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**LAW IS NOT ENOUGH!  
FROM LEGAL AID TO A NETWORK OF LEGAL SERVICES  
AN OVERVIEW OF THE SYSTEM OF ACCESS TO FAMILY  
AND CHILDREN LAW AND JUSTICE IN PORTUGAL**

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**Summary:** Over the last 30 years, family as an institution has mutated, not only due to changes occurring at the internal level, but also as a result of European and global movements. Thus, at the beginning of the 21<sup>st</sup> century, we are confronted with new flexible and fluid family scenarios, within which the deinstitutionalization of family, the democratization of family life, the valorisation of affection in detriment of hierarchy and tradition, and consequently the dejudicializing of the regulation of family conducts and a progressive tendency towards the negotiation of news forms of family organization gain significance. Thus, the awareness and understanding of what kind of mechanisms citizens can use in order to defend their rights in this important social area, *i.e.*, to analyse how access to law and justice takes place in such system, identifying the roles played by the actors and the institutions, becomes increasingly important.

**Key-words:** access to law and justice; mutations; family and children law.

**Introduction<sup>1</sup>**

Confronted with new scenarios, shaped under the signs of flexibility, fluidity and plurality, family and child law is called upon to answer to new questions, still indeterminate and undefined, manifesting themselves inside a two-fold dynamics – privatization and deinstitutionalization of family relations, on the one hand, and (re-)publicness (becoming again matters regulated by public law), on the other. These transformative speeds – one rapid and one moderate, respectively family and family regulation – are accompanied of a third one moving at a slower pace – the system of access to family and child law and justice – without which effectiveness of rights cannot be guaranteed and citizenship cannot be fully exercised. It is, therefore, important to understand what kind of mechanisms citizens can make use of in order to defend their rights.

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<sup>1</sup> This working paper is a result of the research being conducted in Portugal for the Research Project "The mutations of the access to law and justice in the European Union – The case study of family law in Portugal", financed by Fundação para a Ciência e Tecnologia (FCOMP-01-0124-FEDER-007368). It was presented at the "Joint meeting: COMPLEXITY, CONFLICTS, JUSTICE – 20 years of Sociology of Law", in Oñati, Basque Country, in July 2009.

## **1. Law is not Enough: Family and children law mutations need effectiveness**

Since it is difficult to define family itself, to discuss or to write about family regulation has become a complex subject matter. The practices and ideology inherited from the 19<sup>th</sup> century have imposed – in Europe – the social and juridical model of the nuclear family (father, mother and children) based upon a new culture of family and marriage. This model was submitted to a rigid set of norms, linked to the different roles each member was supposed to fulfil. However, by the end of the 20<sup>th</sup> century (especially, after the 1970s) the ideals of family democratization liberated women from the unequal status they had been confined to and gave them the status of social and juridical equality.

Thus, at the beginning of the 21<sup>st</sup> century, we are confronted with new flexible and fluid family scenarios which show a progressive increase: *de facto* partnerships; mono-parental, recombined and transnational families. Unipersonal families have also increased, along with the number of children born outside the wedlock, the latter having increased heavily. Such scenarios are a result of the following factors: the nuptial rate's decrease; the conjugal instability increase (resulting in separation and divorce); the birth-rate drop; and migration processes and globalization.<sup>2</sup> Consequently, we are dealing with the weakening of the matrimonial union and of the “family institution” (Pocar and Ronfani, 2008: 126). Nevertheless, in a context marked by flexibility and fluidity, the prevalent model is still the nuclear family, not always put forward in accordance with symmetry and democracy. Nonetheless, in some life phases, this is no longer the referential pattern followed by a large number of people.

Naturally, these transformations have reflections on the juridical regulation of family, occurring through law reforms, especially after the proclamation of the principle of equality (between spouses and children) in constitutional and civil family laws, as well as with the fragmentation and expansion of the legal regulation of family relations inside labour law, social security law or, even criminal law. All this allows us to identify the following axes of change within family law: the consecration of the principle of equality; the democratization of family life and gender parity; individualism and privatization of family law; secularization, deinstitutionalization and contractuality of family relations; the (re-)publicness of the new family law; the valorisation of affection in detriment of hierarchy; the diminishment of the

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<sup>2</sup> In Portugal, the situation is much the same, although the transformations started occurring only after the Democratic Revolution (1974). As claimed by Aboim, Portuguese family life is on the move, traversed by the modernization movements occurred over the last decades, which have converged towards the demographic and familiar patterns already occurring in other countries (2006: 63).

significance of procreation; children's rights as the central focus of the new family law; fragmentation, retraction and expansion of family law (from civil law to social security law); the dejuridification and the dejudicialization of family conflicts resolution; and finally, the cultural and normative pluralism of the contemporary family regulation.

