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## **GENDER EQUALITY COMMISSION (GEC)**

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### **FEASIBILITY STUDY\***

### **EQUAL ACCESS OF WOMEN TO JUSTICE**

\* Please note that while this Feasibility Study has been commissioned by the Gender Equality Commission (GEC), the views expressed are the authors' and do not necessarily reflect those of the GEC or the Council of Europe.

*Attention : This document is 115 pages long. An abridged version is available*



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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 procedures;
- Lack of financial 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 specific groups of women such as those belonging to a minority, 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 calling for improvement to ensure women's access to justice and to allow the following preliminary observations and proposals:

### ***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 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.

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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.

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

- 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 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.

**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.

**GENDER EQUALITY COMMISSION**

The members of the Gender Equality Commission (GEC) discussed the preliminary feasibility study and its findings during its meeting on 12-14 April 2013. The GEC also held an exchange with Ms Kevät Nousiainen, one of the experts involved in the preparation of the study. The GEC members considered the study to be a useful starting point, to be followed by more in-depth thematic debates or hearings allowing several groups of women and other stakeholders to share their experiences and concerns. These events could help to better understand the persisting barriers (including those of a cultural, economic or social nature) and to identify the measures that can help to remove them.

- It was proposed to hold one hearing in 2013, with another one in 2014, and with a larger event towards the end of 2014 (subject to availability of funding). Possible themes include:
  - persistent barriers in achieving equal access for women to justice;
  - access to justice for women victims of violence;
  - tackling the gaps in research and lack of data disaggregated by sex;
- The GEC underlined the importance of ensuring close co-operation with the CDDH on this subject, including through the Gender Equality Rapporteur of the CDDH.

## BACKGROUND TO THE FEASIBILITY STUDY

1. 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 difficult to obtain, if not unavailable, even within the Council of Europe.

2. 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 considered that this was an important issue for the promotion and achievement of gender equality and proposed an activity on equal access to the courts for women and men<sup>4</sup>.

3. 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."*

4. The 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) item 12 of the agenda.

## INTRODUCTION

5. 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.

6. 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.

7. 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.

8. 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.

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

10. The issue of equal access for women to justice raises various questions which this study seeks to address. These include: To what extent do legal systems serve women and take into account their experiences? 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?

11. 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

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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.

countries. The case studies also identify challenges and provide good 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 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**

12. 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.

13. 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.

14. 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.

15. 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

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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.

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>.

16. 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 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.

17. 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

18. 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 Finnish and Swedish case studies. Both chapters highlight the inherent danger in neutrality, as it risks gender issues being overlooked.

19. 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

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<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.

<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.

assistance law or consumer protection law. The prohibition of discrimination on the basis of gender is usually accompanied by a series of positive measures 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.

20. **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 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.

21. 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**

22. 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.

23. 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.

24. 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

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

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.

25. 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 and a dismissive attitude by police officers. This lack of confidence derives from an institutional culture that may not sufficiently take 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 VULNERABLE GROUPS OF WOMEN**

26. 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 a group of 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.

27. The study provides several examples in this regard. For instance, women living in remote areas, elderly or disabled women, 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.

28. With a view to addressing these challenges, the study highlights the importance of ensuring clear communication, awareness-raising, 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**

29. 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.

### ***i Women as victims of crime***

30. 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.

31. 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.

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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.

<sup>16</sup> 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.

32. 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 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>.

## **ii Women as offenders**

33. 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.

34. 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>.

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

<sup>19</sup> Tasa-arvobarometri 2012, Sosiaali- ja terveysministeriö, 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.

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

35. 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.

36. 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 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.

37. 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.

38. 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.

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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.

39. 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.

40. 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.

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

41. 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.

42. 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.

43. 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.

44. 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.

45. 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>.

46. 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.

47. 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**

48. 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

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

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 mediation legislation being adopted or drafted in countries such as Romania<sup>27</sup>, Serbia or Turkey.

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

50. 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.

51. 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.

52. 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,

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<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.

<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*).

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.

53. 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**

54. 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.

55. 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.

56. 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

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<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

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

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.

57. 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.

## **WOMEN IN THE JUSTICE SECTOR**

58. 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.

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

59. 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.

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

60. 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 traditionally female areas such as civil and family law, while men are overrepresented in areas that are perceived as more male, 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.

## *ii. Legal education and training*

61. 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.

62. 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 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.

63. 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.

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<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>

## APPENDIX 1

### THE FOUR STUDIES BY EXPERTS

#### Chapter 1

#### **Crosscutting national report on women's access to justice in Finland on issues under non-discrimination law**

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#### 1.1 Women's access to justice under Finland's human rights obligations

Access to justice in the report is understood as a *procedural issue* related to securing rights through courts, legal aid and redress, as well as through alternative, 'softer' quasi- or less legal procedures, such as mediation and conciliation. Access to justice is also considered in its more *substantive aspects*. Women's access to justice in this sense involves the question of whether formal rights hide an imbalance, differentiation or even discrimination caused by formally equal rights applied to different life patterns of men and women. The main ambition of the report is to identify problems in which women's access to justice in situations that are under international and national law defined as discrimination against women is limited, both in procedural terms, and because what is under national law defined as discrimination is limited in a manner that prevents women's access to justice. The aim of the report is to illuminate some of the causes to under-representation of women among the applicants to the European Court of Human Rights (ECtHR), especially where Article 14 of the European Convention on Human Rights (ECHR) is concerned. Finland has ratified the ECHR, and also the ECHR Protocol No. 12, which broadens Finland's human rights obligations under the Convention to equal protection of all human rights and freedoms, not only the rights under the Convention.

Finland has also ratified the United Nations Women's Rights Convention (CEDAW), which has a significant impact on understanding gender discrimination<sup>35</sup>. The CEDAW Convention has been influential in stressing *de facto* equality and encouraging states to adopt a definition of equality that stresses positive duties to promote equality and regard *de facto* equality.<sup>36</sup> Under General Recommendation 28, the CEDAW Committee states that '*States parties have an obligation to ensure that women are protected against discrimination committed by public authorities, the judiciary, organizations, enterprises or private individuals, in public and private spheres*', and that '*protection shall be provided by competent tribunals and other public institutions and enforced by sanctions and remedies*'. The CEDAW Committee has lately started the drafting of a General Recommendation on women's access to justice. The Committee notes that women's access to justice is impaired by laws and jurisprudences that are not CEDAW compliant and contain *explicit or implicit discriminatory norms or provisions*. Institutions and procedures are also less than adequate. The Committee sees the plurality of legal mechanisms and systems for accessing justice as a challenge or even an obstacle. The CEDAW Committee 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. The CEDAW

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<sup>35</sup> UN Convention on the Elimination of All Forms of Discrimination Against Women of 1979.

<sup>36</sup> . The transformative approach of the CEDAW combines equal rights, social support and socio-cultural elements in a manner that makes it better equipped to address barriers to substantive equality than other treaties, see A. Hellum and H. Sinding Aasen in the Introduction to Hellum, A. and Sinding Aasen, H. (eds) Women's Human Rights: CEDAW in International, Regional and National Law, Cambridge University Press, Forthcoming 2013

Committee finds that under-representation of women in the courts needs to be addressed. *Lack of reporting discrimination and violence against women* are noted as a problem by the Committee. Witness and victim protection through protection orders and other means are also considered important. The CEDAW Committee notes that *specific groups of women* are particularly disadvantaged. Such groups may include women of ethnic minorities, as well as victims of trafficking in human beings. This report discusses these aspects of women's access to justice in Finland.

This report considers violence against women as a form of discrimination which limits women's access to justice. Special attention is paid to criminal law offences related to the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention)<sup>37</sup>. The ratification of the Istanbul Convention keeps violence against women on the agenda of the Finnish domestic authorities. The Finnish Amnesty representative in the working group that prepares the ratification of the Istanbul Convention notes that the Convention (which is not yet in force) is a path breaking one in considering violence against women as a form of gender discrimination, and in requiring *due diligence*, as well as *legal and other policies* from the states parties. She notes that the minimum requirements concerning victim services are not yet met in Finland, but that there is pressure to ratify the Istanbul Convention nevertheless, as rapid ratification is hoped for in order that the Convention may come into force. Finland's ratification of the Convention without fulfilling its requirements would necessitate that Finland makes reservations, which is rare in the Finnish tradition of ratifying human rights instruments. Reservations tend to weaken the value of human rights instruments severely.<sup>38</sup>

## 1.2 Gender imbalances in society under gender neutral law

From the 1980s on, feminist and gender studies in law in the Nordic states have analysed the relation between gender neutral, formal legal rules and the gendered life patterns, with the ambition of opening up the legal framework to a more realistic consideration of the situation and ensuing improvement of gender equality.<sup>39</sup> Nordic legislation has been gender neutral and based on formal equality for decades.<sup>40</sup> The main finding of the feminist legal studies was that *formal equal rights do not guarantee de facto gender equality*, because gender neutral norms may be formulated so that they take into account considerations that are more relevant for male life patterns than female ones. The question then has been whether male and female patterns of life should be taken into account in legislation. Gender stereotyping is seen as something to be combated.<sup>41</sup> The idea of *gender and equality mainstreaming*, and *impact assessment of legal provisions* in order to guarantee that legislation promotes gender equality, has been a public policy goal since the 1980s. Numerous legislative reforms and amendments have since then been aimed at more gender sensitive legislation, but the development has been slow and most of the problems presented in this report were identified decades ago. The problems are typically

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<sup>37</sup> CETS No 211.

<sup>38</sup> P. Puu Oksanen (2012) 'Naisiin kohdistuva väkivalta ihmisoikeuskysymyksenä: tekojen aika? Oikeus 41 (4), 618-623.

<sup>39</sup> The Nordic contributions to feminist and gender studies in law are too numerous to list here. An important starting point for the studies, however, was the anthology edited by the Norwegian legal scholar Tove Stang Dahl in 1985, see Stang Dahl, T. (1987) *Women's Law: An Introduction to Feminist jurisprudence*, Universitetsforlaget: Oslo (originally in 1985 in Norwegian).

<sup>40</sup> There are very few exceptions to gender neutral legislation. Under Finnish law, mandatory conscription for men is one of these. Maternity protection is also gender specific.

<sup>41</sup> The CEDAW Convention stresses the need to address problematic gender stereotyping, and has helped to identify these.

such that substantive and procedural aspects of *de facto* access to justice are closely connected or even intertwined.

An example of gender imbalance is that men and women also have somewhat different roles in working and family life. Men tend to work more for remuneration, whereas women do more care work in families, which means that they are not similarly situated under labour and family law, even when law as such is gender neutral and based on formal equality. In both national and transnational labour law, issues of work and family are mostly discussed in the context of 'family friendly' policies or combining working and family life. The European Union law and policy aims at gender equality in this field, but gendered norms of parenting have changed very slowly.<sup>42</sup> Anti-discrimination law concentrates on working life but has no impact on family law. In the Nordic states, gender equality discussion has also involved men and parenting, and gender equality policies have aimed at increasing the participation of men in parenting, which would strengthen their role as parents and also improve the position of women in the labour market. Women take long care-related absences from paid work, which has a detrimental impact on their working careers, pay and other occupational benefits.<sup>43</sup> A weaker position of fathers as custodians of children at divorce and separation is, on the other hand, seen as a gender equality problem. Finnish equality policies have for decades paid attention to men's equality problems.<sup>44</sup>

Violence against women is another typical example of a problem where gender imbalance both as to substantive legislation as well as to procedural rights are involved. In Finland, as in most countries, most perpetrators of violent offences (and even the majority of victims of such deeds) are men. Women tend to be involved with criminal law, in particular in violent crimes, as crime victims (although there are women among the perpetrators). Violence against women has been defined as violence the victims of which are predominantly women, or are victims because they are women<sup>45</sup>. The victims of gender discrimination are also predominantly women.

Since the 1980s, human rights as a means of formulating grievances of women have also been put into question by feminist international lawyers.<sup>46</sup> While the unequal positioning of women has been to some extent recognized both under human rights and under national law since then, many sore points remain which make it difficult to question procedural access to equal and

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<sup>42</sup> McGlynn, C. 'Work, Family, and Parenthood: The European Union Agenda' in Conaghan, J. and Rittich, K. (eds) *Labour Law, Work and Family*, Oxford and New York: Oxford University Press 2005; Nousiainen, K. 'Double Subsidiarity, Double Trouble? Allocating care responsibilities in the EU through social dialogue' in Kovalainen, A. Keränen, M. and Dahl, H.M. (eds.) *Europeanisation of Care and Gender: Global complexities*. Palgrave MacMillan 2011

<sup>43</sup> See Lammi-Taskula, J. Salmi, M. and Parrukoski, S. *Työ, perhe ja tasa-arvo*. Helsinki: Sosiaali- ja terveystieteiden tutkimuskeskus 2009.

<sup>44</sup> Valtioneuvoston selonteko naisten ja miesten välisestä tasa-arvosta. Sosiaali- ja terveystieteiden tutkimuskeskus Julkaisuja 2010:8, 20-21.

<sup>45</sup> This definition is found in Recommendation No. 19 of the UN CEDAW Convention. There are even other definitions, such as the one used in the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) of 12 April 2011. In the latter human rights instrument, violence against women has been defined as '*a violation of human rights and a form of discrimination against women and shall mean all acts of gender based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life*'. Finland has ratified the CEDAW Convention, and signed but not yet ratified the Istanbul Convention.

<sup>46</sup> The feminist human rights tradition already in the 1980s was extensive, and its critique of international law developed by the beginning of the 1990s, as shown, for example, by Cook, R. 'Women's International Human Rights Law: The Way Forward' in Rebecca J. Cook (ed.) *Human Rights of Women. National and International Perspectives*. Philadelphia: University of Pennsylvania Press 1994, 3-36. The first texts on women's human rights in Finnish were published in the 1980s, see Nousiainen, K. 'Naisen oikeudet – ihmisen oikeudet?' in Helminen, M. & Lång, K.J. (eds) *Kansainväliset ihmisoikeudet*. Helsinki: Lakimiesliiton kustannus 1987, 2001-231.

universal rights, without questioning the contents of these rights as such. The present report does not try to capture all or even most problems concerning human rights of women, as they appear under Finnish law. The scope of this report concentrates on issues that are *defined as direct or indirect discrimination under international or Finnish law*. It should be borne in mind that all detrimental impact from applying gender neutral or equal legislation on gendered ways of life are by no means defined as discrimination.

### 1.3 Prohibitions of discrimination

Discrimination is prohibited at several levels: international, Council of Europe, European Union and national. The function of these prohibitions is different. National prohibitions of discrimination further exist at different levels of the hierarchical legal system. Constitutional provisions, as well as criminal, labour, and administrative law provisions on discrimination, differ by function and scope. Anti-discrimination law functions under different procedural rules than ordinary civil and criminal law, but has a definite material and personal scope. Thus the 'placing' of a prohibition of discrimination has an impact on the procedural rules to be followed. Sex discrimination in this sense is complicated by the fact that the personal scope under anti-discrimination law is not quite straightforward. It is not always clear whether a person may be protected against sex discrimination in all aspect of occupational life (for example, as a self-employed person or a managing director), and yet prohibition of discrimination is strong in the area of working life.

This report considers constitutional law, anti-discrimination law, labour law and criminal law provisions on discrimination. Separate prohibitions of discrimination are also found in other fields of law, for example in administrative law. Discrimination is prohibited both under public and private law, and redress may involve both civil and administrative courts.

*Effective protection under Finnish anti-discrimination law does not extend to private life.* Even criminal offences that take place in private have been recognised lately as forms of discrimination. International conventions are primarily oriented to impact state practices which endanger the rights of individuals, and have only limited horizontal effect. However, under international human rights law, there is increasing recognition of the problems facing women arising from private relationships. Private relationships tend to be the scene of violations of women's rights. Thus, requirements on redefinition of the state responsibility to combat violence against women with due diligence and attention to the rights of victims are important developments. Such developments are relatively recent, and implementation of the new insights is partial at best.

Concepts of equality and discrimination are multi-faceted, and defined by three main legal sources in the European context: national constitutional traditions, European Union law, and human rights law, in particular the European Convention on Human Rights. Equality and discrimination are understood in several ways in these sources: as equal protection of public goods, as rational equal treatment of similar cases, as non-discrimination on protected group grounds such as gender, and finally, as positive duties to promote equality of opportunity and *de facto* equality.<sup>47</sup> The first concept is typical for human rights protection, the second for public administration, the third for anti-discrimination law, and the fourth to a substantive approach to equality in all the aforementioned contexts. All these understandings are found under Finnish law.

### 1.4. Gender mainstreaming and law implementation

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<sup>47</sup> The Concepts of Equality and Non-Discrimination in Europe: A practical approach. McCrudden, C. and Prechal, S. & European Network of Legal Experts in the Field of Gender Equality Law. European Commission 2009,

There is a huge lack of statistical information about the gendered impacts of legislation and its implementation. In this report, empirical information is gathered from various European sources, from the annual reports of Finnish equality authorities, from special studies carried out by the Research Institute of Legal Policy (especially concerning reports on civil and criminal law cases in courts, legal aid and legal services), and from studies by certain NGOs, especially the League of Human Rights (Finland) and Amnesty (Finland).

In a sense, the Nordic feminist legal scholars have been, since the 1980s involved in studies on the gendered impact of legislation. The idea behind much of the early work in the Nordic 'women's law' was based on a similar idea that was adopted under the heading of gender mainstreaming. Gender mainstreaming was internationally adopted in the 1990s, especially after the UN Beijing Conference, as an important policy tool first by the United Nations, and soon after by the European Union. The UN definition of mainstreaming gender perspective refers to '*a process of assessing the implications for women and men of planned action, including legislation, policies and programmes, in any area and at all levels*', taking into account the concerns and experiences of women as well as men, with gender equality as the ultimate goal.<sup>48</sup> The Council of Europe has defined gender mainstreaming developing policy processes so that all policies will include the perspective of gender equality.<sup>49</sup>

The turn to mainstreaming has been seen as a step forward,<sup>50</sup> but where the aim has been to guarantee implementation of women's human rights, the turn has been seen as problematic.<sup>51</sup> When the mainstreaming policy is implemented, it is one policy among others, and seen as a part of strategic leadership, and the goals of gender equality and inclusion of gendered experiences and concerns compete with other goals. Impact assessment of legislation, which has been the main form of gender mainstreaming in Finland, is carried out relatively seldom. For example, in 2008 gender assessment was mentioned in only 14% of all Government Bills. Most Bills had no reference to gender impact assessment.<sup>52</sup> Gender impact assessment is far less in use than assessment of economic, environmental and some other impacts of proposed legislation. This is not surprising, as impact assessment of law proposals has become popular internationally in the context of attempts to reduce the use of legislation and turn to alternative 'soft' ways of regulating it in the context of New Public Management.<sup>53</sup>

### 1.5. Perceived and experienced gender discrimination

The latest European Barometer on discrimination shows that women are more likely to report gender discrimination than men (5% v. 2%). The number of victims of discrimination is difficult to estimate, as experiencing and perceiving discrimination seems to depend on the cultural

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<sup>48</sup> Report of the Economic and Social Council for 1997 (A/52/3,18 September 1997) A. Mainstreaming the gender perspective into all policies and programmes in the United Nations system, available at <http://www.un.org/womenwatch/daw/csw/GMS.PDF>, accessed 16.1.2013.

<sup>49</sup> Council of Europe Final Report on Activities of the Group of Specialists on Mainstreaming. Strasbourg 1998.

<sup>50</sup> R Gender Mainstreaming. Conceptual Framework, Methodology and Presentation of Good Practices. Rees, T. Reflections on the Uneven Development of Gender Mainstreaming in Europe. *International Feminist Journal of Politics* 7 (4) 2005, 555-574.

<sup>51</sup> As to the UN women's rights policies, Kouvo, S. *Making Just Rights? Mainstreaming women's human rights and a gender perspective*. Uppsala: Iustus förlag 2004.

<sup>52</sup> Saari, M. 'Sukupuolinäkökulman valtavirtaistaminen tasa-arvopolitiikan strategian'a in Kantola, J., Nousiainen, K. and Saari, M. (eds) *Tasa-arvo toisin nähtynä*. Gaudeamus: Tallinn 2012, 175-200.

<sup>53</sup> Pakarinen, A. 'Lainvalmistelun kehittämisprojektien historia ja historiattomuus'. *Hallinnon Tutkimus* 30 (2) 2011, 129-142.

recognition of the phenomenon, as well as personal experience of it. The number of personally experienced cases of discrimination, as well as witnessing discrimination or harassment seems to be almost diametrically opposed to the level of acceptance of people belonging to the groups protected under anti-discrimination law. Social behaviour is typically based on an automatic categorisation of people, which includes both negative and positive stereotyping, which takes place without the awareness of the persons in question. Negative stereotyping is seldom based on a conscious wish to discriminate.<sup>54</sup>

According to the EU Barometer on discrimination<sup>55</sup>, 7% of Finnish respondents report having witnessed gender discrimination, while 19% of Swedish respondents do so. However, the result does not prove that gender discrimination is more seldom in Finland than in Sweden. Finnish respondents find it more difficult to accept a person belonging to minorities (sexual, ethnic, age and religious) to the highest political position than the EU respondents in average do, and much more so than other than Finnish-Nordic respondents.

Gender equality in Finland has been studied in national 'Gender Equality Barometers' since 1998. The most recent Barometer was made in 2012.<sup>56</sup> The Barometer measures both attitudes to and experiences of gender equality. The main findings in the latest Barometer were that the majority of respondents believed men to have a better position in society than women. Two thirds of women held that women's chances in working life were worse than that of men, and less than a half of all respondents considered that there were differences between the sexes as to what type of political responsibility they were suited to (women being more suited than men to the field of social politics, men more suited to military politics). The great majority of respondents were of the opinion that both spouses are responsible for maintaining the family, but men tended to see themselves as the primary bread winners. It is generally held that men should participate more in the care and bringing up of their children. The men and women differed as to whether they approved buying sex, as two thirds of men and one third of women considered it acceptable.<sup>57</sup> Women believed that they were disadvantaged by their sex much more often than men especially as to pay, career development, assessment of competence and sharing of work pressure. Being a woman was seen as a disadvantage especially by women with higher education. Women working in workplaces dominated by male employees felt they had been disadvantaged by their sex more often than other women.<sup>58</sup> Parents with children under 18 shared domestic chores to some extent, but in childcare, particularly, mothers dominated. Responsibilities were shared more often when both parents worked outside the home.<sup>59</sup>

The Barometer contains information about experienced harassment, sexual harassment and fear of violence. Especially women, but even men experienced harassment on the basis of gender in their private life and academic environment, but also at work. A third of women had experienced sexual harassment, and one sixth of men had done so. Since 1998, the percentage

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<sup>54</sup> Laaja, L., Warius, J., Sundbäck, L., Liebkind, K., Kandolin, I., Jasinskaja-Lahti, I. Discrimination in the Finnish Labour Market. An Overview and a Field Experiment on Recruitment. Publications of the Ministry of Employment and the Economy: Employment and Entrepreneurship 16/2012, 19-20.

<sup>55</sup> Special Eurobarometer 393 Discrimination in the EU in 2012. Conducted by TNS Opinion & Social at the Request of the Directorate-General Justice, European Commission 2012.

<sup>56</sup> The Gender Equality Barometer 2012 was the fifth publication in a series which started in 1998. The Gender Equality Barometers are published by the Ministry of Social Affairs and Health, which is responsible for gender equality, and carried out by Statistics Finland, see *Tasa-arvobarometri 2012*, Sosiaali- ja terveystieteiden ministeriö: Julkaisuja 2012:23, Helsinki 2012.

<sup>57</sup> *Tasa-arvobarometri 2012*. Sosiaali- ja terveystieteiden ministeriö, Julkaisuja 2012:33; Helsinki 2012, 15.

<sup>58</sup> *Tasa-arvobarometri 2012*, 28-37.

<sup>59</sup> *Tasa-arvobarometri 2012*, 51-52.

of women who report physical sexual harassment has increased (from 12 to 15% of respondents). Women also fear becoming objects of violence more often than men do when they move alone outside, in mass transportation and at work. More than half of the respondents who reported having been victims of violence had talked about the violence with a close friend, both when the case involved partner and non-partner violence. Two thirds of them had not sought help from any official body; when help was sought, it was most commonly from the police or from health service providers. The percentage of women having sought official help had increased somewhat from the 1998 study, however. The researchers explained the change by the increased awareness of violence against women and increased availability of treatment and support.<sup>60</sup>

It has been generally recognised that most cases of violence remain hidden, as “dark figures” were not reported to the police. Where the perpetrator and the victim know each other, violence is even more seldom reported than among strangers, and the more intimate the relationship, the more infrequent the reporting of it.<sup>61</sup> Finland has a higher number of violent crimes than Western European states in general. There are approximately 2.6 homicides to 100,000 inhabitants annually. The most common homicide takes place among drunken men, and the most common victim is a man who is killed by his friend or acquaintance; the next common type of homicide is a woman killed by her partner (circa 19% of all homicides). Homicides are very seldom not reported to the police, and due to the low number of “dark figures”, they may give a more reliable picture on the gendered relations in crime than other violent or other crimes. In 2000-2009, 87.4% of persons sentenced for homicide were men, 12.6% were women, while 70% of victims were men, and 30% were women.<sup>62</sup> In the latest available national victimisation survey<sup>63</sup>, women reported more threats of violence (6%) and physical violence (6.3%) than men (of whom 5.5% reported having experienced threat of violence and 5.9% reported physical violence). Women also reported damages as often as men did.

A victimisation study carried out in 2005<sup>64</sup>, based on a postal survey to randomly chosen women, was a repeat of a similar study made in 1997. According to the 2005 survey, 43.5% of the respondents had at least once experienced a man’s sexual or physical violence or the threat of such violence after having reached 15 years of age. Violence outside a partnership was more frequent (29.1%) than violence within present partnerships (19.6%), but particularly frequent within a previous partnership, from an ex-partner (49%). The most severe cases of physical violence resulted in injuries, psychological as well as physical. One tenth of the women who experienced violence in a partnership had endured violence for several years, and almost a third of women who had left their partners experienced violence or harassment afterwards. Violence outside a partner setting consisted of occasional violence by an unknown perpetrator, work related violence and violence from a family member, dating partner or male acquaintance. The perpetrator in the majority of violent incidents against a woman is a man whom the women know.<sup>65</sup>

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<sup>60</sup> Barometer 2012, 61-70.

<sup>61</sup> Aromaa, K. and Heiskanen, M. 1992.

<sup>62</sup> Lehti, M. Henkikirikokatsaus 2010. Oikeuspoliittisen tutkimuslaitoksen verkkokatsauksia 17/2011.

<sup>63</sup> Sirén, R., Aaltonen, M. & Kääriäinen, J. Suomalaisten väkivaltakokemukset 1980-2009. Oikeuspoliittisen tutkimuslaitoksen tutkimustiedonantoja 109/2010.

<sup>64</sup> Piispa, M., Heiskanen, M., Kääriäinen, J. & Sirén, Reino Violence against Women in Finland. National Institute of Legal Policy, Publication No 225, and the European Institute for Crime Prevention and Control, affiliated with the United Nations, Publication Series No 51: Helsinki 2005.

<sup>65</sup> Piispa et al., 181-186.

### 1.6. Finnish cases on violation of the ECHR and women's access to justice

The Finnish human rights violations that the European Court of Human Rights has found concentrate on certain issues. Finland, as well as several other European states parties to the ECHR, has been repeatedly found in violation of Article 6 (right to fair trial) by the ECtHR. The said provision as such may be an example of the problematic gendered imbalance. Article 6 (as well as Article 7 on *nulla poena sine lege*) are primarily oriented to protecting a person who is suspected and accused of a criminal offence. Article 6 (1) guarantees '*a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law*'. Judgement shall be pronounced publicly, but media or general publicity may be restricted for the protection of the interest of juveniles or the protection of the private life of the parties, or in the interests of morals, public order or national security. Article 6 (2-3) guarantees rights of persons charged with criminal offence, which include the right to information, preparation of defence, legal assistance and examination of witnesses. Taking into account the different roles men and women play in criminal law matters, these rights (as important as they are) seem to protect men rather than women.

That the system of human rights has developed to protect the rights of the person suspected and accused of crimes, rather than on the rights of the victims in the system of human rights, may be detrimental for women has been repeatedly pointed out by feminist scholars and women activists. The human rights system has been slow to recognize violence against women as a violation of their human rights. Here the problem is not merely that states traditionally have not been considered responsible for 'private' crimes perpetrated by one private person against another private person, but for crimes perpetrated by their own agents. Human rights provisions on fair trial have also stressed the need for protecting the suspect and the accused. While protection against abuse of public power against such persons is important, women would often require protection as victims or survivors of crimes. Recognition of that need has developed slowly both in international and national law.<sup>66</sup>

The high number of cases where the ECtHR has found delay by the Finnish court system shows the systemic nature of the problem. Many or most Finnish cases on Article 6 concern delay. There seems to be no direct link to discrimination in the sense that lengthy proceedings would be seen as especially detrimental to either sex. If one considers that, under criminal law, women tend to appear more in the role of victims than perpetrators, whereas men appear in both roles, it may be expected that the impact of the delay is different to women and men.

Finland has also been found to violate Article 10 of the ECHR repeatedly<sup>67</sup>, and the problem has been especially that Finnish courts have protected the private life of persons against the media too eagerly. Both under the ECHR and Finnish law, media coverage of a person's private life requires consent by the person in question. If information about a person's private life promotes

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<sup>66</sup> Recognition of violence against women as a violation of human rights has been made difficult by the 'private' nature of its many forms, especially domestic violence and sexual crimes. The prevalence of rape in armed conflicts, and its use as a weapon by armed forces was pointed out in literature already in the 1970s, see Brownmiller, S. *Against Our Will: Men, Women and Rape*. Ballantine: New York, 1975. The Geneva Conventions have an ambiguous position as to rape, and the war crime tribunals after World War II did not pay attention to the problem. Due to the lack of clear provisions on the matter, the principle of *nullum crimen* also constrained the International Tribunal established to prosecute violations of international law in the former Yugoslavia facing grave violations against women. The International Criminal Court can prosecute crimes committed after its statute came into force in 2002. The statute pays more attention to victim participation and reparations than former international law instruments, and recognizes use of rape as a violation. In Nordic feminist jurisprudence, Tove Stang Dahl paid attention to asymmetrical position of women as to criminal law and criminal procedure in her *Kvinne som ofre –særilig om hustruvåld*. Studies in Women's Law Nr 14, University of Oslo: Oslo 1980.

<sup>67</sup> The European Court of Human Rights has found in 17 cases that Finland has violated freedom of speech. Most of these cases have concerned the media, and the applicant has been a media company or employee.

significant social discussion, the protection of privacy may give way. Under the Finnish Criminal Code, this happens if the information may help to assess the activities of a person in a position of power, if that is needed for discussing a socially significant matter.

Finnish legislation on trial publicity was reformed in 2007. The aim was to increase transparency and publicity of court proceedings and court documents, and especially to break the court tradition which tended to keep proceedings and documents entirely secret, if one aspect of them required privacy. The publicity of the procedure in administrative courts remained under the Act on the Publicity of Authorities.<sup>68</sup> The provisions on secrecy are largely based on the Act on Court Procedure Publicity Act which regulates the relation of two human rights, the right to fair trial and the right to privacy. The Act is highly relevant concerning gendered crimes, especially sexual crimes. The relevance has to do with two aims that may be conflicting. On the one hand, the victim of crimes which concern his or her privacy has an interest in keeping information about the case secret. Sexual crimes often include aspects that are humiliating to the victim, and making them public may further inviolate the victim. On the other hand, it may be in the general interest that the facts about the crime are made public. The aim of criminal law is not merely to punish the perpetrators, but also to prevent crimes in general, and it may be problematic in terms of general prevention if information about certain types of crimes is kept secret.

A Finnish prominent law journalist has criticised the Finnish case law and law preparation for understanding privacy in this context in a problematic manner, by extending the protection of privacy to cover information about the person of the perpetrators. The recent policy document which aims at an amendment of crimes against freedom of speech<sup>69</sup> proposes that the name of a perpetrator may be published if s/he is sentenced to prison for two years or more. Susanna Reinboth, a well-known Finnish forensic reporter, criticises the proposal as too restrictive. Only three% of all sentences under criminal law in Finland are that severe. For example, only one in four rape and aggravated assault sentences leads to a sentence of two years or more of prison. Should persons who have committed rape or aggravated assault enjoy protection of their privacy in the sense that their names should not be published? According to Reinboth, Finnish case law and doctrine seems to be relatively permissive to media publicity concerning the private life in the sense of sex life and similar privacy, but restrictive where the case has real social relevance.<sup>70</sup>

The possible gendered dimension of these cases is that the privacy that is at stake often concerns family members or sexual relations of 'public' persons. In practice, the family members or partners whose affairs are made public are women. When violence against women is considered as a form of discrimination, it is worth noting that the strong protection of privacy of the perpetrators is problematic. That perpetrators are punished is a part of the protection of human rights of women, and the states are responsible for showing due diligence in the matter. It is known that a great number of rapes and violent acts, especially when these crimes take place in intimate relationships, is left unreported, and if reported, are not brought to court, and even when brought to court, do not lead to a sentence. Under these circumstances, the high level of protection of the perpetrators may be considered as one dimension of the unwillingness to punish and eradicate violence against women.

Professor Terttu Utriainen presented the ECHR and its interpretation in her book on rape in 2010 that rape and the manner in which rape is defined and cases in which rape cases are processed

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<sup>68</sup> Laki oikeudenkäynnin julkisuudesta yleisissä tuomioistuimissa 370/2007, Laki viranomaisten toiminnan julkisuudesta 621/1999.

<sup>69</sup> Ministry of Justice, working group 24/2012, Sananvapausrikkokset, vainoaminen ja viestintärauhan rikkominen.

<sup>70</sup> S. Reinboth(2012) 'Toimittaja – sananvapauden sankari vai sananvapausrikollinen'. Oikeus 41 (4),624-626.

may be seen as a violation of several articles of the Convention, such as Article 3 (torture), Article 6 (fair trial), Article 7 (legality), Article 8 (protection of private and family life) and Article 10 (freedom of speech). Complainants have so far not brought Finnish rape cases to the ECtHR on these grounds.

