19 out of the 48 judgments listed (from June 1979 to June 2006) concluding that the number of applications lodged by women was lower than the number of complaints lodged by men. The report also reiterated comments by Judge Françoise Tulkens<sup>3</sup> (former Vice President of the European Court of Human Rights) on women's access to the Court, i.e.: *"the relatively small number of applications lodged by women raises the question of the sometimes more limited possibility for women to lodge an application with the Court, reflecting a certain vulnerability with regard to the law. Access to the courts, which is already not easy at national level, can be even more difficult at international level"*. The report pointed out that it had not been easy to carry out the survey as the relevant data was sometimes difficult to obtain, if not unavailable, even within the Council of Europe.

In 2009, in the context of its consideration of the follow-up that should be given to document CM(2008)170 – *The Council of Europe and the Rule of Law* – that had been transmitted to it by decision of the Committee of Ministers, the CDEG decided that this was an important issue for the promotion and achievement of gender equality and to propose an activity on equal access to the courts for women and men<sup>4</sup>.

Consequently, when preparing the 7th Council of Europe Conference of Ministers responsible for Equality between women and men, the theme of which was "Gender equality: bridging the gap between de jure and de facto equality", the CDEG decided to include this issue among the priorities set out in the action plan adopted by the conference and to *"develop activities to monitor the equal access to justice of both women and men at national and international levels, in particular to the European Court of Human Rights, prepare an analysis of the data collected and develop, if necessary, awareness raising activities to promote women's access to justice."*

The Gender Equality Commission (GEC) took up this issue at its first meeting (6-8 June 2012). In the framework of activities to implement the Action Plan adopted at the 7<sup>th</sup> Council of Europe Conference of Ministers responsible for Equality between Women and Men (Baku, 24-25 May 2010), the GEC proposed carrying out a feasibility study on women's access to justice to collect more information on the existing situation in member states of the Council of Europe and make proposals for further action in this area. The fact that this is the very first feasibility study undertaken by the GEC illustrates that equal access for women to justice is central not only for guaranteeing equality between women and men, but also for the promotion of the rule of law – one of the cornerstones of the Council of Europe work and activities.

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<sup>2</sup> Case law of the European Court of Human Rights in the field of Equality between Women and Men (CDEG (2006)2).

<sup>3</sup> *Droits de l'homme, droits des femmes. Les requérantes devant la Cour européenne des droits de l'homme*, by Françoise Tulkens Judge at the European Court of Human Rights, Professor at Louvain University, 7 March 2007.

<sup>4</sup> 42nd report of the CDEG (CDEG 2009 RAP 42) item12 of the agenda.

## INTRODUCTION

The importance of laws in ensuring women's rights and achieving gender equality is widely accepted as a guiding principle of international law. In practice, however, women's access to justice requires more than ensuring equal rights or reforming legal systems.

The concept of access to justice, originally linked to ensuring rights through courts and tribunals, has evolved into the broader concept of justice and equal access<sup>5</sup>. From the emergence of collective rights to legal aid, there has been an increasing move towards reforming justice systems in order to simplify them and to facilitate access to them. This has resulted in a heightened awareness of the many obstacles that women face when accessing courts and legal systems. Obstacles, that for the most part impact women exclusively.

Women's limited access to justice is a complex social phenomenon that combines a series of inequalities at the legal, institutional, structural, socio-economic and cultural levels, and that particularly affects women among the most vulnerable social groups. Ensuring access to justice implies providing women of all backgrounds with access to fair, affordable, accountable and effective remedies so that women and men can enjoy both equal rights and equal chances to assert them. The concept of access to justice covers contact with, entry to and use of the legal system. It is more than simply ensuring the efficiency of justice systems. Rather, it is about ensuring the sensitivity and responsiveness of such systems to the needs and realities of women, as well as empowering them throughout the justice chain. Reducing the impact of obstacles faced by women not only facilitates greater accessibility, but is also an essential step towards achieving substantive gender equality.

Addressing the issue of women's access to justice is particularly relevant in the current context of financial and economic crises, where inequalities at all levels of society are on the rise and negatively impact women's lives. Moreover, there is a general lack of understanding of the extent of women's access to justice in Council of Europe member states. This is largely due to the fact that there have been few research initiatives in this field and that data is not systematically collected at national or European level.

The purpose of this feasibility study is to discuss the challenges in women's access to justice in Council of Europe member states.

The issue of equal access for women to justice raises various questions which this study seeks to address. These include: how does the law serve women and their experiences? To what extent do these systems serve them? How aware are women of their rights and the judicial process? What is the impact of gender neutral legislation on women's quest for justice? And how does the court administration help or hinder women in pursuing justice? Have innovative approaches such as legal aid, alternative dispute resolution processes and restorative justice improved women's access to justice?

Given the subject's complexity and the lack of data, the present study cannot aspire to provide a full picture of women's access to justice in Europe. For this reason, the study focuses on four member states: Austria, Finland, Portugal and Sweden. The four case studies provide a panorama of international standards as well as national legal frameworks in the chosen countries. The case studies also identify challenges and provide best practice examples in the areas of criminal law, civil and family law, as well as public law. The impact of legal aid, alternative dispute resolution processes and the presence of women in the justice sector are

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<sup>5</sup> Access to Justice for Migrants and Asylum-seekers in Europe, European Committee on Legal Co-operation, Jeremy McBride, CDCJ (2009) 2.

also discussed. Drawing on findings from the case studies, some preliminary observations and proposals are provided in order to pave the way for further work in this field.

