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The Feminization of the Judiciary in Portugal: Dilemmas and Paradoxes

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1. Introductory remarks

In the last few decades, a significant transformation in the legal professions in Portugal has occurred in the form of their increasing feminization.¹ Reflecting an optimistic future for this quantitative revolution of women in law, Justice Rosalie Abella assumed, in a communication in 1986, that if someone, in 15 years' time, tried to organize a conference on women in the legal professions, people would question the aim of such an event.² Such optimism, however, has been accompanied by a paradox: while some individual women have been achieving considerable success in the legal professions, evidence shows that systemic gender barriers in these professions still persist. Several academic and professional investigations as well as judicial reports in several jurisdictions show that issues of equality in law and in the legal professions continue to present challenges.³ Several studies⁴ in various countries confirm the thesis of Margaret Thornton⁵ that women are still 'fringe-dwellers of the jurisprudential community'.

In Portugal, that phenomenon is rather recent when compared with other countries. Nonetheless, the increasing predominance of female judges and public prosecutors since 2006 has been overwhelming.⁶ These numbers, as well as the growing role of some female magistrates, have attracted the attention of the media and some sectors of the judiciary. A paradigmatic example of this is the recent appointment of the first female State Attorney General in Portugal. However, if in other countries we find detailed analyses of this situation and its consequences, such analyses are still lacking for Portugal. Instead, speculation and stereotyping continue to be relied upon. In this article we sought to analyse the attitudes towards this feminization by judges, public prosecutors and ordinary citizens. For this purpose we conducted

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1 The term 'feminization' is used in this paper as a point of departure, reflecting the increasing number of women in the legal professions. The aim, however, is to understand if, in the view of the legal professionals and ordinary citizens, judicial and legal culture are becoming 'feminised' and, if so, in which way.

2 See M.J. Mossman, *The First Women Lawyers. A Comparative Study of Gender, Law and the Legal Professions*, 2006, pp. 1-5.

3 E.g. U. Schultz & G. Shaw, *Gender and Judging*, 2013.

4 See J. Brockman, *Gender in the Legal Profession. Fitting or breaking the mould*, 2006; R. Hunter, 'Women in the Legal Professions: the Australian Profile', in U. Schultz & G. Shaw (eds.), *Women in the World's Legal Professions*, 2003, pp. 87-102.; Mossman, *supra* note 2.

5 M. Thornton, *Dissonance and Distrust: women in the legal profession*, 1996, pp. 3-4.

6 See Figure 1.

around 50 interviews with judges and public prosecutors, as well as a representative telephone survey of the Portuguese population.⁷

The interviews were conducted between June 2012 and July 2013 with male and female judges and public prosecutors at first instance courts, Appeal Courts and the Supreme Court. The first instance courts were selected according to the following criteria: diverse geographical context – urban and rural, littoral and interior, high and low population density – and the pendency of the legal cases.

These interviews intended to analyse the personal, academic and professional paths of women in the judiciary, seeking to assess any issues regarding access to the profession and the motivations to study and practice. Our focus included three areas of interest. Firstly, their views on their career, e.g., career expectations, career satisfaction, and peer relationships. Secondly, experiences of discrimination as well as problems arising in the context of reconciling family life and professional activity, and professional status. A third set of questions focused on their observation of differences between male and female judgments as well as on factors that might influence the judging by both sexes. Finally, our aim was to understand the attitudes of these professionals towards society, jurisprudence and the role of the judiciary in the national context.

The telephone survey allowed us to analyse the views of the population concerning male and female professional performance in the judicial system. This survey was essential to determine the extent to which the gender of a judge may positively or negatively affect public confidence in the administration of justice. Through this survey, we also sought to evaluate some aspects raised during the project, particularly whether the stereotypes attributed to women in society are transferred to female magistrates or whether these professions are regarded as being gender-neutral.

2. Contextualizing the studies on the feminization of justice

In the process of consolidating and strengthening the nation state, the exercise of law and public administration was identified primarily as a male prerogative,⁸ since women were completely uninvolved with this area of activity. In this sense, the traditional model of the socialization of the legal professions was built as an unknown space for women. Legal professions required an exercise of power, much identified with the authority of parental responsibility that women did not have the ability to accomplish.⁹

For these reasons, the presence of women in the legal professions is a recent trend, typical of the twentieth century, and although most European countries already registered the participation of women lawyers at the beginning of the 20th century,¹⁰ only after the Second World War did we witness a significant gap in women's access to judicial careers. The struggle of women's movements for civil rights, increased educational opportunities and the creation of a rational system of formal qualifications contributed to the establishment of access conditions in which women could overcome the existing academic barriers and achieve the cultural capital required to apply for positions within the legal professions.¹¹ This phenomenon has different contours in each legal culture and does not have the same rhythm in all areas. Different studies have tried to analyse both the trajectory of the careers of women in the justice system and the influence of this new reality in the judicial structure.

Concerning the first approach (analysing the trajectory of the careers of women in the justice system), studies of women's career paths in lawyering show that the rise of their careers and professional prominence have been hampered by the existence of mechanisms of indirect discrimination that materialize in gender inequalities with distinct characteristics:¹² salary discrepancies, unequal opportunities, the low number

7 The universe of the survey was the resident, active and non-active population in Portugal targeted according to the National Statistical Institution (INE) data by sex, age, geographic region, educational degree and occupation. The sample of 810 surveys comprises a universe of 52% women and 48% men.

8 U. Schultz, 'Introduction: Women in the World's Legal Profession: Overview and Synthesis', in U. Schultz & G. Shaw (eds.), *Women in the World's Legal Professions*, 2003, pp. xxv-lxii.

9 See A. Boigeol, 'Male strategies in the face of the feminization of a profession: the case of the French judiciary', in U. Schultz & G. Shaw (eds.), *Women in the World's Legal Professions*, pp. 401-418; see also P. Bourdieu, *La domination masculine*, 1998.