#### 1.7. The Finnish procedural system and women's access to justice

The gender balance of the legal profession in Finland is relatively good. Thus, the CEDAW Committee's finding that the under-representation of women in the courts needs to be addressed is less convincing in Finland, as the majority of judges in administrative courts are women, and also district court judges are increasingly women; the increasing number of women among judges is presented as a problem of men in the media.<sup>71</sup> The police forces remain more male, but women have also a strong presence among the police forces.

The Finnish procedural system has undergone a profound reform during the last decades. At present, Finnish civil law cases that come to the district courts are predominantly decided at the written, preparatory stage of proceedings. These cases concern mostly debts by private persons who are indebted to businesses. The cases that reach a fully-fledged trial procedure are few, so that a district court judge typically has one oral preparatory hearing. Many disputes may be handled in a simple procedure, and the reform of the procedure in general courts in 1993 led to more expensive procedure, as well as increased the risk of expense because the 'loser pays all' rule became the predominant mode of cost division between the parties. New alternative dispute resolution procedures have been introduced, such as mediation offered by the Finnish Bar Association and the courts. Availability of legal aid may also have an impact on the diminishing number of civil law trials.

The Finnish system of legal aid was reformed in 2002. Legal aid costs are covered partly or wholly from public funds, when a person's net income and other funds are insufficient to provide assistance at court, in conciliation or mediation or for providing legal documents. Public coverage of legal aid is available in all legal matters, but is generally not provided if the person in question has a legal aid insurance. The Ministry of Justice's website has a form for calculating whether public legal aid is available to a person with a certain amount of income and funds.<sup>72</sup> In order that legal aid is provided also in the sparsely populated parts of the country, a network of public legal aid offices are established.

It has been repeatedly claimed that, since the reform of the procedural system the risk of costs has risen and that the provision of free legal aid is insufficient. Well-off persons can afford a procedure, or have an insurance, and those very badly off have recourse to free legal aid, but persons with average income have to face a considerable risk if they wish to take a case to court. The Research Institute of Legal Policy carried out an extensive assessment of the impact of the reform of the legal aid system in 2003-2006. At that point, the advocates claimed that cases were often not taken to court due to the perceived risk of costs.<sup>73</sup> The costs have risen since then considerably, so that they have doubled in 14 years; in 43% of cases the sum of costs paid by the parties exceeded the sum under dispute in 2008.<sup>74</sup> Thus, the risk of costs has become a threshold that prevents access to justice. Gender differentiated figures are not available on the studies that use advocates as respondents. However, gender differentiated

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<sup>71</sup> See, for example, Helsingin Sanomat 21.12.2012 'Yhä useampi tuomari on nainen', at <http://www.hs.fi/kotimaa/artikkeli/Yh%C3%A4+useampi+tuomari+on+nainen/1135243190574>, accessed 21.12.2012.

<sup>72</sup> See <https://asiointi.oikeus.fi/web/asiointi/koelaskelma>, accessed 28.12.2012.

<sup>73</sup> Litmala, M. and Alasaari, 2004. Similar views were expressed in a study on labour law cases and willingness to take them to court, Kairinen, M. et al. 2004.

<sup>74</sup> Ervasti, K. Riita-asiat tuomioistuimissa, 49.

figures available from a study of customers of public legal aid are quite interesting. There was no difference between women and men as to how satisfied the customers of the public legal aid were with the service. Nor did the customers differ as to how they saw the cost risk influence their willingness to take a case to the legal system. There was a significant difference between men and women in their views as to what extent they found themselves to be protected under the law, and how they saw the law protecting the interests of well-off persons. Interestingly, men were clearly more of the opinion that the law is seldom on their side, and does not protect their interests, but rather, protects the interests of the wealthy. When asked to what extent, the respondents thought that the fundamental rights are implemented in Finland, three women of four answered that they were implemented well, but only half of the men thought so.<sup>75</sup> Thus, men seem to be more critical of the access to justice than women are.

In a client survey carried out by the Finnish Bar Association in 2004-2005<sup>76</sup>, one third of the respondents were women, two thirds were men. The majority of these clients had paid the advocate from their own means. The clients were generally relatively satisfied with the services. The gender of the client was not significant. The study does not explain why men outnumber women so clearly among the respondents.

The most common type of dispute to proceed to trial consists of cases concerning employment. Approximately one quarter of all civil law trials concern employment, and other common trial types are family law, damages and housing issues. Discrimination cases are often classified under employment disputes. Family law and housing disputes are also typically disputes where parties are private persons, and probably often women. There are no gender disintegrated figures on the parties, however.<sup>77</sup>

Conciliation and mediation takes place in the context of the Finnish court system. In the context of the procedural law reform of 1993, the courts were given the task of promoting conciliation in civil proceedings. A relatively high number of all civil cases in the district courts end in conciliation.<sup>78</sup> The Act on Court Mediation (663/2005) introduced to Finland an alternative to adjudication with the aims of offering a more flexible, cheaper and faster procedure, which would also lower the threshold of seeking judicial redress. Mediation may be applied independently, or by request in context of summons to court, or during the preparatory stage of court proceedings. Only civil disputes that could be dealt with by the court may be mediated at court, but all civil cases including family law cases may be mediated, provided the parties agree to mediation. There are no procedural provisions as to how the mediation should proceed, but court mediation is a facilitative effort aiming at an amicable settlement of a dispute. The Finnish court mediation is in principle a public procedure, but it may be held *in camera* at the request of a party. Court mediation was presented as giving better guarantees on objectivity than other forms of mediation, as it is managed under an objective judge. Yet, the aim is to find a settlement that the parties consent to, and not an outcome that accords with substantive law. Court mediation is

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<sup>75</sup> Lasola, M. 'Oikeusjärjestyksen laatu julkisen oikeusavun asiakkaiden näkökulmasta', in Lasola, M. (ed.) Oikeusolot 2009. Katsaus oikeudellisten instituutioiden toimintaan ja oikeuden saatavuuteen Law and the Citizen 2009. A Survey on Legal Institutions and Access to Justice. Research Institute of Legal Policy 244, Helsinki 2009, 27-36.

<sup>76</sup> Asianajoalan Asiakastytyväisyys 2004.

<sup>77</sup> Ervasti, K. Käräjäoikeuksien riita-asiat 2008. Oikeuspoliittisen tutkimuslaitoksen tutkimustiedonantoja 93/2009.

<sup>78</sup> The number of agreements through conciliation in the district courts is ca 2,500 per year, when the number of cases in oral preparatory procedure and 'normal' procedure is ca 5,000- 6,000. Ervasti, K. Riita-asiat tuomioistuimissa. in Lasola, M. (ed.) Oikeusolot 2009, 43-64.

used only in 1.3% of all civil cases, usually in cases between private persons.<sup>79</sup> Thus it remains less important than the older mediation which is undertaken between the parties of a civil case already in court.

The criminal law procedure in Finland is specific in the sense that it retains some vestiges of the pre-modern right and duty of the victim to bring a complaint against a perpetrator to court. The category of 'complainant's offence' (*asianomistajarikos* in Finnish) means that if the victim does not wish the case to be investigated, the police are not obliged to investigate the crime. The Western procedural rules are often criticised for excluding the victim from the procedure and turning 'his or her case' into an official driven procedure, where the victim merely has the role of witness. The Finnish (and Swedish) legal systems retained the older procedural system far longer than other European systems. The positive side of retaining the category of 'complainant's offence' is that the victim has a say and a position in the case, and may present demands independently from those presented by the public prosecutor.

The continued use of the 'complainant's offence' in the Finnish legal system has been problematic in crimes that may be considered under the heading of violence against women. Both domestic violence and several sexual crimes have been 'complainant's offences'. When domestic violence was made an offence in the 19<sup>th</sup> century, the Finnish Criminal Code (39/1889) defined an assault that took place 'in a private place' as a complainant's offence. In practice this meant that domestic violence was not reported to police, or if it was, the victim seldom wanted to bring a complaint to the court. Similarly, many sexual offences could be brought to court only with the consent of the victim.<sup>80</sup> The Criminal Code has been gradually amended since the 1990s so that first, only petty assault and rape remained complainant's offences, and then an offence made under public prosecution only provided that the victim did not request that no charges be brought to court. Finally, in 2011, the provision on the right to bring charges (Criminal Code, Chapter 21, Section 16) was amended so that the prosecutor is obliged to bring charges even in a case of petty assault, when the victim is or has been in an intimate relationship with the perpetrator (spouse or ex-spouse, close relative, cohabitee or has co-habited with the perpetrator or is otherwise intimate with him).

A similar arrangement remains in respect to rape. Under the Finnish Criminal Code, only rape and aggravated rape is subject to public prosecution, while the lesser category (coercion into sexual intercourse) is a complainant's offence. Under Chapter 20, Section 11, the prosecutor may not bring charges in a case of coercion into sexual intercourse, unless the complainant reports the offence for prosecution, or unless a particularly important public interest demands that the case be prosecuted. In practice, the provision means that the victim has to demand prosecution in order that police investigation gets started. The crime of rape in Finland requires criminal intent by the perpetrator, and thus prosecution also needs to prove that the suspect has intentionally used force in committing the crime of rape.

Conciliation in criminal cases is voluntary, and requires consent by both the suspect and the victim, who may withdraw his or her consent even during the conciliation. Typical cases that are conciliated are assaults. The conciliation may be initiated by the victim, the suspect, the police or the prosecutor, but where the victim is a person who has an intimate relationship with the suspect, the initiative must come from the officials. The decision that conciliation will take place is made by a local conciliation office, and the conciliation is carried out with the help of a

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<sup>79</sup> Ervasti, K. Tuomioistuinsovittelu Suomessa. Oikeuspoliittisen tutkimuslaitoksen tutkimuksia 256, Helsinki 2011, 97-103.

<sup>80</sup> Nousiainen, K. 'Sukupuolittunut ja sukupuolistunut väkivalta', in Nousiainen, K. and Pylkkänen, A. *Sukupuoli ja oikeuden yhdenvertaisuus*. Helsinki: Helsingin yliopiston oikeustieteellisen tiedekunnan julkaisuja 2001, 145-222, at 173-180.

voluntary conciliator. The conciliation may lead to an agreement between the parties, which may lead to an end of the official process (the charge may be withdrawn, a sentence is not given or a milder sentence is chosen by the court). Conciliation is not a public procedure.<sup>81</sup>

In Finland, victim services developed from the 1990s onwards - later than elsewhere in the Western world. The present services are mainly provided by a third party to persons who seek help, and seldom target victims in the margins of society. The particular needs of victims who belong to minorities are not covered sufficiently, and there are few attempts to find these kinds of vulnerable groups. Interviews of providers of victim services showed that they were sensitive to the problems of victimisation, but that they seemed to share an idea of an 'ideal victim' who has in no way participated in his/her own victimisation<sup>82</sup>. The Council of Europe has, for example, defined the minimum standards for support services<sup>83</sup>, as well as instructions on how such services are to be provided.<sup>84</sup> Finland does not fulfil these minimum standards, which has been pointed out, among others, by the concluding observations of the CEDAW Committee.

Among crime victims who seek help from victim services, most have also sought help from authorities. Women seek help mostly for mental support, whereas men were more interested in legal aid. Women crime victims get in contact with more authorities than men, and victims of sexual and partner violence especially seek help more than other crime victims. Among the victims who had reported their case to the police, 41% were dissatisfied with the police procedure. Mostly the police was criticised for belittling or humiliating treatment of the victim. The police had advised the victim to give up reporting the crime, or was unwilling to be involved. Some of those (much fewer) victims whose case had proceeded to prosecution were satisfied with the prosecutor, but others criticised the prosecutor for dismissing the case or for choosing to classify the crime wrongly. Only one tenth of the respondents actually had a case in court. Women were more critical of the treatment they had received than men. The victims of sexual violence were most dissatisfied with all the authorities, and the courts rather than the police were criticised.<sup>85</sup>

#### 1.8. Discrimination under human rights and constitutional law

Finland joined the Council of Europe in 1989 and ratified the European Convention on Human Rights (ECHR) in 1990. The ratification of this Convention was a turning point in legal attitudes towards human rights instruments in Finland. It was only after this time that human rights conventions accepted by Finland gained more concrete attention, for instance, in Finnish law schools. The ECHR had an impact on the reform of the Finnish Constitution<sup>86</sup> and it also introduced the first judicial review of any kind to the Finnish legal tradition. A new chapter on

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<sup>81</sup> Laki rikosasioiden ja eräiden riita-asioiden sovittelusta (1015/2005).

<sup>82</sup> Honkatukia, P. Uhrin rikosprosessissa. Haavoittuvuus, palvelut ja kohtelu. Oikeuspoliittisen tutkimuslaitoksen tutkimuksia 252/2011

<sup>83</sup> Combating violence against women: Minimum standards for support services. Directorate General of Human Rights and Legal Affairs, Council of Europe. Strasbourg, 2008.

<sup>84</sup> Final activity report of the Task Force to Combat Violence against Women, including Domestic Violence. Directorate General of Human Rights and Legal Affairs, Council of Europe. Strasbourg 2008.

<sup>85</sup> Honkatukia, P. & Kivivuori, J. Rikosten uhrin tukipalvelujen asiakkaina. Oikeuspoliittinen tutkimuslaitos, verkkokatsauksia 19/2011.

<sup>86</sup> Issues related to fair trial and freedom of speech have been particularly brought to the fore. M. Pellonpää, 'Euroopan ihmisoikeustuomioistuimen ja EY:n tuomioistuimen vaikutuksista Suomen valtiosäännön kannalta' (On the Impact of the European Court of Human Rights and EC-Court in the Light of the Finnish Constitution), H. Kanninen et al. (eds.), Puhuri käy (Strong Wind Blowing) (Helsinki: Edita, 2009) 103-127.

basic rights and liberties entered into force in 1995, and at the overall reform of the Constitution in 2000, a stronger protection of rights was introduced. Constitutional rights were drafted to reflect international development in the area of human rights and European constitutional development after World War II. International human rights norms binding Finland were taken as a starting point. Finland's adherence to EU law had an even more fundamental impact on Finnish law. During the accession period in the early 1990s, and since the EU membership in 1995, Finnish constitutional law has been influenced greatly by European law<sup>87</sup>.

The basic rights provisions of the Constitution came to include a revised provision (Section 6) on equality, which was expanded to cover not only formal equality before the law (Subsection 1), but also a general prohibition of discrimination (including a reference to sex as a prohibited ground, Subsection 2), a provision on the equal rights of children (Subsection 3), and a provision on the promotion of equality of the sexes (Subsection 4)<sup>88</sup>. Under the prohibition of discrimination, *'no one shall, without an acceptable reason, be treated differently from other persons on the ground of sex, age, origin, language, religion, conviction, opinion, health, disability or other reason that concerns his or her person'*. Under the provision on gender equality, *'equality of the sexes is promoted in societal activity and working life, especially in the determination of pay and the other terms of employment, as provided in more detail by an Act'*.

The aim of the amended provision on equality was to guarantee not merely formal but also substantive equality. The preparatory work refers to the CEDAW as a 'special convention against discrimination' that was taken into account as a motivation for the constitutional provision on discrimination<sup>89</sup>. The constitutional provision on the promotion of gender equality was also motivated by a reference to Article 2(a) of the CEDAW, which obligates the states parties to include the principle of equality between men and women in their legislation. The reference to an act with more detailed provisions on the equality of the sexes is to the Act on Equality between Women and Men (1986/610), but even to other relevant legislation.

Anti-discrimination law focuses on adverse treatment on the basis of personal characteristics, such as sex or race. While there is much controversy as to whether and to what extent certain characteristics should be treated as more 'suspect' than others, the case law of the ECtHR seems to be moving towards considering certain grounds of discrimination to be in need of stricter scrutiny than others.<sup>90</sup> Sex is seen as a 'suspect' ground. Sex is, however, specific in the sense that (together with age), it is a ground that coincides with all other 'suspect' (and 'non-suspect') grounds. Thus, prevalence of discrimination on separate grounds may hide the fact that sex discrimination is often one ingredient of multiple or intersectional discrimination. The difficulty appears in empirical studies on implementation of national as well as supra-national anti-discrimination law. 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.

In Finnish equality law, the connection to human rights and EU legislation via domestic fundamental rights has become important. The courts increasingly refer directly to both these

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<sup>87</sup> T. Ojanen, 'The impact of EU membership on Finnish constitutional law', *European Public Law* 9:2 (2004) 449-469.

<sup>88</sup> Section 6(4) of constitutional rights reads as follows: 'Equality of the sexes is promoted in societal activity and working life, especially in the determination of pay and other terms of employment, as provided in more detail by an Act.'

<sup>89</sup> See Preparatory Works for the Constitution, in Government Bill (HE) 309/1993, 43.

<sup>90</sup> Janneke Gerards 'Chapter one: Discrimination Grounds' in Dagmar Schiek et al. (eds) *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law*. Oxford and Portland: Hart Publishing 2007, 33-184.

sources of law. The development of the anti-discrimination law shows how impact from UN and the Nordic states which is apparent in the field of gender equality (Act on Equality between Women and Men, 609/1986) has given way to EU-related influences, which are apparent in several amendments of the Act on Equality but especially in the Non-Discrimination Act (21/2004) which was enacted primarily in order to implement two EU directives (2000/43/EC and 2000/78/EC). The CEDAW Convention was of great importance in Finland, as the Act on Equality between Women and Men (609/1986), the first piece of anti-discrimination law, was enacted in order that Finland could ratify the CEDAW Convention. The inspiration of the CEDAW was one of the factors that facilitated introduction of positive duties first to the Act on Equality<sup>91</sup> and later also to the Finnish Constitution.<sup>92</sup>

#### 1.9. The European Union's Fundamental Rights Agency's requirements for access to justice in discrimination cases

The European Union's Fundamental Rights Agency (FRA) notes that for genuine access to justice in discrimination matters, the complexity of procedures should be minimised by reducing fragmentation of legal provisions between grounds and areas of discrimination (or the material and personal scope of anti-discrimination law). Procedures should be simple and transparent, decisions clear and binding. Competent equality bodies should have regional or local presence. Procedures for claiming rights need to be enhanced, by making decisions of 'quasi-judicial' equality bodies legally binding. The legal burdens between the parties in discrimination cases should provide a fair distribution, and complaints by multiple claimants should be permitted. Equality bodies should have the resources and powers to bring cases of strategic importance to court, and a critical mass of cases to provide a 'culture of compliance' brought to courts. Systemic problems should be examined, and follow-up procedures used.<sup>93</sup>

#### 1.10. The Finnish anti-discrimination law and FRA requirements

The FRA considers Finland as belonging to the type of equality bodies and courts that is 'promotion-type and quasi-judicial'. The report points out that the Finnish Ombudsman for Equality who monitors the Act on Equality supervises compliance and is empowered to provide advice and assistance to victims, with competences to investigate individual cases, including data collection, requests for clarifications and workplace inspections. The Ombudsman can also take the case to the Equality Board which can prohibit anyone from continuing or repeating discriminatory practice, or impose a penalty payment to the party to whom the prohibition applies.<sup>94</sup>

The Act on Equality is a 'single ground' anti-discrimination act which prohibits gender discrimination. The other Finnish piece of anti-discrimination law, the Non-Discrimination Act (2004/21), prohibits discrimination on all other grounds, as it contains an non-exhaustive list of

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<sup>91</sup> Nousiainen, K. and Pentikäinen, M.' Rise and Fall of the CEDAW in Finland: Time to Reclaim its Impetus' in Hellum, A and Sinding Aasen, H. (eds) *The Added Value of the CEDAW Convention*, Cambridge University Press, forthcoming 2013.

<sup>92</sup> The Finnish Constitution underwent a reform in the 1990s. The formulation of the principle of equality under the Constitution, Section 6, contains several formulations of equality: equality before the law (Section 6(1)), prohibition of discrimination (Section 6(2)), a provision on equal treatment of children (Section 6(3)) and a duty to promote gender equality (Section 6(4)). The provision on equality shall, according to the preparatory works, be interpreted so as to include a positive equality duty.

<sup>93</sup> Access to Justice in Cases of Discrimination in the EU. European Union Agency for Fundamental Rights, 2012, 11.

<sup>94</sup> Ibid, 31.

prohibited grounds of discrimination (including 'other personal characteristics'). The material scope of the Act on Equality is broad, with the exception of the religious communities and relations within the family and other private life relations: and as to the sanctions, the Act is not applied to the acts by the Members of Parliament or the President (Section 2). In terms of effective prohibition of discrimination that gives a victim access to justice (remedies, compensation), the scope of the prohibition of discrimination under these acts is more limited. The personal scope in the latter sense of the Act on Equality is limited to working life, provision of goods and services, educational institutions and labour market organisations (Sections 8, 8a-8e). The Act on Equality contains a provision on the burden of proof intended to make the position of the victim of discrimination easier. A person who claims to have been discriminated against has to prove in a court or other authority facts on the basis of which it may be assumed that gender discrimination has taken place. Then the burden of proof goes to the defendant (Section 9 a).

When the FRA report depicts the Finnish 'Paths to access to justice' in cases of discrimination in Finland, the system is described as bifurcated so that the cases based on the Act on Equality may either lead to the Ombudsman for Equality, who gives legal advice, investigates the matter, and may offer assistance in court procedures, or then a victim of discrimination may bring a case to the district court directly and demand compensation under the Act on Equality. The FRA report further describes the powers of the equality body under the Non-Discrimination Act, the Ombudsman for Minorities, who is also a promotion-type equality body, may be asked for assistance in cases of discrimination on the grounds of ethnicity. Compared to the Equality Ombudsman, the Ombudsman for Minorities has no mandate regarding working life. In fields of occupation and employment, all other discrimination grounds beside gender are monitored by the regional Occupational Safety and Health Authorities. The report also mentions that the occupational safety authorities may make a preliminary examination of a case. If they deem that a case violates the prohibition of work-based discrimination under the Criminal Code, they can forward the case to the public prosecutor for consideration of charges, or to police for investigation.<sup>95</sup>

In reality, the Finnish system is more complicated. It is known from previous studies that the provision on compensation under the Non-Discrimination Act is rarely used. Most cases on discrimination that are investigated by the occupational safety authorities do not go to court as civil compensation cases, but as cases under public prosecution under the Criminal Code. The occupational health authorities tend to report cases to prosecutors as suspect crimes of discrimination in working life. The solution is easier for the victims, as they do not need to bring a civil case to court themselves. A recent study on cases under the occupational safety authorities assumes that the victims in these cases would not have benefited if compensation for the violation would have also been demanded under the Non-Discrimination Act, but admits that the case would be different for cases that do not fulfil the evidence requirements under the Criminal Code (with its different rule on burden of proof and requirement on negligence). Compensation under the Non-Discrimination Act is thus very seldom in use.<sup>96</sup>

Although the Occupational Safety and Health Inspectorates have no competence in gender discrimination cases, which are monitored by the Equality Ombudsman, the majority of persons whose working life discrimination was supervised by the occupational safety authorities were women. While health condition was a frequent discrimination ground, in practice it often concerned pregnancy. A combination of two or several grounds of discrimination was usual,

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<sup>95</sup> Ibid, 32.

<sup>96</sup> Aaltonen, Milla, Joronen, M. & Villa, S. *Syrjintä työelämässä – pilottitutkimus työsuojelupiirien aineistosta*. Sisäasiainministeriön julkaisu 43/2009.

including cases where gender was one of the grounds. Thus, while occupational health authorities in principle do not handle cases of gender discrimination, in practice they do.

The situation is complicated by the fact that cases which could be defined as ones involving gender discrimination are presented as cases of labour law under the Employment Contracts Act (55/2001), which also contains provisions to the employee due to a breach of the employer's liabilities, for example compensation for illegal dismissal. Under the Employment Contracts Act, the employer is prohibited to discriminate an employee on the grounds of health or family ties, but not on the basis of sex. Pregnancy, however, is a health ground related to sex, and family ties often involve child care responsibilities. Employees are highly organised in Finland, and the labour unions often offer legal assistance to their members. The unions tend to consider legal matters from the point of view of labour law rather than civil rights or non-discrimination, which may explain that the legal aid provided by them may prefer to treat a case as a violation of rights under the Employment Contracts Act, rather than as a case of the Act on Equality.

The Equality Ombudsman who monitors the Act on Equality has very limited resources. There is no regional or local presence of the equality body, and while the Equality Ombudsman has the mandate to assist victims of discrimination in court, to date this has not happened. The main mode of assisting victims is that the Ombudsman investigates and gives guidance to the victims, and may also attempt to negotiate the matter unofficially. The Ombudsman has no mandate to conciliate in a binding manner, and no similar powers to assess evidence as the courts have. The Ombudsman may give an opinion to the victim on the merits of the case, but the opinion is not legally binding in the sense that a court should have to abide by the opinion. If the victim wishes to bring a case to court to demand compensation, she or he may not be certain the court will decide the case along the lines taken by the Ombudsman.

The Equality Board is the other equality body involved in monitoring the Act on Equality. The Ombudsman can take a case of discrimination to the Equality Board, which can prohibit anyone from continuing or repeating the discriminatory practice in question. The victim his- or herself has no standing in the sense that he or she may bring a case to the Board. The Board members must represent labour market organisations and equality law expertise, but not, for example, women's organisations. In practice, extremely few cases are brought to the Equality Board. A victim of discrimination may have assistance from a labour union, or a settlement of the dispute may be reached otherwise outside the court. Such settlements may be easier for a victim than litigation, but there is little information on the number of cases or their outcome.

If the structures under the two pieces of Finnish anti-discrimination law, as well as the prohibitions of discrimination under labour law (especially Employment Contracts Act), access to justice in discrimination is complex and opaque, fragmented and difficult to understand in terms of its personal and material scope. The 'quasi-judicial' equality bodies have some powers to promote equality, but they do not have independent powers to decide cases. Conciliation or mediation is not available as a special procedure meant for discrimination cases. Nor do the equality bodies have resources to 'test case' litigation, or to bring a critical mass of cases to court.

#### 1.11. Violence against Women: Domestic violence

In the context of reporting, the CEDAW Committee in its concluding observations has found violence against women as a serious, persistent problem. In the Finnish context, violence against women has not been considered as a form of discrimination. The CEDAW Committee has drawn attention to several problematic aspects of Finnish policies on violence against

women, such as insufficient services to victims (including lack of shelters) and the use of mediation of violence against women.<sup>97</sup>

The special report on violence against women requested from Finland by the CEDAW Committee in 2008 was an important signal of concern at the international level. This report and the CEDAW Committee's observations on the shortcomings of the Finnish government's measures to combat violence against women helped to introduce new national initiatives in the area, including a new Action Plan to Reduce Violence against Women<sup>98</sup>. The Action Plan is comprehensive and based on the co-operation of authorities, but – again – the actual resources allocated to it are very limited. The co-ordination among authorities continues to be in the hands of social welfare and health authorities. The emphasis is on preventive measures. Legislative measures, such as amendment of the Penal Code, take a secondary place in the Action Plan.<sup>99</sup>

Domestic violence in Finland is often connected to social marginalisation and alcohol abuse, but irrespective of the type of domestic violence, women are victims of such violence much more often than men. It is also more typical that the female perpetrator of domestic homicide has previously been a victim of violence by her partner, which is seldom the case with male victims of such homicides. Violence against women is reported more seldom to the police than violence against men, but the numbers are more even between the sexes when aggravated violence is in question, which has been explained either by men being less willing to report milder forms of violence than women, or by the assumption that women, being physically weaker, use weapons more often than men in violence between partners, and when a weapon is used the deed is classified as aggravated more often than such severe cases of violence where a weapon was not used.<sup>100</sup> The authors of the study on Finnish domestic violence deny that such violence could be described as gendered, by affecting women disproportionately. They claim that the level of violence has to be related to the violence experienced by other groups, and that Finnish domestic violence is not only targeted to women but also to men and children, and that women are also violent especially against women. They propose that domestic violence be considered as a non-gendered family phenomenon.<sup>101</sup> This approach is similar to the one that was stressed before the discussion on violence against women reached Finland in the 1990s.

The approach which does not pay attention to the gendered features of domestic violence also fails to notice the problems that are connected to different contexts of such violence. It has been pointed out that women kill their partners often in the course of having been victims of abuse by the partner. They tend to claim self-defence, and that they have used a weapon because without a weapon they would have no chance against a more powerful violent partner. Men, on the other hand, do not need a weapon to kill a partner. Because the Finnish courts seem to consider that the defence of self-defence cannot be applied to cases where a weapon is used against a non-armed attacker, women perpetrators do not manage to convince the court that they have been in

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<sup>97</sup> Concluding Observations of the Committee on the Elimination of Discrimination against Women: Finland, United Nations, Convention on the Elimination of All Forms of Discrimination against Women, Advanced unedited version, 18 July 2008, CEDAW/C/FIN/CO/6, paras. 15 and 16. See further Nousiainen, K. and Pentikäinen, M. (forthcoming).

<sup>98</sup> Action Plan to Reduce Violence against Women, Ministry of Social Affairs and Health, Helsinki 2011.

<sup>99</sup> Nousiainen, K. and Pentikäinen (forthcoming 2013).

<sup>100</sup> Salmi, V., Lehti, M., Sirén, R., Kivivuori, J. & Aaltonen, M. Perheväkivalta Suomessa. Oikeuspoliittisen tutkimuslaitoksen verkkokatsauksia 12/2009. Johanna Niemi-Kiesiläinen has claimed that the classification of violence may be gender discriminatory in the sense that severe kicking, battering and strangling may not be classified as aggravated assault, whereas use of weapon is, Niemi-Kiesiläinen, J. Rikosprosessi ja parisuhdeväkivalta (2004) Helsinki: WSOY; Niemi-Kiesiläinen, J. Rikosoikeuspolitiikka ja sukupuoli. Oikeus 34(3), 255-260.

<sup>101</sup> Salmi et al. 2009, 14.

a situation of justified self-defence.<sup>102</sup> Conciliation or mediation is used in domestic violence cases, although its use in such cases is highly contested, and found problematic by the CEDAW Committee.

Among the crime victims that sought help from victim services, most had also sought help from authorities. Women sought help mostly for mental support, whereas men were more interested in legal aid. Women had been in contact with more authorities than men, and especially the victims of sexual and partner violence had sought help more than other crime victims. Among the victims who had reported the case to the police, 41% were dissatisfied with the police procedure. Mostly the police was criticised for belittling or humiliating treatment of the victim. The police had advised the victim to give up reporting the crime, or been unwilling to be involved. Among the (much fewer) victims whose case had proceeded to prosecution, they were satisfied with the prosecutor, but others criticised the prosecutor for dismissing the case or for choosing to classify the crime wrongly. Only one tenth of the respondents actually had a case in court. Women were more critical of the treatment they had received than men. The victims of sexual violence were mostly dissatisfied with all authorities, and but among the victims of partner violence, the courts rather than the police were criticised.<sup>103</sup>

A study on the users of crime victims' services in 2009 showed that 86% of the users were women, 14% men. Typically, women contacted victim services as victims of often long-lasting violence in an intimate relationship or sexual violence, whereas men contacted the services due to having experienced only once violence in a restaurant or in the street. The authors of the study assume that the services available to victims are oriented to women, and that men have a higher threshold to seek help – victim services were provided by an organisation for crime victims in general, an organisation providing help to victims of rape, and an organisation for immigrant women.

#### 1.12. Access to justice: victims of sexual offences

An estimated prevalence of sexual crimes is uncertain, as different sources give different estimations. Victim enquiries show quite high figures.<sup>104</sup> Victimisation studies may give more realistic numbers than police and court reports. In an international victim survey, Finland was placed in the middle range as to how many respondents had been sexually harassed in 1995-2004. Norway and Sweden showed higher figures than Finland, but it is possible that the 'awareness effect' explains the result of the study to some extent.<sup>105</sup> Court statistics show that in the 1990s, fewer than 10% of reported crimes of rape in Finland led to prosecution. A study on the impact of the amendment of Criminal Code of 1999 (Act 563/1998) showed that more crimes had been reported and investigated after the amendment. On the other hand, more reported cases had been classified as non-crimes by the police, prosecutors had often not prosecuted due to a perceived lack of evidence, and courts had increasingly not convicted the accused. The criminal proceedings could be interrupted for various reasons: because there was no evidence

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<sup>102</sup> Ruuskanen, M. Hätävarjelu. Rikosoikeudellinen ja diskurssianalyttinen tutkimus. Suomalainen lakimiesyhdistys 2005.

<sup>103</sup> Honkatukia, P. & Kivivuori, J. Rikosten uhrit tukipalvelujen asiakkaina. Oikeuspoliittinen tutkimuslaitos, verkkokatsauksia 19/2011.

<sup>104</sup> See, for example, Honkatukia, P. and Kainulainen, H. (2007) Raiskaus, in Rikollisuustilanne 2007. Oikeuspoliittinen tutkimuslaitos, tutkimuksia 238 (2008), 83- 84, which estimated the number of victims of enforced sexual intercourse as ca 16,000 in 2007. The authors cite unpublished figures based on a victim study by M. Piispa in 2006.

<sup>105</sup> Selvityksiä raiskausrikoksista. Oikeusministeriö selvityksiä ja ohjeita 13/2012, 54.

concerning an unknown perpetrator, because the victim asked that a case not be brought to court, or drew back from it.<sup>106</sup>

In 2008 Amnesty International published a report on rape in the Nordic states, and a follow-up report in 2010.<sup>107</sup> The Amnesty report criticised Finnish legislation at the time especially for classification of acts perpetrated against unconscious victims as sexual abuse, rather than rape. The Criminal Code was amended in this respect in 2011, and sexual intercourse with an unconscious person is now defined as rape under Chapter 20, Section 1 (2) of the Criminal Code. Finland was also criticised for continuing to consider rape a 'complainant's offence' (*asianomistajarikos*, see above). Under the Finnish Criminal Code, only rape and aggravated rape is subject to public prosecution, while the lesser category (coercion into sexual intercourse) is a complainant's offence.