## INTERNATIONAL LEGAL FRAMEWORK

There are a number of international legal standards dealing with different elements relevant to access to justice, mainly from the point of view of equality before the law, the right to a fair trial, the rule of law and the prohibition of discrimination. However, there is no comprehensive set of legal standards specifically addressing the issue of women's access to justice.

At the global level, several United Nations legal instruments recognise the right to equality of persons before courts and tribunals and the right to fair trial<sup>6</sup>. The United Nations Convention on the Elimination of All Forms of Discrimination against Women (hereinafter CEDAW Convention) requires states parties to agree to prohibit discrimination of women through laws that carry some form of legal sanction, and to ensure effective legal protection of women's entitlement to enjoy rights on an equal basis with men<sup>7</sup>. It also requires states parties to "repeal all national penal provisions which constitute discrimination against women"<sup>8</sup>. Moreover, Article 15 embodies the principle of women's equality before the law, which includes women's equal access to courts and tribunals, as well as their equal protection of the law. The CEDAW Committee is currently elaborating a general recommendation on access to justice for women to contribute to the clarification and understanding of the substantive content of the CEDAW Convention in this regard beyond the existing General Recommendation No. 28.

At the European level, the European Convention of Human Rights provides in Article 6 for the right to a fair trial in relation to any civil litigation or criminal charges. It also provides for the right to legal assistance where the accused has no means to do so and where the interests of justice so requires. In Article 14, it also prohibits any sex discrimination in the enjoyment of the rights and freedoms set out in the Convention. Protocol 12 was later introduced to broaden this prohibition beyond the limits of the rights and freedoms of the Convention but has only been ratified by 18 member states of the Council of Europe.

Legal aid for civil, commercial or administrative matters is addressed in several conventions of the Council of Europe. The European Agreement on the Transmission of Applications for Legal Aid and its Additional Protocol contain measures to facilitate cross-border applications for legal aid. The Convention on Action against Trafficking in Human Beings and the Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) both envisage the right to legal assistance and to free legal aid for victims<sup>9</sup>. In addition, several non-binding instruments address legal aid<sup>10</sup>. A number of recommendations address access to justice more generally<sup>11</sup>.

Since 2000, the European Union has issued several directives prohibiting discrimination on various grounds, including sex, in a number of areas, in particular the field of employment and

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<sup>6</sup> See Article 14 of the International Covenant on Civil and Political Rights, Article 10 of the Universal Declaration of Human Rights and Article 5(a) of the Convention on the Elimination of Racial Discrimination.

<sup>7</sup> Article 2 (b) and (c) CEDAW Convention.

<sup>8</sup> Article 2 (g) CEDAW Convention.

<sup>9</sup> See Article 15 of the Convention on Action against Trafficking in Human Beings and Article 57 of the Istanbul Convention (not yet in force).

<sup>10</sup> Committee of Ministers Resolution (76) 5 on legal aid in civil, commercial and administrative matters and Resolution (78) 8 on legal aid and advice.

<sup>11</sup> Recommendation No. R (81) 7 of the Committee of Ministers to member states on measures facilitating access to justice and Recommendation No. R (93) 1 of the Committee of Ministers to member states on effective access to the law and to justice for the very poor.



access to goods and services<sup>12</sup>. Among others, these directives introduce judicial enforcement mechanisms for the principle of non-discrimination and ease the burden of proof for victims.

Furthermore, the Charter of Fundamental Rights of the European Union prohibits discrimination on the grounds of sex and requires equality between men and women to be ensured in all areas. Article 8 of the Treaty on the Functioning of the European Union stipulates that the European Union “shall aim to eliminate inequalities, and to promote equality between men and women” in all its activities.

## EQUALITY BEFORE THE LAW AT NATIONAL LEVEL

Although meaning well, legislation establishing equality between women and men before the law can have unintended consequences. This is mainly due to the fact that such laws are formulated in gender neutral terms. **Gender neutral laws** have usually been formulated on the basis of one universal reality - that of men. By constituting the norm, it is men’s opinions, values, needs and conflicts that have shaped such laws. Formal equality focuses on “achieving equality as sameness”<sup>13</sup> meaning that women are to be included in the world as it is and be treated identically to men. Failing to take into account the daily and diverse reality of women’s lives, this “neutrality” is an illusion misleading policies and actions. It can for instance give way to situations where women dispose of equal rights, but since they do not possess the same access to opportunities enjoyed by men, they cannot successfully assert these rights. Consequently, formal equal rights do not guarantee *de facto* gender equality, since they may indirectly give a comparative advantage to men. Such unintended impact of formal equality and gender neutral laws and policies is addressed in the Finish and Swedish case studies. Both chapters highlight the inherent danger in neutrality, as it allows gender issues to be overlooked.

Across the globe, **anti-discrimination legislation** has been introduced in order to ensure *de facto* equality. Anti-discrimination provisions may be included at the constitutional level, in separate anti-discrimination laws or in the area of labour law, electoral law, social assistance law or consumer protection law. The prohibition of discrimination on the basis of gender is usually accompanied by a series of positive duties in order to ensure an equality of outcome. As the study shows, anti-discrimination laws can fail however to tackle the deeper implications of gender injustice and thus not tackle it at its roots. Anti-discrimination laws mainly address discrimination in the public sphere and thus may ignore a series of inequalities that occur in the private sphere which impact women’s access to justice negatively. Furthermore, this may be aggravated by treating discrimination on the basis of separate grounds, gender discrimination being just one of the many intersecting factors. The opposite can also be the case; where the recognition of discrimination on the grounds of ethnicity, age, religion, sexual orientation, or other similar ground may be considered without acknowledging that gender is also involved. The case studies show that anti-discrimination laws can only be one part of the solution. Effectively guaranteeing access to justice for women requires more than that.