10 See V. Olgiati, 'Professional bodies and gender difference in court: the case of the first (failed) woman lawyer in modern Italy', in U. Schultz & G. Shaw (eds.), *Women in the World's Legal Professions*, pp. 419-436.

11 P. Bourdieu, *Distinction: a social critique of the judgement of taste*, 1986.

12 See C.F. Epstein, *Women in Law*, 1993; C.F. Epstein et al., 'Glass ceiling and open doors: women advancement in the legal profession',

of women in leadership roles, an unsupportive working environment,¹³ and the confinement of female lawyers/judges to certain areas of practice, often the least lucrative.¹⁴ Some research has also shown that in the legal professions feminization is generally followed by a re-segregation of some sectors (e.g. family law).¹⁵

The analysis of working conditions and job satisfaction has shown that future expectations and career planning for women are deeply influenced by models that in many cases do not distance themselves from an ideal spouse and mother.¹⁶ In this case the career choices are accompanied by the imposition of sacrifices: leadership positions and profits at work or household duties and family life. The fact that liberal professionals, such as lawyers, are generally associated with the existence of a long hours' culture exacerbates this reality.¹⁷

Programmes relating to female judges have privileged certain issues in order to counteract prevailing trends, for example, the accommodation of family demands on the principles of the management and administration of the courts.¹⁸ Similarly, political groups and feminist law firms have established less hierarchical and more participatory structures of human resource management.¹⁹

Concerning the second approach mentioned above, there seems to exist no (systematic) analysis between the characterization of the process of the 'feminization' of judicial careers and the structural changes that this phenomenon has caused in the configuration of the legal professions, the professional strategies and decision-making process of female judges and public prosecutors.

Questions similar to those that arose about women lawyers have been redirected towards women judges, in particular whether female judges bring a different perspective to the function and professional tasks and whether the presence of women marks a difference in the administration of justice. In several countries, the recent and considerable increase in the number of women in justice has led to studies on the impact of judges on the legal profession and sustained empirical research on gender differences in judicial activity.²⁰ The argument justifying the study of the impact of women in the administration of justice comes from the understanding that law enforcement is not mechanical and implies an interpretation on the part of the judge.²¹ Thus, judges bring their own perspectives and life experiences into the legal professions.²² According to Kohen,²³ interpretation is measured by the understanding that a judge makes of the law, since it is related to the way he or she comprehends the acts presented, according to his/her profile, life experiences and world view. More recently, Rosemary Hunter, Clare McGlynn and Erika Rackley²⁴ have compiled a set of judgments, accompanied by a commentary elaborated by the authors, explaining the original decision, its background and doctrinal significance, the issues it raises, and how the feminist judgment, in their opinions, deals with them differently.

1995 *Fordham Law Review* 64, no. 2, pp. 291-449; D. Rhode, *Speaking of sex: the denial of gender inequality*, 1997.

13 See New Jersey State Employment and Training Commission, Council on Gender Parity in Labor and Education, 'Legal talent at the crossroads: Why New Jersey women lawyers leave their law firms, and why they choose to stay', 2009. Available at <http://www.knbraniganlaw.com/pdf/women_law_2009.pdf> (last visited 25 November 2013); J. Monahan & J. Swanson, *Lawyers At Mid-Career: A 20-Year Longitudinal Study Of Job Satisfaction And Life Satisfaction*, 2008; M. McClenaghan Martin, 'The Gender Gap: Breaking Through the Glass Ceiling?', *New York Law Journal*, 29 December 2006; National Association of Women Lawyers, *National survey on retention and promotion of women in law firms*, 2006. Available at <<http://nawl.timberlakepublishing.com/files/NAWL%20FINAL%20PUBLICATION%2010-25-06%20SURVEY%20REPORT.pdf>> (last visited 25 November 2013).

14 S. Bolton & D. Muzio, 'Can't Live with 'Em; Can't Live without 'Em: Gendered Segmentation in the Legal Profession', 2007 *Sociology* 41, no. 2, pp. 47-64.

15 F. Bettio & A. Verashchagina, *Gender Segregation in the Labour Market – Root causes, implications and policy responses in the EU*, 2009.

16 See U. Schultz, 'Women lawyers in Germany: perceptions and construction of femininity', in U. Schultz & G. Shaw (eds.), *Women in the World's Legal Professions*, 2003, pp. 295-322.

17 K. Dau-Schmidt et al., 'Gender and the legal profession: The Michigan alumni data set 1967-2000', Indiana University School of Law, 2007. Available at: <<http://www.escholarship.org/uc/item/6mr10150#page-2>> (last visited 25 November 2013).

18 T.P. Beleza, 'Condicionalismos familiares no exercício da magistratura', 1997 *Boletim do Conselho Superior do Ministério Público*, II, p. 16.

19 See Epstein, *supra* note 12.

20 See S. Sherry, 'The gender of judges', 1986 *Law & INEQ. J.* 4, p. 159; D. Allen & D. Wall, 'Role Orientations and Women State Supreme Courts Justices', 1993 *Judicature* 77, no. 3, pp. 156-165; S. Davis et al., 'Voting behaviour and gender on the US Courts of Appeals', 1993 *Judicature* 77, no. 3, pp. 129-139; R. Graycar, 'The gender of judgments: some reflections on 'bias'', 1998 *UBC Law Review* 67, pp. 249-271; Boigeol, *supra* note 9.

21 B. Wilson, 'Will women judges really make a difference', 1990 *Osgoode Hall Law Journal* 28, pp. 507-522.

22 D. Kennedy, *A Critique of Adjudication*, 1997; J. Resnik, 'On the bias: feminist reconsiderations of the aspirations of our judges', 1988 *Southern California Law Review* 61, p. 1926.