Scholars interested in studying case law on rape find it difficult, as access to the materials is strictly limited.<sup>108</sup> In 2012, the Ministry of Justice published a study carried out by the Research Institute of Legal Policy with the aim of making an international comparison of the level of sanctions on rape. The study required a considerable amount of work, as the cases were mostly classified as secret. The report notes that the number of cases reported to the police has risen from 400 in 1991 to 800 in 2010. The study further showed that the number of prosecuted cases had risen, but proportionally the number of cases where the prosecutor had decided not to prosecute doubled in a short time. Similarly, the number of convictions increased after the amendment of 1999, but the percentage of cases where the court has not convicted the accused is clearly higher than that of most other crimes. One quarter of all cases were convicted as coercion into sexual intercourse. The length of the procedure was (both median and average) one and a half years. The time from when the crime was reported to when the case was decided by the district court lengthened clearly during the last ten years. The study concludes, however, that the crime procedure in rape cases has become more effective, as the number of cases that have been prosecuted and the number of the persons prosecuted for the crime has at least doubled.<sup>109</sup>

Rape is a crime of violence against women, as most perpetrators are men and victims women.<sup>110</sup> The Gender Equality Barometer has measured attitudes to the sentences for rape since 1998. The attitudes have remained similar: a huge majority of both men and women consider that the sentences are too lenient. In 2012, 91% of women and 90% of men were of that opinion.<sup>111</sup> This opinion has been also held by some female legal scholars, who have also pointed out that the Finnish Criminal Code continues to define rape in terms of violence involved and not in terms of lack of consent.<sup>112</sup> Terttu Utriainen, a Professor of Criminal Law has considered the present sentencing in rape cases to be lenient, and she notes especially the wide

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<sup>106</sup> Kainulainen, H. Raiskattu? Tutkimus raiskausten käsittelemisestä rikosprosessissa. Oikeuspoliittisen tutkimuslaitoksen julkaisuja 212/2004. Tilastokeskus/Oikeus2004:16. Raped? A Study of Rape in Criminal Proceedings.

<sup>107</sup> Amnesty International, Case Closed – Rape and Human Rights in the Nordic Countries, 2008.: <http://www2.amnesty.se/extern/ai/global.nsf/%28sidor%29/E940A65>, accessed 18.12.2012.

See also Case Closed: Rape and the Human Rights in the Nordic Countries: Summary Report. Amnesty International 2010.

<sup>108</sup> Jokila, H. (2009).

<sup>109</sup> Selvityksiä raiskausrikoksista. Oikeusministeriö: Helsinki 2012, 31-50.

<sup>110</sup> Selvityksiä raiskausrikoksista. Oikeusministeriö selvityksiä ja ohjeita 13/2012.

<sup>111</sup> Tasa-arvobarometri 2012. Sosiaali- ja terveysministeriö, Julkaisuja 2012:33; Helsinki 2012,70.

<sup>112</sup> Utriainen, T. Raiskaus rikosoikeudellisenä ongelmana. Lapin yliopisto: Rovaniemi 2010.

use of suspended sentences<sup>113</sup>. She also criticises a lack of differentiation between rape and aggravated rape under Finnish law. As shown in her study on rape cases, the deeds that were punished as either aggravated or not, did not differ from each other, which shows that the classification fails to distinguish between 'ordinary' rape and grave type of rape.<sup>114</sup>

### 1.13. Access to justice by victims of trafficking

Finland has introduced a system of victim assistance to the victims of trafficking, which should induce victims to come forward and resort to the authorities. However, the assistance offered to the victim is dependent on the residence status or initiation of pre-trial investigations and criminal proceedings against the traffickers, although the interests and needs of the victim should be the focus of all anti-trafficking strategies and activities under the Council of Europe's Trafficking Convention. The Finnish legislation that prohibits trafficking was also problematic in its ambiguity as to pandering and aggravated pandering, as both definitions of trafficking and aggravated pandering refer to causing bodily harm. The definition of trafficking is ambiguous in many respects, especially as to how the vulnerable position of the victim is understood. The Finnish prosecutors and courts have resorted to the criminalisation of pandering rather than trafficking, especially in the context of sex business, as pandering is easier to prove. The position of the sex workers is quite different under these two criminal offences. The trafficked person has the status of a complainant who is entitled to assistance and compensation, whereas a person who is pandered is considered as a willing participant in the sex business, and merely a witness in the criminal procedure against the suspect.<sup>115</sup>

### 1.14. Minority women's access to justice

Since the 1980s, Finland has received refugees under the UN Third Country refugee resettlement programme, and since the 1990s, there has been a considerable immigration to the country. The 'old' national minorities (Swedish speakers, the Roma and Sámi) enjoy a varying measure of protection of their language and culture, whereas the protection of 'new' immigrant groups is mainly based on non-discrimination.

Male immigrants have a similar (low) risk of becoming victims of domestic violence as men belonging to the national majority, but the risk of immigrant women to become victims of such violence was twice as high as that of majority women. The number of immigrant women in Finnish shelters for battered women is high, especially in the larger cities.<sup>116</sup> Different groups of immigrant women are vulnerable to violence from their Finnish or immigrant partners and husbands, but there seem to be specific ethnic patterns of violence. Somali women, for example, often fall victims to battery, while women of Russian and Estonian origin are more often victims

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<sup>113</sup> Utriainen 2010, 292-293.

<sup>114</sup> Utriainen 2010, 278-278.

<sup>115</sup> Roth, V. Defining Human Trafficking and Identifying Its Victims. A Study on the Impact and Future Challenges of International, European and Finnish Legal Responses to Prostitution-Related Trafficking in Human Beings. Leiden and Boston : Martinus Nijhoff 2012, Roth, V. 'Prostituutio, paritus ja ihmiskauppa', in Kantola, J., Nousiainen, K. & Saari, M. Tasa-arvo toisin nähtynä. Tallinn: Gaudeamus 2012, 245-270.

<sup>116</sup> T. Haarakangas, N. Ollus and S. Toikka, Väkiälyttä kokeneet maahanmuuttajanaiset – haaste turvakotipalveluille Suomessa. Ministry of Social Affairs and Health, Publications on Equality 3, 2000, and N. Ollus and T. Haarakangas, 'Väkiälyttä kokeneiden maahanmuuttajanaisten auttaminen – turvakotien kokemuksista palvelujen kehittämiseen', in R. Nurmi and R. Helander (eds), Väkiälyttä ei tunne kulttuurisia rajoja. Maahanmuuttajanaisiin kohdistuva väkiälyttä Suomessa. Naisiin kohdistuvan väkiälyllän ja prostituution ehkäisyhanke (1998–2002), Helsinki: Yliopistopaino, 2002, 55-69.

of sexual violence.<sup>117</sup> Finnish reports to the CEDAW Committee have contained information on immigrant and minority women, and the Committee has urged the Finnish Government to take effective measures to eliminate the discrimination against them. In 1998-2002, the Ministry of Health and Social Welfare established a project for the prevention of violence against immigrant women<sup>118</sup>, but the practical task of providing assistance has fallen on non-governmental organisations. An association for immigrant women (Monika-Naiset Liittory) has provided such assistance.<sup>119</sup>

#### Conclusions and Recommendations:

1. Where the legal system is based on formal equality in the sense of gender neutrality, the impact of the legal system may be detrimental to women (and at least occasionally even to men), because the manner in which the sexes typically lead their lives vary. At the individual level, a man or a woman living in a manner that is typical for the other sex may suffer similar disadvantage. Partly, the differentiated lifestyle is chosen voluntarily, but it is also based on stereotypical assumptions about the sexes.
2. The legal systems (both international, EU and national) prohibit some of the disadvantageous practices as gender discrimination, but not all of them.
3. The presence of women in the legal system in Finland is on one hand quite strong, as women are well established in the legal profession.
4. Women seem to be less present in the legal procedure than men for reasons that are not accounted for in a reliable manner. Gender-differentiated statistics are needed.
5. The procedural system has become more based on alternatives to traditional court procedure. The gendered impacts of this change are largely uncharted.
6. As noted under 2., the legal system prohibits certain practices as discrimination, but not others that may cause gendered harm. The anti-discrimination law, equality bodies and procedures are opaque rather than transparent, and seem to offer no real alternative to fully-fledged legal procedure.
7. Violence against women remains a problematic area, where violations of women's human rights remain unrecognised and without response by the state.
8. Amending the access to justice of the victims of violence against women requires amendments of both procedural and criminal law as well as other types of resources.
9. Better recognition of women's access to justice requires both procedural and substantive law reforms.

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<sup>117</sup> K. Pohjanpää, S. Paananen and M. Nieminen, *Maahanmuuttajien elinolot. Venäläisten, virolaisten, somalialaisten ja vietnamilaisten elämää Suomessa vuonna 2002 Elinolot 2003:1*. Tilastokeskus (Statistics Finland), 2003.

<sup>118</sup> Nurmi and Helander (eds), *Väkivalta ei tunne kulttuurisia rajoja*.

<sup>119</sup> Nousiainen, K. *Utility based equality and disparate equalities*. In Schiek, D. and Chege, (2009).

## **Chapter 2**

### ***(Un)equal access of women and men to civil and family justice in Portugal***

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#### Summary

This document focuses on the issue of women's access to justice related to Portuguese experience in the areas of civil and family law. If it is possible to identify a body of literature related to gender inequalities, it becomes difficult to point out studies which have the purpose of analysing the links between women's discrimination and access to justice. In this study we carry out research and make conclusions about this important issue in order to frame the socio-judicial phenomenon of women's access to justice.

Inequality in access to justice is a complex social phenomenon that combines economic inequalities (costs), social and cultural (distance of the Courts or the non-recognition of the fact of injury as rights) to the detriment of the most vulnerable social groups. These factors along with gender inequality also turn unequal access for women and men to justice.

In Portugal, despite the accelerated transformation which occurred in society after the beginning of the democratic process in 1974 and the entry to the EEC in 1986 (now EU), which is reflected in the evolution of socio-economic and socio-demographic indicators, today women are today still exposed to a society dominated by patriarchal social relations, to lower wages, to greater poverty and to unequal distribution of tasks in family care. This study also underlines that beyond the strong inequalities effects on women, Portugal, apart from the legal aid scheme, has two innovative institutional experiences: the competences of the Public Prosecutor (in Portugal it is not only the public prosecutor; but also the application for legal aid made through social security services, which points out the character of social provision of legal aid and the existence of a very large network of care services in the community. Men and women can be granted the right to legal advice, the total or partial exemption from court fees and also the right to the appointment of a public defender, to be performed by the Bar Association and to be paid by the state, in accordance with the terms of the Bar.

#### 2.1. Barriers to law and justice access

Studies carried out by judicial sociology since the beginning of the 20<sup>th</sup> century show us that the obstacles to effective access to justice for the lower classes in terms of economic power are of three types: economic, social and cultural. Economic costs namely include: preparation, fees and judicial taxes, legal fees and fees for other professionals such as experts. We must also count with other transportation costs, a number of opportunity valuable costs, apart from the costs for delays (Santos *et al.*, 1996: 486).

All these costs make justice more expensive and proportionately more costly for small legal cases given that some of these costs are fixed by the justice systems and thereby victimise the most vulnerable social groups. Within these groups are women as a consequence of the resulting inequalities in gender relations.

The justice administration sociology has thus been occupied also with the social and cultural obstacles to effective access to justice for the most vulnerable social groups, and this is perhaps one of the most innovative fields of research. Studies show that the lower the social class the citizens belong to, the greater the distance to reach the administration of justice is, and that this

distance is caused not only by economic factors, but also by social and cultural factors, even if these three factors are more distantly related to economic inequalities.

Firstly, people with low incomes tend to have an inferior knowledge of their rights and therefore have more difficulty in recognising a problem that affects them as being legal – they either ignore the rights at stake, or the possibilities for legal redress. Caplowitz (1963), for instance, concluded that the lower the social class of the consumers, the bigger the probability of knowing their rights in case of purchasing a defective product (quoted in Santos, 1994).

Secondly, even if recognising a problem as a legal one, such as a violation of a right, it is necessary that the person is willing to undertake an action. Data shows that individuals of the lower classes are much more reluctant than others to apply to courts, even when they recognise they are facing a legal problem. In a research conducted in New York with victims of minor car accidents, it was found that 27% of the respondents from lower classes didn't do anything, as compared to 24% of the respondents from upper classes (quoted in Carlin and Howard, 1965). Two factors seem to explain this lack of confidence or resignation: on the one hand, their previous experience with the justice system which has led them to an alienation from the legal world (an understandable reaction if we think about studies which show differences between the quality of legal services provided to richer classes and to lower income classes); and on the other hand, a general situation of dependence and insecurity, which produces the fear of reprisals if they apply to court.

Thirdly and finally, it is evident that the recognition of the problem as legal and the desire to apply to courts to solve it are not enough to undertake that initiative. The lower the socio-economic class of citizens, the less likely it is that they know a lawyer or have friends who know lawyers, the less likely it is that they know where, how and when to contact an attorney, and greater the geographic distance between where they live or work and the area where law firms and courts can be found.

However, more recent studies, such as opinion surveys on the social representations of the courts, law and litigation (Santos *et al.*, 1996: 503-684), allow us to conclude that, in Portuguese society, citizens have a good knowledge of existing law, but such knowledge does not necessarily reflect the growing demand of the courts. Furthermore, these studies show that a significant percentage of the population (about 20% in some matters) does not know the law and therefore has more difficulty in recognising the possibilities for legally redressing problems that affect it.

In an opinion survey conducted in England, whose results were published in 2004, it was concluded that every year about one million disputes are undertaken for which there is a legal solution type, but any action is undertaken. The following explanation for this inertia is the (wrong) conviction that the law offers no solution, no recognition of the existence of the dispute; recognition of the dispute but no importance given to the issue; and finally, the fear of the possible consequences arising from the eventual filing of the lawsuit (Luca, 2007: 2).

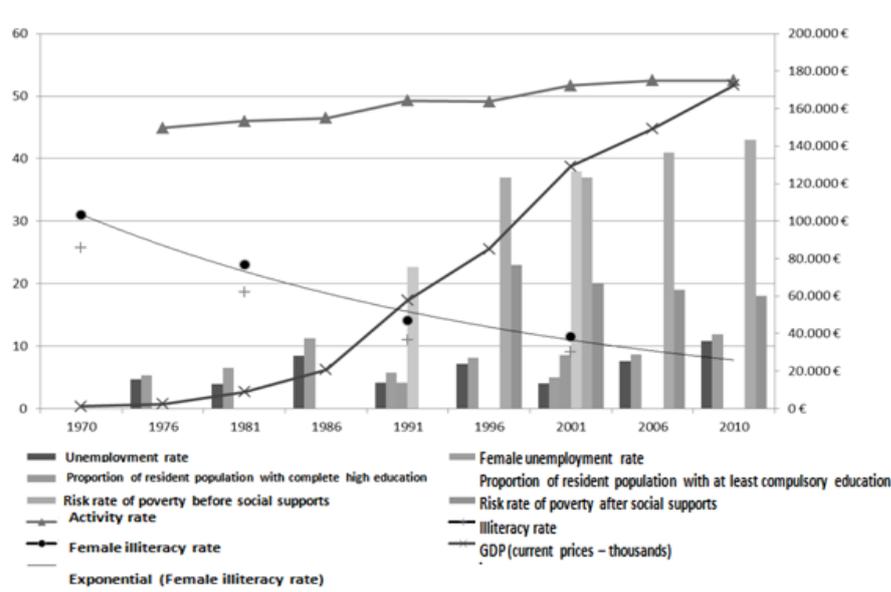
All these studies revealed that social discrimination in access to justice is a phenomenon much more complex than it may seem at first glance, since, in addition to more and more obvious economic constraints, it involves also social and cultural constraints resulting from socialisation processes and internalisation of dominant values which are very difficult to surpass. As previously mentioned, the richness of the sociological research results in the field of access to justice could not fail to be reflected in the institutional and organisational innovations that, all over, have been undertaken to minimize the great discrepancies found between civil justice and social justice (Santos, 1994:148).

## 2.2. Men, women and the family in Portugal: evolution and inequalities

In general, demographically, Portugal has been witnessing in the last four decades a gradual increase of the resident population. The largest increase occurred in the transition from the 1970s to the 1980s. According to the census, the country has grown from 8,663,252 inhabitants in 1970 to 9,833,014 inhabitants in 1981. In the last census, in 2001, Portugal's population was 10,000,000 inhabitants, increasing to 10,636,979 in 2010. Thus, between 2001 and 2006, the growth rate was about 2.6%, and from 2006 to 2010, it reached the percentage of 0.35%.

Women, both at the level of practice as in the symbolic level, are key actors in the social transformation of family and demographic behaviour. *"The exponential growth of women's professional work, which has continued to increase, as well as the high number of women in higher levels of education, gave support to the emergence of new forms of family relationships, more egalitarian, and contributed to a new architecture of positions in the female division of labor"* (Aboim, 2006).

**Chart 1 – Socio-economic Indicators (1970-2008)**



Sources: Barreto *et al.* (2000); INE; Eurostat

Between 1970 and 2010, the activity rate of the Portuguese population has grown considerably, resulting primarily from the female population's increased entry into the labour market. From 1975 until now, the volume of active women has continued to increase. At that time they represented 32.9%, but in 2010 already 48.3% of Portuguese women exerted a professional activity. The participation of women in the labour market in Portugal was enhanced since the 1960s by the colonial war, among other factors. Between 1961 and 1974 young men were required to perform military service for about four years. Nevertheless, and according to Anália Torres *et al.* (2008), only the revolution of 25 April 1974 allowed the necessary legal changes for the development of the discourse on equal opportunities between men and women in the different spheres of life.

In the same period, between 1970 and 2010, with the democratisation of education there was an increase in female education. Indeed, the illiteracy rate of the female population has been decreasing systematically, bucking the trend of lower initial enrolment of women and being closer to the general national average of the Portuguese population. However, the phenomenon of democratising the education rank – by reducing illiteracy and increasing the proportion of the population with at least compulsory education, and university graduates – had consequences on the traditional demographic behaviour, not only of women and men, but especially in delaying

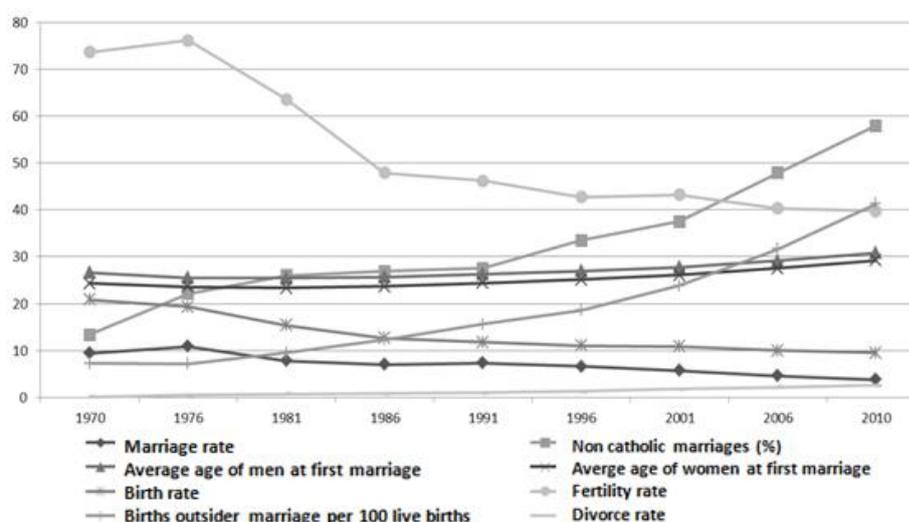
the age of marriage. The stretch of schooling corresponds to a delayed entry into the active adulthood.

The increased participation of women in the labour market has contributed, in one way or another, to improving the socio-economic status of families. Moreover, the considered period is marked by a general improvement of the living conditions of the Portuguese society (Chart 1). The Gross Domestic Product (GDP) grew exponentially between 1970 and 2010, from 1,059 million euros to 172,571 million euros at current prices, reaching the highest growth between the 1980s and 2001. In the census of 1981, the GDP was 8,847 million euros and since the next general population census of 1991, it amounted to 50,000 million euros, reaching 129,308 million euros in the census of 2001. The disposable income of households follows the trend of the GDP growth, with higher growth also in the 1980s and 1990s. This evolution happens despite the global trend of rising rates of unemployment. It should be noted that, although the risk of poverty rate has increased between 1996 and 2010, from 37% to 43%, the rate after social transfers has decreased, reaching 18% in 2010.

These changes in the Portuguese society have contributed to what Wall (2005) designates as motion privatisation of the conjugal and family life. The emigration in the 1960s and 1970s, the improvement of living conditions, the entry of women into the labour market (allowing a double income family) and the changes in values after 25 April 1974, among other factors, gave young couples new opportunities to form families, to realise dreams of home ownership, to be empowered regarding relatives and rural lifestyle, to distance themselves from formal family interactions, hierarchically and tightly controlled by the older generations, to live with some companionship, focusing their efforts on education and promotion of children's lives. Now, if we add these changes to formal equality before the law, the end of the figure of "head of household", the legal divorce possibility and no legal distinction between children resulting from the marriage and out of marriage, we started the path towards democratisation of family relations and gender equality.

The constitution and organisation forms of the conjugality, which the demographic indicators allow to visualise, in broad outline, display signs of reducing the formal nature of the conjugal bond and pluralisation of the range of possible transitions in familiar paths, adding moments of rupture and restoration in accordance with a less institutional vision of the couple relationship and of the family itself (Aboim, 2006), and of individualisation and personal fulfilment. It is a growing trend not to get married, and to marry later and more often than not only civilly.

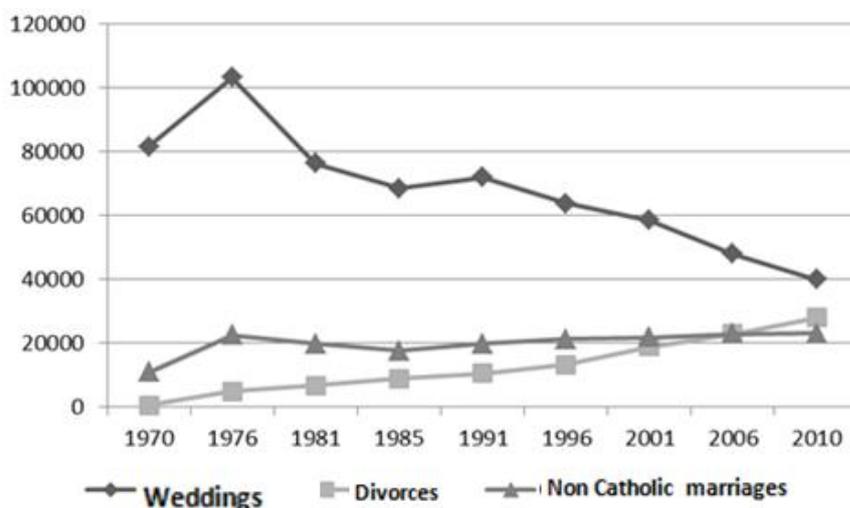
**Chart 2 – Socio-demographic Indicators**



Sources: Barreto *et al.* (2000); INE

This change of values that transfers the idea of equality of opportunity and greater personal freedom and autonomy to private life, materialised in deep legal reforms. Indeed, the frequency of divorce has increased in Portugal since the 1970s, also a result of changes in family law (Chart 4). Changes to the institutes of divorce and legal separation of people and goods, which until then were forbidden to Catholic marriages– the overwhelming majority of marriages – allow divorce and separation to all types of marriages. The strong impact that this legislation had should be noted: the number of divorces increased fourfold between 1970 and 1976, reaching the 6,827 divorces in 1981. This transformation is not as visible as the rate of divorce, passing from 0.5 in 1976 to 0.7 in 1981 (Chart 3).

**Chart 3 – Number of weddings and divorces between 1975 and 2008**

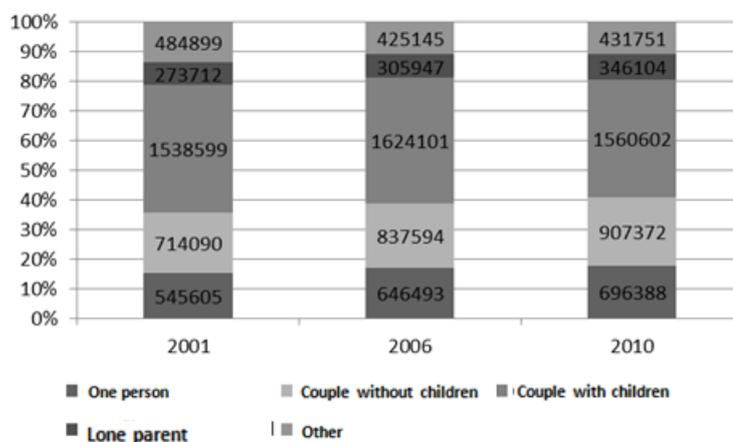


Sources: Barreto *et al.* (2000); INE

Since that time the number of divorces has continued to grow, registering almost 28,000 divorces in 2010, while the share of marriages dissolved by death of a spouse decreases gradually, representing around 8%.

According to the 2001 Census, the majority of Portuguese families (99.9%) is composed of "private families", i.e., includes individuals living in the same housing unit who have relationships among themselves, occupying all or part of the housing (Leite 2003). Therefore, institutional families – the number of individuals living in collective accommodation, regardless of the kinship between them, observe a common discipline, are beneficiaries of the goals of an institution and is governed by an entity inside or outside the group – have in Portugal, a negligible weight.

Chart 4 – Family types



However, in recent years there has been a slight increase in the proportion of people living alone and "childless couples", even though the nuclear family (couple with children) continue to represent over 40% of families, this has a tendency to decline (Chart 4). Childless couples are single persons who register positive changes as a result of an aging population, the postponement of motherhood and the increase of divorce.

When looking at the totality of households by type, one can see that the type of core with a higher proportion of couples is the law – meaning, still, a married man and a married woman – with and without children, followed by the core of mother-children. The expression of the nuclear family of father with children and grandparents with grandchildren has a negligible expression of cores in total.

2.3. Access to Law and Justice in Portugal: Article 20 of the Constitution of the Portuguese Republic and the constitutionalisation of the right of access to law and justice (applicable to civil and family litigation)

The Constitution of the Portuguese Republic (hereinafter CRP) of 1976, created the right of access to law and justice (Article No. 20). It is a constitutional right of a similar nature to the rights, freedoms and guarantees, i.e., a fundamental and positive right, engaging benefits. It is, therefore, by virtue of paragraph 1 of article of CRP, a fundamental right directly applicable and binding on both public and private that is still dependent on state benefits (courts, procedures, legal aid, etc.).

It is, however, a law whose content must be achieved under common law and being "*congenital an unavoidable dimension by the State (...) to make available to individuals - domestic or foreign, individual or collective - a judicial organization and a range of processes guarantors of effective judicial protection*" (Canotilho and Moreira, 2007: 408).

Thus Article 20 of the CPR contains several rights, quite distinct ones: the right of access to the law and the right of access to courts, the right to information and legal consultation, and also the entitlement to judiciary sponsorship and the right to assistance of counsel as well. Also encompassed in this law are the right to enjoy certain claim in a court, which is required to give a reasoned decision and the right to view documents; the requirement that the deadlines for action are established in a reasonable manner; to obtain in time, a sentence, and the right to appeal decisions which affect the rights, freedoms and guarantees enshrined constitutionally. However it should be noted that the right of access to justice is not limited to access to courts or

judicial means, and that these dimensions are a part of it, but not the only part (Canotilho and Moreira, 2007: 410).

Regarding the right to information and legal consultation and on legal representation, the scope of it is not bound by CPR, which refers to the ordinary law of its implementation. But for Canotilho and Moreira (2006: 410) it is indisputable that this right will only have an essence as it covers the possibility of access, in actual conditions, to public services or public responsibility, legal information and consultation, as well as to legal representation.

## 2.4. Portuguese legal aid law for civil and family disputes: Law no. 47/2007, of 28 August<sup>120</sup>

### 2.4.1. The role of social security services

Law No. 47/2007, of 28 August 28, is the actual general legal framework of access to law and justice, which includes the right of access to law and civil and family justice. It deepens former Law No. 30-E/2000 of 20 December which had stipulated the power for Social Security services for the assessment of applications for legal aid in general and for civil disputes and family disputes in particular.

The legislature understood that Social Security services would be in a better position to decide "in a more socially and just way" to grant or not legal aid benefit.

This, by virtue of enjoying a specialisation known to be possible in the Social Security services, unlike what happened in court, because even the databases of these services would be put at the disposal of legal aid. It was argued further that Social Security, with its nearly 500 service stations where they could be given the requirements for legal aid, shortened the access to law and justice in relation to the place of the citizen's residence.

Thus, the request for legal aid was available in any public service department of social security services and was formulated in a given template that could be submitted in person, by fax, by mail or by electronic transmission (in this case by completing the respective digital form, accessible by computer and communication link).

Social Security must complete the administrative procedure and the decision on the application for legal aid within days.

### 2.4.2. Beneficiaries

With regard to the grant beneficiaries, it keeps the previous forecast for natural persons (men and women) living in Portugal and also the persons covered by the 2003/8/EC Directive of the Council of 27 January and, also, according to the new wording of paragraph No. 3 of Article 7, people for collective profit and individual establishments with limited liability shall not be entitled to legal protection, while people without collective profitable purposes only have the right to legal protection in the form of legal aid.

### 2.4.3 Legal aid: the modalities

The arrangements for legal aid include legal advice (Articles 14 and 16), even though they are the same from the previous regime, there is now a new organisation, so the arrangements are therefore: a) waiver of court fees and other charges on the process; b) the appointment and payment of compensation by a legal aid lawyer; c) payment of the compensation defender; d) phased payment of court fees and other charges on the process; e) the appointment and payment of compensation phased patron; f) phased payment of the compensation defender; g) and assignment of enforcement agent. In turn, and with regard to sub-paragraphs d) to f), the

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<sup>120</sup> This law applies to Law No. 30-E/2000 of 20 December, which granted the non-judicial procedure for obtaining legal aid from social security services, and the Law No. 34/2004, of 29 July, which was preceded by an agreement with the Bar Association, which aims essentially at the definition of the concept of economic failure, the reinforcement of legal information and legal advice and transposition of the 2003/8/EC Directive of the Council of 27 January.

frequency of payment may be changed depending on the value of benefits, being the value of the benefit calculated in accordance with the rules of No. 2 of the same Article.

#### 2.4.4. Judicial and non-judicial scope

In terms of the scope of the legal aid scheme<sup>121</sup>, this becomes much more inclusive, since, in accordance with Article 17, it shall also be applied to Justices of the Peace and to other structures of alternative dispute resolution<sup>122</sup>, adding the processes which incur in the, public service of national civil registration that was already the case, but only concerning the processes of divorce by mutual consent.

#### 2.4.5. Participation of legal practitioners

Under Article 45, which concerns the model of recruitment and selection, appointment and remuneration, there are new rules on the admission of forensic practitioners to the system of access to the law, appointment of patron and defender of the respective payment and compensation:

- a) the selection of legal practitioners must ensure the quality of services provided to beneficiaries of legal protection under the system of access to the law;
- b) the participants in the system of access to the law can be lawyers, trainee lawyers and solicitors;
- c) legal professionals can be nominated for a number of processes and scales of prevention;
- d) if the same conduct gives rise to several processes, the system must ensure, preferably the same trustee or appointment of the public defender beneficiary;
- e) all notifications and communications between practitioners, the Bar, the social security services, the courts and the applicants on the system of access to law should be carried out, wherever possible, by electronic means;
- f) legal professionals participating in the system of access to the law should use all means available in electronic contact with the courts, particularly in regard to the transfer of procedural and autonomous requirements;
- g) the legal professionals who do not respect the rules of the exercise sponsorship and defence counsel may be excluded from the system of access to the law;
- h) legal professionals participating in the system of access to the right who decide to leave the system, for whatever reason, before the final judgment of a process or the termination of due diligence to which they have been appointed, must repay, within 30 days all sums paid on behalf of each process or ongoing diligence; and
- i) the out-of-court settlement before the hearing should be encouraged by the provision of an increased amount of compensation. The admission of practitioners to the system of access to the law, the appointment of a legal aid lawyer and defender of the respective clearing and

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<sup>121</sup> Thus, the system of legal protection is likely to be applied to the justices of the peace and other structures of alternative dispute resolution, in the conservatory, the Constitutional Court, the Supreme Court, the Courts of 1<sup>st</sup> instance, particularly in Courts of work, of family and children, the implementation of sentences, Seafarers of Appeal, the Supreme Administrative Court, the Central Administrative Court, the administrative and tax courts and the Court of Auditors (Salvador da Costa, 2007: 115). However, it cannot work in relation to claims of the Court of Justice of the European Union or the European Court of Human Rights, which have a legal aid scheme itself, as stated above. Moreover, as the legal protection is only granted on pending cases in court and, exceptionally, in cases of infraction, there is no plausible reason to be granted in order procedures, in prisons and in police institutions.

<sup>122</sup> Under the Annex on Ordinance No. 10/2008, of 3 January, amended by Ordinance No. 210/2008 of 29 February, which applies to the structures of alternative dispute resolution in the legal aid scheme are: Justices of the Peace; system of labour mediation, system of family mediation; system of mediation, arbitration centre for disputes consumption in Lisbon; arbitration centre automotive, consumer information centre and arbitration in Porto; centre information, mediation and arbitration consumption in Vale do Cávado; central arbitration of consumer disputes in Coimbra, central arbitration of consumer disputes in Vale do Ave, information centre, mediation and arbitration of consumer disputes in Algarve, and centre information, mediation and arbitration of car insurance.

payment pursuant to the preceding paragraph, is regulated by the member of the Government responsible for justice.

#### 2.4.6. Concept and the relevant income threshold of 315 Euros and 1,048 Euros

Another important matter under this statute is, as already mentioned, the "new" concept of economic failure. Under Article. 8, it is a situation of economic failure, taking into account income, assets and ongoing expense of one's household<sup>123</sup>, who has no objective conditions to support the costs of a timely process.

The criteria for assessing the economic failure<sup>124</sup> are set out in a new Article - Article. 8-A – according to which, in the case of individuals, failure is judged according to the following criteria:

- a) the applicant whose household has an income relevant to legal protection equal to or less than three quarters of the Social Support Index<sup>125</sup> (i.e. with an income less than or equal to approximately 315 Euros) has no objective conditions to withstand any amount relating to the cost of a procedure, is free from the fees and the appointment of a legal representative, or even the procedures for allocating enforcement agent and free legal consultation;
- b) the applicant whose household has an income relevant to legal protection more than three quarters or less or two and a half times less the value of the Social Support Index (i.e. performance superior to 315 Euros mentioned above but less than 1,048 Euros) has objective conditions for the costs of legal advice subject to prior payment of a fee<sup>126</sup>, but does not have the objective to support the costs of a timely process and, therefore, benefits of legal aid in payment arrangements and phased allocation enforcement agent; and
- c) is not in a situation of economic failure. Applicants whose household has an income relevant to legal protection more than two and half times the value of the Social Support Index (i.e., superior to the value of 1,048 Euros). The income relevant for legal protection is the amount resulting from the difference between the value of the net income<sup>127</sup> of the household and the full amount of the relevant deduction<sup>128</sup> to legal protection and it is calculated in accordance with the Appendix to this law.