**Gender mainstreaming** has often been put forward as a way of addressing the direct and indirect effects of gender neutral laws. This strategy supposes “the (re)organisation, improvement, development and evaluation of policy processes, to ensure that a gender equality

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<sup>12</sup> Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Directive 2002/73/EC of 23 September 2002 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions and Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services.

<sup>13</sup> Verloo, M., & Lombardo, E. (2007). Contested Gender Equality and Policy Variety in Europe: Introducing a Critical Frame Analysis Approach. In M. Verloo (Ed.), *Multiple Meanings of Gender Equality: A Critical Frame Analysis of Gender Policies in Europe*. Budapest: Central European University Press.

perspective is incorporated at all levels and stages of all policies by those normally involved in policy making<sup>14</sup>. Gender impact assessments of legislation are an integral part of gender mainstreaming and allow legislators to identify potential negative impacts. However, the case studies show that such assessments are not conducted in a systematic way. In 2008, for instance, only 14% of Finnish government bills had been gender-proofed. As the case study reveals, considerations of an economic or environmental nature seem to take precedence over gender when reviewing proposed legislation. When a general mainstreaming policy is implemented, gender as a category seems to compete with other categories, which may lead to gender considerations being overlooked.

Another point put forward by the Swedish and Finnish case studies is the importance of **equality bodies** in ensuring *de facto* equality. Examples include for instance the Swedish Equality Ombudsman which monitors compliance with laws that promote gender equality standards and prohibit discrimination. However, an issue that is pointed out is that even when such bodies have quasi-judicial status, their decisions are not legally-binding which limits considerably their impact.

## **BARRIERS TO WOMEN'S ACCESS TO JUSTICE**

Although the study focuses on four case studies, it identifies several barriers in women's access to justice that also affect women in other Council of Europe member states. Inequality in access to justice is a complex social phenomenon that results from the existence, and often the combination, of inequalities at the legal, institutional, structural, socio-economic and cultural levels. Such barriers may affect access at all stages of the justice chain.

At the legal and institutional level, and despite efforts to achieve gender equality before the law, many countries continue to have discriminatory laws or provisions which negatively impact women's access to justice. In addition, where laws and mechanisms to protect women's rights exist, they may be accompanied by a lack of public awareness of their existence and a weak capacity of officials in the justice system to enforce them.

Socio-economic and cultural barriers can strongly limit the ability of women to pursue justice. Many of these barriers are the result of unequal power relations in favour of men which result in lower wages, greater poverty, gender stereotyping and the unequal distribution of tasks within the family to the detriment of women. As the study shows, accessing justice can be expensive and thus limit the access of women living in poverty or within low income categories. Costs are not only linked to legal fees and judicial taxes, but may be incurred as a result of ensuring transportation to courts, finding accommodation or for instance seeking childcare. Cost may be worsened by a lack of adequate and affordable legal aid and by lengthy proceedings. Although such costs may also be incurred by men, the main difference is that women are more likely to be dependent on others in order to cover such costs. In addition, in most cases women bear the burden of care-giving in the family. Such dependence and obligations might dissuade women from filing a complaint or pursuing a claim.

Discriminatory attitudes, stereotypes and prejudices at the cultural level may also play a key role. This not only concerns women themselves, but may be embedded in institutional or legal culture. Regarding women specifically, cultural and social expectations and values may prevent them from seeking justice. This is particularly true in cases related to the family sphere such as child support, domestic violence and divorce proceedings. Another interesting example in the study is the fact that women from certain categories such as lower classes are less likely to seek justice due to a lack of confidence in the justice system or for fear of mistreatment by police officers. This lack of confidence derives from an institutional culture that may not sufficiently take

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<sup>14</sup> Council of Europe Final Report on Activities of the Group of Specialists on Mainstreaming, Strasbourg, 1998.

into account the needs of women claimants or that may result in discriminatory attitudes, secondary victimisation or inadequate legal counsel. Such women are also less likely to be aware of their rights, of the remedies available or which justice mechanisms should be accessed.

## **CHALLENGES FACED BY PARTICULARLY VULNERABLE GROUPS OF WOMEN**

In addition to the barriers that women usually face when accessing justice, belonging to a particular group of women can result in an increased restriction of their access to certain rights. As the study shows, women living in rural areas, elderly women, women with disabilities, lesbian/bisexual/transgender women, trafficked women, migrants (which include refugees, asylum seekers and undocumented women) and women from certain ethnic or religious groups are structurally disadvantaged. This may be due to group specific disadvantages at the socio-economic level, but may also be the result of a lack of awareness of their specific needs among officials involved in the administration of justice. Such women are also often the victims of stereotyping. This results in bias and insensitivity on the part of the judiciary.

The study provides several examples in this regard. For instance, women living in remote areas may not be able to travel long distances or may not be aware of existing services such as legal aid or the rights they are entitled to. Moreover courts, tribunals and police stations are not always equipped to receive disabled or elderly women. This does not only imply ensuring physical access to facilities, but also ensuring that such facilities have technical equipment to enable such women to testify without difficulties or participate as witnesses. The vulnerable legal status of some groups of women such as unregistered or irregular migrants, asylum-seekers or trafficked women may make it particularly difficult to turn to authorities such as the police and courts. Such women may be reluctant to report a crime due to fear of being expelled from the host country or they may not be able to communicate with the police or with prosecutors and judges if interpretation is not provided free of charge.