The transformations of family and of family and children law also mean its democratization and, consequently, correspond to the mutation of the access to law and justice mechanisms, in order for all parties to have conscience of their (his/her) rights and duties and fully exercise them. Without effective mechanisms, family and children law will not play its part in the making of a better individual and collective citizenship. Thus, it is important to analyse the effectiveness of these mechanisms and the conditions of their exercise, in order to value its adequacy or sufficiency in relation to such transformations.

## **2. From Legal Aid to a Network of Legal Services**

### **2.1 The Human Right of Access to Law and Justice**

As Hudson (1999: 17) claims, where there is no access to law, there is no power and without power there are no effective rights and no real obligations. What is implicit in the expression "access to justice", as the author carries on, is the awareness that law occupies an important symbolic and practical role in our western societies. The problem here is, in fact, the understanding of a gap between such law and the citizen's reality, for what they are looking for is the resolution of their problems and conflicts. That is the reason why the theme of access to law and justice is still so worthy of attention, for this right continues to present itself as the main instrument to achieve material equality for all. Moreover, access to law and justice is one way of ensuring that citizens trust their justice system, which, in turn, promotes the enforcement of a democratic regime.

Thus, it is still very important to discuss access to law and justice for the very reason that, as a basic human right, consecrated in international documents such as the Universal Declaration on Human Rights (article 10)<sup>3</sup> or the European Convention on Human Rights (article 6),<sup>4</sup> it represents, symbolically, the way to attain citizenship. It means ascending to

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<sup>3</sup> Article 10: Everyone is entitled in full equality to fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

<sup>4</sup> Article 6: 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary

the status of being a subject of the law and a subject of rights, which implies, on an instrumental level, the way of accessing the legal information and the capacity of enforcing one's rights (Faget, 1995). Therefore, and as Cappelletti and Garth already claimed in their seminal work of 1978, "(...) effective access to justice can thus be seen as the most basic requirement – the most basic 'human right' – of a modern, egalitarian legal system which purports to guarantee, and not merely proclaim, the legal rights of all."

Both at the international law or at the domestic law levels, the respect and the protection of human rights can only be assured and provided for by effective judicial mechanisms. When the violation of a right occurs, access to law and justice gains a vital importance to the victim and it also becomes an essential component of the protection, enforcement and efficacy of the human rights' system. In fact, access to law and justice intersects with human rights in various ways. First, and as mentioned before, it is itself a fundamental right as consecrated in several international conventions and declarations; second, it is a means of protecting and enjoying other rights; and third, for the right of access to law and justice to be fully experienced, other human rights must also be protected, such as the right to information, the right to physical safety, the right to confidentiality or the right to privacy.

However, access to law and justice cannot be seen just as an equivalent of access to courts, and it is fundamental to widen that perspective. That is why we must consider access to law and justice as implying legal information, legal counselling and legal representation in court, as well as the resolution of conflicts by impartial, not-corrupt and fair institutions (Luca, 2007). Hence, and on a broader concept, access to law and justice refers to the methods by which individuals are able to obtain legal information, benefit from legal services and to resolve disputes. Thus, it must include access to a court procedure, to legal aid and to extra-legal mechanisms for conflicts' resolution. Access to law is not an end in itself; the goal is justice, and formal proceedings or representation by lawyers is not always the most

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in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. 3. Everyone charged with a criminal offence has the following minimum rights:

- (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
- (b) to have adequate time and the facilities for the preparation of his defence;
- (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
- (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

effective way of addressing legal concerns (Rhode, 2004: 189). Actually, one of the European Union's goals in terms of justice is the use of the alternative mechanisms for conflict resolution, since it is important that citizens are ensured appropriate qualified resources, the courts being only one mechanism among others, and a part of the legal system, a system that must be plural for the world is, itself, plural.

In that sense, the *three waves* metaphor by *Cappelletti and Garth* (1978) is still valid, for we can observe an advancement in the access to law and justice regimes: the first wave which started around 1945 concerned the creation of the legal aid regimes, where the objective was to provide legal assistance in court; with the second wave, there was the promotion of representative actions and other procedures that would allow a single lawsuit to resolve a large number of claims (the defence of collective rights); and with the third wave there was the emergence of the alternative dispute resolution mechanisms and other procedural changes, as well as the legal system reforms, searching for more economical solutions, where concepts like efficacy and efficiency become fundamental. Nowadays, the transformations of the access to law and justice models are under an important development, one in which those three moments and different models of action interpenetrate and coexist (legal aid, public interest; and alternative dispute resolution mechanisms).