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<sup>123</sup> The law presumes to belong to the household of the applicant of legal protection, people who live with him/her in the same household, i.e., interdependence of rooms, resources and interests, which implies a communion life, within a domestic economy under the contribution of all or some to the expenses of commons.

<sup>124</sup> The proof of the failure must be made under the terms of the new Article 8.-B. If in doubt about the finding of a lack of economic situation, it may be requested by the manager of the service of social security that considers the application, to authorise the applicant, in writing, the access to information and bank documents and that these are shown before this service and, where appropriate, before the tax administration.

<sup>125</sup> According to Order No. 9/2008, of 3 January, the value of Social Support Index for the year 2008 was 407.41 Euros. For 2009, pursuant to Ordinance No. 1514/2008 of 24 December, the value of Social Support Index was 419.22 Euros, having maintained the same amount for 2010 as a result of the statement issued by the Council of Ministers "the Government maintains, for 2010, the value of the Social Support Index for 2009, amounting to 419, 22 Euros, beginning on 1 January 2010" (<http://www.maisvalias.com / 2009/09/10/indexante-de-apoios-sociais-2010 />, accessed January 2010).

<sup>126</sup> That will be worth 30 euros.

<sup>127</sup> This value results, in accordance with the Appendix to the law in question, from the sum of the value of net household income plus the amount of the implicit financial assets calculated based on household assets.

<sup>128</sup> The relevant amount of the deduction is calculated by adding the value of the deduction of charges for basic needs of the household with the amount of the deduction of fees for residential household. All values are calculated according to mathematical formulas established by Law No. 47/2007, in particular in the Appendix thereto.

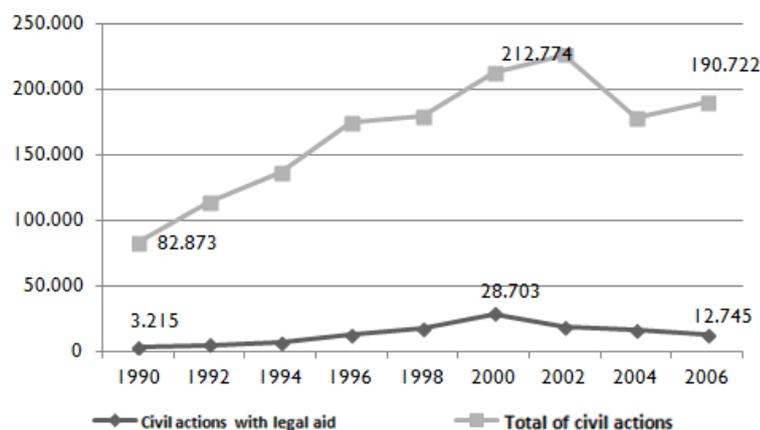
In case of a dispute with one or more members of the household, the assessment of economic failure<sup>129</sup> takes into account only the income, capital and ongoing expense of the applicant or his and some elements of one's household, if he requests. If, before a case, the top manager of social security services responsible for the decision on granting legal protection understands that the application of the criteria set out in the preceding paragraphs leads to a manifest denial of access to the law and the courts, s/he can, by especially reasoned order without possibility of delegation, decide differently than that one resulting from the application of the criteria.

## 2.5. The evolution of the mobilisation (to the system of legal aid in civil and family conflicts)

### 2.5.1 The "reality" of court ended proceedings (Justice Statistics)

In order to analyse the impact of legal aid law it was possible to construct a data series from 1990 to 2006 related to the development of ended civil lawsuits in judicial courts (civil declaratory actions plus actions of divorce and separation of people and goods) and within these, those with legal aid.

Chart 5 - Total of ended civil lawsuits and civil actions ended with legal aid from 1990 to 2006



In the context of civil proceedings ended between 1990 and 2000, the number of legal aid applications and granted defendants in these actions suffered an increase of 3,215 in 1990 to 28,703 requests granted in 2000 (i.e. an nine-fold increase), having in the meantime always registered a gradual ascent, representing, respectively, 3.9% of civil lawsuits in 1990, and 13.5% of all civil lawsuits filed in 2000<sup>130</sup>.

From 2000 to 2006, the growth trend of terminated civil lawsuits with legal aid reverses, registering a gradual decrease. Indeed, the number of terminated civil lawsuits with legal aid (granted total required) decreased between 2000 and 2006, specifically from 28,703 in 2000 to 12,745 in 2006 (Chart 5).

<sup>129</sup> The form of assessment of economic failure by the formulas contained in the law, as well as appearing on the web page simulators Social Security will be analysed on its own.

<sup>130</sup> According to the data provided by the statistics of justice (entry characterisation of the terminated lawsuit), from the responsibility of GPLP, today DGPJ, these are the values of national legal aid.

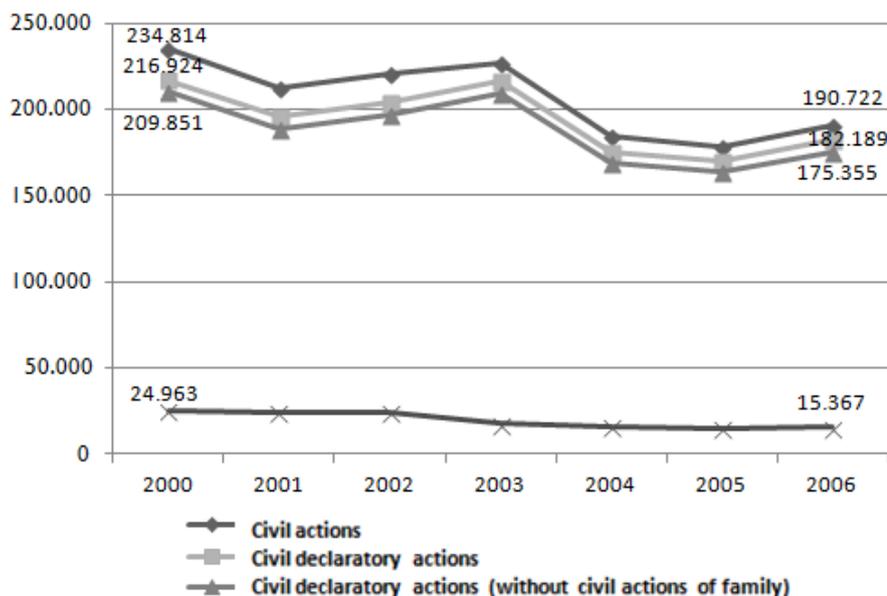
The growth of applications for legal aid from 1990 to 2000 in civil actions is understandable, once the system became better known, litigants sought it as a way to reduce or eliminate the costs of lawsuit. Also lawyers and trainee lawyers cherished the development of the system, since they were paid for the work they did.

The largest decrease occurred between 2000 and 2002, which corresponds to the period in which it was made, simultaneously, the change to the legal aid scheme, whose jurisdiction for review shall be borne by the Institute of Solidarity and Social Security and the use of non-judicial procedures for divorce by mutual consent to the Civil Registry Office. Also the proportion of terminated civil actions with declarative application for legal aid in the total of civil actions filed tax showed a declining trend during the period considered, 10% in 2000 to 5% in 2006. This decline in terminated civil lawsuits with legal aid since 2001, has the sole explanation of the various processes that withdrew from *disjudicialisation* processes, who withdrew from the court conflicts of various kinds, including the actions of declarative collecting debts and family actions like divorces by mutual consent for which was required, significantly, legal aid (Santos *et al.* , 1996).

#### 2.5.2. The civil litigation and the family litigation: the evolution of mobilisation (or feature) to the system of legal aid (2000 to 2006)

After the general analysis of the development of terminated civil lawsuits and within these those benefitting from legal aid between 1990 and 2006, a comparative analysis of the evolution of the mobilisation of legal aid can be developed in civil lawsuits and within these, in civil family lawsuits (family of civil declaratory actions and deeds of divorce and separation of people and goods) between 2000 and 2006.

**Chart 6 - Total of ended civil actions by type from 2000 to 2006**

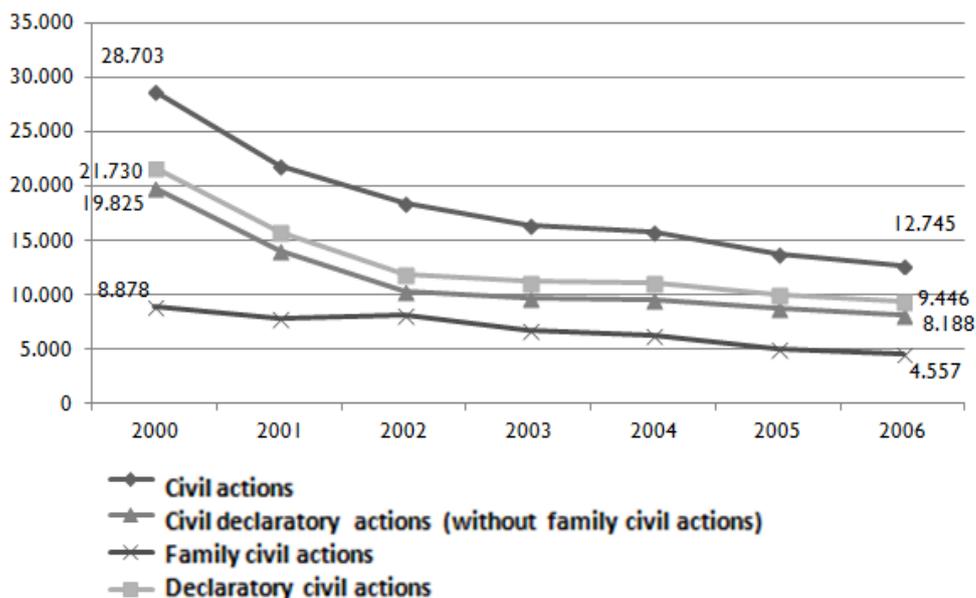


During the period, from 2000 to 2006, as shown in Chart 6, the civil lawsuits have declined from 234,814 in 2000 to 190,722 in 2006, registering a peak in 2000 and minimum in 2005 (178,550). The decreasing trend is common to all types of actions, although it is more pronounced among civil lawsuits from families experiencing a decline of 38% between 2000 and 2006, from 24,963 actions to 15,367, in line with the aforementioned *disjudicialisation* process.

2.5.2.1 Demand for legal aid

From 2000 to 2006, as already noted, the growing trend of ended civil lawsuits with legal aid (civil and declarative actions for divorce and legal separation of people and goods) is reversed, registering a gradual decrease. Also in this period the proportion of ended declarative civil actions (no family civil lawsuits) with application and granting of legal aid in the total of civil actions filed showed a declining trend during the period considered, 10% (21,730 actions in a total of 216,924) in 2000 to 5.2% (9,446 actions in a total of 182,189) in 2006.

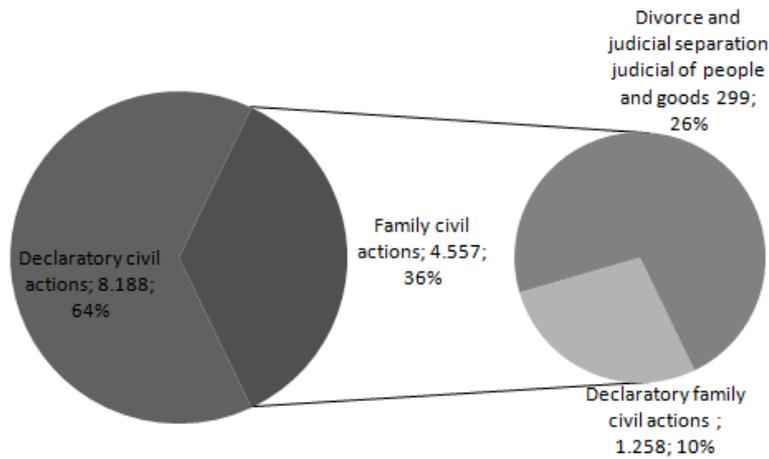
Chart 7 - Total of ended civil lawsuits with legal aid by type from 2000 to 2006



In 2006, in percentage terms, the terminated family civil lawsuits with legal aid accounted for about 36% of terminated civil lawsuits with legal aid (Chart 8).

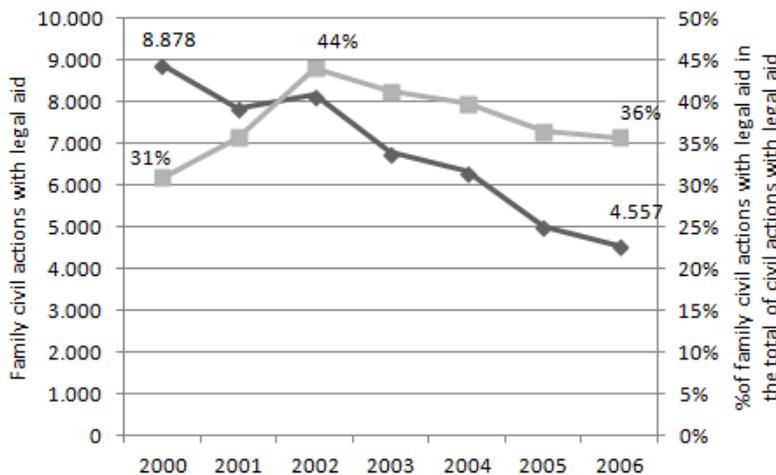
The evolution of civil lawsuits from family (civil declaratory actions of family and divorce and separation of people and goods) with legal aid shows a sharp decline in absolute terms of 8,878 ended actions with legal aid in 2000 to 4,557 in 2010, in line with the decrease in the total number of civil lawsuits from family. In percentage terms the decline is not as sharp, in fact, the proportion of civil actions for family legal aid decreases with only 35.9% in 2000 to 29.7% in 2006, recording the highest proportion in 2004 (38.93%) and lowest in 2006. The fact of the proportion of civil actions for family legal aid in civil lawsuits of total household is significantly higher than average proportion (8.7%) with the support of civil lawsuits judiciary in the total of these actions should be noted.

**Chart 8 - Action with ended civil legal aid by type of action, 2006**



Even though there is a trend of decline in absolute terms in the total number of civil lawsuits from families with legal aid, we can also identify from Chart 9 an increase in the percentage of civil lawsuits from families with legal aid in the total of ended civil lawsuits (declarative and civil actions for divorce and judicial separation) with legal aid: increasing from about 31% in 2000 to 36% in 2006, registering the largest increase occurred in 2002 (44%) - Chart 9. These data mean that the demand for legal aid is more relevant and important in judicial family and children conflicts than in other areas of civil patrimonial nature or contractual of civil justice.

**Chart 9 - Total of family civil actions with legal aid in the total of actions within civil legal aid**

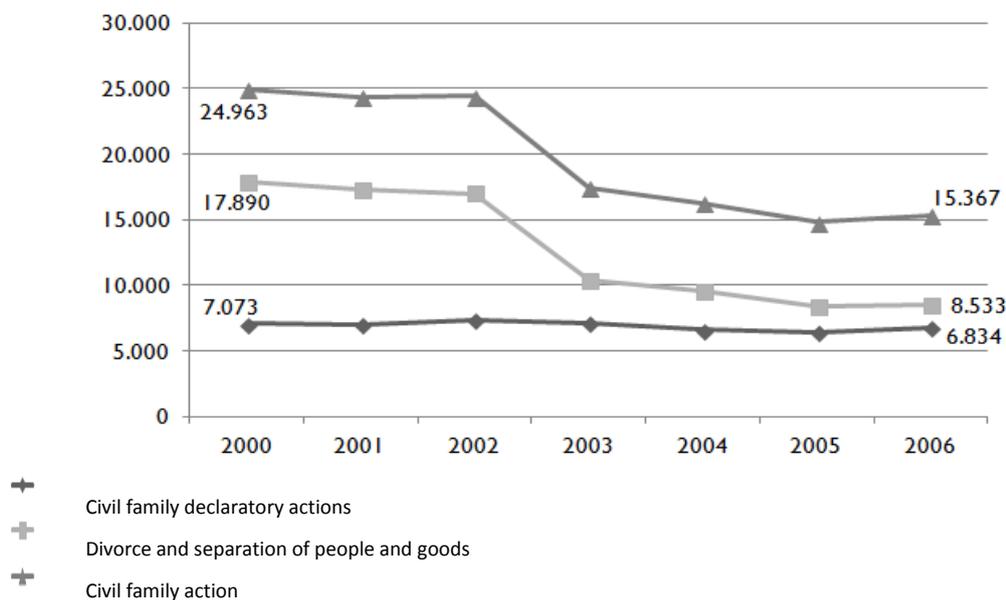


2.5.3. Family civil justice

The sociological profile of family and children justice only can be traced, as noted, with the use of statistical information arising from statistical bulletins of declarative civil actions, divorces and legal separations and protective justice. For the characterisation of legal aid we cannot use the

data of protective justice, since the respective entry statistic does not include the variable legal aid. Therefore, an analysis of civil lawsuits from family, civil declaratory actions of family<sup>131</sup> and divorce actions, in which a party has resorted to legal aid will be done.

**Chart 10 – Ended Family Civil lawsuits by type from 2000 to 2006**



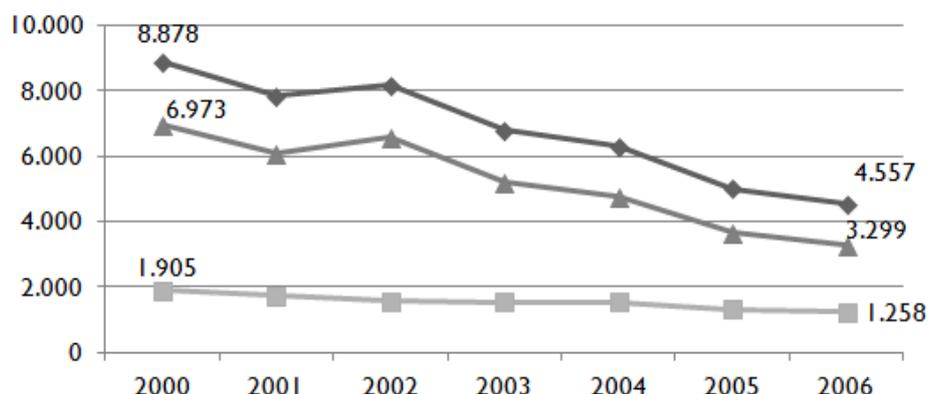
By observing Chart 10 it is clear that, although the downward trend is common to all types of civil lawsuits from family, this is more pronounced between the actions of divorce and legal separation of people and goods, in which the number of actions decreased 47.7%, i.e. from 17,890 in 2000 to 8,533 in 2006, registering the biggest fall from 2002 (17,013) to 2003 (10,358).

#### 2.5.4 The search for justice in civil family law

The volume of civil actions for family legal aid noted, as already mentioned, in absolute terms a marked decrease of 8,878 actions with legal aid in 2000 to about half in 2006 (4,557), however the demand for legal aid in the total of civil actions per household slightly increased. Indeed the proportion of civil actions for family legal aid in civil lawsuits in the total of household, increased between 2000 and 2006, from 31% to 36% (Chart 9).

The observation of the evolution of civil family suits with legal aid by type of action (Chart 11), shows that the trend of decrease, in absolute terms, between civil actions for family legal aid is slightly more pronounced in actions of divorce and legal separation of people and goods, passing 6,973 actions in 2000 to about half in 2006 (3,299) than in civil actions for declaratory family that decrease (-34%) from 1,905 to 1,258 in the same period.

<sup>131</sup> Civil family lawsuits are the sum of the database of civil declaratory actions of family and divorce and legal separation of people and goods. See footnotes 86 and 87 attached to this chapter.

**Chart 11 - Civil family lawsuits with legal aid by type of action from 2000 and 2006**

- ◆ Civil family declaratory actions
- ▲ Divorce and separation of people and goods
- Civil family action

Despite the volume of divorce actions and legal separation of people and goods decline, both in absolute terms and as a percentage of the total of civil family suits with legal aid, these actions continue to represent the majority of civil family lawsuits with judiciary support, specifically 72.4% of civil lawsuits from families with legal aid in 2006. Thus, it is noteworthy that the proportion of declarative actions of civil legal aid for family with all of these actions has decreased from 26.9% to 18.4%, while the proportion of divorce actions and legal separation of people and goods with legal aid in the total of divorce actions remained virtually unchanged over the period considered (39% in 2000 and 38.7% in 2006) (see table in Appendix 1 to this chapter).

#### 2.5.4.1. Declaratory civil family actions

Regarding the evolution of declarative actions of civil legal aid for family by object type of action, in the period considered, in general terms, we can identify the loss of importance of protective orders, divorce and alimony, and the growth of actions grouped in Marriage-Family statistical concept, i.e., actions related to impediments to marriage, assigning home address and family status recognition to unmarried people (Table 1).

**Table 1 – Total of declarative civil family law actions and civil declaratory actions of family law with legal aid for action object, from 2000 to 2006.**

		2000		2003		2006	
		Total	% with legal aid	Total	%	Total	%
Type of Action	Alimony	642	22,5%	536	18,8%	470	16,1%
	Divorce <sup>132</sup>	232	4,7%	73	1,3%	70	0,7%
	Family-marriage	561	20,4%	870	35,3%	849	36,8%
	Filiation	778	10,1%	739	8,2%	659	11,8%
	Disabilities	874	7,0%	1.068	8,7%	1.214	9,4%
	Protective measure	1.254	26,2%	1.119	20,3%	850	13,5%
	Civil Records	291	0,9%	66	0,1%	34	0,1%
	Succession	2.441	8,2%	2.659	7,4%	2.688	11,6%
	Civil guardianship		0,0%		0,0%		0,0%
Total of civil declaratory actions of family law		7.073	100,0%	7.130	100,0%	6.834	100,0%

According to the interviews conducted, these actions are related to the allocation of the marital home and family recognition to unmarried ones, which are responsible for this growth. More concretely, precautionary measures and actions of alimony in 2000, representing 26.2% and 22.5% of the actions of family in 2006, decreased to 15.4% and 19.3%, respectively. The actions of family-marriage, in turn, tend to increase their weight from 20.4% in 2000 to 33.7% in 2004, reaching the 36.8% in 2006.

When analysing the percentage of stocks with legal aid (Table 2) in each of the object types of actions, we highlight those actions "family-marriage" and alimony that represent the highest percentage of stocks with legal aid applied for and granted over the period considered.

More specifically 54.5% and 43.2% of these actions had legal aid in 2006, although in both there is a downward trend in the proportion of actions to legal aid, which is in line with the use of non-judicial procedures and also actions of alimony<sup>133</sup>. Among the actions where the volume of applications for legal aid is weaker, it is possible to highlight inheritance, civil registration and disabilities, which in 2006 recorded percentages below 10%.

<sup>132</sup> The actions of divorce should not be collected on entry statistician, and that is why they are not considered in the analysis.

<sup>133</sup> The alimony actions between elder people begin in civil registries at the actual moment.

**Table 2 – Objects of action with and without legal aid for civil declaratory actions of family law**

		2000			2003			2006		
		Total	% with legal aid	% without legal aid	Total	% with legal aid	% without legal aid	Total	% with legal aid	% without legal aid
Type of Action	Alimony	642	66.7%	33.3%	536	54.5%	45.5%	470	43.2%	56.8%
	Divorce	232	38.8%	61.2%	73	27.4%	72.6%	70	12.9%	87.1%
	Family-Marriage	561	69.3%	30.7%	870	63.0%	37.0%	849	54.5%	45.5%
	Filiation	778	24.7%	75.3%	739	17.2%	82.8%	659	22.5%	77.5%
	Disability	874	15.2%	84.8%	1.068	12.6%	87.4%	1.214	9.7%	90.3%
	Protective Measure	1.254	39.8%	60.2%	1.119	28.2%	71.8%	850	20.0%	80.0%
	Civil record	291	6.2%	93.8%	66	3.0%	97.0%	34	2.9%	97.1%
	Successions	2.441	6.4%	93.6%	2.659	4.3%	95.7%	2.688	5.4%	94.6%
	Civil guardianship	0	0.0%	100.0%	0	0.0%	100.0%	0	0.0%	100.0%
Total of civil declaratory actions of family law		7.073	26,9%	73.1%	7.130	21.8%	78.2%	6.834	18.4%	81.6%

#### 2.5.4.2 Actions for divorce and legal separation of people and goods

Legal aid granted by type of divorce and separation of people and goods in the period considered, refers mostly to contested divorce cases (Table 3). It should be noted that the weight of these processes gradually increases over the period considered, until in 2006 about nearly 100% of cases with legal aid, given that the processes with mutual consent, as is known, are no longer under the exclusive competence of the courts.

**Table 3 - Legal Aid Granted by type of procedure of divorce and separation of people and goods**

	2000		2003		2006	
	N	%	N	%	N	%
Litigious Divorce	4.141	59.4	5.029	96.2	3.279	99.4
Divorce by mutual consent	2.719	39.0	138	2.6	1	0.0
Legal separation of people and goods: litigious	45	0.6	51	1.0	15	0.5
Legal separation of people and goods: mutual consent	55	0.8	0	0.0	0	0.0
Separation Convention in divorce	13	0.2	10	0.2	4	0.1
Total	6.973	100	5.228	100	3.299	100

2.5.4.3 Gender of applicants for legal aid in civil justice and in family civil justice

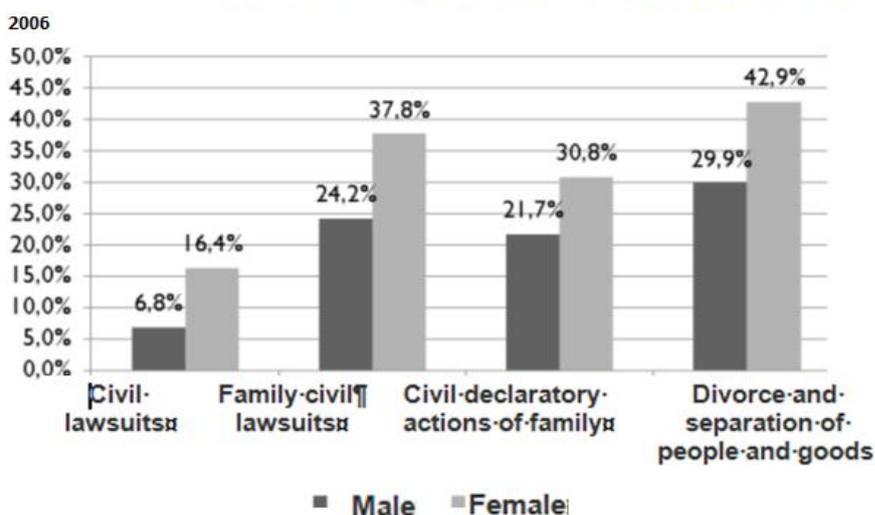
The analysis of the following table shows that with regard to the applicants for legal aid (authors and defendants), individuals, women have a greater weight in the family civil justice (civil of family declaratory actions plus actions of divorce and separation people and goods) than in the group of civil actions (Table 4), remaining the same between 2000 and 2006. Indeed, in 2006, close to 68% of individuals with legal aid in family civil actions were women, while in civil lawsuits these represented 47% of individuals with legal aid.

**Table 4**  
**Gender of applicants for legal aid in civil justice and family civil justice**

		Civil actions		Civil family actions		Civil declaratory actions of family		Divorce and separation of people and goods	
Without legal aid	Male	113.591	72.8%	5.850	47.3%	4.209	58.0%	1.641	32.2%
	Female	42.523	27.2%	6.507	52.7%	3.052	42.0%	3.455	67.8%
With legal aid	Male	8.654	53.0%	1.868	32.1%	1.169	46.2%	699	21.2%
	Female	7.664	47.0%	3.955	67.9%	1.360	53.8%	2.595	78.8%
Total	Male	126.502	73.0%	7.718	42.5%	5.378	54.9%	2.340	27.9%
	Female	46.773	27.0%	10.462	57.5%	4.412	45.1%	6.050	72.1%

Through the analysis of Table 4 it is also possible to identify some differences in gender distribution between the declarative actions of family and civil actions for divorce and legal separation of people and goods that has been granted legal aid. In declarative civil actions there is a relative balance between men and women who have been granted legal aid, although the percentage of women has increased slightly between 2000 and 2006, 49.5% (1,361) to 53.8% (1360) (Chart 12). In turn, the actions of divorce and separation of people and goods, the vast majority of applicants with legal aid are women, specifically 78.8% on the total applicants with legal aid (2,595 of 3,294).

Chart 12 - Percentage of the total of men and women with support by type of action,



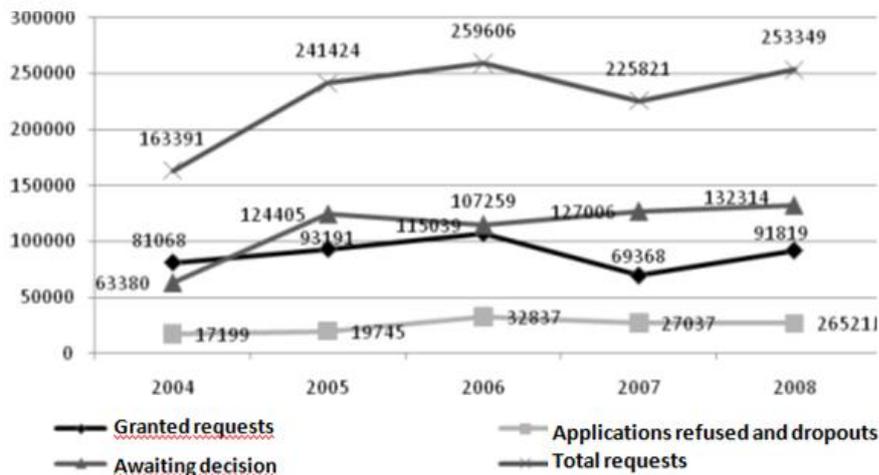
Simultaneously in Chart 12 we can observe in the different types of action that there is a greater propensity among women to apply for legal aid than among men, which is likely more expressive in actions for divorce and legal separation of people and goods, given that 42.9% of women in 2006 applied for legal aid.

## 2.6. Demand for Legal Aid (2004-2008)

### 2.6.1. The growth of applications until 2006 and the ineffectiveness of Social Security

According to the data provided by the Institute of Solidarity and Social Security, the values of legal aid applications relating to individuals recorded on the mainland, an increase of 103,965 in the year 2001, as stated, to 163,391 in 2004 and to 253,349 in 2008 - Chart 13 -, i.e. about 55% during this period of four years, and if we count from the year 2001, gives an increase in the period 2001 to 2008, about 243%. But in 2007 there was a slight decline in total orders received. The evolution of applications granted notes the same trend of growth, with the exception of 2007. Already applications refused or withdrawals after a period of growth between 2004 and 2006, declined in the last two years of the period considered. Thus, paradoxically, the publication of restrictive legislation in 2004 did not prevent the growth of demand, except in 2007, which does not mean that demand could grow no more, if not for the effect of the legislation. Or, again, the impact of knowledge and application of new legislation has no immediate effects.

**Chart 13 – Requests for support entered with decision and awaiting decision of singulars, 2004 to 2008**



Source: Institute of Solidarity and Social Security (non published data)

Table 5 shows that the rate of rejection to individuals ranged from the minimum of 8.2% in 2005 and the maximum value of 12.6% in 2006, up in 2008, 10.5%. This rejection rate is similar to that recorded in 2001. We can thus conclude that the refusal to grant legal aid by the Institute of Solidarity and Social Security is not significant, as it was in the courts, and that this rate has risen significantly, which can only mean that maybe it will be refused legal aid. We should, finally, enlighten that the claims pending decision doubled between 2004 and 2005, from 63,380 to 124,405, after registering a gradual growth to 132,314, only interrupted in 2006, indicating inability of the system in at least one meeting each year equal to the number of applications received. We should also stress the values of support requests by individuals who are waiting decision which are in all years, except for 2004, higher than the granted requests. The rate of applications waiting decision varies between the minimum of 38.8% in 2004, and the maximum

value 56.2% in 2007. As legislative changes of 2004 and 2007 seem, thus, have had an impact on the performance of the social security, with the exponential rise of applications awaiting decision in 2005 and 2007.

**Table 5 – Percentage of received requests with decision and waiting for a decision of individuals, 2004 - 2008**

	Requests granted		Applications refused or dropouts		Waiting for a decision		Others		Total
2004	81.068	49.6%	17.199	10.5%	63.380	38.8%	1.744	1.1%	163.391
2005	93.191	38.6%	19.745	8.2%	124.405	51.5%	4.083	1.7%	241.424
2006	107.259	41.3%	32.837	12.6%	115.039	44.3%	4.471	1.7%	259.606
2007	69.368	30.7%	27.037	12.0%	127.006	56.2%	2.410	1.1%	225.821
2008	91.819	36.2%	26.521	10.5%	132.314	52.2%	2.706	1.1%	253.360

Source: Institute of Solidarity and Social Security (non published data)

### 2.6.2. Social Security Public Services and Lawyer Bar Services in action

Portugal has approximately 500 social security public services, “customer service”, which also accepts the legal aid form with attached documents that prove the income and composition of the family of the beneficiary candidate. So women resort to this service and with the help of public Workers they fill out the form in question.

These services cross this form data along with the documents of the social security data centre and then decide the attribution or the rejection of legal aid based only, as a rule, in family income criterion (see point 2.4.6 ). In case of rejection it’s possible to appeal to the judicial court.

In case of success of legal aid applications, the Social Security Services inform the Lawyer Bar Services and a legal aid lawyer is nominated from the Bar. The lawyer is responsible of the procedure from the beginning and meets the beneficiary in his Cabinet.

The majority of individual lawyers and the small and medium Cabinets of lawyers are registered to act in legal aid service. The beneficiary goes to this office, as well as the others clients, a service which is paid by Ministry of justice. The services costs are determined between the Bar and the Ministry of Justice.