With a view to addressing these challenges, the study highlights the importance of ensuring clear communication, access to information and to facilities as one possible way of facilitating access to justice for particularly vulnerable groups of women. However, another important element is tackling multiple discrimination and secondary victimisation on the part of police officers and professionals working in the judiciary, as well as ensuring that laws protect the rights of such categories of women.

## **CHALLENGES FOR WOMEN IN RELATION TO CRIMINAL LAW**

Women in the criminal justice process face a number of challenges, predominantly in their role as victims of crime, but also as offenders. Feminist criminal theory has criticised general concepts and principles of criminal law as representing the male experience rather than that of women<sup>15</sup>. This reinforces existing differences between women and men rather than addressing them. Crime is a gender-differentiated phenomenon and will have to be addressed as such to produce justice.

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<sup>15</sup> For an overview of the feminist critique of criminal law, see Celia Wells, "The impact of feminist thinking on criminal law and justice: contradiction, complexity, conviction and connection", *Criminal Law Review* 2004, Jul, 503-515.

#### **iv. Women as victims of crime**

Women experience violent crime to a lesser extent than men, but the type of crime they experience most frequently is the most traumatising in nature: sexual violence<sup>16</sup>. Whether this is perpetrated by a current or former partner or a complete stranger, sexual violence in all its forms has particularly devastating emotional and psychological consequences for its victims nourished by feelings of shame, fear, lack of confidence and distrust. Many of these directly impact women's ability to take on an active role in bringing the perpetrator to justice – a role which is often required by the criminal justice system. Often, victims are required to file charges or specifically request prosecution for acts of sexual violence, or to testify several times and often in the presence of the accused. Circumstantial evidence is often inadmissible, making the victim the sole source of evidence. Criminal procedure and court administration generally do not allow for the particular vulnerability of women victims of sexual violence to be taken into consideration, meaning their specific needs are often not accommodated. Judicial practice or existing procedural requirements often lead to decisions that are not victim-friendly, with the result of alienating victims from the process and leading them to withdraw the case or give up. As a result, attrition rates are high and conviction rates low<sup>17</sup>. The same can be said for cases of domestic violence, which is another type of crime predominantly experienced by women, but which the criminal justice system in many countries is still grappling with.

Several initiatives introduced in Austria have led to positive results. At a procedural and administrative level, changes have been made to offer police and prosecution services that specialise in sexual violence. However, they tend to exist only in urban areas rather than rural which again raises questions about equal access on another level. Psycho-social and legal support to victims of physical and sexual violence is allowed at all levels of the criminal justice process from the first statement at the police to testifying in court. Court service centres for victims of crime have been introduced in 16 regional courts to help victims of crime navigate the court system and feel less helpless.

The way in which substantive criminal law is shaped may also have an impact on women's access to justice as definitions of criminal conduct used in criminal legislation may not reflect the experience of women as victims. Rape legislation that focuses on proving the use of force for a conviction is an often cited example. Austrian rape legislation has long been changed to focus on the lack of consent to reflect that rape is first and foremost a violation of a woman's sexual integrity, irrespective of the means employed. This, however, has not led to an increase in conviction rates which instead seem to be decreasing. The reasons for this will have to be looked at in more detail as no evaluation has been carried out to date. In Finland, a study that traced the developments in prosecution and conviction of rape cases concludes that overall, the number of prosecutions is rising but that issues remain with decisions around the classification of the crime (as rape which is subject to public prosecution or as sexual coercion which requires the victim to request prosecution) and a rise in decisions not to prosecute at all<sup>18</sup>. A study

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16 Gender data report – 1st data report on equality between women and men in the Federal Republic of Germany (2005), commissioned by the Federal Ministry for Family, Senior Citizens, Women and Youth of Germany, editor Ms Waltraud Cornelißen, Chapter 10.

<http://www.bmfsfj.de/doku/Publikationen/genderreport/01-Redaktion/PDF-Anlagen/gesamtdokument%2cproperty%3dpdf%2cbereich%3dgenderreport%2csprache%3dde%2crgb%3dtrue.pdf>

<sup>17</sup> In the last few years, conviction rates for rape in Austria have gone down, despite rape legislation that does not require proof of physical resistance to the act but that is based on lack of consent.

<sup>18</sup> Selvityksiä raiskausrikoksista, Oikeusministeriö, Helsinki 2012, 31-50.

measuring attitudes on sentences for rape in Finland shows that, in 2012, the overwhelming majority of women (91%) and men (90%) consider sentences too lenient<sup>19</sup>.

#### **v. Women as offenders**

The gender neutral nature of criminal law can lead to structural problems in dealing with women offenders. Legal definitions of murder and manslaughter often correspond to behaviour and notions of criminal intent that fit the male norm rather than the female. Men who kill their female partners are often convicted of manslaughter instead of murder, as they are considered to have acted without premeditation, usually in the context of escalating violence in an abusive relationship, the male partner being the abuser. Women who kill their male partners often plan the act in order to put an end to years of suffering domestic violence at his hands. Planning the act and choosing to use a knife or other tool, makes it premeditated murder, and the existing concepts of self-defence are ill-equipped to capture the reality of women who have been subjected to physical, sexual and psychological violence for years and simply do not dare to directly confront their abuser without a weapon. Against the backdrop of statistics that show that most homicides between current or former partners are committed by men, this means that the relatively small number of women victims of domestic violence who kill their abusers are convicted of murder rather than manslaughter and consequently serve much longer prison sentences than men who perpetrate domestic violence, and in the course of their abuse, kill their victims. This raises a whole set of questions of how justice is being served to men and women.