23 B. Kohen, *El género en la Justicia de Familia. Miradas y protagonistas*, 2008.

24 R. Hunter et al., *Feminist Judgments From Theory to Practice*, 2010.

The debate over the existence of female judging has proved to be as rich as it is inconclusive, sustaining itself through the very division within feminist legal theory on the debate between equality and difference. Many of the feminist analyses of law have focused on one of the most important debates within feminist legal theory: are women equal to men before the law, or are they not? And more pressingly, should they, or should they not, be seen as equals? This debate known as the 'dilemma of difference' arises in the daily life of the courts, where judges and lawyers have to determine whether or not the differences matter in each specific case: they can notice or ignore the difference; they can opt for neutrality which means to maintain the status quo or to integrate the difference; they can make room in the law to legally accommodate these differences or, on the contrary, to set formal rules that constrain such an accommodation.²⁵ We can distinguish four feminist currents in the debate surrounding equality: liberal feminism, radical feminism, cultural feminism and postmodern feminism.²⁶ Contrary to binomial rationality/irrationality, liberal feminists believe that women are as rational as men, but are confined by external forces to the private sphere. These feminists argue that equality means equal opportunities with men so that women have the same conditions as men to make rational choices that are in their best interest.²⁷

Cultural feminists also use the analysis of the differences between men and women, but, contrary to the previous approaches, they do not perceive the differences as being insignificant, as something that should be revised or as being used by a corrupt system to legitimize women's subordination. This approach, based on Gilligan's seminal study in 1982, has supported the hypothesis that the presence of women in legal careers can deflect from significant changes in male legal culture and practice,²⁸ leading some authors to speak of feminist legal methods.²⁹ Although this theory has been extended to several analytical fields of law, it is not exempt from criticism, namely the risk of reinforcing the ancient stereotypes about women as emotional and illogical and that use generalized metaphors, neglecting individualism.³⁰

Indeed, the voices of these women have different registers.³¹ As stated by Mack and Roach Anleu:³²

'The findings challenge the monolithic image of the generic disembodied judge as well as the binary construction of male/female differences within the judiciary. (...) Women judges may experience several possible gendered and judicial identities: assimilation to masculine judicial norms, the ideal of the disembodied neutral judicial officer who is neither male nor female, a gender aware female judge, or a feminist judge. These identities are not necessarily mutually exclusive.'

Lastly, postmodern feminism challenges the legal positivist principle of the rational subject, able to choose and to consent to actions in a stable way, coherent, even predictable, by arguing that the subject is constituted by several institutional and ideological forces that overlap, intersect and even contradict each other and which do not fall solely in the gender category.³³ Thus, female judging would always be seen in its plurality contesting any homogeneity of the category of being a 'woman.'

In this sense, Erika Rackley³⁴ talks about the problems of neglecting the concepts of diversity and difference in the judiciary. She claims that we all have traditional images of the judge and those who do not fit this mould are excluded in many ways; such has been the fate of the woman judge. So, for this author, a judiciary is stronger the greater the diversity of its members, so if we want the best judiciary we can get, we should wish to see one which is fully diverse.

25 M. Minow, 'Foreword: Justice Engendered' (1987), in M. Sunder (ed.), *Gender and Feminist Theory in Law and Society*, 2007, pp. 35-120.

26 P. Cain, 'The Future of Feminist Legal Theory', in N. Dowd & M. Jacobs (eds.) *Feminist Legal Theory. An anti-essentialist reader*, 1990, pp. 14-19.

27 M. Duarte, 'O lugar do direito nas políticas contra a violência doméstica', 2012 *Revista Ex aequo* 25, pp. 59-74.

28 C. Menkel-Meadow, 'Portia in a different voice: speculations on a Women's Lawyering process', 1985 *Berkeley Women's Law Journal* 1, pp. 39-63; C. McGlynn, 'Will women judges make a difference?', *New Law Journal*, 29 May 1998, pp. 813-814.

29 K. Bartlett, 'Feminist Legal Methods', in K. Bartlett & R. Kennedy (eds.), *Feminist Legal Theory. Readings in Law and Gender*, 1991.

30 J. Williams, 'Deconstructing Gender', 1989 *Michigan Law Review* 87, pp. 797-805.

31 D. Rhode, *The Difference "Difference" makes: Women and Leadership*, 2003.

32 K. Mack & S. Roach Anleu, 'Skills for judicial work: Comparing women judges and women magistrates', in U. Schultz & G. Shaw (eds.), *Gender and Judging*, 2013, pp. 227-228.

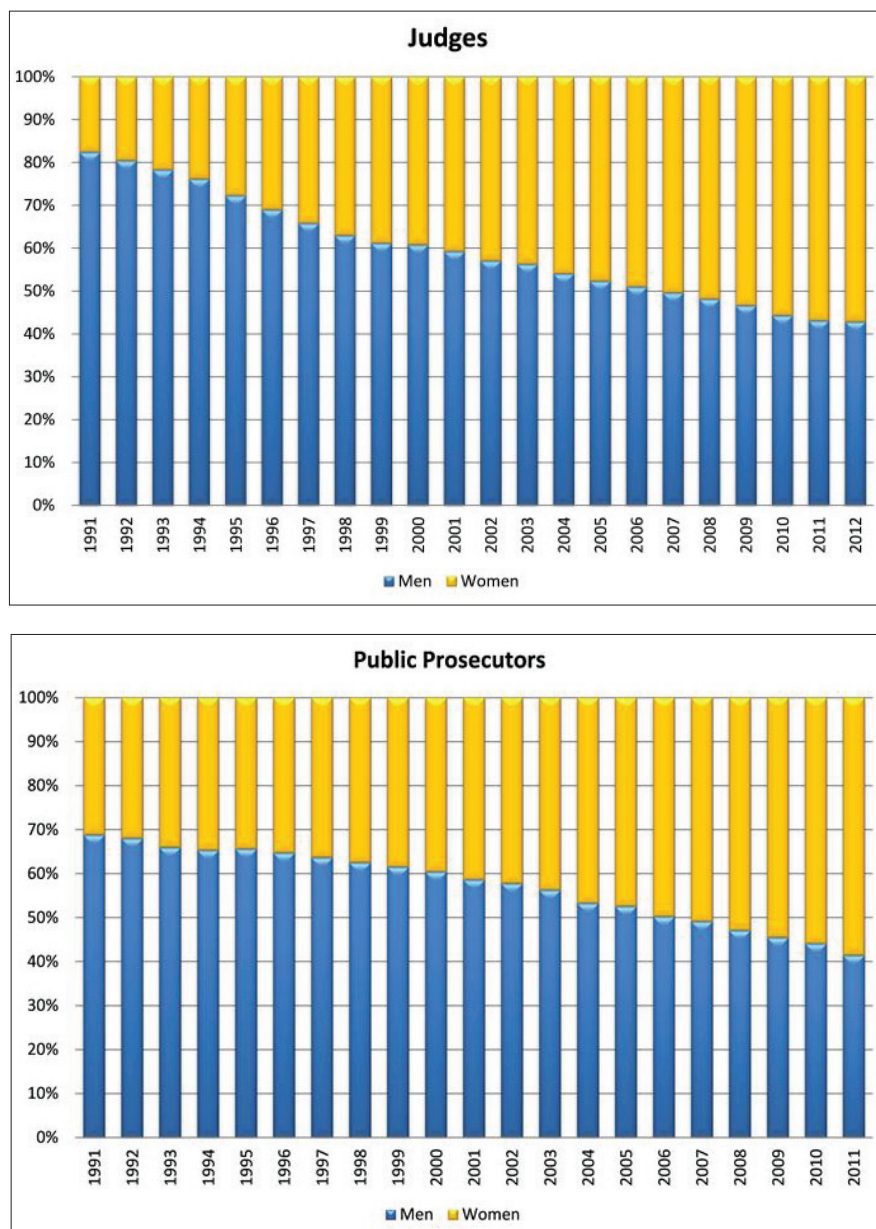
33 See Duarte, supra note 27.