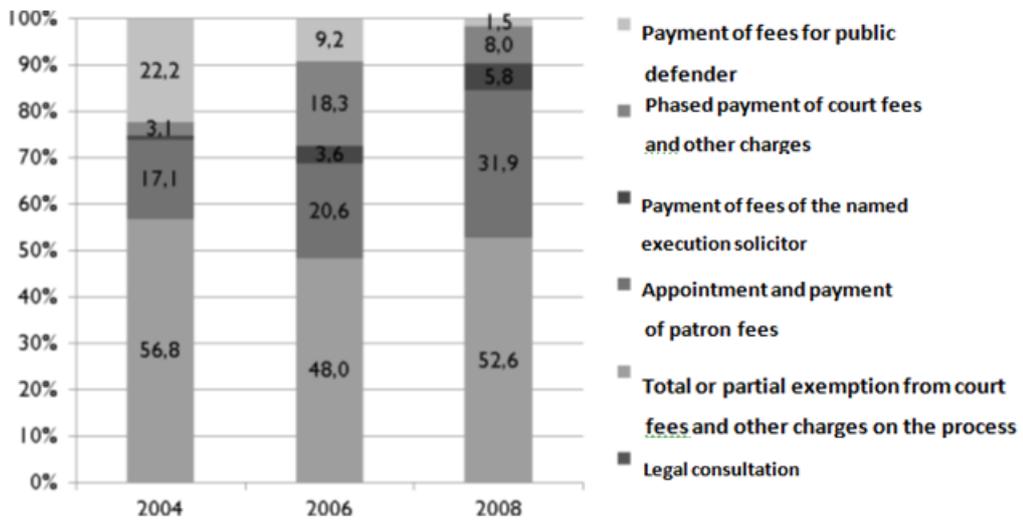
In general, women request legal aid (nomination of legal aid lawyer and/or exemption of judicial taxes, to obtain a judicial divorce or/and to make the regulation of the parental responsibilities of her children and to oblige fathers to contribute to pay children’s expenses.

### 2.6.3. Conceived legal aid modalities

The most requested legal assistance required by individuals among others, according to the Institute of Solidarity and Social Security between 2004 and 2008, was the total or partial exemption from payment of court fees and other charges pertaining to the process, representing over the years about half of arrangements granted – Chart 14. The second most requested modality was the appointment and payment of fees, which in 2004 represented 17.1% of the issued and modalities increasingly, reaching in 2008, 31.8%, i.e. 46,434. The fees for the legal defender, according to data released by the Institute of Solidarity and Social Security, was the modality that found the sharpest decline in the period between 2004 and 2008. In 2004, this category accounted for about 22.2% of the modalities provided, i.e. 29,512, but in 2008 did not

exceed about 8% of the modalities provided, 2,242 cases. Finally, we highlight the weak expression of the modality of legal advice that, over the considered period, does not represent 1% of the modalities provided, and its highest value 0.75%, i.e., 1,060 cases in 2005.

Chart 14 – Forms of conceived legal aid to individuals, 2004 to 2008



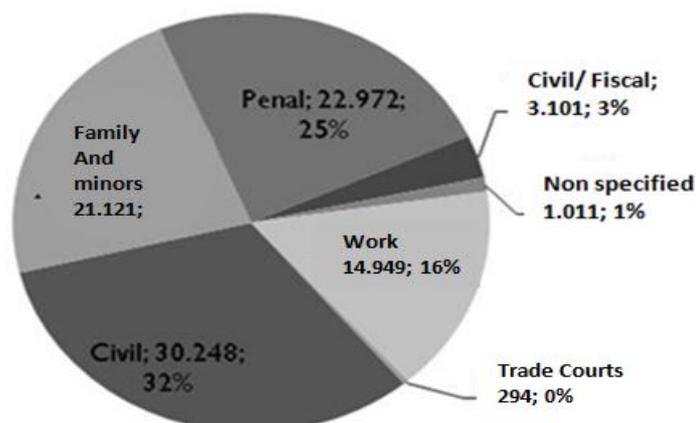
Source: Social Security and Solidarity Institutel (non published data)

## 2.6.2. Legal Aid granted by type of dispute and by area of law in 2008

### 2.6.2.1. Overall analysis: the predominance of civil justice

Throughout legal aid, we have civil and criminal actions that have a greater weight, accounting for 32% and 25%, respectively. However, the "actions of family and children" have similar values of prosecutions, representing 23%, about 21,121 cases of legal aid. In addition to the work actions representing 16% (14,949 cases) of legal aid, other areas of law, administrative and tax courts and trade, have virtually no expression in the total legal aid.

Most objects of civil action with legal aid are not specified civil actions related, which puts some limitations on the interpretation of Table 6. Even so, it is worth noting the predominance of "executions", which represent approximately 20.9% (6,333) of actions with civil legal aid in 2008. Except for the recognition of rights actions, representing 9.3% (2,803) of the actions with civil legal aid, we cannot highlight any other object of civil lawsuit.

**Chart 15 - Total of legal aid by areas of law, 2008**

Source: International Institute for Solidarity and Social Security

The high demand for legal aid for executive actions are in line with the settlement of civil justice by these actions, following the recognition of rights and actions, which represent actions related to high-intensity conflict, in which applicants without litigating in court cannot see their rights recognised.

**Table 6 – Civil lawsuits with legal aid by object action (with and without unspecified civil actions)**

Object of Action	N	% total	% without other objects
Contracts	1,050	3.5%	6.9%
Debts	1,230	4.1%	8.1%
Executions	6,333	20.9%	41.5%
Inventories and heritage	2,311	7.6%	15.1%
Property	518	1.7%	3.4%
Protective measures	406	1.3%	2.7%
Rights recognition	2,803	9.3%	18.4%
Appeal	614	2.0%	4.0%
Sub-total	15,265	50.5%	100.0%
Other objects	14,983	49.5%	-
Civil Actions	30,248	100.0%	-

Source: Institute of Solidarity and Social Security (non published data)

### 2.6.2.2. Legal aid granted in the justice of family and children

With regard to the actions of Family and Children, it turns out that legal aid is granted mainly to the following types of actions: divorce, separation, family dwelling house and alimony and parental responsibility, the alimony pension to minors, failures and guardianship, representing 52.4% (11,063 cases) and 41.2% (8,699 cases) respectively, of the total conceived legal aid (Table 7).

**Table 7 - Total of legal aid by type of family and minors actions**

	N	%
Children's rights (tutelar civil protection, educational tutelary and promotion and protection)	9,094	43.1%
Adoption	20	0.1%
Parental Responsibility Setting, child support, defaults and guardianship	8,699	41.2%
Restrictions to parental responsibility	12	0.1%
Promotion and protection	238	1.1%
Educational tutelary	125	0.6%
Divorce, Separation, home family address and alimony	11,063	52.4%
Civil Declaratory actions of family	538	2.5%
Investigation and Research of maternity and paternity	375	1.8%
Support to elder children	163	0.8%
Others	426	2.0%
Total	21,121	100.0%

Source: International Institute for Solidarity and Social security(non published data)

The request for legal aid in actions related to the rupture of a marriage have special relevance. We cannot, nevertheless, through those data arrive at the percentage of cases for legal aid for access to non-judicial means (e.g. divorce by mutual consent in conservatories) or access to the courts. As for the civil juvenile legal aid intended to litigate in court, defending the rights of children, in order to regulate parental responsibilities of parents in relation to them. Other types of action of family and children have a very low expression, together accounting for about 5% of the actions granted legal aid for family and children.

### 2.6.2.3. Legal aid evaluation: some complaints

In the Portuguese legal system, as I explained, a lawyer is nominated by the Bar at the beginning of a process following it to its conclusion. However beneficiaries have some complaints.

They are forced to accept the nominated lawyer by the Lawyer Bar. The lawyer's performance is in many cases criticised. Some beneficiaries and other professionals said in the interviews that these legal aid lawyers are less qualified and less professionally prepared than the majority of other private lawyers. But without legal aid many women have no way of defending their rights. Women mobilise legal aid mostly to defend their rights in divorce cases and in procedures of regulation of parental responsibilities of their children.

Secondly, as I wrote, the Security Social Services apply legal restrictive criterion of economic insufficiency, which means that only the poor or people with low wages have the possibility of demanding legal aid.

Thirdly, the most important criticism focuses on the delay of Social Security analyses and decisions of the legal aid request procedure, as well as the delay referring the decision of judicial process to court.

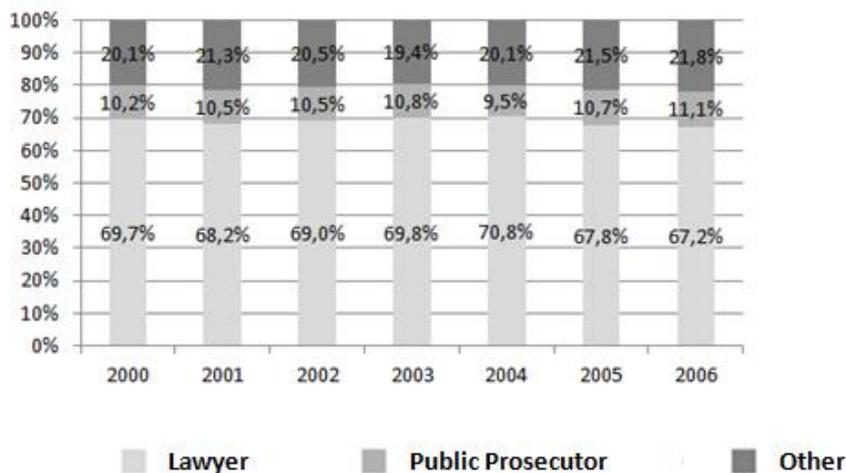
In Portugal, legal aid is not a usual subject referred to by the media or in NGO reports. However, over the last twenty years many socio-legal studies have been developed about this subject conducted by researchers of the Center of Social Studies of University of Coimbra that reveal both the potentialities – without legal aid it is impossible for many people to fight in court to promote their rights - and the fragilities of the legal and institutional system – that turns to be a very selective system - of legal aid to promote citizenship.

## 2.7. Prosecutor: a very special mobiliser of family and children justice

### 2.7.1. Family declarative civil actions (without divorce actions)

From the analysis of statistics provided by the Directorate General for Justice Policy regarding family declarative civil actions, legal aid representation as to the author and to defendants, we can conclude that 10.2% (1,215) in 2000, and 11.1% (1,341) of the finished declarative civil actions, in 2006, were sponsored by the Public Prosecutor and the remaining by lawyers (67.2% or 8,136) and others (21.8% or 2,636) - (Chart 16).

**Chart 16 – Finished civil family actions according to legal representation of the complainant and the defendant, 2000 to 2006**



Source: DGPJ [non-published data]

When crossing the variable legal representation with the variable mode of legal aid, civil lawsuits relating to the family, it can be observed that 5% (537) in 2000 and 6% (755) in 2006, the actions civil claims were brought by family lawyers and trainees under legal aid (Table 8). Thus, between 2000 and 2006, the number of actions brought by lawyers for legal aid grew by 40%, from 537 in 2000 to 755 in 2006, ranging from a maximum value of 978 stocks in 2004, and the minimum 475, in 2001, while the number of civil lawsuits brought by lawyers recorded a slight decline of 4% from 7,760 in 2000 to 7,381 actions in 2006.

Prosecutors have greater participation, both in absolute and relative terms, in legal representation on behalf of the author than the defendant in finished family declaratory actions. In percentage terms, an average of 16% of sponsorships judiciary - in 2007 reached 17.3% (1,118) - in finished civil family processes, on behalf of the author are the prosecution's responsibility and only an average of 3.9% - 228 in 2006 - the defendant's representations were their own responsibility.

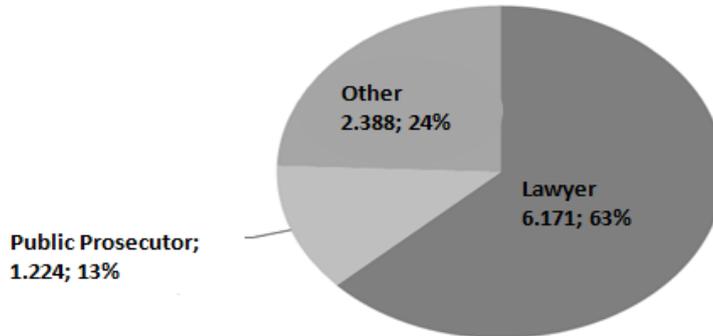
**Table 8 – Finished lawsuits of civil family declaratory actions by the public prosecutor and by type of legal representation, 2000 to 2006**

			2000		2003		2006	
			N	%	N	%	N	%
Legal representation	complainant	Lawyer	5,450	81,8	5,566	81,8	5,264	81,5
		Public Prosecutor	1,001	15	1,140	16,8	1,118	17,3
		Other	209	3,1	97	1,4	80	1,2
		Total	6,660	100	6,803	100	6,462	100
	defendant	Lawyer	2,847	54,3	3,054	55,2	2,872	50,8
		Public Prosecutor	214	4,1	187	3,4	223	3,9
		Other	2,179	41,6	2,292	41,4	2,556	45,2
		Total	5,240	100	5,533	100	5,651	100

Source: DGPJ [non published data]

Charts 17 and 18 illustrate the percentage of finished family civil actions in 2006 without and with legal aid, according to the total of authors and defendants. While in finished cases without legal aid the prosecutor is responsible for legal representation of about 13% of cases, in legal aid cases concluded the prosecutor is responsible for only 5% of legal representation. Now in the same action we can have the prosecution representing the interests of a child and of one parent (or both) litigating with legal aid.

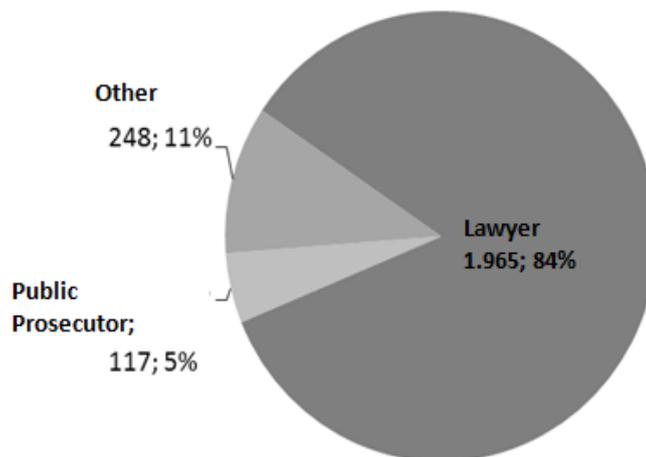
**Chart 17 – Finished civil family actions according to legal representation (complainants and defendants), 2006 (without legal aid)**



Source: DGPJ [non published data]

It can be concluded that the prosecution acts more significantly in cases in which the parties can also apply for legal aid. The lawyers between 2000 and 2006, represent approximately 81.5% of the authors (5,264, in 2006) and over 50% of defendants (2,872 in 2006). In the same year 2006, 24.2% of these lawyers (1,965 out of 8136) and authors represent defendants in the appointment of the legal aid system, however, if the analysis focuses only on the actions with legal aid, the representation of authors defendants and lawyers is about 84%, since, due to the nature of the dispute, applicants require, as a rule, the appointment of lawyer.

**Chart 18 – Finished civil family actions according to legal representation (complainants and defendants), 2006 (with legal aid)**



Source: DGPJ [non published data]

### 2.7.2. The Public Prosecutor in action

In Portugal the Public Prosecutors are not only criminal prosecutors, they have also legal special functions regarding family matters. In all courts they have a public service and in cases of the best interest of the child and civil incapacities of a family member they represent them in court. It is a traditional and respected public service in Portugal and from qualitative interviews conducted by the Center of Social Studies of University of Coimbra it is known that this service is in general mobilised by women to defend the interests of their family and children.

### 2.8. judicial information of Women's rights: the action of the State and the NGOs

In Portugal we have a public policy of rights information to women in general, and, specially, those suffering from domestic violence, and in civil, family and migrant matters.

The State's action is conducted by CIG (*Comissão para a igualdade e cidadania de género*) – Commission of Equality and Gender citizenship – that provides legal information and social support to women victims of domestic violence (2,515 victims contacted CIG in 2009) and have a legal and psycho-social Cabinet which gives legal aid (779 cases in 2009) and provides shelters to protect women..

CIG is one of the existing governmental mechanisms promoting gender equality which is an official department under the Office of the Presidency of the Council of Ministers and is accountable to the Secretary of State for Parliamentary Affairs and Equality.

This Commission replaced the Commission for Equality and Women's Rights (*Comissão para a Igualdade e para os Direitos das Mulheres - CIDM*), which in turn replaced the Commission on the Status of Women (*Comissão da Condição Feminina - CCF*). It assists the implementation of public policies in the field of citizenship and on the promotion and protection of gender equality. Its organisational structure was established by Decree-Law 164/2007 of 3 May, which established the Commission's following responsibilities:

- support the preparation and development of global and sectoral policies regarding the promotion of citizenship and gender equality and to participate in the implementation of specific policies and its liaison with integrated policies; contribute to the amendment of the regulatory framework, or to its implementation, in respect of citizenship and gender equality, by preparing regulatory proposals, issuing opinions on legislative initiatives or suggesting mechanisms to promote full and effective compliance with the regulations in force, particularly in the mainstreamed fields of education for citizenship, equality and non-discrimination between women and men, maternity and paternity protection, reconciliation of women and men's work, personal and family life, combat forms of gender violence and support for victims;
- prepare studies and planning documents to support political decision-making in the area of citizenship and gender equality; promote education for citizenship and activities designed at raising civic awareness in regards to the identification of discriminatory situations and ways of eliminating them; promote activities to facilitate equal participation in economic, social, political and family life;
- suggest measures and carry out activities to counter all forms of gender violence and to support its victims; support non-governmental organisations on measures, projects or activities that promote aims corresponding to those of the Commission; attribute quality awards to entities that adopt codes or follow best practices examples in promoting gender equality, preventing gender violence and providing support to victims;
- provide technical supervision of structures assisting and caring for victims of violence and strategic co-ordination with other official sectors involved in such support; maintain public opinion informed and aware by means of the media, by producing publications and

- by keeping a specialised documentation centre and library; prepare general recommendations regarding best practices in promoting gender equality, especially at the advertising level, at the working procedures of educational structures, at the training and work organisation in the public and private sectors, as well as at checking their conformity with these best practices; assign technical competencies and certify persons and entities' quality who are institutionally involved in the promotion and protection of citizenship and gender equality; develop legal advice and psycho-social support services, especially in situations of discrimination and gender violence;
- receive complaints regarding situations of discrimination or gender-based violence and present them, when appropriate by issuing opinions and recommendations, to the competent authorities or to the entities involved;
  - ensure adequate forms of institutional participation for NGOs that contribute to the implementation of citizenship and gender equality policies;
  - organise, in accordance with the law, the national registry of NGOs whose statutory object is essentially the promotion of values of citizenship, human rights protection, women's rights and gender equality;
  - co-operate with international and European organisations and other equivalent foreign entities, in order to participate in the broad guidelines regarding citizenship and gender equality and to promote their implementation at national level;
  - co-operate with national, regional and local public and private entities in projects and activities coinciding with CIG's mission, in particular by establishing partnerships;
  - provide technical assistance to initiatives promoted by other entities in the area of citizenship and gender equality; issue favourable opinions on the signing of co-operation agreements that involve official state entities in matters related to the support of victims of gender violence.

CIG continues the work carried out over the years by CCF and CIDM in the area of gender equality, with an extended remit that includes citizenship issues. Its work includes, in particular:

- a comprehensive pioneering compilation of discriminatory acts against women, dating from the 1970s;
- an equally pioneering dynamisation of *Women's Studies* in Portugal since the early 1980s, through seminars, publications and incentives for research in this area, along with the establishment of co-operation agreements with various Portuguese and foreign universities;
- pursuing multidisciplinary studies and research projects/actions aimed at providing a scientific basis for intervention in several areas, most of which have been published in the *Status of Women Dossiers* and *Gender Studies* collections;
- awareness-raising and training in the field of equality, with multiplier effects, aimed at various socio-professional groups (local authority officials, health, social services, education, media and security forces personnel) as well as professional training for women, particularly emigrants, artisans and farmers;
- implementing numerous intervention projects, on its own initiative or as a partner, in a wide range of areas, including: Family planning; Education and youth; Reconciliation of work life with personal and family life; Intervention at local level, particularly by creating structures for equality at local level;
- training for equality; Intercultural and active citizenship;
- decision-making;
- advertising and the media;
- gender mainstreaming;
- motherhood in adolescence;
- promoting human rights and building up citizenship;
- violence against women; and
- trafficking in human beings.

In view of the responsibilities established by its organic law, especially those providing support for the development of global and sectoral policies on promoting citizenship and gender equality, CIG is responsible for co-ordinating the measures set out in the *Fourth National Plan for Equality – Citizenship, Gender and Non-Discrimination (2011 – 2013)*, the *Fourth National Plan against Domestic Violence (2011 – 2013)* and the *Second National Plan against Trafficking in Human Beings (2011 – 2013)*.

The State also has a specialised public service in migrant rights (ACIDI – Alto Comissário para a Imigração e diálogo intercultural) – High Commissioner for migrants and intercultural dialogue. This is not a service specifically directed to women's rights which gives information in 12 languages and has a translation service for 60 languages. Also ACIDI gives legal information. These are functions which are important to defend migrant women's rights. The Service has a formal legal restriction to support illegal or undocumented migrants, nevertheless an informal action from ACIDI is recognised to support to this cases.

The State action is complemented (sometimes even confronted) with the action of several NGOs. These NGOs are especially active in the fight against domestic violence (v.g. APAV – Association to support victims – in 2010 provided legal information to 5,221 victims) and to promote child's rights (v.g. IAC- Institute to support children –in 2008 provided legal information to 394 cases).

In the labour area there is also the Commission for Equality in Labour and Employment (CITE) which is an administratively independent tripartite collegiate body and a legal entity. It is accountable to the member of Government responsible for labour and social solidarity issues in conjunction with the member responsible for gender equality.

CITE is composed of the following members: a member representing the ministry responsible for labour, who is the Chair; a member representing the ministry responsible for Public Administration; a member representing the ministry responsible for local administration; a member representing the ministry responsible for equality; two members representing each of the union associations with a seat on the Standing Committee for Social Concertation; a member representing each of the employers' associations with a seat on the Standing Committee for Social Concertation. The Commission's mission is to promote equality and non-discrimination between men and women in labour, employment and vocational training, and to assist in implementing legal provisions and collective agreements in this matter, as well as those regarding the protection of parenthood and the reconciliation of work with family and personal life, in the private, public and co-operative sectors.

### 2.8.1. The action of Commission for Equality and Women's Rights

Domestic violence<sup>134</sup> is one of the concerns for CIG. With the improvements of law enforcement statistics and after the changes to the Criminal Code (2007), 30,543 incidents of domestic violence were recorded. The total convictions<sup>135</sup> for crimes related with domestic violence were of 1,301 for 2009<sup>136</sup>. As most victims of this crime are females and mainly ashamed to ask for help in person, a telephone helpline, called *Information service for victims of domestic violence*

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<sup>134</sup> The Order defines as an act of domestic violence any crime under the Criminal Code allegedly committed against the victim by someone with whom she habitually resides in her accommodation, irrespective of family relationship, blood relationship or kinship, or any other relationship between the aggressor and the victim.

<sup>135</sup> The largest percentage of those accused are spouses or partners, followed by former spouses or partners, parents and children.

<sup>136</sup> Source: DGPJ. Ministry of Justice statistics.

(SIVVD) has been working since 1998 where concise information and a legal advisor is provided. Many of these victims consult CIG's legal advice departments to resolve their problems. In 2010 this telephone helpline received 2,072 requests for violence cases<sup>137</sup>, made directly by victims, family members, friends, neighbours and institutions' officials.

*Carla<sup>138</sup> was frequently victim of offences by her husband since they had married. There were certain circumstances (alcohol abuse) where he used to become more aggressive, and his family, living with them never said anything, never cared about the times she was beaten. They used to ignore the screams at home and the offences of which she was victim. Carla was unemployed, doing the domestic work for the whole family and had two children (3 and 9 years old). She found herself in that vulnerable position every year for almost 7 years<sup>139</sup>, until one of her friends gave her the SIVVD phone number. Discreetly she called it and told her story like it would be the story of a friend of hers. She was informed about what measures she could take, about being a victim under the protection of law and she was advised to make a complaint to the police, giving the details of 'her friend's story' to allow the police services to act, once it was a public crime. She was also given the contacts of shelters<sup>140</sup>, reception centres and specialised assistance where 'her friend' could be received with her children under certain circumstances that were explained to her in detail.*

CIG also provides advisory and help for other forms of violence on women such as in cases of sexual harassment, inclusion of prostitutes in society (through the provided help given in O Ninho (The Nest), an NGO which sits on CIG's Advisory and whose goal is the social and human promotion of women victims of prostitution, carrying out information, training, reception and social support initiatives.

Trafficking of Human Beings is another big concern for CIG, since prostitution and trafficking are directly related to situations of economic, social, human and psychological exclusion. CIG is responsible for the co-ordination of the national plan against trafficking in human beings (2011-2013).

#### 2.8.2. The High Commission for Immigration and Intercultural Dialogue: examples on how it acts

"The mission of The High Commission for Immigration and Intercultural Dialogue (ACIDI) is to collaborate in the creation, implementation and evaluation of sector, crosscutting and public policies concerned with the integration of immigrants and the ethnic minorities, as well as to promote the dialogue between the various cultures, ethnic groups and religions."<sup>141</sup>

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<sup>137</sup> "Nearly all victims using the SIVVD were female; most situations involved physical/psychological violence, but there were also complaints of psychological violence without associated acts of physical violence. There were also reports of sexual violence". In Gender Equality in Portugal, 2010, CIG.

<sup>138</sup> Names are fictitious.

<sup>139</sup> The majority of reports related to situations of ongoing abuse. However, in recent years there has been a rise in those seeking information/support less than a month after a violent episode.

<sup>140</sup> In 2008 there were 36 shelters for victims of domestic violence (31 in mainland Portugal and 5 in the Autonomous Regions). In Gender Equality in Portugal, 2010, CIG.

<sup>141</sup> Alto Comissariado para a Imigração e Diálogo Intercultural - Mais diversidade, melhor humanidade, available in [http://www.acidi.gov.pt/institucional\\_book.pdf](http://www.acidi.gov.pt/institucional_book.pdf)

ACIDI has many services provided to immigrants in Portugal: the SOS Phone line<sup>142</sup> that provides information in eight languages through socio-cultural mediators, the National Immigrant Support Centre, as an integrated response for immigrant citizens (CNAI), since 2004, congregating various services and information at the same place, a service provided by socio-cultural mediators, 'prioritising a cultural, linguistic<sup>143</sup> and affective bridge with the clients'. Furthermore, ACIDI provides a Telephone Translation Service covering around 60 languages. ACIDI (at CNAI) also provide legal support and the situations are mainly concerned with getting legal in Portugal and getting justice over working conditions (as getting contracts, social security complaints, etc.). This information is also provided in the Family Reunification Support Office (GARF), where information on procedures for family reunifications are given, among many other services provided by ACIDI.

### **Real cases where ACIDI was search by immigrant women:**

#### *Case 1*

*Roberta was a Brazilian woman who was recognized as a victim of immigrant smuggling and, because of this she received a residence permit from the Immigration and Border Service, following approximately seven years of being illegal in Portugal. During this time, she and her two daughters were involved in prostitution. One of her daughters got pregnant and Roberta went to ACIDI because she has just got her permit to stay in Portugal, as a victim of human smuggling, but her daughter who was by then an adult was still illegal and pregnant, she was recused to have maternity assistance at the hospital. At ACIDI, Roberta was received by another Brazilian woman that, knowing the situation of many immigrant women in Portugal involved in prostitution schemes, created an atmosphere of trust with her to make her feel comfortable about explaining her problem. Roberta explained her situation and the socio-cultural mediator brought her to the juridical assistance, where it was explained to her that, in accordance with Portuguese law, all immigrant women, in regular or irregular situations in Portugal, had the right to get maternity assistance from public services. Roberta also received information about what steps to take to get her daughter regularised in Portugal.*

#### *Case 2*

*Natalyia was an Ukrainian women who came to Portugal with her 4 year old son with a man who promised to help her, since she was very poor; she had no job in Ukraine and her son was suffering from a heart disease and needed medical care. On arrival in Portugal, Natalyia was forced into prostitution by the man who had brought her to the country and during this time he beat her and kept her 4 year old son with him. She was a victim of trafficking in human beings and she had an imposed debt of 5,000 Euros to pay him for bringing her and her son to Portugal. Desperate, she ran away at the first opportunity and she was found by local ACIDI employees in the street with a paper written in Cyrillic. As no-one understood what she was saying, she was brought to the ACIDI building where its translation service was contacted.. Immediately, ACIDI employees brought her to the police services where she told her story and got victim protection status. She was brought, with her son, to a shelter for trafficked woman where she got help.*

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<sup>142</sup> The SOS Immigrant Phone line is a telephone service, created with the objective of providing immigrants and their respective associations, together with companies and Government agencies, with a general information service on the topic of immigration.

<sup>143</sup> The mediators provide a service in 12 different languages and dialects.

## 2.9. Specific categories of women accessing courts and Alternative Dispute Resolution in civil and family Law

In Portugal we don't have any civil and family law with specific categories that could give more facilities to women regarding the access to justice. Migrant women, disabled women, elderly women, women in rural areas, lesbian and bisexual women, transgender persons do not enjoy any special guarantees in civil and family law.

As already mentioned in Portugal only the Public Prosecutor has the legal duty to promote the rights of children and people with civil incapacities. The socio-legal studies show that mothers whether young, single, divorced or separated - are the main users of this child support received from the children's fathers.

If fathers do not pay this maintenance allowance for the children, then women can demand a guarantee fund from the State to provide this payment.

Women who suffer from domestic violence have special protection of a criminal law and can have a court order to restrict the presence of the aggressor but indirectly this statute gives them the right to demand from the aggressor a civil compensation and children's custody. In generally the courts give a low compensation, but the family courts give children's custody to the mother.

Also in Portugal we do not have special Courts or other alternative dispute resolution of civil and family conflicts specialised in women's rights. However, the Portuguese socio-legal studies (Pedroso, 2011) conclude that the organisation and culture of specialised courts of family and minors help women access to claim family and child rights.

The Public Service of Family Mediation is an emergent service that in 2010 received 767 requests of information and 372 requests of mediation. The action of this public service is not consensual. Some legal professionals (lawyers, judges and public prosecutors) are against this service because in their opinion the service cannot neutralise the vulnerabilities of women in a dispute context.

## 2.10. Analysis of the Condemnations of the Portuguese State due to the Violation of Article 6 (fair trial), Article 8 (right to private and family life), Article 12 (right to marry) and Article 14 (non-discrimination) of the European Convention on Human Rights

### 2.10.1. Article 6 of ECHR

Article 6 of the European Convention of Human Rights, on civil law matters, presents the right to an equitable process as a guarantee, containing the right to the examination of a particular case, the right to an examination of the case in a reasonable period of time and the right to access to an independent and impartial court. These principles are also provided for in the Constitution of the Portuguese Republic.

The most important cases in which Portugal was condemned for the violation of article 6, paragraph 1, of the European Convention on Human Rights, mainly concern what refers to the right to a decision in a reasonable time. Actually, this is the most negative aspect pointed out to the Portuguese legal system: the delay of justice (e.g. *Guincho v. Portugal*, Complaint No. 8990/80 – Decision: 10 July 1984; *Farinha Martins v. Portugal*. Complaint No. 53795/00 - Decision: 10 July 2003; *Lobo Machado v. Portugal* Complaint No. 15764/89 - Decision: 16 September 1996; *Baraona v. Portugal*, Complaint No. 10092/82 - Decision: 8 July 1987).

The analysis of the decisions of the European Court of Human Rights shows that, in general, Portuguese women do not address this Court and the most important subject of the decisions was the delay of Portuguese courts. There is no evidence in the ECtHR decisions of unequal access of man and women to courts.

#### 2.10.2. Article 8 (right to private and family life), Article 12 (right to marry) and Article 14 (non-discrimination) of the ECHR

Decisions of European Court of Human Rights against Portugal under Article 8 of ECHR mostly come from male applicants (*Salgueiro da Silva Mouta v. Portugal* – No. 33290/96; *Maire v. Portugal* - 48206/99; *Velosa Barreto v. Portugal* – 1995) .

In the cases of *Silva Mouta* and *Maire* the subject is similar: the applicants are in both cases fathers, and the children's mother ran away with their children allowing no contact whatsoever. The applicants claimed that the Portuguese courts violated Article 8 of the ECHR by failing to return the children to them.

In *Velosa Barreto v. Portugal* the applicant was prevented from taking possession of the house he had inherited from his parents, and thus prohibited from living in it, the Court held that the measure was aimed at the social protection of the tenants and the domestic courts found that he had no urgent need for the property as he lived with other members of his family. The Court held that a fair balance had been struck between the individual and the community interests under Article 8.

In the case *Pontes v. Portugal* (No. 19554/09) the couple *Pontes* argued that Portugal violated Article 8 because the authorities limited their contacts with their child, putting him up for adoption.

The already quoted case *Salgueiro da Silva Mouta* was also considered a violation of Article 14 of the ECHR because it recognised that the applicant was discriminated on his sexual orientation, as he is a homosexual.

Last, but not the least, under Article 12 of ECHR we have the application of a female couple (*Helena Paixão and Teresa Pires v. Portugal* – No. 6788/10) that wanted to have a legal marriage, since the marriage of two people of the same sex was forbidden. However this application was withdrawn on 27 June 2010 as a consequence of the family law legal reform that allowed marriage between people from the same sex.

In conclusion, Portuguese women do not address the European Court of Human Rights very often.

#### 2.11. The Convention on the Elimination of Discrimination against Women and Portugal regarding civil law matters and access to justice

The Committee on the Elimination of Discrimination against Women has considered the sixth and seventh periodic reports of Portugal (CEDAW/C/PRT/6 and CEDAW/C/PRT/7) – (the next report is due in July 2013) - at its 864th and 865th meetings, on 3 November 2008 (see CEDAW/C/SR.864 and CEDAW/C/SR.865).