Generally, the type of crime committed by women differs from that committed by men both in scale and severity, and the overall numbers of women offenders are much lower than those of men<sup>20</sup>. As a result, women generally serve less harsh prison sentences compared to men<sup>21</sup> and the number of women prisoners is much lower<sup>22</sup>.

## **CHALLENGES FOR WOMEN IN RELATION TO CIVIL AND FAMILY LAW**

Family law and jurisprudence is infused with values of the society it governs. It concerns a range of sensitive issues such as divorce, spousal and child support, parental responsibilities, guardianship and the division of property. As such, it provides ample gateways for attitudes and gender stereotypes to surface, both in its substantive and procedural aspects.

In most countries, family law discourse has shifted from reinforcing the values and obligations of the traditional patriarchal family in which the male breadwinner provides for his dependants to recognising a more egalitarian family structure based on a marital partnership in which both parties share the fruits of the relationship in the event of a break-up. In some jurisdictions, family law and jurisprudence is now slowly moving to reflect higher levels of autonomy and choice, although this does not make it immune to gender stereotypes. Gender bias exists, but it is unclear to what extent it impacts women more than men. Some studies aim to prove that women are financial “losers” in division of property cases after divorce, mainly because implicit contracts

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<sup>19</sup> Tasa-arvobarometri 2012, Sosiaali- ja terveystieteiden ministeriö, Julkaisuja 2012, 33, Helsinki 2012, 70.

<sup>20</sup> In Austria and Germany, the most common types of crime committed by women are theft, fraud, and offences related to child neglect. Violent crime such as physical assault and robbery as well as drug-related crimes are much rarer among women offenders than male. For Austria, see Veronika Hofinger et al (2009): “Pilot report on the execution of prison sentences”, unpublished. For Germany, see Tanja Köhler (2012): “Women offenders – A study of their sentencing and recidivism”, Göttingen Studies in Criminology, Germany.

<sup>21</sup> Tanja Köhler (2012): “Women offenders – A study of their sentencing and recidivism”, Göttingen Studies in Criminology, Germany, p.295.

<sup>22</sup> Veronika Hofinger et al (2009): “Pilot report on the execution of prison sentences”, unpublished.

within marriage are not honoured<sup>23</sup>. Others try to point out the low numbers of fathers awarded custody over young children because of the presumption that women are better carers, although in many countries more and more fathers take on caring responsibilities<sup>24</sup>. Such judicially assumed presumptions more often reflect the views of individual judges rather than the reality of the people they affect. Concepts such as the best interest of the child are sometimes abused to justify gender biased decisions based on presumptions rather than on a real analysis of the issues at stake in the individual case. For instance, many custody decisions after spousal abuse by the male partner/father still place the right of the abuser to exercise parental responsibilities or the right of the child to contact with both parents over safety and other concerns of the victim - and her children.

More unbiased research would be necessary to determine the extent of the existing gender bias in family courts and which sex it favours in what type of cases. Further research would also shed light on the extent of systemic inequalities resulting from the family law justice system or the law itself and to what extent gender neutral family law creates the illusion of fairness and equality while ignoring the power dynamics and differences affecting women's and men's daily lives.

Nonetheless, there are a number of more established challenges for women who seek to pursue their rights in family courts. These begin with women's inability to access adequate legal representation as the financially weaker party because of restrictive legal aid schemes exacerbated by cuts to the sector. As the case study from Portugal shows, the number of civil law cases brought with the help of legal aid and that resulted in a court decision has dropped steadily after a peak in 2000. Since then, the number of family law disputes for which legal aid was granted has halved<sup>25</sup>, although the number of applications for legal aid has slightly increased.

The role of out-of-court settlements is increasing in a number of jurisdictions in many parts of the world. While they are of benefit in many ways, they raise questions of fairness and justice where they are agreed to for the wrong reasons. These may include financial pressure to keep expenses low, stress, lawyers wishing to seek quick finality of the case, time pressure or simply the reluctance to see privacy compromised in a court hearing. In many member states, women's roles in the family and the labour market suggest that these factors may affect women more than men. To what extent this is the case would need to be explored by more targeted research.

Civil law in as far as contracts, torts law or other is concerned, seems to raise fewer issues with regard to women's pursuit of justice. Data on the number of civil law suits initiated by women and their success rate or by type of legal question are unavailable but would help to get a clearer picture of women's legal agency and the obstacles they may or may not be facing compared to men.

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<sup>23</sup> "Marital splits and income changes over the longer term", Stephen Jenkins, Institute for Social and Economic Research, University of Essex, 2008; "Who wins, who loses and who recovers from divorce?", Hayley Fisher, University of Cambridge and Hamish Low, University of Cambridge and IFS, available at [www.econ.cam.ac.uk/faculty/low/papers/divorce.pdf](http://www.econ.cam.ac.uk/faculty/low/papers/divorce.pdf)

<sup>24</sup> "Gender bias in child custody decisions", Richard A. Warshak, Family Court Review, Volume 34, Issue 3, pages 396-409, July 1996, "Maternal Preference in Child Custody Decisions", Leighton E. Stamps PhD, Journal of Divorce & Remarriage, Volume 37, Issue 1-2, 2002, pages 1-11.

<sup>25</sup> In 2000, 8878 cases were brought with the help of legal aid, whereas in 2006, the number was only 4557.

## CHALLENGES FOR WOMEN IN RELATION TO PUBLIC LAW

Public law deals with the organisation of the government, the relations between the state and its citizens, and the powers, rights, and duties of various levels of government and government officials. It governs any official act that concerns the public at large and individuals can use it to challenge public body decisions.