34 E. Rackley, 'Rethinking Judicial Diversity', in U. Schultz & G. Shaw (eds.), *Gender and Judging*, 2013, pp. 501-519.

3. The Portuguese judiciary: a general overview of the presence of women in the judicial professions

In recent decades, the unprecedented transformation in the legal professions has been undeniable. In Portugal, women were allowed to enter the magistracy only in 1974, as a consequence of the democratic revolution.³⁵ From 1976, when the first woman became a public prosecutor, until today, the composition of the legal profession has drastically changed. Figure 1 shows the evolution of the percentage of men and women either as judges or as public prosecutors.

Figure 1 Percentage of female and male judges and prosecutors (1991-2011)³⁶



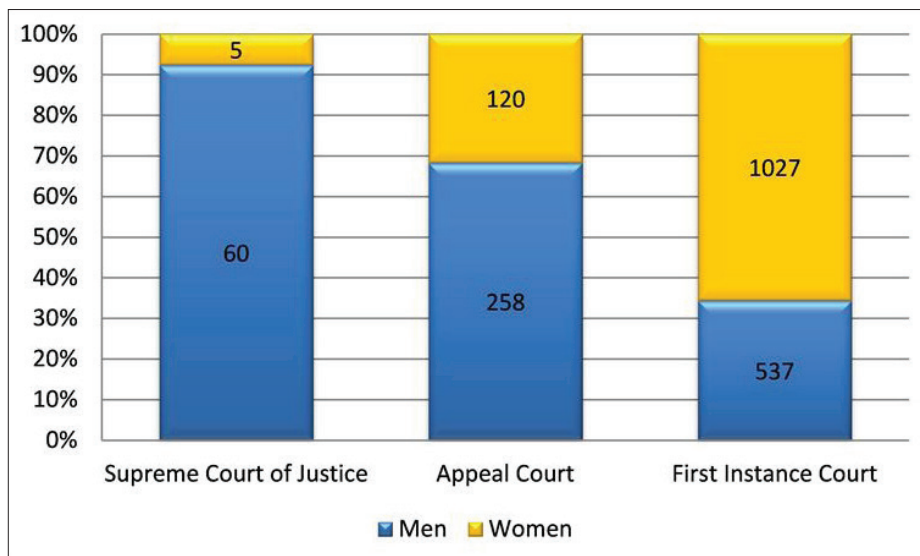
35 Until about forty years ago, when Portugal was still ruled by a dictatorship government, the law was extremely oppressive towards women. For example, only in 1974 were women in general given the right to vote. Only in 1976 was the right of men to open their wives' letters abolished. Only in 1975 was an article of the Criminal Code revoked that claimed that if a man caught his wife in the practice of adultery and he killed her or her lover, the only penalty the perpetrator would suffer would be to be expelled from the judicial district for a period of six months. Only in 1974 were women allowed to have access to a career as a judge and a public prosecutor.

36 Source: DGPI/Prodata/PGR.

The consistent increase in the presence of women in both the career of being a judge and in the Public Prosecution service is evident from the figures above. From 1991 to 2012, the percentage of female judges among the total number of judges in Portugal increased to around 40%. In the Public Prosecution service that percentage dropped to 30%, but that is easily explained by the higher initial percentage of women in 1991. In both branches a milestone was reached in 2006 when, for the first time, female judges and public prosecutors outnumbered their male peers.