Regarding the civil law matters and access to justice, the Committee requested the State Party to ensure that the Convention and its Optional Protocol become an integral part of the initial and ongoing legal education and training of judges, lawyers and prosecutors.

One of the important measures to facilitate women's access to justice is the "equality adviser statute", which assigns a clear mandate to gender focal points within each Ministry that is responsible for promoting gender equality. Each of it describes their function and stipulates the creation of intra-ministerial working teams.

CEDAW in its recommendations concluded that it does not have a clear picture as to whether there will be a sufficient level of authority among these advisers, and whether the relationship between the Commission for Citizenship and Gender Equality and the new advisers will go beyond an advisory function through the ministries. The Committee was also concerned that the advisory role of the Commission relating to the creation of equality advisers by local authorities may not have sufficient impact so that such advisers will be established in each municipality.

#### 2.12. Legal education and legal training for judges, prosecutors, police officers and lawyers

Among the major universities in Portugal, only the Law School of Universidade Nova de Lisboa (New University of Lisbon) has in its lecture programme a class of gender law and Women's Rights. Portugal does not have institutional or judicial culture regarding women's rights.

The organisers of judicial professions training are aware of this institutional lack.

#### 2.13. Compensations and reparation schemes for Women in civil and family law

In Portugal we do not have civil compensation and reparation schemes only for women. These mechanisms are for both male and female victims. However, we can assume that compensation is low and that it is not gender-sensitive.

#### 2.14. Conclusions

Inequality in access to justice is a complex social phenomenon that combines economic inequalities (costs), social and cultural (distance of the Courts or the non-recognition of the fact of injury as rights) to the detriment of the most vulnerable social groups. These factors along with gender inequality also turn unequal access for women and men to justice.

In Portugal, despite the accelerated transformation occurred in the Portuguese society after the beginning of the democratic process in 1974 and the entry to the EEC in 1986 (now EU), which reflects in the evolution of socio-economic and socio-demographic indicators, women are today exposed to a society dominated by patriarchal social relations, to lower wages, to greater poverty and to unequal distribution of tasks in family care.

1. Equal access to law and justice enshrined in Portugal, in the Constitution as a fundamental right, which is currently developed by the law of legal aid (Law No. 47/2007 of 28 August ) that serves to compensate social inequalities between men and women in access and right to justice. It is noteworthy that this law applies to all men and women living in Portugal, as well as to those covered by 2003/8/EC Directive of the EU Council of 27 January.
2. The application for legal aid is made through social security services, which is a Portuguese innovation, pointing out the character of social provision of legal aid and the existence of a very large network of care services in the community. Men and women can be granted the right to legal advice, the total or partial exemption from court fees and also the right to the appointment of a public defender, to be performed by the Bar Association and to be paid by the state, in accordance with the terms of the Bar.

3. However, this law only allows granting legal aid to those who have economic failure defined by law to have access to all forms of legal aid, as a household monthly income of less than 315 Euros. To gain access to a waiver of court fees (total, partial or phased) the household income cannot exceed 1,048 Euros. However, these thresholds are too low and do not cover all the social needs of legal aid.
4. In all civil justice (including family civil justice) using the indicator of terminated civil lawsuits, in 2006 (latest year with available statistics) actions with legal aid represents only 6.6% (12,745) of the processes. Among these cases, 64% (8,188) correspond to declarative civil actions and 36% (4,557) to family civil lawsuits, of which 26% (3,299) are the actions of divorce and legal separation of people and goods, and 10% (1,258) are the other declarative civil actions.
5. In Portugal the civil justice system has been subject to a strong process of the use of non-judicial procedures (e.g., deviation of recoveries and divorces by mutual consent to administrative proceedings), which lowers the recourse to legal aid in civil and family justice, but even though, there is a strong use of legal aid in family justice, which compensates the unequal access to justice for women.
6. Thus, recourse to legal aid in 2006 through the mentioned indicator of ended actions allows us to conclude that in the total of civil lawsuits 53% of men (8,654) and 47% of women (7,664) rely on legal aid. But in family civil lawsuits, 67.9% (3,955) of women resort to legal aid, with a particular focus, within these actions, on divorce actions, in which 78.8% (2,595) of women resort to these actions legal aid.
7. Referring now to another indicator, i.e., the social security data, it is shown that, in 2008, 91,819 were granted legal aid applications (36.2%), 26,521 (10.5%) were rejected, and 132,314 (52.2%) await decision, which shows a large inefficiency of social security services. Within this demand 32% (30,248) are for civil lawsuits and 23% (21,121) are for family actions and under aged, which mean that in this year civil justice and family justice represent the largest demand legal aid in Portugal.
8. In compensation of social inequality and inequality between men and women in access to law and justice in Portugal there is, apart from the legal aid scheme, two innovative institutional experiences: the competences of the Public Prosecutor and about 300 normally municipal Commissions for the protection of children and youth at risk (non-judicial institutions with representatives of public services and from the community organisations – CPCJ) in defence of children's rights.
9. However, as shown by the studies carried out, the Public Prosecutor is essential in the most part for women and mothers asking the Public Prosecutor to initiate tutelary civil actions (42,616 – 66%) - mostly regulating parental responsibilities – and processes promotion and protection of children at risk (10% - 6,389). For their part, in 2010, the CPCJ initiated 34,753 processes of children in danger (i.e., socially at risk).
10. In conclusion, in legal aid, the Public Prosecutor, as part of children's rights, and the CPCJ clearly show that there is an unequal access to justice and the right of civil and family and children justice, and also between men and women, and that these instances are means to compensate this inequality of access between men and women.

## 2.15. Recommendations

1. To promote equal access of women and men to civil and family justice is necessary for public legal aid systems in all cases of discrimination of women or women's vulnerabilities can give special attention to women and give them legal information and juridical representation without economic restrictions of access to the system.
2. A policy of public action (combined action from state and NGOs of community) is necessary to assist the capacity of the public services and NGOs to disseminate legal information of women's rights and promote equal access to justice to women and men.
3. The Public Prosecutor and CPCJ competences and action are an example of Portuguese good practice of promotion of children rights, and indirectly, women's rights.
4. The creation of a public (or in co-operation with NGOs) entity with the function of representing women in cases of inequality of their access to justice.
5. A specialised Court and legal profession in women's rights.
6. The ADR's created to solve civil and family conflicts can only respect or promote women's rights and equal access to justice if this legal statute and practice can neutralise the gender inequality of women.

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### **Chapter 3**

#### **Criminal Law by the example of Austria**

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This chapter deals with access to justice for women in Austria in a criminal law context. Following a short introduction, three topics are highlighted - the situations of:

- women being victims and/or witnesses,
- women being offenders, and of
- particularly vulnerable groups like migrants and disabled women.

The summary resumes the most important findings and recommendations.

#### 3.1 Introduction remarks

When trying to examine the conditions of access to justice for women, reliable gender-specific statistics are necessary. Detailed statistics are missing in Austria.<sup>144</sup> Therefore mostly indirect information had to be used, like qualitative studies on certain topics, or reports dealing with specific questions.

In Austria, the Ministries of the Interior and of Justice have already been co-operating for a long time to renew data collection of criminal statistics. A working group of feminist and women's organisations and experts has been consulted in this process but even in this working group, prolonged discussions are necessary (e.g. on categories which are needed to define the relationship between victim and perpetrator in a clearly distinctive way).

Looking at UN Women's ten bullet points concerning proven approaches to make justice systems work for women, it can be concluded that Austria has either achieved most of these goals or at least accepted them as relevant. By way of example, the Austrian state supports women's legal organisations as well as specialised services and there are gender-sensitive laws (especially in the field of domestic violence / violence against women and children, traditional violence against girls and women).

The number of women among police officers<sup>145</sup>, judges<sup>146</sup>, prosecutors, and prison guards<sup>147</sup> has increased over the past decades and furthermore some women have obtained leading positions both in the police forces and in the judicial system. In the courts of first instance more women than men – about 60%% – are working as judges (although this does not necessarily mean that

<sup>144</sup> Criminal statistics report mostly total numbers without differentiating between men and women – see Statistik Austria:[http://www.statistik.at/web\\_de/statistiken/soziales/kriminalitaet/verurteilungen\\_gerichtliche\\_kriminalstatistik/index.html](http://www.statistik.at/web_de/statistiken/soziales/kriminalitaet/verurteilungen_gerichtliche_kriminalstatistik/index.html)); it is the same situation in Germany – see Destatis:  
<https://www.destatis.de/DE/ZahlenFakten/GesellschaftStaat/Rechtspflege/Rechtspflege.html>

<sup>145</sup> No actual data. In 2009, 20%% of the civil servants and employees of the Ministry of the Interior were women, but among the students at the police school the relation has been about 50:50 ([http://www.bmi.gv.at/cms/bmi/\\_news/bmi.aspx?id=70612F4F74634A497369453D&page=214&view=1](http://www.bmi.gv.at/cms/bmi/_news/bmi.aspx?id=70612F4F74634A497369453D&page=214&view=1)).

<sup>146</sup> 53% of Austrian judges and 50.4 % of public prosecutors are female – but only 36% in leading positions (Die Presse, 29.12.2012, [http://diepresse.com/home/politik/innenpolitik/1327934/Justiz\\_Mehr-Frauen-als-Maenner](http://diepresse.com/home/politik/innenpolitik/1327934/Justiz_Mehr-Frauen-als-Maenner)).

<sup>147</sup> Nevertheless, the CPT criticised in 2010 that especially in prison departments for juveniles the guard teams should be of mixed gender and that the number of women should be increased.  
<http://www.cpt.coe.int/documents/aut/2010-05-inf-eng.pdf> (p.34)

they are more sensitive to women's needs than men). This means that the profession of a judge is gradually becoming predominantly a female profession, such as for example being a teacher in a primary school – and this usually leads to a loss of reputation for the profession, as well as the professionals.<sup>148</sup>

Trainings have been established for police officers, judges and state prosecutors to inform them about domestic violence<sup>149</sup> and to sensitise them towards `special needs` of women respectively of certain groups (e.g. rape victims). Students at the police school as well as judges during their vocational training have to participate in basic courses. But as judges and public prosecutors are not obliged to attend any training after having been appointed, usually only already sensitised ones are interested in such specialised courses.

Furthermore, the non-involvement of criminal law has to be mentioned as a weakness of the Austrian Protection against Domestic Violence Act which came into force on 1 May 1997. It is not a separate law but its provisions are set out in three laws (Police Security Act, Enforcement Code, and Civil Code) and it consists of:

- police measures: police are obliged to issue a banning order against a perpetrator in case of imminent danger after having carried out a risk assessment. As a banning order is a protection measure, violence must not have happened already. If the perpetrator is present, also an expulsion order has to be issued and if necessary asserted by direct force. Both victim and perpetrator are handed out information leaflets (rights and duties, addresses of support organisations). A banning order has to be controlled at least once during the first three days; if the aggressor is found in the home, he is fined. A banning order is issued for two weeks<sup>150</sup>, but is extended to four weeks if the victim files an application for an interim injunction.
- An interim injunction is imposed at the request of the victim by the family court (i.e. civil court) in a simplified procedure. This requires that the aggressor's behaviour makes it unacceptable to expect another person to live with him or to meet him. An interim injunction focuses either on prohibiting the perpetrator to re-enter the apartment/house (including the surroundings) (maximum duration: six months) or on forbidding any contact with the victim (maximum duration: one year).
- Youth welfare offices may apply for such an interim injunction in favour of children at risk.
- The establishment of intervention centres which have both to protect and to empower victims of violence has been a crucial element of the reform. The Austrian Protection against Violence Act has established a two-phase model: First, the police decide on issuing a banning order (also against the victim's will), and only in the second step the victim herself decides on whether to apply for an interim injunction and thus far-reaching protection. The background of this model is the difficulty of extricating oneself from a violent relationship; therefore the victim has to be supported in undertaking this step – by an intervention centre. Thus the intervening police officers have to inform the responsible

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<sup>148</sup> Studies, e.g. from Germany, showed at the example of teachers that the 'feminisation' of a profession starts a vicious circle: as a consequence of the loss of reputation salary levels fall, investments in infrastructure are reduced, public confidence decreases (Hänsel Dagmar/Ludwig Huber 1996 *Lehrerbildung neu denken und gestalten*, Weinheim).

<sup>149</sup> This includes e.g. victimisation strategies as well as strategies of women living in a violent relationship ('Stockholm syndrome').

<sup>150</sup> In the beginning the duration was limited to seven days, but the period was extended by two amendments to ten days and then to two weeks. An application for an interim injunction doubles the duration. The extension was held necessary to give the victims enough time to decide for or against an interim injunction.

intervention centre about every banning order without delay, and the organisation contacts the victims pro-actively.<sup>151</sup>

The Protection against Domestic Violence Act is highly accepted by the police meanwhile. But as it does not have criminal law provisions, judges and public prosecutors are not affected by the need to protect women against their violent partners in the same way as police officers. So when for example a feminist NGO brought the cases of two women murdered by their husbands to the CEDAW Committee, the relevant Austrian courts were criticised for not having protected these women by arresting the perpetrators who had already been known as being violent towards their wives (decision in 2007, 39<sup>th</sup> session).<sup>152</sup> The Austrian Government argued that arresting them would not have been proportionate, but the CEDAW Committee replied “that the perpetrator’s right can’t supersede women’s human rights to life and to physical and mental integrity” (CEDAW/C/39/D/6/2005, Yildirim, 12.1.5). The Committee recommended that Austria reinforce the implementation of the Violence Protection Act, prosecute consequently and sanction severely domestic violence, guarantee a better co-operation between criminal justice agencies and victims’ support organisations, as well as intensify trainings for judges, lawyers and police officers in the field of combating violence against women (ibid).<sup>153</sup>

And just a short remark concerning the two best-known Austrian victims of crime: Natascha Kampusch, who had been imprisoned for eight years, and Elisabeth Fritzl, who has been confined in a cellar by her father for 24 years. The two women came free in 2006 and 2008, and especially in the case of Ms Kampusch, presumptions and suspicions concerning police investigations but also the possible role of a mysterious second kidnapper are still ongoing. The only lesson that might be learned from these two criminal cases is the importance of victim protection particularly protection against media as not only tabloids, but also so-called high-quality media have not stopped keeping an eye on the two women and their families without any respect for privacy.

## 3.2 Women as victims and/or witnesses

### 3.2.1. Criminal proceedings

The EU Framework Decision on the standing of victims in criminal proceedings (March 2001) had an important influence on the Austrian situation and did not only lead to more participation rights but also to an improvement of psycho-social and legal support offered to victims of crime.

An instrument which is well developed in Austria is the psycho-social and legal assistance of victims of certain crimes (bodily injury, threat, and sexual violence) including their accompaniment to police and court proceedings.<sup>154</sup> This is meant to be a gender-neutral instrument for the protection of victims, but practically mostly women benefit from it. A legal

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<sup>151</sup> Intervention centres for combating domestic violence have been established in all of the laender capitals, and additional regional offices are operated in the laender covering larger geographic areas.

<sup>152</sup> [http://www.iwraw-ap.org/protocol/doc/Sahide\\_Goekce\\_v\\_Austria.pdf](http://www.iwraw-ap.org/protocol/doc/Sahide_Goekce_v_Austria.pdf)  
[http://www.iwraw-ap.org/protocol/doc/Fatma\\_Yildirim\\_v\\_Austria.pdf](http://www.iwraw-ap.org/protocol/doc/Fatma_Yildirim_v_Austria.pdf)

<sup>153</sup> After the CEDAW critique, Austria extended the time limit of interim injunctions from three to six months and introduced the crime of ‘continued violence’ to the Criminal Code. Both measures are part of the Second Protection against Domestic Violence Act 2009.

<sup>154</sup> No statistics available; evaluation by Haller/Hofinger (2007). Since 2009 psycho-social assistance is also granted for civil law proceedings if they are related to a crime (e.g. compensation). Although the criminal courts are supposed to decide also on the victims’ civil claims in order to avoid additional and time-consuming civil law proceedings, in most cases the victims have to go to the civil court and to start long-lasting (and often unsuccessful) proceedings.

entitlement had been fixed in 2006 but even before that time, some child protection institutions and feminist institutions had offered their clients to accompany them in court proceedings. Since 2006 about 50 institutions which offer psycho-social assistance have become contract partners of the Ministry of Justice (which pays for the services) and they co-operate with lawyers in order to offer their clients also legal support.<sup>155</sup> As the majority of support organisations are located in Vienna and the capitals of the laender, clients living in the country-side are disadvantaged: they are offered assistance as well but they often have to travel to meetings with social workers and lawyers or they can only be supported by telephone phone.<sup>156</sup> If necessary, translators are financed.

Persons who are entitled to psycho-social and legal assistance have to be informed by the police about this right (what works well for victimised children/juveniles and for women as victims of partner violence). The offer of assistance does not only aim at the protection of victims, but also at strengthening prosecution. In spite of psycho-social assistance, especially in cases of sexual violence support organisations are nevertheless still sceptical if their clients can be protected against secondary victimisation during court proceedings.

Testimony can be given via video conference ('careful questioning') which allows the victim to avoid both contact with the perpetrator and being questioned twice during the trial. Careful questioning is obligatory for victims of a sexual crime who are younger than 14, other victims may also apply for it.

TV and radio recordings as well as live transmissions and photographs during proceedings are generally forbidden in Austria (§ 28 (4) Code of Criminal Procedure).

In addition, the Austrian legal system offers free legal aid for persons who cannot afford to participate in legal proceedings without getting in financial difficulties personally or bringing their families in difficulties (examination of income).<sup>157</sup> All lawyers are obliged to offer free legal aid as a compensation for a lump sum which is paid to the lawyers' pension fund by the state. Nevertheless, there are no statistics on beneficiaries of free legal aid.

What should also be mentioned in this chapter is the disputed role of restorative justice. Victim-offender mediation (VOM) is a non-formal legal measure which is mostly used by the public prosecutor (but also by the court) to avoid formal legal proceedings. It is successful in settling various forms of disputes, e.g. among neighbours, but it has already been debated for years as to whether VOM should be practiced in cases of domestic violence (in practice it is used). In the view of experts (and mine as well), VOM must be excluded in cases of perpetuated violence as this would mean to ignore the imbalance of power in the relationship. Moreover, following the logic of the Violence Protection Act, the decision to participate in a VOM should not be left over to the victim of violence. (At this point the problem of having ignored criminal law questions when drafting the Violence Protection Act becomes evident).

### 3.3 Criminal Law

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<sup>155</sup> This form of accompaniment also exists e.g. in some German laender and in the Netherlands.

<sup>156</sup> In general, the social workers also may travel to see their clients but this requires sufficient human resources.

<sup>157</sup> In Austria the amount of income as a prerequisite for free legal aid is not fixed, the criterion is 'personally necessary expenditures'. The threshold is an income higher than the minimum subsistence level and lower than the amount needed for a decent livelihood which is adequate for the applicant's social status. Furthermore he/she must not have any savings. Link to the form (German only): [http://www.justiz.gv.at/internet/file/2c9484852308c2a60123e62645a90524.de.0/zpform+1-2011\\_ausfuellbar.pdf](http://www.justiz.gv.at/internet/file/2c9484852308c2a60123e62645a90524.de.0/zpform+1-2011_ausfuellbar.pdf)

With regard to substantive criminal law, Austria has a very victim-friendly regulation of rape: different than in most European countries, the victim's resistance against the perpetrator is not required for the qualification as rape and all forms of penetration are considered a rape (since 1989)<sup>158</sup>. Although the legal basis is rather progressive, the number, as well as the rate of convictions, has decreased within the last few years. The reasons for this development have not been evaluated so far.

Following the Swedish example, Austria has introduced "repeated violence" as a punishable offence (2<sup>nd</sup> Protection against Domestic Violence Act, 2009). Unfortunately, the implementation of this section of the Criminal Code has not been evaluated so far.

Another measure concerned criminal dangerous threats towards a family member: only since 2006 has this been a crime prosecuted *ex officio* also when it is committed within the family; beforehand the victim had to authorise the prosecution of the perpetrator. This was criticised by victim support organisations as it may be dangerous for victims of partner violence to be held responsible for prosecution.

In Austria, crimes committed in partnerships are not treated as aggravated forms of violence.

There are no specific laws about forms of the so-called traditional violence. Forced marriage is subsumed under aggravated coercion; "honour killing" is treated as murder<sup>159</sup>, female genital mutilation as serious bodily harm (and the limitation period starts only at the victim's 28<sup>th</sup> birthday). Because of these subsumptions no statistics (neither reported cases nor convictions) are available.

### 3.4 Organisation/Administration

Among the staff of the criminal courts and (some) public prosecution offices as well as among the police forces specialised groups for victims of sexual violence have been established. Those groups, in particular within the police, are highly acclaimed, but as they are situated in bigger towns (capitals of the *laender*) they are not always available for the first interviews with victims. The establishment of such groups within the courts and prosecution services has been demanded by feminist organisations (especially intervention centres) for years because they expected the members of these groups to become and act as highly sensitised experts.

As the first Austrian Court, the Regional and District Court of Linz established a "one-stop-shop" for clients in November 2005. The so-called Service Centre is supposed to shorten waiting times, and to provide users with general information, as well as various forms, helping in their completion, making appointments with judges and so on. This initiative has obtained the "Crystal Scales of Justice", the Council of Europe prize for good practice in civil justice organisation and procedure in 2006. By the beginning of 2013, following the example of Linz, some 16 service-centres have been established. Service-centres are helpful for all users but in particular for special groups like older women or persons living in the countryside as they often tend to feel

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<sup>158</sup> By the same amendment of the Criminal Code, marital rape was declared a crime. Nevertheless prosecution was only allowed at the victim's request. In 2004, marital rape got the status of a crime prosecuted *ex officio*.

<sup>159</sup> In Austria honour killings are very rare; it is always the same case which has been quoted repeatedly: in April 2004, Layal M., a 20 year old women from the Lebanon was stabbed by her 17 year old brother. He did not regret his deed but declared that he had to kill his sister as she had brought shame to the family. Although her engagement was already planned, she had had several 'relationships'. <http://diestandard.at/1620659?seite=2>

like strangers in unfamiliar surroundings.<sup>160</sup> Furthermore, in Linz, a children's zone was integrated into the waiting area so mothers can take their children to court. In many Austrian courts special waiting areas (for the protection of victims) and play zones for children have been established, even a handbook for planning and constructing waiting areas has been edited by the Ministry of Justice (BMJ, no year).

What is especially important with regard to the waiting areas is the aspect of protection. Children, juveniles, and other sensitive witnesses need a quiet and respectful atmosphere before being questioned and meeting the perpetrator might traumatise them further. This can be guaranteed by protected areas – and by the vigilance of the psycho-social assistance. It is part of their duties to avoid such a contact and if there is no waiting area they sometimes make agreements with the responsible judge like sitting with their client in a coffee shop nearby and waiting for her/his telephone call to come to court.

In 1998, a group of feminist activists – among them lawyers as well as psychotherapists – founded a private association<sup>161</sup> which offers women funding for legal proceedings as their financial situation is perceived as a frequent disadvantage for their access to the legal system. Financial support can be given especially for victims of violence (at the criminal as well as at the civil court) and for equal treatment proceedings at the Labour Court.<sup>162</sup> They do not have the same financial limits like free legal aid, and if they lose a case their clients do not have to pay for the costs of the other part (which they have to do when they get legal aid.) The association mostly supports test cases (model proceedings) to solve legal questions in an exemplary way. It is subsidised by some ministries and the women's departments of some laender, but also by members and private donors.

### 3.5. Women as offenders

A study which examined convictions after partner femicides/homicides in Austria in the period from 2008 to 2010 (Haller 2011) found much more (attempted) femicides (39) than homicides (8). Furthermore, in most cases the women's deeds were not regarded as homicide by the court but as manslaughter or a fatal bodily injury. The study aimed at identifying high-risk situations and could highlight some relevant factors. It was neither intended nor possible to examine if the juries' decisions had a women-friendly judicial bias.<sup>163</sup>

In Austria no statistics about differences between convictions of men and women (crimes, severity and duration of penalty) or concerning probation measures are available. But recently a German lawyer published a study on women convicted of criminal offences (Köhler 2012). In general, she concluded that women commit less severe crimes than men. 59% of the convicted women had committed offences against property, but 32% of the male delinquents had; on the other hand only 7% of the women had committed violent crimes, against 13% of the convicted men. Cases of neglecting welfare and education duties were the only crimes where women had a share of more than 50% (ibid, 284). A more detailed analysis of violent crimes showed that

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<sup>160</sup> In interviews women living in rural areas often talked about their fear "to go to town": they did not feel at ease in an environment they did not know (Haller 2005).

<sup>161</sup> <http://www.frauenrechtsschutz.at/Content.Node/index.php>

<sup>162</sup> According to their statistics, they supported about 30 women per year from 2005 until 2008. For the following years no statistics are available.

<sup>163</sup> As a matter of fact some differences were evident. Crimes committed by women were less severe and fewer victims were killed by them (18 women out of 39, 2 men out of 8). The majority of the men's crimes were (attempted) murder, i.e. intentionally committed, because of the (former) partners' jealousy; most women reacted highly emotionally in an escalating dispute.

both sexes were in most cases convicted because of bodily injury. Women had their largest share – 39% – in maltreatment of minors they were responsible for, such as pupils and trainees but this value was still below the share of male perpetrators (ibid, 284). Besides, women have less often a criminal record than men, and even if women have previous convictions, they do not have as many as men: 4% of women, but 12% of men have more than five previous convictions (ibid, 286). Resuming these findings, Köhler states that there is no bonus for female offenders – the punishment of women is less severe than sanctions for men because of comprehensible reasons but not because of a bonus of being a woman. Men having committed less serious crimes and not having previous convictions are sanctioned in the same way as women (ibid, 295).

According to a report on the Austrian penal system women have had a share of about 4 to 6% of the total number of prisoners since the early 1980s; in 2008, 454 women (5.5%) were arrested (Hofinger et al. 2009, 4).<sup>164</sup> Almost no gender differences exist concerning the number of permissions to go out and the number of received visitors but just like in everyday life arrested men earn more money than women (5.3 vs 4 Euros per day) (ibid, 60, 66, 69).<sup>165</sup>

Similar to Germany, the majority of women are arrested because of theft and fraud (44% in 2008), while bodily injury, robbery and drug-related crimes are rare; in 2008, 39 women (i.e. 12% of female prisoners) were in jail because of homicide (Hofinger et al. 2009, 43). Men returned to prison after another conviction with a share of 34%, women with a share of 20% (ibid, 49).

Imprisoned mothers may keep their children with them up to the age of three if the youth welfare authority does not object. The women's prison Schwarzau offers special facilities for women with children (mother-child unit, kindergarten). If there are other caring relatives who live in freedom the children normally grow up with them. This topic was broadly discussed when a baby was taken away from a double-murderer immediately after giving birth.<sup>166</sup>

The European Committee for the Prevention of Torture after its visits of Austrian prisons and detention centres in 2004 and 2009 criticised that not enough toiletries were given to prisoners (mentioning especially foreigners) and recommended that women be allowed more often to take showers.<sup>167</sup>

According to the CPT reports, complaints procedures are available in Austrian prisons, for women as well as for men. Only after the visit in 2004, the CPT recommended that the Austrian authorities should establish more effective complaints procedures in two prisons. This topic was neither gender-specific nor continued in the following report.<sup>168</sup>

Within the last years a few people died in prison, all of them men.

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<sup>164</sup> In just one prison (Schwarzau) the majority of the arrested persons are female but women are also arrested in court prisons (which are both remand prisons and for sentences shorter than 18 months).

<sup>165</sup> The remuneration system comprises five levels and is gender-neutral. But as men are offered more (and higher) qualified jobs (the maximum level is being foreman in a workshop) they earn more money than women (who for example work as unskilled labourers in a sewing workshop). Because of the small number of detained women and as women and men cannot be brought together in the prison workshops it is difficult to offer qualified jobs to women.

<sup>166</sup> [http://www.kindergefuehle.at/news0/news/article/geburt-in-haft-kinderstube-hinter-gittern/?tx\\_ttnews%5BbackPid%5D=34&cHash=16b3b1b217e1fa09f7f6f0ff7518b790](http://www.kindergefuehle.at/news0/news/article/geburt-in-haft-kinderstube-hinter-gittern/?tx_ttnews%5BbackPid%5D=34&cHash=16b3b1b217e1fa09f7f6f0ff7518b790)

<sup>167</sup> <http://www.cpt.coe.int/en/states/aut.htm>

<sup>168</sup> <http://www.cpt.coe.int/documents/aut/2005-13-inf-eng.pdf> (p.48)

A search in HUDOC<sup>169</sup>, the database of the European Court of Human Rights, showed that only two cases were brought in by female applicants within the last ten years. One case (*Omeredo v. Austria* - 8969/10; Article 3 of the Convention)<sup>170</sup> was declared inadmissible by the Court in 2011, but in the other case (*Hannak v. Austria* - 70883/01) the Court declared a violation of Article 6 § 1 of the Convention.<sup>171</sup>

Electronic monitoring of persons sentenced to prison was introduced in September 2010. After one year the Ministry of Justice reported 850 requests, about 400 of them were approved. On 30 August 2011, 132 persons were electronically monitored, i.e. about 2% of all prisoners; women were overrepresented (because of less severe offences) with a share of 13%.<sup>172</sup>

German feminist criminologists have criticised criminal law for discriminating women in cases of partner homicide/femicide. The German Criminal Code qualifies 'insidious' killing as murder – insidious in the sense of taking advantage of the victim's vulnerability and guilelessness for example when she/he is asleep.<sup>173</sup> A woman who has been living with a violent partner for years and who fears for her and her children's lives might stab him to death when he is asleep as she would never dare to confront him. This makes her an insidious offender and therefore a murderer. On the other hand, a man who slays his wife using brutal violence in the course of an escalating dispute might not be sentenced because of murder but only of manslaughter because his acting can be seen as an act of self-defence (Lembke 2006, 8). This means a privileged status of the 'right of the stronger' who is not afraid and therefore openly attacks (ibid, 10).

It is especially in the US that the knowledge about the different living conditions of women and men has influenced jurisdiction. As the court acknowledged the effects of the 'battered woman syndrome', a woman was released from jail in California in 2009 (Lembke 2006, 20-23). She had

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<sup>169</sup> <http://hudoc.echr.coe.int>; the search was restricted to judgements and decisions concerning Articles 2 (right to life – 0 cases), 3 (prohibition of torture or inhuman or degrading treatment or punishment – 1 case), and 6 (right to a fair trial – 84 cases, only 9 of them concerning criminal proceedings)

<sup>170</sup> Ms Omeredo fled Nigeria in May 2003 and applied for asylum in Austria on the grounds that she was at risk of female genital mutilation (FGM) in Nigeria. The Federal Asylum Office rejected her request with the argument that she had the alternative of living in another province of Nigeria where FGM was prohibited by law. After the rejection of her appeal she turned to the European Court in 2010 and complained under Article 3 of the Convention that she would run the risk of being subjected to FGM if expelled to Nigeria and that relying on an internal flight alternative and moving to another part of Nigeria as a single woman without her family to help her would also amount to a situation in violation of her rights under that provision. The Court concludes that owing to her education and working experience as a seamstress, there is reason to believe that the applicant will be able to build up her life in Nigeria without having to rely on support of family members. The Court thus finds that the complaint under Article 3 of the Convention is manifestly ill-founded (Article 35 § 3 (a) of the Convention) and must therefore be rejected (Article 35 § 4 of the Convention).

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-106527>

<sup>171</sup> Ms Hannak alleged that the criminal proceedings against her had not been concluded within a reasonable time as required under Article 6 § 1 of the Convention. In April 1984 preliminary investigations were instituted against her (and her husband) on suspicion of aggravated fraud. In April 1987 the preliminary investigations were closed and in July 1987 the indictment was issued. But it was only in May 1999 that the written version of the judgement was served on Ms Hannak. She filed a plea of nullity and an appeal against the sentence which were both rejected by the Supreme Court and the judgement was served on 13 January 2000. The European Court of Human Rights observed that the proceedings – which had lasted for 15 years, nine months and three days – were characterised by several significant delays (although they were of some complexity, as the Austrian government had argued) and could not find any satisfactory explanation for these delays. Therefore in its opinion the applicant's case was not heard in a "reasonable time" within the meaning of Article 6 § 1 of the Convention <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-67875>

<sup>172</sup> [http://m.jusline.at/show\\_pm.php?feed=9398](http://m.jusline.at/show_pm.php?feed=9398). In August 2012 the relevant court approved the use of an electronic shackle for a rapist who had already partly spent his prison sentence in jail. It is planned to tighten the criteria for electric monitoring.

<sup>173</sup> In Austria manslaughter is qualified by a 'generally comprehensible intense excitement'; like in Germany the killing of a sleeping person would be murder.

been condemned because of murder as she had accompanied her husband and remained sitting in the car when he robbed a shop and killed an employee. After thirty years spent in prison, the court finally accepted that this woman who had been battered and raped for years did not dare to oppose her husband's instructions.<sup>174</sup>

3.6. Particularly vulnerable groups like women living in rural areas, elderly women, disabled women, migrants and trafficked women

Women who live in the country-side, elderly women, migrants and trafficked women are structurally disadvantaged. What concerns the situation of disabled women is a lack of information but many court houses and police stations are not equipped for disabled people. The Ministry of Labour, Social Affairs and Consumer Protection which is an important funder of (also women's) NGOs decided to support only institutions offering a barrier-free access to their bureaus but this idea is double-edged: some institutions which can neither afford to move nor to install the necessary technical equipment might be obliged to stop working.

As already mentioned in the context of psycho-social and legal assistance, it is difficult for women living in rural areas to have access to support institutions. The family car is typically used by the husband, going to a bigger town by public transport is time consuming, opening hours of childcare services are often limited to the morning, and the neighbours are curious (Haller/Hofinger 2007). Furthermore, living far from support organisations often means that people do not know about their offers or even about their existence what leaves them alone with their problems. In addition it is evident that from the very beginning the Violence Protection Act has been implemented more properly by the police in urban than in rural areas because of prejudices and patriarchal attitudes (Haller 2005).

There are no special studies about the access to justice of elderly women, but it can be assumed that their situation is similar to the one of women in the countryside, maybe also – the older they are – to the one of disabled women. In general it is not easy for older women to have access to support institutions: they are often immobile, most of them do not have money of their own as they have never been active in working life. A recent study concluded that in violent partnerships the extent of violence does not decrease in old age and especially when one partner has to care for the other victim protection is difficult because of the (sometimes even mutual) care dependency (Amesberger/Haller 2010).