It is difficult to obtain statistics on the use of public law by women, as court data is rarely disaggregated by sex. However, the case study from Sweden reveals that among the 55,000 cases before the administrative courts in Stockholm, Göteborg and Malmö that concern **natural** persons, 43% concern women either as applicants or as respondents. This fairly even share is less balanced when it comes to particular types of cases, for example tax cases, where women represent only 23% of all applicants. As far as social insurance cases are concerned, women form a slight majority of all applicants (56%). Information on the outcome of court cases disaggregated by sex is unavailable, which makes it impossible to draw conclusions on how administrative law and justice serve women in practice.

Different areas of public law, however, seem to bear systemic inequalities rooted in how they have been conceived. Tax law, for example, and the public pensions system, are usually based on the principle of recognising paid work only. This reinforces the lower value of family and caring work which is often carried out by women, helping to keep up their economic dependence on the male breadwinner. Similarly, the Swedish case study shows that rules on granting compensation for occupational injuries and occupational illnesses under social insurance law are heavily influenced by gendered perspectives of “men’s work” and “women’s work”. A study conducted in 2009 revealed that it was much easier to receive compensation for occupational injuries in professions predominantly carried out by men. Women seemed to be more affected by long-lasting occupational illnesses rather than short-term injuries because of the nature of their paid work (back problems as the result of long careers in nursing, cleaning or working as a cashier). Yet, their rate of recognition is lower than that of men because competing causes of damage related to women’s unpaid work in the home (household chores and looking after young children or older family members) are routinely invoked, often leading to compensation being refused.

In many Council of Europe member states, public law contains extensive legal guarantees of the principle of equality between women and men which shows the importance of this area of law to women. Beyond constitutional guarantees of formal equality between women and men, the United Kingdom, for example, introduced in 2007 a Gender Equality Duty, requiring public bodies in England, Wales and Scotland to take active steps to eliminate unlawful sexual discrimination and harassment and to promote equality between women and men. The duty has ramifications for policy-making and how public services are delivered. Moreover, this duty can be invoked in court when challenging decisions taken by public bodies. Other initiatives to give practical meaning to the concept of formal equality between women and men are equality bodies such as the Equality Ombudsman in Sweden. It aims to combat discrimination and promote equal rights and opportunities irrespective of sex, race and disability and ensures compliance with the Anti-Discrimination Act and the Parental Leave Act. Following the introduction by the European Union of several directives prohibiting discrimination on various grounds, including sex, EU member states have introduced extensive anti-discrimination legislation and ensured their enforcement through courts. This has generated a wealth of case law on sex discrimination in the area of labour law, access to goods and services and other important areas of law. However, qualitative research on the use of anti-discrimination law by women is largely absent.

Feminist legal scholars have praised the role of the Constitutional Court of Germany in promoting women's rights through landmark decisions, but point to the limited use of constitutional litigation as a strategic tool to achieve *de facto* gender equality, as the process is slow and unfit to radically change legislation based on the male norm<sup>26</sup>.

International jurisprudence can serve as an important avenue for women seeking justice, but an analysis of cases brought before the European Court of Human Rights shows that the majority of applicants are men, even in cases concerning gender-based discrimination (Article 14 and/or Protocol 12). From 1969 to 1997 a total of 10 judgements concerning Article 14 of the Convention were handed down by the Court. Only 3 specifically concerned women, whereas two concerned both women and men. For a more recent period of 1 January 2009 - to 31 March 2010, the data shows that 9 out of 32 applications (28%) were lodged by women only and by women together with men. Most of the applications lodged by men on the basis of Article 14 concern issues such as homosexuality and welfare benefits, whereas those of women concern social and economic issues such as social security benefits, immigration and restrictions in the domestic labour market.

More research would be needed in order to establish the reasons for such low levels of complaints to the European Court of Human Rights lodged by women and whether this is a reflection of issues to do with women's access to justice at national level.

## **THE EFFECTS OF ALTERNATIVE DISPUTE RESOLUTION PROCESSES ON WOMEN'S ACCESS TO JUSTICE**

Alternative dispute resolution (ADR) processes encompass a range of mechanisms to settle disputes out of the court room such as mediation, arbitration, neutral evaluation and facilitation. In addition to these court-annexed options, community-based dispute resolution mechanisms also function in some contexts as alternative ways of achieving justice that rely on elders, religious leaders, or other community figures. Supported by arguments that such methods decrease the cost and time of litigation, reduce court backlog, and help preserve important social relationships for disputants, ADR processes have become increasingly popular in Europe, with a new wave of mediation legislation being adopted or drafted in countries such as Romania<sup>27</sup>, Serbia or Turkey.

In general, all countries in Europe have implemented some ADR in family law. Mediation is frequently used in disputes on divorce, child custody and child contact. However, as this study shows, there are a number of concerns for equal access for women to justice in these processes. When mediation and "conciliation" hearings (Poland) are mandatory, women, but also mediators, may feel pressured to reach a settlement and preserve the family unity. Mediation, far from being a site of neutral and symmetrical exchange, is an arena where power operates. Mediating disputes in families where there is a history of domestic violence inherently perpetuates inequality between the victim and the violent partner. In the context of child contact disputes, for example, some researchers examined the conversations between family court advisors and parents during conciliation or mediation sessions, finding that, where mothers

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<sup>26</sup> "Law as a feminist strategy", Gesine Fuchs und Sabine Berghahn, *Femina Politica* 2/12, p.15.