However, the access of women to the intermediate and higher levels of the judicial hierarchy³⁷ has been somewhat slow.³⁸ The first appointment of a woman judge to the Constitutional Court was in 1989.³⁹ In 1993 a female judge was appointed, for the first time, to an Appeal Court and only in 2004, 30 years after the abolition of the prohibition on women accessing judicial careers, did the Supreme Court of Justice appoint its first female judge. Figure 2 shows the number of female and male magistrates at each stage of a judicial career.⁴⁰

Figure 2 Number of female and male judges and public prosecutors at each stage of a judicial career (2012)⁴¹



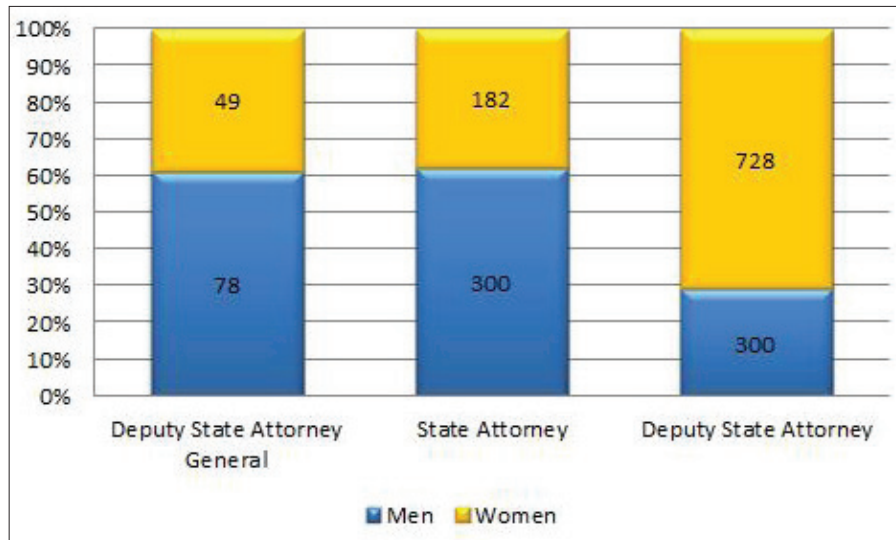
37 At the top of the pyramid of the Portuguese judicial system there is the Supreme Court of Justice, with competence in all legal fields as the highest instance, followed by five Courts of Appeal. Within this judicial system, there are the first instance courts. First instance courts can be characterised by one of three categories, depending on the subject and value of the cases at stake: (1) courts of generic competence (general courts of law); (2) courts of specialized competence (criminal instruction (preparing criminal cases to be heard by other courts), family, minors/juveniles, labour, commercial, maritime, and the execution of sentences); (3) courts of specific competence (civil, criminal and mixed jurisdictions; civil courts and criminal; civil small claims courts and criminal small claims courts). To this structure we must add the Constitutional Court, with specific rules on the appointment of judges.

38 One aim of our research was to understand if the growth in the number of women in legal careers has been accompanied by an equal growth in opportunities for career development. We focused on two main aspects. First of all, we focused on the evolution of the perceptions of women in positions of visible responsibility (e.g., chair of the courts, coordination of public prosecution). We were interested in knowing whether the internal organization of the courts, the rules of progression, recruitment and selection, and training, either by fighting discrimination or by promoting positive discrimination, make it possible or not for women to grow, progress and exercise leadership positions. Secondly, we focused on the areas of women’s specialization within the judiciary, which may be related to their own career options or to the imposition of the internal logic of hierarchical organizations. This part of the project will not, however, be dealt with in this article.

39 As mentioned in the previous footnote, the appointment of judges to the Constitutional Court is substantially different from the remainder of the judicial structure. The majority of the judges of the Constitutional Court are elected by Parliament.

40 The career advancement of judges can be divided into three categories: the first-instance court judges; the Appeal Court judges; and the Supreme Court judges. In the Public Prosecution service, the hierarchy is divided into three levels (from the bottom of the career to the top): deputy state attorney; state attorney; and deputy state attorney general, which is at the top of the career, since the State Attorney General is a political appointment. The State Attorney General is appointed and dismissed by the President of the Republic subject to a proposal by the Government.

41 Source: CSM/PGR.



When we take into account the distribution of women at the different stages of a judicial career, we notice that the presence of women still lags behind in the higher courts. In 2012, we had (and still have) five women among a total of 65 judges at the Supreme Court, which corresponds to around 7% of women in the Supreme Court. In the Appeal Courts, about 32% of the judges are women and, in the first instance courts, that percentage increases to around 66%.

In the Public Prosecution service, the presence of women is much higher, as we can see, where women correspond to 71% of the public prosecutors at the beginning of their career, to 38% of the state attorneys, and to 39% at the top of the hierarchy. Since 2012, and for the first time, the Public Prosecution service in Portugal has a woman as the State Attorney General, which is the top of the hierarchy.

There is a significant difference between judges and public prosecutors when it comes to women having access to higher positions in the career hierarchy. The European Commission for the Efficiency of Justice came to the same conclusion in 2010, when comparing the percentage of female and male judges and public prosecutors, at the different stages of these careers in different countries. In 2010, Portugal, among a total of 33 European countries, was the thirteenth country with higher feminization (65%) among judges at first instance, but when it comes to the Appeal Courts it is in the 24th position, and at the Supreme Court it is the country with the least women judges.

In the Public Prosecution service, the situation is quite different. In a total of 29 European countries, Portugal, in 2010, was in 7th place in the first instance courts, and 3rd in the Supreme Court.

One of the reasons highlighted to explain this difference between the two branches is the different historical path and development of the career. Until 1974, a career in the Public Prosecution service was seen as a preliminary career before entering the judicature. To become a judge, one would need to first become a public prosecutor and only then could one apply to become a judge. In 1974 the two branches were separated and the public prosecutors already in office were obliged to opt for one of the two careers. This division was the result of an imminent need for more public prosecutors. The existence of more vacancies in the Public Prosecution service was concurrent with the opening of the career to women, who quickly accessed the top positions.⁴² But this raises the following question which still has to be answered: is it only a matter of time before women equal the number of their male peers at the top of the judicial hierarchy?

In the population survey carried out in the research project, it is clear that the judiciary is seen as a predominantly male profession. On the subject of women professionals, even though they are the significant majority in the courts of first instance, 61% of the respondents think that there are more male than female judges and public prosecutors, and only 16% think that there are more women.