The third-country-migrants are particularly discriminated against for multiple reasons: as foreigners with restricted rights, often not speaking German well, working in poorly paid jobs, many of them living with patriarchal partners. Even their residence permit depends on an intact marriage if they have come to Austria in the context of a family reunion. In the women's shelters migrants are highly over-represented what illustrates their exposure to male violence and the lack of efficiency of the Violence Protection Act with regard to them.

The private association LEFÖ which is partly financed by the federal government and the City of Vienna has as one of its main focuses, improving the situation of trafficked women.<sup>175</sup> They offer psycho-social and legal support for victims and accompany them to police and court. Victims of trafficking get a 30-day reflection period to decide whether they will testify against the offender, and they are guaranteed temporary residence until the completion of the court proceedings. Persons at risk can become part of the witness protection programme of the Ministry of the Interior (no data available). The first level of witness protection is parented by LEFÖ (around the

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<sup>174</sup> San Francisco Chronicle: [www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/03/28/BADQ16O7GU.DTL&ty...](http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/03/28/BADQ16O7GU.DTL&ty...) (7.4.2009)

<sup>175</sup> [http://www.lefoe.at/index.php/News\\_en.html](http://www.lefoe.at/index.php/News_en.html)

clock protection in one of its apartments), on a second level victims sometimes are brought to another department, and high risk victims can even get a new identity. According to LEFÖ, even a woman who does not co-operate with police and prosecution usually gets a residence permit on humanitarian grounds. Victims being parented by the intervention centre have not been sent back to their home countries against their will so far (especially women from Eastern Europe want to go back home, others – especially from Africa – usually stay in Austria).

In April 2012 a trial against six men who had trafficked women ended with mild punishments. They were found guilty of having forced 31 women from Bulgaria into prostitution. The maximum punishment being ten years, one perpetrator was sentenced to four years imprisonment and the imprisonment of the others was imposed on partial probation. The men applauded when they heard the judgement. LEFÖ criticised these sentences because they would reduce the readiness of their clients to report and to witness further on.<sup>176</sup>

### 3.7. Summary and Recommendations

As a principle, Austria guarantees the same rights without any discrimination to all inhabitants with Austrian nationality. This includes the access to justice. But nevertheless women are disadvantaged what concerns their socio-economic status: for example they earn lower wages than men and are exposed to a higher risk of living in poverty.

Women are well represented in the legal system with a share of more than 50% of judges and public prosecutors, but they are underrepresented in leading positions.

The Austrian Protection against Domestic Violence Act (1997) is quite effective and has therefore become a model for several European countries. Taking the protection of women seriously, Austria has been among the first countries which signed the Council of Europe Convention on preventing and combating violence against women and domestic violence in Istanbul on 11 May 2011 – unfortunately the Convention has not been ratified so far

What should also be recommended is the instrument of psycho-social and legal assistance offered to victims of violence. The Ministry of Justice finances these services via support organisations. The cost-free offer includes consultancy, administrative support, and the accompaniment to the filing of a charge and to police interrogations as well as the accompaniment to court by a psycho-social expert and by a lawyer. This substantial support is especially helpful because of the high threshold for free legal aid. For this reason it has to be criticised that in civil law proceedings related to a crime only psycho-social assistance is granted.

With regard to substantive criminal law, the Austrian legal provision of rape is a very progressive one compared to most other European countries as the victim's resistance is not required for a qualification as rape. Besides, rape includes all forms of penetration, and the Criminal Code treats marital rape in the same way as rape in other contexts.

In 2009 'repeated violence' became a punishable offence by the 2<sup>nd</sup> Protection against Domestic Violence Act which in most parts introduced new regulations but – to a smaller degree – also was an amendment of the first one. As in most cases, partner violence is repeated violence and this fact mirrors the situation of many victims and allows a more severe punishment. Unfortunately the effects of this paragraph are not known as its implementation has not been evaluated so far.

Another good example for facilitating the access to justice are 'one-stop-shops' for clients: The pilot project in Linz, which obtained the Council of Europe prize for good practice in civil justice

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<sup>176</sup> <http://news.orf.at/stories/2116973/2116288/>

organisation and procedure in 2006, was followed by the establishment of other service-centres (there are 16 at the moment).

As women commit fewer crimes than men only a very small number of women are in prison. There are nearly no gender differences between female and male detainees regarding the number of visitors and of permissions to go out, but – like in everyday life – even in prison women earn less money than men.

The access to justice may be difficult for elderly and handicapped women and for women living in the country-side (data is not available) but it is particularly difficult for third-country-migrants. They are discriminated against in many aspects. Many of them are not only victims of partner violence but they are also subject to structural violence because of restricted rights.

Victims of trafficking are supported by one specialised NGO which not only offers psycho-social and legal services, but also accommodation in protected apartments. Furthermore the Ministry of the Interior has a witness protection programme for women at risk. Even women who do not support prosecution usually get a residence permit on humanitarian grounds.

Making a concluding remark, it has to be underlined that much more gender-specific data in all the fields which have been touched on here would be needed for giving a precise picture of the access to justice for women.

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## **Chapter 4**

### **Access in Administrative Law in Sweden**

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#### Summary

This chapter is about the legal system in Sweden and access of women to it. It mainly focuses on the administrative courts and administrative law but covers some other areas of law as well.

The chapter starts with a brief summary of the work of the government to reach gender equality, including a description of the Equality Ombudsman. After an initial description of the court system in Sweden, the chapter deals with judicial statistics, in particular concerning the number of cases in which a woman is a party.

Then follows a discussion on whether the legal system, although it is nowadays formally gender neutral, is really gender neutral in practice. Two different areas of law are highlighted, the rules guiding when a contract has been concluded and the issue of settling of disputes in court.

After that, the three major areas of law in the administrative courts are highlighted from various aspects. Tax cases, social insurance cases and finally migration cases are discussed, with a view to find out whether women are treated differently than men in legal matters.

Conclusions and recommendations finalise the chapter.

#### 4.1 Gender Equality in the Swedish Government

In the Swedish government questions regarding gender equality are the responsibility of the Ministry for Education and Research.

Traditionally gender equality formed an area of its own in politics. To improve gender equality it was noted that the best way was to include the aspect of gender equality in all decisions in all areas, as equality between women and men is created where everyday decisions are taken, resources allocated and norms established. Therefore, in Sweden, gender mainstreaming is the main strategy used to achieve the gender equality policy objectives. Gender mainstreaming means that decisions in all policy areas must have a clear gender perspective.<sup>177</sup> Sweden has applied the strategy of gender mainstreaming since 1994.<sup>178</sup> The strategy has been developed to combat the tendency for gender equality issues to be neglected or treated as side issues to other political issues and activities.

The gender equality policy has been evaluated in 2005.<sup>179</sup> One of the results found was that when it comes to power and influence men still have a greater power. The share of women has increased in directly elected political bodies and in indirectly elected political bodies where the results are presented in public. But in indirectly elected positions, and mainly those that are not presented in public, male dominance still prevails.<sup>180</sup>

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<sup>177</sup> This section based on <http://www.government.se/sb/d/4096/a/125215> as of 2013-01-21.

<sup>178</sup> SOU 2005:66, Makt att forma samhället och sitt eget liv – jämställdhetspolitiken mot nya mål, p. 5.

<sup>179</sup> Made through the earlier mentioned SOU 2005:66.

<sup>180</sup> SOU 2005:66, p. 7.

Recently the Swedish government has adopted a new gender mainstreaming strategy for the Government Offices for 2012-2015. It covers all the decision-making processes, but identifies a number of central processes that are given special priority.

The government is planning to implement a development programme for government agencies to bring about sustainable change in their gender mainstreaming efforts. The objective is that selected agencies will showcase good practice and lessons learned about how gender mainstreaming in central government activities can be conducted in an effective and sustainable manner.

At regional level, in the county administrative boards, special gender equality experts are employed. Their work involves strengthening the conditions to enable implementation of the national gender equality goals at regional level.

As examples of what the government has decided to do in regard of gender equality can be mentioned an information campaign about men's violence against women, including "honour" related violence, development of support of the social services to women suffering from violence and children having witnessed violence, promotion of equal participation of men and women in work life and equal conditions for entrepreneurship.

Sweden has been criticised by the Committee on the Elimination of Discrimination against Women in several areas (CEDAW).<sup>181</sup> The Committee indicated that too little has been made and that the progress is too slow. Among areas criticised the merger of the anti-discrimination legislation into one single Anti-Discrimination Act that covers seven grounds of discrimination can be criticised, of which one is discrimination on the grounds of sex,<sup>182</sup> and that the gender mainstreaming plan lacks effective monitoring and accountability mechanisms, including sanctions for non-compliance.<sup>183</sup>

The critics of the Committee have been underlined by The Swedish Women's Lobby which is the Swedish co-ordination body of the European Women's Lobby, the largest umbrella organisation for women's organisations in the EU. In a recent report, the Swedish Women's Lobby has made a follow-up of the earlier mentioned observations of CEDAW.<sup>184</sup> Its report mentions, among other things, the merger of the anti-discrimination legislation, the anti-discrimination authorities, and the simultaneous weakening of the requirements in several aspects. For instance, the requirement of the employer to make a gender equality plan was changed from concerning employers with more than 10 employees to concerning only employers with more than 25 employees. This change means that 99% of all private companies nowadays are excluded from the requirement to make such a plan.<sup>185</sup> Another change in the legislation that was made at the same time is regarding the requirement of a compulsory yearly salary survey. It was changed to a requirement of a salary survey only every three years.

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<sup>181</sup> Concluding observations of the Committee on the Elimination of Discrimination against Women: Sweden, 2008.

<sup>182</sup> Ibid., par. 16.

<sup>183</sup> Ibid., par. 20.

<sup>184</sup> The Swedish Women's Lobby: Vad gör regeringen för kvinnors rättigheter? – en uppföljning av FN:s Kvinnokommittés rekommendationer, 2012.

<sup>185</sup> Ibid., p. 5.

The government announced just recently that it will increase the budget for the Equality Ombudsman to increase its monitoring of salary surveys.<sup>186</sup> The government points out that in spite of the requirement of compulsory salary surveys the differences in salary between men and women still exist; during a lifetime an average man earns about SEK 3.6 million (approximately 440,000 Euros) more than an average woman, according to the minister in charge. The Equality Ombudsman will have a greater responsibility for supervision of employers, so that the requirements regarding salary surveys are fulfilled.

#### 4.2 The Equality Ombudsman<sup>187</sup>

Previously there were four anti-discrimination ombudsmen. The Equal Opportunities Ombudsman (JämO) dealt with gender-based discrimination, the Ombudsman against Ethnic Discrimination (DO) focused on discrimination related to ethnicity, religion or other belief, the Disability Ombudsman (HO) was responsible for combating discrimination relating to disability, and the Ombudsman against Discrimination because of Sexual Orientation (HomO) monitored compliance with the rules prohibiting discrimination due to a person's sexual orientation. In 2009 these four ombudsmen were merged into a single body: the Equality Ombudsman (DO). At the same time the different acts on discrimination on the respective grounds were merged into a single law, the Discrimination Act.

The Equality Ombudsman is a government agency that seeks to combat discrimination and promote equal rights and opportunities for everyone. In pursuit of this goal, the agency is primarily concerned with ensuring compliance with the Discrimination Act. This law prohibits discrimination related to a person's sex, transgender identity or expression, ethnicity, religion or other belief, disability, sexual orientation or age.

The Equality Ombudsman also monitors compliance with the Parental Leave Act and seeks to ensure that employees on parental leave are not treated less favourably at work.

The Ombudsman's principal task is to ensure compliance with the Discrimination Act. The Ombudsman registers and investigates complaints based on the law's prohibition of discrimination and harassment, and can represent victims in court free of charge.

The Ombudsman also investigates complaints from employees on parental leave who feel they have been treated unfairly for having taken such leave.

In addition, the Ombudsman monitors how employers, higher education institutions and schools live up to the requirements of the Discrimination Act requiring active measures against discrimination.

The Ombudsman's other duties include raising awareness and disseminating knowledge and information about discrimination and about the prohibitions against discrimination, both among those who risk discriminating against others and those who risk being subjected to discrimination. This means that the agency offers guidance to employers, higher education institutions, schools and others, and helps develop useful methods on their behalf. A further task is to ensure, through awareness-raising initiatives, that everyone knows his/her rights.

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<sup>186</sup> Press release by the government 2013-02-20, see <http://regeringen.se/sb/d/16954/a/209535> as of 2013-02-21.

<sup>187</sup> This chapter based is on [www.do.se](http://www.do.se) accessed on 17 January 2013.

In addition, the Ombudsman is required to draw attention and create debate around human rights issues. It also has special responsibility for reporting on new research and international developments in the human rights and discrimination field.

It has been questioned, among others by the Committee on the Elimination of Discrimination against Women and by the Swedish Women's Lobby,<sup>188</sup> whether the merger of the different Ombudsmen into one would lead to that the questions regarding gender equality would get less attention than before, when the Equal Opportunities Ombudsman still existed and was quite active. From 2006 to 2008, the former Equal Opportunities Ombudsman made the largest review ever of how well employers followed the regulations regarding salary surveys, as such surveys were found to be a powerful means of eliminating gender differences in salary. The Ombudsman went through the salary surveys of 568 employers, regarding in total 750,000 employees. Since the merger in 2009, not a single salary survey has been conducted.<sup>189</sup> In 2012 a new unit was formed in the Equality Ombudsman that will work only with such reviews, to improve the situation.<sup>190</sup>

### 4.3 Gender Based Knowledge in the Law Education

#### 4.3.1. Law Degree

To obtain a law degree certain requirements need to be fulfilled. One of them is that the student shows knowledge of such conditions/circumstances of society and of families that influence the facts of life of men and women.<sup>191</sup> This requirement thus means gender based knowledge. It has been in force since 1999.<sup>192</sup>

The Swedish National Agency for Higher Education (Högskoleverket) has regularly made evaluations of Universities, to see that they do reach the requirements. The law degrees were evaluated in 2012. The evaluations have however not included the requirement of gender based knowledge.

A survey has been made of university education that leads to future work where one comes in contact with men's violence against women.<sup>193</sup> The education surveyed includes among others law, psychology and teaching. Three criteria were surveyed: that one can distinguish the number of hours spent on teaching about men's violence against women, that knowledge about men's violence against women is mentioned in the study plan of the education and that the knowledge of the students is examined.<sup>194</sup> The result showed that in only one third of education surveyed, the students are given enough knowledge about men's violence against women. Even less education deals with the questions of "honour" related violence and violence in same-sex relations.

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<sup>188</sup> Concluding observations of the Committee on the Elimination of Discrimination against Women: Sweden, 2008, par. 16 and The Swedish Women's Lobby: Vad gör regeringen för kvinnors rättigheter? – en uppföljning av FN:s Kvinnokommittés rekommendationer, 2012, p. 4 f.

<sup>189</sup> Svenska Dagbladet Näringsliv: Lönegranskning missas av nya DO, 2011-08-01, see [http://www.svd.se/naringsliv/lonegranskning-missas-av-nya-do\\_6362144.svd](http://www.svd.se/naringsliv/lonegranskning-missas-av-nya-do_6362144.svd) accessed on 21 February 2013.

<sup>190</sup> Kollega: DO har gått bet på jämställdhet, 2012-12-03, see <http://www.kollega.se/index.cfm?c=16694> accessed on 21 February 2013.

<sup>191</sup> Appendix 2 to högskoleförordningen (1993:100).

<sup>192</sup> Gunnarsson and Svensson, Genusrättsvetenskap, 2009, p. 17.

<sup>193</sup> Nationellt Centrum för Kvinnofrid: Delrapport 2 Nationell kartläggning om hur mäns våld mot kvinnor, hedersrelaterat våld och förtryck samt våld i samkönade relationer beaktas i grundutbildningar vid universitet och högskolor. NCK-rapport 2010:3.

<sup>194</sup> Ibid., p. 11.

With regard to law education specifically, five out of the six universities concerned answered the survey. Two of them did not pass the three criteria. Although they did teach about men's violence against women, they did not specify the number of hours or have it written in the study plan or have examinations on this subject. In the other three universities, the number of hours varied a lot, from 2 to 32 hours. They did not have men's violence against women written in the study plan either, but they examined the knowledge so they were found to pass the criteria. Only one law education establishment taught "honour"-related violence and violence in same-sex relations.

#### 4.3.2 Training of Judges and Others

Crimes concerning violence in close relations are often difficult to investigate. Often the parties involved have different opinions of what has happened and often nobody has been witnessing what happened. The police are continuously being educated in this area. There is an interactive education for police in external service and also specific education for investigators. Nowadays the education at the Police Academy contains a ten-week course on the matter.<sup>195</sup>

Public prosecutors also have special training courses on men's violence against women. For the last few years most public prosecution offices have prosecutors specialised in men's violence against women.

In the training of judges, there is little or no discussion on matters related to gender equality.

#### 4.4 General Situation of the Courts in Sweden<sup>196</sup>

##### 4.4.1 The Types of Courts and the Cases They Handle

In Sweden there are two types of courts, the general (ordinary) courts and the administrative courts. The first ones deal with criminal cases, civil action cases and family law cases (when the parents have difficulty in agreeing concerning the custody of a child, residence, visitation schedules or child maintenance, often in connection with a divorce). The general courts also handle matters such as adoption applications and prenuptial agreements.

There are 48 District Courts which deal with cases occurring in their geographical region. The judgements of the district courts can be appealed to the six Courts of Appeal and then to the Supreme Court.

The Administrative Courts settle disputes when individuals, companies or organisations are not satisfied with a decision of a governmental agency. The Court has the jurisdiction for more than 500 types of matters, known as cases. The most common cases concern taxes, social insurance, migration issues, social benefits and recalling of driving licences. The Court also handles applications made by a government agency for custodial care for young people, substance abusers or mentally ill people.

There are 12 Administrative Courts which deal with appeals of decisions made by the government agencies in their geographical region. The judgements of the Administrative Courts can be appealed to the four Administrative Courts of Appeal and then to the Supreme Administrative Court.

Most cases in the Administrative Court are settled based only on the exchange of letters and consequently the appellant and his or her opposite party do not need to actually go to the court.

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<sup>195</sup> See <http://www.polisen.se/Om-polisen/Uppdrag-och-mal/Sarskilda-satsningar/Brott-i-nara-relationer/> accessed on 21 February 2013.

<sup>196</sup> This paragraph is based on the leaflets produced by the Swedish Court Agency: The District Court and The Administrative Court. The figures are received from the annual 2011 report of the Courts of Sweden.

When an appeal has been received by the court, the government agency is permitted to comment on the appeal. These comments are then forwarded to the appellant who is given the opportunity to comment on what the government agency has stated. When the exchange of letters has been completed, the case is examined and prepared by a lawyer and then a decision is taken. Occasional oral court proceedings take place in a little less than 20% of all the cases, often at the request of the appellant.

#### 4.4.2 Statistics Regarding the Employees in the Courts

There is slightly more than 6,000 people employed in the courts, including about 1,100 permanent judges. Some 71% of all employees are women. Approximately 44% of permanent judges are women. Some 70% of law clerks and non-permanent judges are women.

Of the heads of department of various levels 45% are women. Further, 32% of permanent judges that are also heading various courts and their departments are women. Of judges that are heading courts 30% are women.

The annual 2011 report of the Swedish Courts notes that the proportion of women law clerks and non-permanent judges is high. According to the report, there is a risk that working as a judge will become a female-dominated profession. The report states that professions with a high proportion of women today are associated with lower salaries and that the risk is that the profession of a judge in the future will be perceived as less attractive, which will make recruitments more difficult.

#### 4.4.3 Legal Aid

##### 4.4.3.1. Private disputes<sup>197</sup>

If a person is involved in a legal dispute and need financial assistance, the first instance for getting legal aid is the legal protection cover under the individual's insurance. Legal protection is automatically included in virtually all Swedish home and contents insurances and in most insurances of boats and motor cars. There are also insurances containing legal protection cover included in trade union memberships.

There is also legal assistance available from the State, through the Act on Legal Aid. Those who do not have an insurance with legal protection but should have had one cannot normally get assistance from the State for costs.

Legal aid is only given to those having low incomes. Further, the Act on Legal Aid does not apply to all types of private disputes. Legal aid is granted only if, regarding the nature and importance of the affair, the amount at dispute and other circumstances, is reasonable that the State contributes to the costs. Certain types of cases are excluded from the Act on Legal Aid. Disputes concerning the division of assets after a divorce are normally excluded. As women in a divorce often are in a weaker position economically than men there is a risk that women due to these rules refrain from demanding what they are legally entitled to and therefore leave the relationship empty handed.<sup>198</sup>

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<sup>197</sup> <http://www.domstol.se/Funktioner/English/Legal-assistance/> accessed on 29 January 2013.

<sup>198</sup> The Swedish Women's Lobby: Vad gör regeringen för kvinnors rättigheter? – en uppföljning av FN:s Kvinnokommittés rekommendationer, 2012, p. 28 f.

#### 4.4.3.2. Public Defence Counsel<sup>199</sup>

The court can appoint a public defence counsel for those suspected of having committed a crime. The public defence counsel will assist with everything relating to the criminal case and will also attend the trial at the court.

The State will pay all or part of the costs for public defence counsel. If the suspect is sentenced for the offence, all or part of the State's costs are, depending on the income, normally to be paid by the suspect.

#### 4.4.3.3 Administrative cases<sup>200</sup>

In some administrative cases, for example when somebody is at risk of being taken into compulsory care or of being extradited from Sweden, the individual can get public defence counsel, to protect his/her interests.

The court or public authority that processes the case can grant public defence counsel. Assistance through public defence counsel does not cost anything for the party provided with counsel.

### 4.5 Statistics

According to the Regulation (2001:100) on the official statistics (14 §), all individual-based official statistics are to be disaggregated by sex, if there do not exist any particular reasons against it. For the activities of the Courts it is the Swedish Courts Agency that is responsible for the statistics.

#### 4.5.1 Cases in the Administrative Courts

The Swedish Courts Agency has statistics regarding the cases and the personnel of the courts. In general, no statistics exist concerning the caseload disaggregated by sex.

While working on this report, a special research was made in the database of the cases of some of the Administrative Courts. The research was made in the three largest Administrative Courts, in Stockholm, Göteborg and Malmö. It was made on all the incoming cases during 2011, which amounted to more than 55,000.

The search is based on the Swedish personal identity number (in Swedish *personnummer*) and co-ordination number (in Swedish *samordningsnummer*), which both has a digit (the second to last) that is even for women and odd for men. So by knowing the personal identity number one can tell what the sex of a person is. Only those who reside permanently in Sweden have a personal identity number. The so-called co-ordination numbers are given to those who do not reside in Sweden, but for certain reasons need to be handled and identified by a Swedish government agency. As most people seeking residence permit in Sweden do not have either of these numbers, it was not possible to include them in the research made. Thus the research includes all types of cases of the Administrative Courts except migration cases.

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<sup>199</sup> <http://www.domstol.se/Funktioner/English/Legal-assistance/If-you-need-advice/Defence-advokat/> accessed on 29 January 2013.

<sup>200</sup> <http://www.domstol.se/Funktioner/English/Legal-assistance/If-you-need-advice/Public-defence-counsel/> accessed on 29 January 2013.

#### 4.5.1.1. Results of the Research

In some types of cases, many of the parties are legal entities. In the figures presented below only the parties being natural persons are included. Some parties are registered with “sex unknown”, when they do not have a personal identity number. As the large majority of the cases in the administrative courts are appeals of decisions made by Swedish authorities, the individual parties in these cases are appellants. In some cases, though, an authority makes an application for custodial care for young people, substance abusers or mentally ill people. In those cases the individual parties are respondents.

Approximately 43% of all the types of cases involve women, i.e. 43% of all individual parties are women. Thus men and women are quite equally present as parties in courts.

The lowest share of women is in one of the two largest case types, tax cases, where women are only 23%. There are statistics available through Statistics Sweden showing that in 2010 about 27% of all companies were run by women (meaning a woman being the operational manager).<sup>201</sup> The low share of women in tax cases is thus not surprising. Women also have less complicated income tax returns meaning that they do not as often need to appeal the tax decision.

In the second of the two largest case types, social insurance cases, the women are 56%. As it will be seen below, women have a higher share of sick leave, which can partially explain why they more often appeal social benefit decisions than men do.

One detail that is interesting to note is that in the cases of road tolls 68% of the appellants were men. That figure can be compared to the result from a survey made on road travel during 2005/06 that shows that of all road travel men conduct about 58%.<sup>202</sup> The difference could imply that men are in general more willing to appeal than women in this context.

#### 4.5.2 Migration Statistics<sup>203</sup>

As the migrations cases in the administrative courts are not included in the research presented above the statistics on migration cases, both in the Migration Board and in the courts are received from the Migration Board.

From January to November 2012, the Migration Board decided in almost 33,000 cases regarding asylum. Some one third of the applications were approved, slightly more than one third were denied and the rest were dismissed (not decided on the facts). Almost the same number of applications thus were approved and denied. The situation is almost the same for both men and women, as almost the same number of their applications were approved and denied. One third of all applications for asylum during this period were made by women.

From statistics received for this study from the Migration Board, the following can be concluded:

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<sup>201</sup> Andersson and Andersson, Företagsledarna i Sverige – En algoritm för att peka ut företagens operativa ledare i näringslivet, from Fokus på näringsliv och arbetsmarknad hösten 2012, SCB 2012.

<sup>202</sup> See Vägtrafikskador 2011, Statistik 2012:14 (Road Traffic Injuries 2011) made by Trafikanalys, which refers to a national travel habit survey 2005/06 (SIKA Statistik 2007:19).

<sup>203</sup> These statistics were received by the Migration Board in December 2012.

- The total number of cases that the Migration Board has handled during January – November 2012 is about 265,000. Asylum cases represent about 33,000. Of the total number of denials in all types of cases (approximately 48,000), about 63% were appealed to the Migration Courts. The appealing rate is about the same for men and women; 64% for men and 62% for women.
- Of the cases appealed to the Migration Courts, 42% were appealed by women. Of all approvals in the Migration Courts 45.5% are in cases appealed by women, which thus means that women relatively get more approvals for each woman appealing than men do (58% appealing, 54.5% getting approval). The approval rate is 5.8% in total; 5.4% for men and 6.2% for women.

#### 4.5.3 Comments on the statistics

There are no statistics of the courts disaggregated by sex, which is unfortunate. Another aspect that would have been helpful for getting a better picture of women's access to the courts is statistics on the share of women getting a denial in the authority appealing to the court. These statistics have been available regarding migration cases, but not in other types of cases.

#### 4.6 General Comments on Gender Equality in the Legal System

This chapter deals with some general aspects on gender equality in the legal system. The following three chapters deal with the matter of gender equality in each of the three largest groups of cases in the administrative courts: tax cases, social insurance cases and migration cases.

There are various aspects of the question of access of women to justice. One is how many of the people turning to the courts, either with an application or an appeal, are women. Are there fewer women than men that go to court? Another aspect is if a woman who turns to a court will be treated in the same way as a man. Will she be equally listened to and/or considered trustworthy?

##### 4.6.1 Formal and Substantive Gender Equality Principles

Gender equality in the legal system is guided by the thought that gender equality is a basic value in the society. Depending on what the legislator wants to achieve, gender equality is regulated in different ways, as prohibitions on discrimination or as gender equality promoting actions. Two different principles, the formal gender equality principle and the substantive gender equality principle, exist.<sup>204</sup> The Swedish constitution applies the first one, as it says that no law must mean that somebody is mistreated because of his or her sex.<sup>205</sup> The EU Treaty applies the second principle, as it states that in all its activities, the Union shall aim to eliminate inequalities, and to promote equality between men and women.<sup>206</sup> The substantive gender equality principle aims not to equality in treatment but equality in results.<sup>207</sup> This principle thus allows actions such as setting quotas in favour of the mistreated sex.

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<sup>204</sup> Gunnarsson and Svensson, *Genusrättsvetenskap*, 2009, p. 64.

<sup>205</sup> Regeringsformen 2 kap. 13 §.

<sup>206</sup> The Treaty on the Functioning of the European Union, Article 8.

<sup>207</sup> Gunnarsson and Svensson, *Genusrättsvetenskap*, 2009, p. 65.

Historically, the legal rights have differed a lot between men and women. Nowadays the legal system in Sweden is formally equal, with only a few exceptions: the crime of child homicide (which is when a mother soon after having given birth kills her child, has a lower penalty level than ordinary murder) and gross violation of a woman's integrity (which is when a man repeatedly assaults a woman that he has or has had a relation to, has a higher penalty level than ordinary assault). One of the exceptions used to be the common military service which was compulsory for men, but voluntary for women. But in 2010 common military service in peacetime ended and now it is voluntary for both men and women.

One of the most distinctive features of the legal system is that it should be objective. The legal system in Sweden appears to be gender neutral. Discrimination on grounds of sex is forbidden and if any discrimination does happen there are legal remedies for that. Even though the legal system now is formally equal, one could question whether it is so also in practice.

It was rightly pointed out that by making the legislation gender neutral, gender becomes an irrelevant legal criterion.<sup>208</sup> We are all shaped to individuals during our lifetime. Conceptions in society, including the legislation, as well as in other people influence and limit our possibilities to develop as individuals. One of these limitations is the prevailing structure of power that is not equal. The legal system as the norm of society has great influence. It has been shown that gender neutral legislation with equal rights to men and women and formal equality do not necessary lead to actual equality.<sup>209</sup>

Sweden has been criticised by the Committee on the Elimination of Discrimination against Women in several areas.<sup>210</sup> Sweden has been urged by the Committee to take proactive measures, e.g. to increase the number of women in high-ranking posts, particularly in academia, and to accelerate the realisation of women's *de facto* equality with men in all areas. In several areas the Committee stresses the principle of substantive equality and thus points out that this principle is the important one.

#### 4.6.2 Two Different Spheres

The society is, according to the social contract, often structured as a public sphere and a private sphere. This division is seen also in the legal system, where public law and private law are two different areas of law. The public sphere, which the social contract governs, has traditionally been associated with men.<sup>211</sup> The private individual is not in the same way part of the social contract, but is guided by dependence and altruism. The private individual often is a woman.<sup>212</sup> One of the reasons for this partition between men and women is that women through history have been precluded from enjoying political and legal rights and have been prevented from taking part of the working life. Instead women have been referred to the home and the family and have adjusted themselves to that situation.<sup>213</sup> Even though things associated with the private sphere and with women (such as cleaning and taking care of children) nowadays to some extent

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<sup>208</sup> Gunnarsson and Svensson, *Genusrättsvetenskap*, 2009, p. 182.

<sup>209</sup> *Ibid.*, p. 188.

<sup>210</sup> Concluding observations of the Committee on the Elimination of Discrimination against Women: Sweden, 2008, para. 25.

<sup>211</sup> Andersson and Andersson, *Företagsledarna i Sverige – En algoritm för att peka ut företagens operativa ledare i näringslivet*, p. 14. The authors point out that the share of women running businesses varies a lot depending on in which area the business is. 59 out of 100 businesses in health care are run by women, while the amount in businesses in building is 3 out of 100.

<sup>212</sup> Gunnarsson and Svensson, *Genusrättsvetenskap*, 2009, , p. 205.

<sup>213</sup> [http://mimersbrunn.se/Olika\\_feministiska\\_inriktningar\\_4461.htm](http://mimersbrunn.se/Olika_feministiska_inriktningar_4461.htm), as of 2013-01-22.

are done in the public sphere (through cleaning companies and nurseries) the different spheres and the sex segregation has moved along. Nowadays most women are working outside the home but the labour market still is sex segregated. Women mainly work in certain areas, such as health care and education, and men in others, such as industry and building.<sup>214</sup>

The fact that individuals and the society have different expectations on men and women in some aspects of society does not mean that such a partition is good or ought to exist. It only means that this is the situation at present. The consequence of this division between public and private is that men and women have been connected with different ways of thinking and feeling. Men are somehow more associated with justice and fairness while women are more closely associated with caring and the importance of close private relations.<sup>215</sup> This division also has consequences for the legal system. As the legal system mainly regulates the public sphere while the private sphere is seen as withdrawn from interference from the state and therefore to a lesser degree reached by the legal system, this has consequences on those who live mainly in the private sphere or who are exposed to abuse in the private sphere (mainly women).

So the perception that the legal system is gender neutral means that it becomes invisible that men have been and still are the objective and the universal and women are the opposite, which is the subjective and non-universal. Men are the norm, which means that it is their opinions, needs and conflicts that form the law.<sup>216</sup>

#### 4.6.3 Contracts

One example of the legal system being formed mainly for the public sphere is the general principle of business law *pacta sunt servanda* (promises must be kept).<sup>217</sup> Contracts are an important instrument in the interaction between people in their economic dealings. A contract is seen as being made by individuals with mutual awareness and mutual reliance and manifests the freedom of concluding contracts. When a contract has been made it is to be preserved and honoured. Only under certain exceptional circumstances the legal system allows it not to be preserved and honoured. The reason for the principle is the legal certainty, to support turnover and facilitate business transactions. The principle is set clearly from a business perspective; to support business, to make people trust one another so that they are willing to invest time and money into business co-operation.

The principle at first sight seems to be completely independent of the gender of the people concluding the contract; it is valid for all contracts whatever the sex of persons who conclude them. It is valid for all kinds of agreements in all areas of the society.

But in personal relations, where the relation itself and its preservation is highly valued, the principle is more doubtful. If one invokes the principle and forces a contract through against the

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<sup>214</sup> Statistics Sweden, Women and men in Sweden 2012, p. 62 f.

<sup>215</sup> Gunnarsson and Svensson, *Genusrättsvetenskap*, 2009, p. 205. As an example of this statement, see for instance University of Gothenburg, *Jämställda fakulteter? - En studie av arbetsfördelning och normer hos lärare och forskare vid två fakulteter vid Göteborgs universitet*, 2012. In this research has been studied how researchers look upon the role of a researcher. The study finds that there is a norm among both men and women for how a researcher should be. Properties such as productivity, efficiency and competitiveness are valued higher than social relations and caring. A life with commitments and responsibilities outside of work is seen as an obstacle rather than an asset. The conclusion is that women are seen as the antithesis to a researcher.