### **3. Legal Aid in Portugal in the 21<sup>st</sup> Century: A triangular public system**

#### **3.1 The Constitution and the Present System of Legal Aid**

It is interesting to notice that the first Act to introduce legal assistance in Portugal was Law 7/70, when Portugal was still under the dictatorship. Nevertheless, it was only after the Revolution (in 1974) that article 20 of our Constitution (1976) proclaimed that access to a court of law to defend everyone's rights is guaranteed to all citizens, as well as that every citizen has a right to legal information and to legal protection.<sup>5</sup> The Constitution, however, does not establish the gratuity of legal services, but legal services, on the other hand, cannot be limited or constrained if the citizen has not sufficient financial means to pay for such services. That is the reason why the legal aid system exists, in order to promote the equality of all citizens in accessing law and justice in the case of insufficiency of financial means.

Law 7/70 was revised only in 1987, eleven years after the Constitution, with Act 387-B/87, from December 29th. That revision meant changing from a mere legal assistance

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<sup>5</sup> Legal protection can be divided into legal counselling and representation in court. Legal information and legal counselling are dependent of State and legal professions organizations' actions.



regime to the regime of access to law and courts, introducing now the possibility of having free access to legal information and legal advice.

In 2000, another major reform took place with the Act 30-E/2000, from December 20th. That reform transferred the competence to evaluate all the requests for legal aid/support from the courts to the social security services, for until then, it was the judge appointed to resolve the conflict at stake who had to decide if the legal aid claimant was entitled to benefit from legal support. In 2004, there was yet another reform, mainly to carry out the transposition of the European Directive on cross-border legal aid in the European Union, as well as to enlarge the range of claimants/beneficiaries (Law 34/2004, July 29th).

In August 28th, 2007 a new Act was enacted (Law 47/2007), enforced in January 2008, which has a broader scope of application, for now every citizen who chooses to resolve conflicts, such as the cases processed by the civil notaries, like divorce based on mutual consent (since Act 272/2001, October 13th), or under the competence of the Justices of the Peace (Julgados de Paz) or any other public alternative dispute resolution structures, may do so by requesting legal support.

### **3.2 The *Network* of Family and Child Law Legal Services: The State, the Market and the Community**

#### **a. A Triangular Public System**

The present Portuguese public system of access to law and justice may be seen as a triangular system: it is financed by the Ministry of Justice, processed by the Social Security Services, and it is the Lawyers Bar competence to nominate and appoint the lawyers responsible for legal information, counselling and representation. This system is, nevertheless, subject to several criticisms, such as: a) the eligibility criteria; b) the insufficiency of legal counselling; or c) the poor quality of the services provided.

#### **b. The Network of Public Actors/Structures**

Access to law and justice is not merely served by the legal aid system. The information system is based upon a vast network of structures and/or actors, amid which Public Prosecution has an important role to play (Public Prosecution has a status similar to that of the Judges).

We usually associate the Public Prosecution's action to the criminal area, for there is where its main functions are performed. It is important to stress however, that it is up to the Public Prosecution to play a fundamental role in promoting the citizen's access to law and justice. Public Prosecution has the responsibility of defending social rights, as well as the duty to represent all of those who cannot represent themselves, for instance, children. The Public Prosecution's judicial intervention on the defence and the promotion of children rights is mainly concerned with the judicial cases of a child or a teenager at risk and the processes of judicial education, when a minor has committed a crime or an offence (Law 166/99, from the 14<sup>th</sup> September, and Law 147/99, from the 1<sup>st</sup> September).

Before having any judicial intervention however; the Public Prosecution offers a free of charge and very important information public service. Its good geographical distribution and network integration provides for a nation-wide, easy, fast, and at no cost service. Public Prosecution has, therefore, an important "interface" role to play, articulating mechanisms operating within the access to law and justice system, the citizens and the courts.

As stated above, the Social Security services are, since 2000, responsible for the evaluation of the legal aid claims and eligibility criteria to access the public legal aid system.

The Police and law enforcement – mainly the Proximity Police Officers (*Agentes de Proximidade*) and Safe School Officers (*Equipas do Programa Escola Segura*), created in 2006 – also have a very important role to play, especially in what regards the signalling of situations concerning children and domestic violence. It operates as a pivotal actor within the system, articulating with the Public Prosecution, the Commissions for the Protection of Children, the Courts and NGOs.

More recently, the Family Mediation Services<sup>6</sup> were created, as an extrajudicial form of family conflict resolution. Promoted by the Ministry of Justice, these services attempt to reach the agreement through an informal, accessible, voluntary and confidential process. These services<sup>7</sup> are competent to mediate conflicts regarding alimony, divorce and several other questions mainly concerning divorce and separation.

In regards to the promotion of gender equality and the prevention of domestic violence, the *Comissão para a Cidadania e Igualdade de Género* (CIG) upholds an information

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<sup>6</sup> *Despacho* no. 18.778/2007.