42 For similar findings in the USA, see B.B. Cook, *Women in the judicial process*, 1988.

The results of different studies on the incorporation of women in the legal professions tend to show that the increase in the number of women was not translated into substantial changes in relation to the ability to influence the prevailing legal ethics. Neither has the status of women in the legal professions automatically improved as it has remained marginal. According to Kohen,⁴³ some forces mitigate a fully open structure, ranging from perspectives impregnated on the criteria of a true meritocracy, the protection of in-groups and long-standing prejudices against outsiders.⁴⁴ Various authors demonstrate these persistent barriers to the equality of opportunity.⁴⁵

4. Paths and experiences

The first clues to the question raised in the previous topic of this paper were sought by analyzing the paths and experiences of female and male judges and public prosecutors in the judiciary. Some studies have shown that there is no significant gender difference in the social perceptions of the work performance of women in legal careers.⁴⁶ But is there any difference in the professional path that might influence different expectations and career advancement for women?

One can find two objective differences between Portuguese female and male judges and public prosecutors. The first one is that women tend to access judicial careers earlier, that is, women tend to apply for and be appointed to a judicial career when they finish their law studies, while men tend to be in legal practice for a few years. The second one is that men tend to move more than women from one court to another, which may be a reflection of women's greater appreciation for family stability at the expense of job satisfaction. In fact, this second objective difference is closely related to the findings on the differences among the expectations towards careers and professional satisfaction. If, on the one hand, female magistrates are more cautious in their ambitions than male magistrates; on the other, they also seem to be more willing to reject promotion in favour of the family, namely if the promotion requires a move to another city or district. Indeed, the current structure of the judicial career requires different moves to different courts. Even within the first instance courts, career progression depends on moving from a general jurisdiction court to a specialized court. These latter courts are fewer in number than the former and are geographically more concentrated. During the interviews carried out within the research, female judges and public prosecutors frequently stated that they would willingly reject promotion if that entailed moving to a different court. This statement was rare among the male judges and public prosecutors interviewed.

'It wasn't my choice at a professional level to come to this court [a general competence court], because I am a supporter of the specialization of courts (...). I live here, and the reason I chose this court was to be close to my family (...). I would never come to this court if it wasn't for my family.'

E1 (female judge)

From another side, older female magistrates are the most discouraged, stating that they no longer want to do a perfect job, or to be a perfect wife or a perfect mother for that matter. They just want to deal with both spheres of their lives. This, once again, was not an observation made by their male peers.

'The social expectation about the role of a woman in the private sphere conflicts with legal professionalism, it is true. Sometimes I wonder if I would be a better professional if I had chosen

43 See Kohen, *supra* note 23.

44 See Epstein, *supra* note 12.

45 See M.J. Mossman, 'Invisible Constraints on Lawyering and Leadership: the case of women lawyers', 1988 *Ottawa Law Review* 20, pp. 567-600; See Thornton, *supra* note 5; See McGlynn, *supra* note 28; See H. Sommerlad, *Gender, Choice and Commitment. Women solicitors in England and Wales and the struggle for equal status*, 1998; See also U. Schultz & G. Shaw (eds.), *Women in the World's Legal Professions*, 2003.

46 W. Felstiner et al., 'The effect of lawyer gender on client perceptions of law behavior', in U. Schultz & G. Shaw (eds.), *Women in the World's Legal Professions*, 2003, pp. 23-32.

not to have a family and children, but I also think I would be much unhappier; I don't know if I am a worse professional because of that. I feel that I have to work harder. But I also feel my personal and family life enriches the way I perform my job.'

E17 (female judge)

Closely related to these findings, the majority of female judges and public prosecutors recognize that women face more difficulties in exercising their professions than men, pointing to the difficulties in reconciling professional and personal life. They relate those difficulties to the *woman* condition, something external to the profession and, therefore, they do not consider them as gender-based discrimination.

'It was very difficult to reconcile work and the family. It is very hard in terms of schedules (...) When the children are little it is very difficult (...). In my very personal experience, the burden of taking care of my family relies on me. It was my choice, but it is very complicated and tough.'

E1 (female judge)

Nonetheless, they tend to admit that this 'woman condition' affects their professional performance and their opportunities in their career progression.

'It is the mirror of how personal life can constrain a woman's professional life. (...) I had the grade of Good without any other reason being given than they didn't think it was the right moment to award the merit mark. For me, it was clearly that it was the consequence of my pregnancies, even though he gave me excellent productivity (...) But, my perception is that, without saying it, because it can't be said, the reason for not having the merit mark were my pregnancies. Only that. (...) All my colleagues were given a merit mark, except me and a female colleague, with exactly the same argument. It was not the right moment.'

E7 (female judge)

This remark is consistent with the perceptions of citizens about the difficulties of women magistrates. In the population survey which we conducted, 53% of the population think that women face more difficulties than male magistrates. For those who affirm that women face more difficulties, 45% believe that those difficulties emanate from society itself while only about 15% believe that those difficulties come from their colleagues.

The fact is that the impact of children or family life in the inspections and evaluations they are subjected to, the reconciliation between a family and a career or the guilt and pressure to perform the role of a good spouse and a good professional are almost absent from the concerns reported by male magistrates. In fact, when these concerns arise in their remarks they are often combined with a reference to the fundamental role that their wives play in caring for the children, performing an essential role that allows them to concentrate on their career.

'My children were raised by their mother. My wife was their father and their mother. When I was at a first instance court I simply didn't have any time for my wife and my children.'

E23 (male judge)

Nonetheless, the majority of female judges and public prosecutors confirmed that they had never experienced any kind of gender-based discrimination. Concerning working conditions, the working environment and relationships with peers, when the question was put in terms of the experience of discrimination, it was seen as a very sensitive subject among the legal professions. The difficulties encountered by women in the development of their professional activities are not interpreted as a gender-based discriminating factor.

5. Does gendered judging actually exist? The perceptions of the professionals and of citizens

Despite the fact that some studies indicate that quantitative feminization has brought significant changes in practice or to professional culture,⁴⁷ many authors continue to address the issue of the differences that women have introduced into the legal system, although the results remain inconclusive.⁴⁸ Kohen⁴⁹ states that although women are considerably different, according to social and ethnic identities, they share a series of experiments. This is a complex issue that has given rise to intense debate. As McGlynn⁵⁰ notes, this argument implies that we question, firstly, if women argue/reason differently from men; secondly, if all women are different from men; thirdly, the impact of gender mainstreaming in other aspects of identity, such as class, race and sexual orientation; and, fourthly, the activity of the judge.