<sup>216</sup> Gunnarsson and Svensson, *Genusrättsvetenskap*, 2009, p. 206.

<sup>217</sup> This section is based on Helmér, C, *Utveckling av en metod för tolkning av juridiska texter utifrån ett genusperspektiv*, Master's thesis at University of Linköping, 2002, p.38-47.

other party's will, the risk is high that the relation will break. In personal relations such a break is unthinkable or at least not desired, so therefore a more flexible attitude towards the valid agreement is more appropriate. These personal relations are more common in the private sphere, so the principle of *pacta sunt servanda* is not as appropriate in this sphere.

Agreements within the family, for instance about the division of the work in a household or about the caretaking of the children, are not in practice guided by the principle of *pacta sunt servanda* but rather by an assessment of what is most appropriate at the time of the agreement. The agreement is not to be maintained at all costs, but a right to renegotiation exists as soon as something occurs that changes the situation, as simple as one party changing his or her mind. Within the private sphere an agreement is rather seen as something that is valid until it is renegotiated. The general principle in the private sphere is therefore not *pacta sunt servanda* but rather "an unconditional right to renegotiation". So in practice we have different principles in the different spheres.

There would be no problem with the two different general principles concerning agreements if the different spheres at all times were separated from each other. But what happens when the two spheres meet? One example of this is surety. This is to be seen clearly as a business agreement, following the principle of *pacta sunt servanda*. But often such an agreement is of personal nature, based on the relation between the parties. The reason for somebody to decide to stand surety for somebody else's debts is often not strictly commercial, but is rather a personal service based on a relation oriented assessment of the situation.

As was mentioned earlier, due to different expectations on men and women, women are often more oriented towards caring and establishing and keeping close relations and they are mainly acting in the private sphere. Even if most women nowadays work outside the home,<sup>218</sup> they still have the greater responsibility for the home and the children.<sup>219</sup> If a woman decides to stand surety she is likely to make a relation oriented assessment of the situation before making this decision. This decision might not be of her free will, not the result of negotiations between two equal parties, but is the result of one party feeling that she (or he) has to accept, in order to keep the relation going. Is it under those circumstances fair that the agreement is to be kept even if things happen, that in the personal sphere would be a reason for renegotiation? A legal assessment of the agreement would be based on the principle *pacta sunt servanda*. The market, the public sphere, is thus superior to the private sphere and is given a higher status. It will also mean that the considerations of the woman and the rationality of her acting are denied. The law will find that the agreement is still valid and that the decision to enter the agreement was ill-considered and ignorant. Thus the legal system maintains the existing ideas on gender. When a contract with an underlying agreement of personal nature is determined according to the principle of *pacta sunt servanda*, a woman risks being in a worse position when a dispute occurs and her reality and conditions are made invisible. It can thus be questioned whether the principle of *pacta sunt servanda* really is gender neutral.

#### 4.6.4 Settling Disputes<sup>220</sup>

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<sup>218</sup> Statistics Sweden, Women and men in Sweden 2012, p. 52: In 2011 82,5 % of all women aged 20-64 were part of the work force (meaning being employed or being unemployed but wanting to work).

<sup>219</sup> Statistics Sweden, Women and men in Sweden 2012, p. 39: During a week in 2010/11, women carried out unpaid work for an average of 26 hours, while men spent about 21 hours.

<sup>220</sup> This section is based on Helmér, C, Utveckling av en metod för tolkning av juridiska texter utifrån ett genusperspektiv, Master's thesis at University of Linköping, 2002, p. 59-66.

There are many ways of settling disputes. One of them is what can be called the battle strategy, where the conflict is seen as a battle that you can either win or lose. The battle is often settled by turning to a higher instance, an objective third party. A party can use its reasoning ability, its rank or position to win. Another strategy is the compromise strategy, where the parties try to negotiate a solution that is acceptable to them both. This often means loosening differences, offering concessions and quickly finding some kind of middle position.

One of the major purposes of the legal system is to settle disputes. The legal way of settling disputes, turning to a court, is characterised by a clear division of the roles and formal rules for the acting of all the parties involved. The court settles the dispute in an impartial and neutral way. The parties have to present the dispute to the court and give the arguments and evidence that exist; the purpose is to try to convince the court to judge in accordance with their own view. The communication between the parties is not, as in negotiations, with the purpose to find a mutual agreement that both parties can accept. The parties hand over the responsibility for solving the dispute to the court.

As has been discussed earlier, men are often more associated with justice and fairness while women are somehow associated with caring and the importance of keeping close private relations.<sup>221</sup> There is research that shows that women are more oriented towards relations in conflicts and men are more bureaucratic.<sup>222</sup> Another survey shows differences in the way men and women act and talk during court proceedings.<sup>223</sup> The women appeared more withdrawn and more inclined to start a dialogue. Men and women expressed themselves in different ways; the men talked longer, more like a monologue, with a slightly more complex language, put themselves and the effort they had made forward, were more interested in matter than in people, were active and driving. The women talked less and shorter, had a dialogical way of talking, a slightly simpler language, diminished themselves and the effort they had made, were more interested in people than in matter, were receptive and listening. Also the lawyers varied their language depending on whether they talked to a man or to a woman.

When a woman, using the compromise strategy, is in court to settle a dispute she often acts according to the compromise strategy. She might want to negotiate a solution that is acceptable to both parties, for instance by offering concessions. As the court normally is not interested in negotiating solutions but, based on the arguments of the parties, finding what the correct solution according to the law is, her acting is found inappropriate. And offering concessions can be understood as admitting that your case is bad.

This means that she finds herself in a worse position as she is not playing by the rules of the court. Her acting is seen as unsecure and incorrect and she is seen as vague. Her wish to start a dialogue with the court and explain the reasons for her acting is seen as negative by the court and is rejected as irrelevant or even inadmissible. Thus the legal way of solving disputes, which is modelled by a dispute solving strategy, that thus favours one of the parties, cannot be seen as equal.

#### 4.7 Major groups of cases

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<sup>221</sup> See for instance earlier mentioned statistics from Statistics Sweden about the segregation of the labor market.

<sup>222</sup> Professor S. Schlyter, *En man och en kvinna beskriver sitt arbete. Tiga är silver men tala är guld. Rapport från en konferens om kvinnor och mäns olika språk och olika värde. Informationsskrift 6.* Stockholm: Arbetslivscentrum, 1986.

<sup>223</sup> Helmér, *ibid*, p. 62 f.

In the administrative courts there is a large number of different types of cases. The three largest groups of cases are tax cases, social insurance cases and migration cases. The three following sections will be dealing with some aspects on gender equality particular to those types.

#### 4.8 Tax Law

For cultural and historical reasons, the tax system is based on a division of work, where work in the public sphere, done mainly by men, has been valued in public economy, and work in the private sphere, done mainly by women, has not been given a proper value.<sup>224</sup> Women's contribution to welfare for the family and for society thus has not been fully appreciated. This outlook has led to discrimination of women when it comes to economic independence. The tax system might potentially have great importance in achieving economic equality between men and women.

The view of men as the wage earner and as the provider for the family is old and still prevailing in many areas. In earlier days in Sweden, there was joint taxation for married couples. The joint taxation meant that the total income of the family counted and then the husband paid tax for half of the income and the wife for the other half. In those days the income tax was strongly progressive, so the system of joint taxation meant that the one with the highest income (often the husband) reduced his tax. But there was no incentive for the wife to start working (or work longer) as that would lead to even higher taxes for the family. Thus many married women stayed at home, being economically dependent on their husbands.

In 1971 the system of joint taxation ended, which meant that the husbands got a large tax increase. Then it became more rewarding for the economy of the family to have the wives work (or work longer) and so the women started working in the public sphere, making way for better public day care for children and better parental benefits.

The economic equality between men and women improved when the system of joint taxation ended, as the value of the work of women was increased. Having the tax system view women not only as wives or mothers, but as individuals and as workers might have been the most important reason for Swedish women nowadays working almost as much as the Swedish men.

There are great differences in economy between men and women. Men have higher incomes,<sup>225</sup> run businesses more than women do, and the businesses they run differ from the ones women run when it comes to ownership, capital and business organisation.<sup>226</sup> Women often run small scale companies only to get the livelihood and the companies seldom expand. They are often allotted a non-independent position in family companies, seen mainly as assisting wives and not as an equal partner. The work of women in the homes and in the family, which is of greater extent especially when the children are small, is not valued and does not give right to pension or other social benefits. To achieve better equality between men and women, a just tax system, that increases the value of the work of women, is needed. Instead of lowering the taxes, women would generally more benefit from a progressive individual tax on both income and capital.

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<sup>224</sup> This section is based on the article *Skattesystemet är designat för män* by Åsa Gunnarsson, Professor of Lw at the University of Umeå. Published in *Framtider*, No. 3/2010.

<sup>225</sup> Statistics Sweden, *Women and men in Sweden 2012*, p. 76: In 2011 the salary of women was 93% of that of men, even after having taken into account the differences between women and men in age, educational background, full-time/part-time, sector and occupational group.

<sup>226</sup> See Andersson and Andersson, *Företagsledarna i Sverige – En algoritm för att peka ut företagens operativa ledare i näringslivet*, from *Fokus på näringsliv och arbetsmarknad hösten 2012*, SCB 2012, regarding women running businesses.

#### 4.8.1 The Tractor Case

A case that to some extent has been analysed from a gender perspective is the so called “tractor case” (Supreme Administrative Court, RÅ 1989 ref. 57). It is about an employer who sold a used tractor to an employee’s wife at a price lower than the market price. The tractor was to be used in the wife’s agricultural business. The Court found that the difference between the purchase sum and the market price was to be taxed as an income for the husband, the employee.

One can discuss whether the Court went too far when deciding that the benefit of the wife was to be taxed by the husband. The woman was seen by the Court only as an ‘appendix’ to her husband and not as an individual running her own business. Is it not possible that the reason for the difference between the purchase sum and the market price is that she had made a bargain? Can a woman not make a good deal? Is it only because she is a woman that one automatically assumes that there is some kind of benevolence from the employer involved?

#### 4.9 Social Insurance

##### 4.9.1 Gender Perspective on Sick Leave of Men and Women<sup>227</sup>

It has been known for a long time that women are off work due to illness more often than men are. Already in the 1940s, a British doctor indicated that one possible explanation of this was the double responsibility of women for both paid and unpaid work. During the second world war, British women started working outside their homes and also were solely responsible for the family. Later research has shown that there are several factors for the higher share of sick leave of women.<sup>228</sup> Besides the responsibility for unpaid work, other factors are the possibility or lack of possibility to influence one’s situation at work and the psycho-social work environment.

There are more women on sick leave than men. The study of some of the European countries found that the situation is the same in all of them. The gender differences are greater in the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) though. The frequency of sick leave of Swedish women is 50% higher than the average of women in the eight European countries studied, while the sick leave of Swedish men is 15% higher. In Sweden women have two-thirds of all the sick leave.

The reasons for not being able to work are many and so are the reasons why the figures vary between men and women. Three major aspects of the gender differences are:

1. Gender differences in health, access to health care and treatment, knowledge of the illness patterns of men and women, and differences in responding to men and women in the health care system.

2. Differences in the types of work that men and women have. Even when men and women are working in the same area (for instance as doctors) they are often found in different specialities, and in typically women-dominated professions men are often found in higher positions than women are.

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<sup>227</sup> Based on Hensing, G, University of Göteborg, Genusperspektiv på socialförsäkringen – om kvinnors och mäns sjukfrånvaro published in the report Kön, klass och etnicitet – jämlikhetsfrågor i socialförsäkringen, Socialförsäkringsrapport 2012:4.

<sup>228</sup> See Svensson, E-M, Arbete och delaktighet – en genusanalys av begreppet arbetsorförmåga, p. 156 f, in Vahlne Westerhäll, L (Red.) Arbets(o)förmåga ur ett mångdisciplinärt perspektiv, 2008.

3. Women do most of the unpaid work at home, which affects the health and the possibility of recovery, which in turn affects the risk of not being able to work. During a week, women carry out unpaid work for an average of 26 hours, while men spend about 21 hours.<sup>229</sup>

There is more research being made about illnesses affecting mainly men than illnesses affecting mainly women. Therefore we lack knowledge about certain symptoms that happen to women. The lack of knowledge about illnesses affecting mainly women can lead to poorer treatment and to a higher likeliness for a doctor to tell the patient not to go to work as no better treatment is known.

When it comes to differences in types of work and professions, the Nordic countries have a high rate of man power compared to other European countries, which can explain some of the differences in levels of sick leave in the different countries. But the Swedish labour market is one of the most gender differentiated in the world.<sup>230</sup> 72% of the men work in male-dominated professions and 67% of the women work in female-dominated professions. The female-dominated work in health care, schools, etc. takes a lot of both physical and mental presence and emotional stress. Salaries are often lower than in male-dominated professions. All these factors lead to stress, which in turn can result in sick leave.

In a study, the researchers examined the level of sick leave in those professions and work places where men and women work equally.<sup>231</sup> The results of this study were that the female dominance of sick leave decreased, but still existed. This shows that the profession plays a part in the level of sick leave but also that the profession is not the only reason.

Sweden has been called upon by the Committee on the Elimination of Discrimination against Women to conduct further research to investigate the shortcomings in gender equality in health services and access to medical treatment for women and men.<sup>232</sup>

#### 4.9.2 Factors Mentioned in Judgements on Sick Leave<sup>233</sup>

A study has been made of a number of judgements from some of the Administrative Courts in cases concerning sickness benefit and sickness compensation. The study does not discuss the final judgements, but what arguments were invoked by the parties or by the court itself, i.e. whether arguments with connection to gender, social class or ethnic background were mentioned. A little more than 200 judgements from 2004 – 2008 were studied.

The right to sickness benefit and sickness compensation need two legal criteria to be fulfilled: that the individual due to *illness* has got a diminished *capacity for work*. Apart from these two criteria, several other factors of either personal or social nature were mentioned in the judgements.

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<sup>229</sup> Statistics Sweden, Women and men in Sweden 2012, page 39.

<sup>230</sup> Hensing. p. 27.

<sup>231</sup> Laaksonen, M, et al, Gender differences in sickness absence – the contribution of occupation and workplace, 2010, p. 394-403.

<sup>232</sup> Concluding observations of the Committee on the Elimination of Discrimination against Women: Sweden, 2008, par. 34-35.

<sup>233</sup> Based on an article by Ruth Mannelqvist, University of Umeå, published in the report Kön, klass och etnicitet – jämlikhetsfrågor i socialförsäkringen, Socialförsäkringsrapport 2012:4.

The personal factors mentioned were mainly lack of motivation to get well or to work, but also obesity or alcohol abuse. The social factors were family or the possibility to manage the chores at home. Whether the individual had a family or not was quite often mentioned, especially for women and for immigrant women in particular. In one judgement, concerning a 45 year old woman having said that she could not take care of her children due to her illness, the Court stated that a mother who without help from others cannot lift or carry her child cannot be considered to have a full capacity for work.

As already indicated, the aim of the study was not to analyse the outcome of the judgements, in the light of the factors mentioned. As the number of judgements was limited, the study was not able to draw any conclusions as to whether the factors mentioned had an impact of the outcome of the judgement. How should one relate to avoid conceptions of people influencing the assessment in decisions that are to be taken? One way is to in each case question whether the decision would have been the same if the individual belonged to another category, group or sex.

#### 4.9.3 Cases of Occupational Injury Compensation

A change in the rules of occupational injury compensation in 1993 led to a decrease in the number of approved occupational injuries mainly for women. Another change in the rules was made in 2002. The statistics showed that the assessment of occupational injury varied depending on whether the applicant was a man or a woman; men tended to more often get occupational injury compensation.

A study has been made as to why these differences in assessment exist.<sup>234</sup> Some of the “simple” explanations of the difference are that men work in professions where there is a higher risk of accidents, that men are more inclined to report occupational injuries, that the occupational illnesses of women are difficult to assess and are complex, that those occupational illnesses that women get often are due to factors outside their work. Common to these explanations is that they do not assess the valuations and ideas on gender that exist. Analysing the situation from a gender perspective one can see that we look differently upon work of men and women; the work of men is the norm of what “proper” work is. The work of women is subordinate. And then men become the norm also for what “proper” occupational injuries or illnesses are.

In the study, two patterns were clearly seen. Firstly, it was easier to get compensation for an occupational injury than for an occupational illness. Secondly, there was a great difference in the assessment of different occupational illnesses; in some professions and for some symptoms it was easier to get compensation than in others. Women are often having occupational illness and not so often occupational injuries and women are the majority in professions where it is difficult getting compensation.

As examples of work that mainly women do and that are heavy and in the long run can cause bodily damage can be mentioned nursing (lifting patients), cleaning, waitressing or working as a cashier in a supermarket. To get compensation the individual must prove that the damage to a greater extent is caused by the work and not by any competing cause of damage. For this, scientific medical research is needed proving that a certain type of work can cause a specific damage. There is research done on occupational illnesses in typical male dominated areas of work (which could be a consequence of most researchers being men), for instance concrete workers, farmers, painters and people working with vibration work or with solvents, but there is little research having been made in women dominated areas of work. Then there is not enough

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<sup>234</sup> Hanna Sofia Rajamäe, Kvinnliga, manliga och ”riktiga” arbetsskador – en genusrättsvetenskaplig studie av arbetsskadebegreppet, University of Göteborg, 2009.

evidence to prove that the damage that the woman is suffering from is caused by her work and the woman will not get any compensation. If there are competing causes of damage no compensation will be paid. As women often have types of work that are also done in the home (taking care of children or elderly or ill people, cleaning) it makes it even more difficult to exclude any competing cause of damage.

Here is an illustration of this. A woman has for many years worked as a nurse in geriatrics. Her work involves a lot of lifting of the elderly patients. Her back starts aching, the ache increases and eventually she comes to a point when she cannot work anymore. She applies for compensation for occupational illness. Then she has to prove that her ache to a greater extent is caused by her work. As it now is many years since the ache began it can be difficult to assess and prove what type of work she has been doing through the years and what has caused the pain. An argument against her getting compensation will be that it is normal that someone's back starts aching when he or she gets older and that the ache can be caused also by other things in private life, such as carrying your own children or working in the garden. As there is too little scientific evidence of nursing causing back pains and as she cannot prove that her pains are not caused by something else, she is left without compensation.

Thus it is seen that the gender system, which is an expression for the overall system where men are the norm and women constantly get in a subordinate position, plays a great part in why the differences exist. This system gives the premises for our way of looking at work and at occupational injuries and illnesses. This system has consequences for the individual when he or she applies for occupational injury compensation. Thus the answer to the question why the differences exist is paradoxically that women often get typically "female" injuries or illnesses. One could criticise the individual officers making the decisions, but probably they have the same norms and values as the rest of the society. So the rules of occupational injury compensation that should be gender neutral are not equal in practice.

#### 4.10 Migration Cases

Surveys have been made of how women are treated when coming to Sweden seeking asylum. Some of them assess the situation some years ago and it is uncertain whether and to what extent the situation has improved.

One study analysed the cases of ten women applying for asylum in Sweden.<sup>235</sup> They all claimed that they needed protection due to their sex. All applications were denied and the applicants appealed to the then existing Aliens Board (from 2006 and onwards the decisions of the Migration Board are appealed to one of the three Migration Courts). Both the decisions of the Migration Board and the Aliens Board were analysed in the study.

In quite few cases, the situation for women in the country of origin was not discussed at all. And if it was discussed, it was only ending up with a conclusion that the situation for women in the country in question was not such that the application would be granted only because of it.<sup>236</sup>

The most common reason for denying an application was by reference to the possibility of protection from the relevant authorities in the country of origin.<sup>237</sup> In many cases, the authorities were considered to have both the wish and the ability to give protection against persecution.

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<sup>235</sup> Adriansson, J, Tio asylsökande kvinnor – en analys av Migrationsverkets och Utlänningsnämndens beslut i tio kvinnors asylärenden, University of Göteborg, 2006.

<sup>236</sup> Ibid., p. 75 f.

<sup>237</sup> Ibid., p. 76.

This was being said even though in the same decision was stated that the situation for women in the country in question was weak and the power of the families was strong, which is an apparent contradiction.

Little attention was being paid to the fact that women having been exposed to sexual abuse often have great difficulties telling about the abuse. So if a woman later in the procedures tells about sexual abuse she is immediately considered to be not trustworthy.

#### 4.10.1 Study Concerning the Migration Board<sup>238</sup>

The Migration Board earlier had guidelines on how to investigate and assess the need for protection of women (from 2006). The purpose of these guidelines was to ensure a correct handling of the cases of women applicants.

A study was made in 2008 by the Swedish Red Cross of how these guidelines worked. Different methods were used. The files of some cases were thoroughly examined. Interviews were held with both officers of the Migration Board, interpreters, public counsel, judges of the Migration Court, and the women themselves. Certain comments deserve to be mentioned here.

There are habitual structures that prevent women from getting their cases properly examined and judged. The women are rarely asked whether they would prefer a female officer, interpreter or public counsel to talk to.

Some groups of asylum-seeking women do not have the same possibilities as others to be heard. In the first place, women belonging to a family (i.e. seeking asylum together with their husband and children) are regularly questioned after the husband has been questioned and mainly in the purpose of adding information on the facts told by the husband and checking the credibility of the husband.

The women are seldom given the possibility to tell their own story and then if the woman has her own grounds of protection there is little or no possibility for her to tell about them.

Officers and legal counsel often think that a woman in a family is not politically active, but only seeking asylum due to the political activities of the husband. Political activity is often thought of as activity in the formal public sphere, where mainly men are. Therefore other forms of political activity that many women take part in, such as taking care of wounded rebel soldiers, recruiting sympathisers, writing and spreading leaflets, are not taken as seriously.

There are stereotypes of married women that make the officer and the legal counsel look upon the case of a woman coming together with her husband in a way that is detrimental to the woman. According to the stereotype picture and gender defined roles, the family is the natural place for women, who consequently do not have a greater relation to the political environment and therefore do not have asylum claim on their own. It appears that women are not expected to take part in political activities of the husband or of relatives.

Women are often interviewed by the officer simply to confirm the story of the husband, as it is considered that a married woman is aware of the political activities of her husband. A woman who is unaware of the details can make both the husband and herself lack credibility. But not in all cultures do men share all details about their military or political activities with their wives.

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<sup>238</sup> Based on the report Riktlinjer för utredning och bedömning av kvinnors skyddsbehov – ett fungerande verktyg?, Maite Zamacona Aguirre, Svenska Röda Korset, 2008.

There are also stereotypes on how a married woman should behave. She is expected to put family first, not taking part in anti-regime or other political activities that can endanger the security of herself or her family. Women deciding to leave their country due to their political activities and leaving their family behind often have greater difficulties being believed, as they did not put family first.

Illiterate women and women with low level of education are often in a worse position, due to the difficulties of the officer or the public counsel to communicate with them. Women having suffered from sexual abuse are equally worse off. Officers and public counsel have difficulties to understand and investigate their cases and often fear re-traumatising if asking questions about details regarding sexual abuse, even though these details are important in assessing the need for protection. It is also emotionally demanding to hear about upsetting events such as sexual abuse, which unconsciously lead the officers not to discuss their matters.

Country of origin information that particularly deals with the situation of women and their political or gender related need for protection is rarely used.

When the threat of persecution comes from individuals, such as family members, it is even more difficult for women to get protection. The persecution is often seen as a private matter that does not have enough intensity to be considered as persecution deserving refugee law protection. Also there is often a requirement that women seek the protection from their home country authorities before seeking asylum in another country. There is no analysis of why the woman chose not to ask the authorities for help. Several studies show that women worldwide choose not to report to the police matters of gender related violence and there are justifiable reasons for not making a police report. To require that an asylum seeking woman turns to the authorities in her home country, an individual assessment must be made based on the personal circumstances of that particular woman and also based on relevant country of origin information taking into consideration gender aspects and the specific situation of women.

#### 4.10.2 Close Relative Immigrants<sup>239</sup>

Close relative immigrants make up a growing proportion of those receiving residence permits. In 2010, a total of 74,000 persons were granted residence permits in Sweden. 19,000 of these received them on the grounds of ties with a person who is resident in Sweden.

The main rule is that foreigners who receive residence permits on the grounds of ties with a person who is resident in Sweden get a permanent permit. However, foreigners who have not previously cohabited with the person with whom they have ties (what is termed newly-established relationships) receive only a temporary residence permit, normally for two years. If the relationship continues after two years, the foreigner can apply for a permanent residence permit on the grounds of continued ties. Many foreign women try to stay in their relationships for two years in order to receive a permanent residence permit since it may be difficult for them to return. The two-year rule is problematic if the migrating woman finds herself in a violent relationship, as the rule contributes to her staying in that relation. The rule also causes problems as some men on purpose abandon the woman shortly before the two years have passed. The migrating women thus are in a very vulnerable situation until they have received the permanent residence permit.

Newly-established relationships have increased significantly. In 1999, one third of cases based on ties with a person resident in Sweden involved newly-established relationships. Nowadays these relationships represent 90% of cases involving ties with a person resident in Sweden. This means that the two-year rule affects not just a limited number, but actually the absolute majority of one of the largest immigrant groups.

The two-year rule is actually more of a three-year rule as the Migration Board has waiting times and the relationship must endure when the Migration Board examines the case. The fact that the decisive point in time is the Migration Board's examination is not known by many people, so the confusion over the concept of the two-year rule is considerable. This makes the rule difficult to predict.

According to the inquiry, research has shown that women immigrants with temporary residence permits have less access to legal solutions to fight the violence exercised by men against them than other women who are exposed to violence. It has also been documented that the legal regulation of residence permits for women immigrants is of key importance for women's abilities to protect themselves against violence by leaving violent men. The Aliens Act has also been particularly criticised in research. This criticism is based on the lack of gender equality ambitions to combat men's violence against women in close relationships. The statements in the preparatory documents to the Act are especially criticised, where the focus is put on women's motives for migrating to Sweden, while no mention is made of men's views, motives or the fact that problems arise through men using violence.

The inquiry concludes that the two-year rule must be investigated, as it is unreasonable to have legislation that contributes to women staying in violent relationships at the same time as the task of society is to protect women against violence. The legislation means that it is the foreigner, and most often a woman, who alone bears the risk if the relationship ends during the first years, and moreover alone, or together with her child, must bear the consequences of violence. The person with whom an immigrant has ties, usually a man, is, on the other hand, able to make use of the legislation through his superior situation. The investigations of the inquiry indicate that the number of men who systematically exploit the legislation is by no means small.

One reason for the two-year rule is that it allows a generous examination of a permit application on the first occasion when the temporary residence permit is granted. At that point in time, the authorities' examination does not need to be so detailed, since it only involves a temporary residence permit. The seriousness and sustainability of a relationship are revealed, so to speak, through the probationary period. According to the research, it would be better if the main weight of this examination is put to the first occasion, since this would reduce human suffering.

#### 4.10.3 Women Being Victims of Trafficking

Since 2004 there is a possibility for a woman being victim of trafficking to get a time-limited residence permit, in order for her to stay while the criminal proceeding take place. This regulation has been noted by the Committee on the Elimination of Discrimination against Women, while criticising Sweden in other aspects on the question of trafficking.<sup>240</sup> It is to be noted that this regulation exists not in the interest of the woman, but in the interest of the State to investigate serious crimes. Once the crime in question is investigated and the following court proceedings are finished the woman normally has to go back home. It can be questioned what her situation will be like then, when returning. The risk seems high that she will get a bad

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<sup>240</sup> Concluding observations of the Committee on the Elimination of Discrimination against Women: Sweden, 2008, par. 30.

reputation and that her family, if she has one, will reject her and her only way of supporting herself will be to resort to prostitution.

## Conclusions and Recommendations

### Conclusions

Today the legal system is at first glance gender neutral. That has not always been the case and many years of political work have been needed to reach this point. But there is an inherent danger in this neutrality, as it makes gender issues to be overlooked in legal matters. Research has indicated that women are in practice still treated differently than men, at least in some areas of law. If that is the case in some areas of law it is likely that the situation is similar in other areas of law.

One could criticise the individual judges and decision-makers for maintaining existing differences, but probably they have the same norms and values as the rest of the society. That would imply that to improve the situation, a higher general level of gender equality is needed, to change the ideas and norms on gender in the eyes of all the individuals in society. On the other hand, the legal system is an important factor when it comes to changing the opinions of people, as changes in the legal system might very well make opinions change. Therefore, it is important that further work is made on gender equality in the legal system.

Different actions are required depending on whether the formal or the substantive gender equality principle is applied. Nowadays the formal gender equality principle does not cause any problems as the legal system is gender neutral. There are signs of problems on different levels when it comes to the substantive gender equality principle though. The question is how far the State's responsibility goes in eliminating inequalities in practice. This report has pointed at some areas where inequalities exist in practice. It is difficult to draw a certain conclusion on this, other than that more research need to be done.

### Recommendations

There is a need for more available access to statistics disaggregated by sex regarding cases in courts.

There needs to be more research on the substantive gender equality principle.

There needs to be a clearer picture of both authorities and the courts of who is appealing. Do women get dismissals more often than men by the authorities? Do women appeal less frequently? Do women more often get denials from the courts?

There needs to be a discussion on which questions in life and parts of life are encompassed by the courts. Is there a tendency towards questions that to a great extent involve women being solved outside of the courts? If so, is this tendency good or bad for the women and justice systems in general?

The evaluations of the legal education needs to include the requirement of gender based knowledge.

The education of judges on gender equality must be improved.

## APPENDIX 2

### REPORT ON CASES BROUGHT BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS BY WOMEN (PREPARED IN APRIL 2010)

The subject of the survey is the place of women in disputes concerning rights protected by the Convention, and in particular their access to the European “monitoring mechanism”.

#### Questions/Problems

1. Do women make use of the right of appeal by lodging applications with the European Court of Human Rights? How many applications are lodged with the Court each year and how many of them are lodged by women? Has the number of complaints lodged by women risen in line with the general increase in the number of applications brought before the Court?
2. How many complaints lodged by women result in judgments?
3. What are the statistics concerning women’s applications to the Court and how many have been declared inadmissible?
4. Which articles of the Convention do they most frequently invoke?
5. How are women’s complaints dealt with by the Court: does it give priority to cases concerning women? Does the Court take women’s own experience into consideration?
6. Why are there so few applications concerning gender equality? To what extent does use of the right of individual application still require a certain degree of emancipation? Is it only the more precarious socio-economic position of women which prevents them from lodging an appeal? Do they have the required level of knowledge? Are they genuinely interested in judicial confrontation or dispute? Are women beginning to lodge applications in their own right?
7. Do the rights protected by the Convention really concern women? Are there shortcomings in existing legal instruments?
8. What measures might be taken in the judicial process to give women real access to the European Court of Human Rights?

#### Statistics

- Cases (judgments and decisions) concerning Article 14, over the period between the establishment of the Court and 1 January 1979: the number of applications lodged by women on their own and by women together with men was 7 out of 65 (10.8% of applications)<sup>241</sup>.
- Breakdown by sex of the Commission's decisions on the admissibility of applications in 1995: out of 1 421 applications, 207 concerned women only (14.5%), and 100 concerned both women and men (7%)<sup>242</sup>.

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<sup>241</sup> HUDOC database.

- Breakdown by sex of the Court's decisions concerning all of the rights protected by the Convention over the period from 1960 to 29 January 1997: out of a total of 542 judgments, only 65 specifically concerned women (12%), and 54 concerned both women and men<sup>243</sup>.
- Breakdown by sex of the Court's decisions concerning gender-based discrimination (Article 14 of the Convention) over the period from 1960 to 29 January 1997: out of a total of 10 judgments, 3 specifically concerned women (30%), whereas 2 concerned both women and men (20%)<sup>244</sup>.
- In cases found inadmissible by a chamber of 7 judges<sup>245</sup> and cases which were judged on the merits by a chamber or by the Grand Chamber over the period 1 November 1998 - to 1 March 2006: the number of applications lodged by women was 1 300 (16% of applications)<sup>246</sup>.
- List of judgments compiled by the Steering Committee on Gender Equality (CDEG) in 2006<sup>247</sup>: the number of judgments concerning gender equality, in which applications were lodged solely by women and by women together with men was 19 out of the 48 judgments listed.
- Judgments handed down by a chamber or the Grand Chamber concerning Article 14 of the ECHR, over the period 1 January 2009 - to 31 March 2010: 9 out of 32 applications (28%) were lodged by women only and by women together with men<sup>248</sup>.
- Article 14 taken in conjunction with Article 1 of Protocol 12, over a period up to 1 April 2010: out of a total of 8 cases, no applications have to date been lodged by women<sup>249</sup>.
- Concerning Article 1 of Protocol 12, over a period up to 1 April 2010: out of a total of 26 applications submitted, only 4 were lodged by women, and 2 by women together with men<sup>250</sup>.

This is an extract from a longer document which you can find [here](#).

<sup>242</sup> This figure does not take account of applications in which the applicants' identity was kept secret or applications lodged by applicants whose sexual identity cannot be clearly defined (cases in which first names are both masculine and feminine or in which applicants have changed sexual identity). *Outline of the case-law of the organs of the European Convention on Human Rights concerning discrimination on grounds of sex*, Memorandum prepared by the Secretary General, Rapporteur Group on Equality between Women and Men (GR-EG), Committee of Ministers, 11 April 1997 (restricted).

<sup>243</sup> This figure does not take account of judgments arising from applications in which the applicants' identity was kept secret: aforementioned *Outline of the case-law of the organs of the European Convention on Human Rights concerning discrimination on grounds of sex*.

<sup>244</sup> *Ibid.*

<sup>245</sup> With the exception of cases declared inadmissible "de plano" by a committee of 3 judges, in other words 85-90% of applications.

<sup>246</sup> In absolute figures. Tulkens F., ***Droits de l'homme, droits des femmes: Female applicants before the European Court of Human Rights***; in Liber amicorum Luzius Wildhaber: Human Rights, Strasbourg views, Edition Lucius Caflisch et al., Kehl, Strasbourg, Arlington, Va., N.P. Engel, 2007, p.423-445.

<sup>247</sup> *Case law of the European Court of Human Rights in the field of equality between women and men*, Strasbourg, November 2006, CDEG(2006)2.

<sup>248</sup> HUDOC database.

<sup>249</sup> *Ibid.*

<sup>250</sup> *Ibid.*