<sup>27</sup> In Romania, a proposal for a Law on mediation was introduced in 2012, which controversially also included rape among the cases when mediation would be offered to the disputants. Women's organisations in the country mobilised against the provision arguing that the availability of mediation for rape cases would lessen the gravity of the act, send a message about impunity and pressure the victim into finding a settlement with the aggressor. As a consequence of the mobilisation, the entry into force of the law has been postponed.



brought up the topic of domestic violence, this would disappear by being ignored, reframed or rejected by family court advisers<sup>28</sup>.

In some legal systems, alternative dispute resolution processes or sentencing such as mediation or conciliation are also used in criminal law. These methods have negative effects in cases of violence against women, and other situations when the two parties have unequal positions. These effects are exacerbated if the alternative dispute resolution method is mandatory. When domestic violence cases are addressed through alternative dispute resolution methods, there is evidence to suggest that most cases would end at the first stage of conciliation, either because the woman is intimidated by the presence in court of her abuser, or because of the pressure for the case to be closed<sup>29</sup>. Thus, mandatory alternative dispute resolution processes may lead to re-privatisation of domestic violence and trivialisation of the crimes of violence against women, ultimately sending a message to victims that perpetrators can act with impunity. It is for these reasons that the Istanbul Convention prohibits mandatory alternative dispute resolution processes or sentencing in relation to violence against women and domestic violence. The CEDAW Committee also considers alternative dispute mechanisms such as mediation as a risk for women to be discriminated against, due to lack of judicial safeguards, especially in domestic violence cases.

In the employment discrimination area, resolving disputes without litigation has also significant appeal. However, the issue of power raises a number of concerns about the use of ADR in relation to sexual harassment disputes and complaints of discrimination.

Overall, the concerns raised in this study for equal access for women to justice through alternative dispute resolution methods are aligned with those expressed by some practitioners and scholars, who have concluded that mediation has failed to provide a truly accessible, fair, and empowering process for all<sup>30</sup>. Gender, among other axes of inequality, acts to create disadvantages for women in mediation processes. At the same time, the under-representation of women among mediators and ADR professionals compared to men also raises questions about fairness and justice for women in these processes. In cases of gender-based discrimination and violence against women, there is a need for public justice, as well as a need to set precedents, which may be lost when issues are settled by mediation.

There are, however, some examples of community justice projects that show the way how women can take ownership over the process and assert their rights within community-based alternative dispute resolution processes. Examples from Roma communities in Southeast Europe show that community mediation may be effective in increasing access of women from minority groups to formal or informal justice.

## **LEGAL AID AND ITS IMPACT ON WOMEN'S ACCESS TO JUSTICE**

The provision of legal aid has been promoted as an effective means to ensure equality before the law, the right to legal counsel and the right to a fair trial. Ensuring access to affordable legal representation and adequate legal aid is often a determinant in women's access to justice, and has proven particularly useful in helping women overcome practical and economic barriers.

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<sup>28</sup> Marianne Hester. 2011. The Three Planet Model: Towards an Understanding of Contradictions in Approaches to Women and Children's Safety in Contexts of Domestic Violence. *British Journal of Social Work* (2011) 41, 837–853, quoting Trinder et al. (2010).

<sup>29</sup> Such findings are reported in Brazil (UN Women. 2011. *Progress of the World's Women. In Pursuit of Justice*) and Croatia (The Advocates for Human Rights, Autonomous Women's House and Bulgarian Gender Research Foundation. 2012. *Implementation of Croatia's Domestic Violence Legislation. A Human Rights Approach*).

<sup>30</sup> See a brief review in Leah Wing. 2009. *Mediation and Inequality Reconsidered: Bringing the Discussion to the Table*. *Conflict Resolution Quarterly*, vol 26, no 4, Summer

All Council of Europe member states provide legal aid both in criminal law and civil law fields<sup>31</sup>. Ideally, access to legal aid should be facilitated in both criminal and civil cases, whether the woman is a complainant or a defendant. However, some states may focus more on one field rather than the other and the nature of services and eligibility criteria varies across Europe. In Portugal, for example, legal aid for civil and family law disputes consists of the total or partial exemption from court fees, as well as covering costs for legal counsel, costs of the other party if the case is lost and paying enforcement agents. The legal aid scheme also applies to alternative dispute resolution processes. In the Austrian legal system, lawyers are obliged to provide free legal aid in criminal proceedings for persons unable to cover costs. As retribution, a lump sum is paid by the state to their pension fund. In the case of Finland, when a person's net income and other funds are insufficient, legal aid costs are partly or wholly covered by public funds, so as to provide assistance in court proceedings, in conciliation or mediation or for providing legal documents. In Sweden, an individual involved in a legal dispute may obtain legal assistance through legal protection insurance. For those who do not have such insurance or have low incomes, the state normally covers the costs. Moreover, it should be mentioned that throughout Europe, where legal aid is not available, women's support organisations may step in. However, such organisations usually depend on external funding sources in order to operate, which may not be available on a regular basis and thus limits the assistance they can provide.