Following this international debate, one of the central objectives of the project was to acknowledge whether in Portugal there is a female model in judging. By mapping the female magistrates' representation of themselves, of their male peers and of any other legal professionals (lawyers and judicial officers), we wanted to know the following: whether there are significant differences between men and women in judicial practice; whether or not there is a reproduction of the principles of law enforcement based on the representation of the neutral professional, without gender identity, responsible for implementing the letter of the law; whether the representations of the role of women in the judiciary differ depending on the area of the law (e.g. criminal or family). In this sense, we wanted to ascertain the perceptions of female magistrates concerning the application of the law, particularly in legal matters where the gender perspective tends to be relevant, for example domestic violence or discrimination in employment.

As we mentioned, the presence of women is much higher in the first instance courts than in the Appeal Courts or at the Supreme Court. For some judicial actors, this situation has contributed to some conservative rulings concerning women's rights, namely in domestic violence cases and rape. Let us see some examples.

In 1989, the Supreme Court, ruling on a lower court decision that convicted two Portuguese males of the rape of two young foreigners who had requested a lift, stated the following:

'(...) it is true that these are abhorrent crimes that have no justification. However, the truth is that, in this case, the two victims greatly contributed to their predicament. Indeed, we must not forget that the two victims did not hesitate to come to the road to hitch a lift from whoever passed by, and this in the hunting ground of the "Iberian macho". We cannot believe that the two women did not foresee the risk they put themselves in, because here, just as in their home country, a desire to attract the opposite sex is an undeniable fact. Thus, when the two women entered the car with two men, they did so, in our view, aware of their danger, especially being in a tourist area of international fame where foreign tourists are usually abundant and who display sexual behaviour that is much more liberal and relaxed than that of most residents. (...)'

In May 2004, the Supreme Court issued a ruling on the crime of murder in which it accepted a breach of the obligation for a woman to sexually subject herself to her husband as a mitigating circumstance:

'In this particular case, we will take into account some particular circumstances of aggravation, not to mention the [few] mitigating circumstances to which the offender is entitled, and thus, on the one hand, the fact that he is illiterate, and also that the victim, without knowing why – ignorance being once more favourable to the defendant – after the end of March 2002, when the defendant returned from France after he had finished a work contract, (...) did not even want to have sex with him, which at least may help explain his doubts as to her fidelity.'

47 E.g. E.B. Junqueira, 'Women in the Judiciary: a Perspective from Brazil', in U. Schultz & G. Shaw (eds.), *Women in the World's Legal Professions*, 2003, pp. 437-450.

48 Cf. Sherry, *supra* note 20; Davis et al., *supra* note 20; Graycar, *supra* note 20; Kohen, *supra* note 23.

49 Kohen, *supra* note 23.

50 C. McGlynn, 'Judging Women Differently: Gender, the Judiciary and Reform', in S. Millns & N. Witty (eds.), *Feminist Perspectives on Public Law*, 1999, p. 100.

In September 2013, the Appeal Court of Oporto confirmed the decision of a lower court to absolve a psychiatrist accused of raping a patient who was 34 weeks pregnant. According to that ruling:

‘To pull the head (or the hair) of the woman, compelling her to perform oral sex and pushing her against a couch to have intercourse do not constitute acts susceptible of being defined as violent.’

Although some magistrates attribute the conservatism of the decisions of the superior courts to the scarcity of women in those courts, the truth is that among the magistrates we interviewed, both male and female, we find two trends. The first one was to affirm that there are no differences between men and women at all. The other one was to affirm that there are no differences, except in certain legal matters for which women had more sensitivity, like domestic violence, child abuse or rape.

‘There is a certain posture labelled as male or female, in men and women, respectively. That is life. But to ask if it has any impact on the administration of justice? No. Unless we are dealing with facts related to gender, in which we have to admit that there are certain personal dramas relating to women that women understand better, in the same sense that I better understand a personal drama which is typically a male one.’

E4 (male judge)

One other pattern was to affirm that women were more sensitive to social problems, and it is reflected in the way they conduct their duties.

‘I think that the presence of women in the judiciary humanizes justice. It relies upon character, but people notice some differences in treatment depending on the judge. The fact of me being pregnant, although my gown hides this somewhat, but maybe people look at me and think: “She is a woman just like the others!” People construct an image of the magistrate, with expectations about the way they speak, behave in a certain manner, and when they notice they are human beings like the rest, this is a good thing. I see no harm in it at all. I do not see any problem with that.’

E17 (female judge)

‘It is a tricky question... Women do have another kind of sensitivity, like a sixth sense..’

E1 (female public prosecutor)

‘The forms of judging are equal, but there is a feminine flair, that is true. With some issues, women have that flair. There is no doubt that they have.’

E 13 (female public prosecutor)

‘Maybe there are some differences in family law and juvenile law cases, yes. For example, when we have to listen to children, they have more empathy with us, maybe because of the maternal aspect, than with a man. (...) I try to make them as comfortable as possible, within the limitations of the court, because it is not a nice place for a child to be. (...) The question does not arise in other legal matters. The other legal matters are very down to earth, I mean, “did it cause the damage or not” or “did it break or not”... It’s different. (...) I am not referring to performance, because performance is equal in both sexes. We are subject to the same censorship in the way in which we work. (...) So concerning the work, I do not think about diligence as such, maybe there are differences.’

E8 (female public prosecutor)

This is, however, a winding path. The views on the admission of women to the legal professions by some of their male peers, when the differences between women and men are highlighted, tend to degenerate into personal indulgence.

‘I think it is very positive that women are in the legal professions. The more, the better. If the world was governed by women there would be less wars, once women are for peace, they have innate human qualities. They are more reasonable, more committed, they know what they want. It is genetic; they are just smarter (...).’