<sup>7</sup> The mediation request may be done via telephone, email, mail or in place. Family mediation cases usually have a time length between 1 and 3 months, depending on the number of intervenient and the conflict at stake.

system, providing legal information to victims of domestic violence and other types of gender discrimination.

**c. Partnerships, Market and Community: The broader network**

In order for the State to accomplish its constitutional duty which is that of guaranteeing access to law and justice, besides appealing to the public administration (Social Security services, CIG) and to the Public Prosecution, the State also develops and maintains partnerships to uphold the legal aid system. Therefore, as previously mentioned, the State (Ministry of Justice and Social Security Services) finances and grants legal aid, but it is the Lawyers Bar competence to appoint a lawyer when the Social Security Services have granted legal aid. The Lawyers Bar also has Legal Advice Cabinets where citizens can request information regarding their legal questions however this service is currently not in operation. Since the above mentioned system was frequently subject to criticism, mostly regarding its insufficiency, there is the need to carefully evaluate and monitor its performance.

On the subject of promoting children's rights and resolving conflicts concerning "children at risk" or "in danger", with the aim of protecting the best interest of the child, the central State has instituted the *Comissões para a Protecção de Crianças e Jovens* (Commissions for the protection of children), as non-judiciary official institutions, with autonomy and decisional independence. The commissions are an innovative way of institutionalizing nationwide partnerships between the State, the municipalities and the non-governmental agencies/associations. These commissions have the function of promoting children's rights, preventing and/or ending situations which put children's safety, health, education or full development at risk therefore, their activity is closely monitored by the Public Prosecution. Besides collaborating with the State, the commissions also work together with several NGOs working with family matters and with children.

At the community level we must also mention non-governmental organizations, which provide legal information to those who seek their assistance, especially regarding domestic violence, children's rights or other family matters.

The market level is performed, essentially, by lawyers (barristers and solicitors), whose services are paid by those who can afford to do so. In addition, at this level we may find legal protection insurances; they are, however, still very marginal.

The research we have been conducting allows us to graphically illustrate the structures and actors involved in the Portuguese system of access to law and justice. As table 1 shows, the mechanisms do not relate solely to the public system supra mentioned, but also to all those coming from the community, the market or those considered hybrid (public/private partnerships). This analytical grid was inspired by the concepts of *structural place*, by Sousa Santos (1995: 411-455), and *principles of political regulation*, by Ferreira (2005). It analyses the actors behind legal information, legal advice/counselling, legal representation and conflict resolution within the structural spaces/principles of political regulation of State, community, market, and State in partnership (when the State combines with other spaces/principles – such as the community or the market – in order to provide a better public service).

**Table 1 - A Portuguese Map: The actors/structures of the access *network* to Family and Children Law and Justice**

Actions Spaces	Legal Information	Legal Advice	Legal Representation	Conflict Resolution
COMMUNITY	-Formal and informal associations -NGOs -Third Sector	-Formal and informal associations -NGOs -Third Sector	- Barristers and/or Solicitors from these associations	- Family therapy/ Informal conciliation and mediation
MARKET	-Barristers and Solicitors -Lawyers/Family counsellors -Insurances	- Barristers and Solicitors -Insurances' lawyers	-Barristers and Solicitors - Insurances' lawyers	- Family therapy/conciliation and mediation (economic activity)
STATE	-Public Administration (ex.: Social Security, Commission for Gender Equality - CIG) -Family Mediation System -Public Prosecution	-Municipalities and local agencies (Lawyers) -Public Prosecution (child's superior interest)	-Public Prosecution (promotion of the child's best interest)	- Family Mediation System - Courts of Law
State in partnership	-Lawyers' Bar Advice Cabinets - Commissions for the Protection of Children (CPCJ)	-Lawyers' Bar Advice Cabinets	- Lawyers (Legal Aid)	- Commissions for the Protection of Children (CPCJ)

Source: Pedroso and Branco (2008)

#### **4. A Network of Legal Services in Construction**

Family law is, as we know, in permanent mutation. What we find in this important social area is a plurality of mechanisms, public and private, that perform their services in and out of the judicial system. This network of services (complementary and interdisciplinary) offers a wide-range set of mechanisms which aim at safeguarding and promoting universal principles and fundamental rights, particularly those pertaining to the more vulnerable families, the main beneficiaries of the legal aid public system. Said network has, as well, the purpose of defending and promoting the rights of every family and child, which is enforced by the Public Prosecution, by the Commissions for the Protection of Children, by the family mediation system or by the mechanisms offered either by the market or within the community.

The "map" we have elaborated, and the insufficiencies we have encountered, may act as a strategic research agenda (one that is to be developed in the near future), in order to recognize the frailties and the potentialities of a law which is meant to be effective and accessible and that will promote full citizenship.

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