Understanding the gendered implications of legal aid provision is fundamental in helping women to claim their rights. The study highlights several issues that limit women's ability to obtain such aid. One possible obstacle is limited access to information on legal aid and how it can be obtained. Information may not be readily available on which authority needs to be addressed and what the necessary steps to follow are, or application forms might be too difficult to understand. Moreover, women may base themselves on a series of myths such as exorbitant costs of cases or that legal aid is a loan. Women might also not be aware that lawyers can offer initial free interviews where information about legal aid can be provided. Such misinformation can play an important role in dissuading them from seeking counsel. Another obstacle comes in the form of limited eligibility criteria. Gender-blind eligibility criteria can seriously hamper women's chances of obtaining legal aid. In many cases free legal aid is awarded on the basis of family income. Such a requirement does not take into account that not all women have access to family resources or have independent income, or that cases are likely to be taken against a family member whom they are dependent on. In Sweden, for instance, legal aid is only provided to low income individuals and excludes certain types of cases such as disputes concerning the division of assets after a divorce. Given that women in a divorce are often financially in a weaker position, such rules may dissuade them from demanding what they are legally entitled to and thus might result in them leaving the relationship empty-handed. Furthermore, if obtaining legal aid relies on high levels of evidence of reporting to justice agencies or criminal justice action against the perpetrator, they may not benefit all victims of domestic violence, as many do not seek help from agencies.

Ensuring access to legal aid is but one possible solution. The quality of legal advice and representation obtained through such aid is equally important. Women who need legal aid usually come from disadvantaged or particularly vulnerable groups. Case-handlers may not be aware of the issues faced by such women, which can lead to a failure in presenting evidence, or in an inability to establish a relationship of trust. The impact of budget cuts in a context of financial and economic crisis may also negatively impact the quality of such legal representation. In particular, the introduction of fixed fees instead of charging by the hour can lead to situations where lawyers will not be paid for the hours needed to represent clients in complex cases. This can translate into a discouragement to diligently represent the client.

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31 European Commission for the Efficiency of Justice (2012): "European judicial systems: Efficiency and quality of Justice".

## **WOMEN IN THE JUSTICE SECTOR**

Promoting gender equality in the justice sector has been put forward as one possible way of improving women's access to justice and therefore also the quality of justice. The underpinning assumption is that increasing women's representation in the judiciary allows the justice sector to become more receptive to their realities and to the gendered impact of laws. This sensitisation results in turn in a better implementation of laws. Furthermore, improving the gender balance in the judiciary can also be seen as a way of increasing women's trust and confidence in the courts.

### ***ii. Representation of women in the justice sector***

The "Efficiency and Quality of Justice" 2012 Edition of the European Commission for the Efficiency of Justice (CEPEJ)<sup>32</sup> provides information and statistics concerning the representation of women within legal and law enforcement professions. The report reveals that in 2010, there was a nearly equal representation within the judiciary in general terms, with an average for all member states or entities of 52% of men and 48% of women. Moreover, a group of 15 member states had more than 50% of women amongst their judges, while some member states such as Latvia, Romania, Serbia and Slovenia recorded more than 70%. However, when considering progress in judicial hierarchy, the amount of women decreased regarding the percentage of women judges and prosecutors. The study's case studies reveal similar results.

It should be mentioned, that although such results shed light on the amount of women in the legal profession, it tells us little about the distribution of women and men in different fields. For example, women tend to be overrepresented in "feminine" areas such as civil and family law, while men are overrepresented in areas that are perceived as more "masculine" such as tax or commercial law<sup>33</sup>. Consequently, such male dominated fields may be less receptive to women's needs. In relation to police forces, providing for an adequate number of female law enforcement officers has proven to be highly effective in increasing reporting rates for sexual violence and other forms of violence against women<sup>34</sup>. However, as the study shows, the police force continues to be a male dominated field despite an increase in the number of female officers. Such a reality may dissuade women from reporting or cooperating with the police and thus further limit their access to justice.

### ***vi. Legal education and training***

Increasing women's participation in the justice sector is certainly an important element in effecting change within the legal system. However, providing training on gender equality and anti-discrimination legislation at the level of the judiciary and of law enforcement agents is key to ensuring a more gender-sensitive administration of justice.

One particular issue raised by the study is that training offered to judges on matters related to gender equality is not standard practice across Europe. For example, judges and public prosecutors in Austria are not obliged to attend any training following appointment. Consequently, only those that have already been sensitised to women's rights prior to being appointed seem to be interested in specialised courses. In addition, the Portuguese case study also highlights the country's lack of institutional or judicial culture on women's rights. This is also the case in Sweden, where there is little or no discussion on matters related to gender equality

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<sup>32</sup> European Commission for the Efficiency of Justice (2012): "European judicial systems: Efficiency and quality of Justice".

<sup>33</sup> [http://www.academia.edu/220173/Gender\\_InJustice\\_Feminising\\_the\\_Legal\\_Professions](http://www.academia.edu/220173/Gender_InJustice_Feminising_the_Legal_Professions)

<sup>34</sup> <http://progress.unwomen.org/pdfs/EN-Report-Progress.pdf>

when it comes to judges' trainings. Another point that is highlighted by the case studies is that few higher education establishments include coursework on gender, in particular for law students. Sensitising law students to gender issues and anti-discrimination legislation can certainly contribute to a heightened awareness once they enter the legal profession.

One area that has however increasingly received attention is violence against women. In Austria, trainings have been established for police officers, judges and state prosecutors to inform them about domestic violence and make them aware of the special needs of certain groups of women such as rape victims. In Sweden, public prosecutors receive special training courses on men's violence against women. Although this is certainly a step in the right direction, violence against women is but one issue affecting women. Awareness needs to be increased among the judiciary and law enforcement officers in relation to the barriers women face when accessing justice. It is essential that gender-sensitivity be a key element of their initial vocational as well as in-job training. Training should however involve both male and female professionals. The fact of being a woman does not necessarily guarantee the use of "gender lenses". Women, just as men, function on the basis of male dominated social and cultural values and norms, and thus may also engage in discriminatory and insensitive practices or may not be aware of the correct implementation of laws.