E5 (male judge)

One last tendency was to confirm that women had to demonstrate that they are not emotional or sensitive, and so they have to be more intransigent and arrogant than male professionals.

‘I don’t want to be misunderstood, but I notice that women in the judiciary have a less pragmatic judging style than men and tend to be more despotic in their exercise of power, more arrogant. I think, and many of my colleagues agree, that a woman with power is not as pragmatic. This has nothing to do with age, because there are young judges with common sense, but maybe lacking in experience, while I see old judges who possess a great lack of common sense and sensitivity.’

E10 (male public prosecutor)

‘Men are more practical. I prefer to work with men, to be quite honest. Women are pickier; they bicker. It is our nature. Men are more practical, they are also more stubborn, however.’

E13 (female public prosecutor)

None of the interviewees admitted that the variable of sex had an impact on the decision in a legal case. In fact, the role they mainly attribute to judges is the one of law enforcer, who is neutral and, therefore, non-gendered. Interestingly, this view is not far removed from the one possessed by citizens as divulged by the population survey. This survey investigating the perceptions of citizens about female judges and public prosecutors sought to uncover which image of female judges and public prosecutors the population has and if stereotypes attributed to women in society can be transferred to a female magistrate, or if this is a neutral profession in a gender perspective.

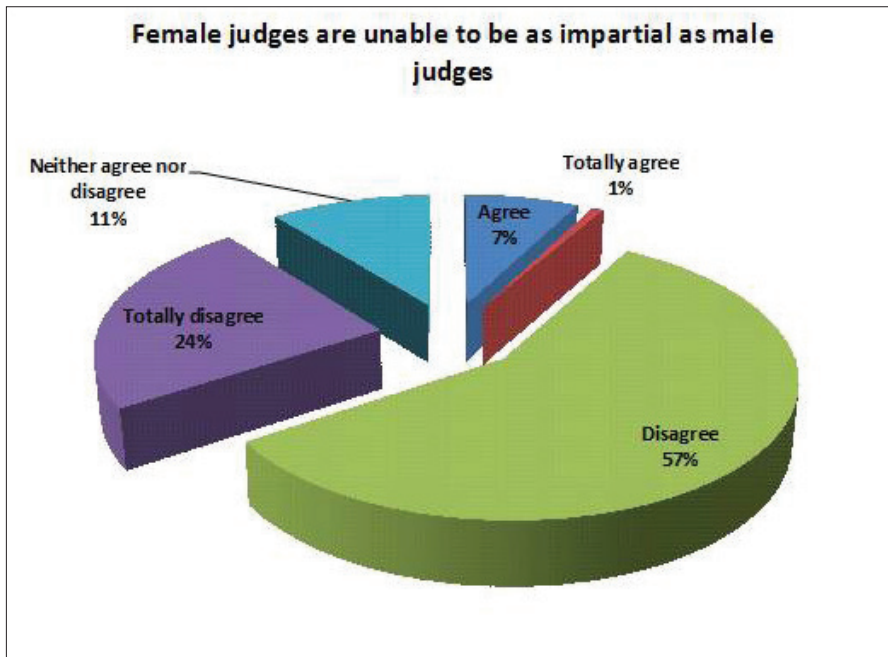
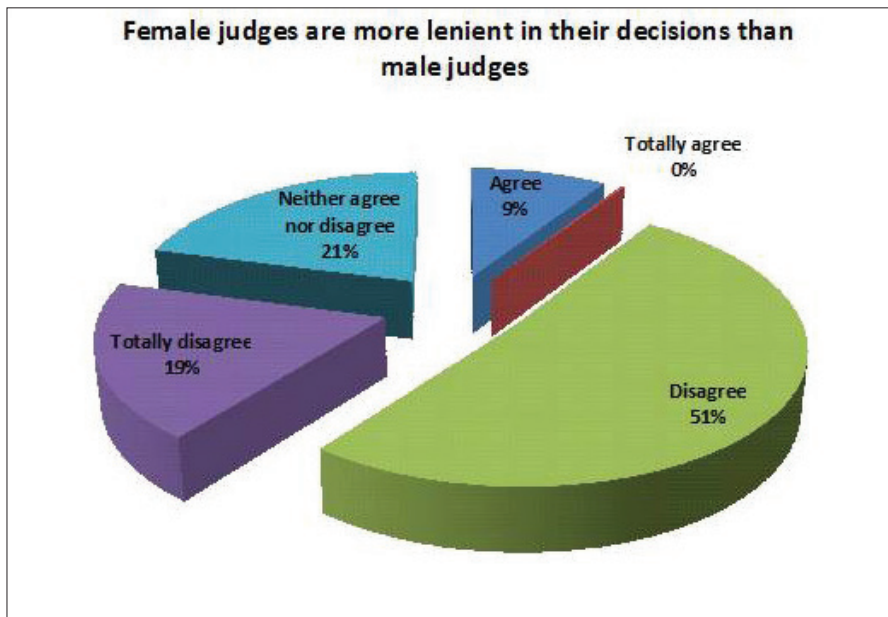
In the survey, the majority of the respondents tend to reject any difference between men and women, but the percentage of people who acknowledge a difference increases when certain aspects are mentioned. As to the remark ‘female judges are unable to be as impartial as male judges’, 81% of the respondents answered that they disagreed with this observation, among which 24% strongly disagreed; while only 7% agreed. As to the observation ‘female judges are more lenient in their decisions than male judges’, 70% disagreed, while 9% agreed.⁵¹

The percentage of people that reject differences between men and women drops when the decisions relate to the Public Prosecution service (only 53% of the respondents disagreed that male public prosecutors displayed more respect towards defendants; while 33% agreed); when the differences are related to characteristics traditionally attributed to women, like sensitivity (35% of the respondents agreed that male judges are not as sensitive as female judges, while 51% disagreed); or when the subject-matter in question is traditionally assigned to women (whether female judges had more ability in cases relating to the family and children, 56% agreed, while 24% disagreed).⁵²

51 See Figure 3.

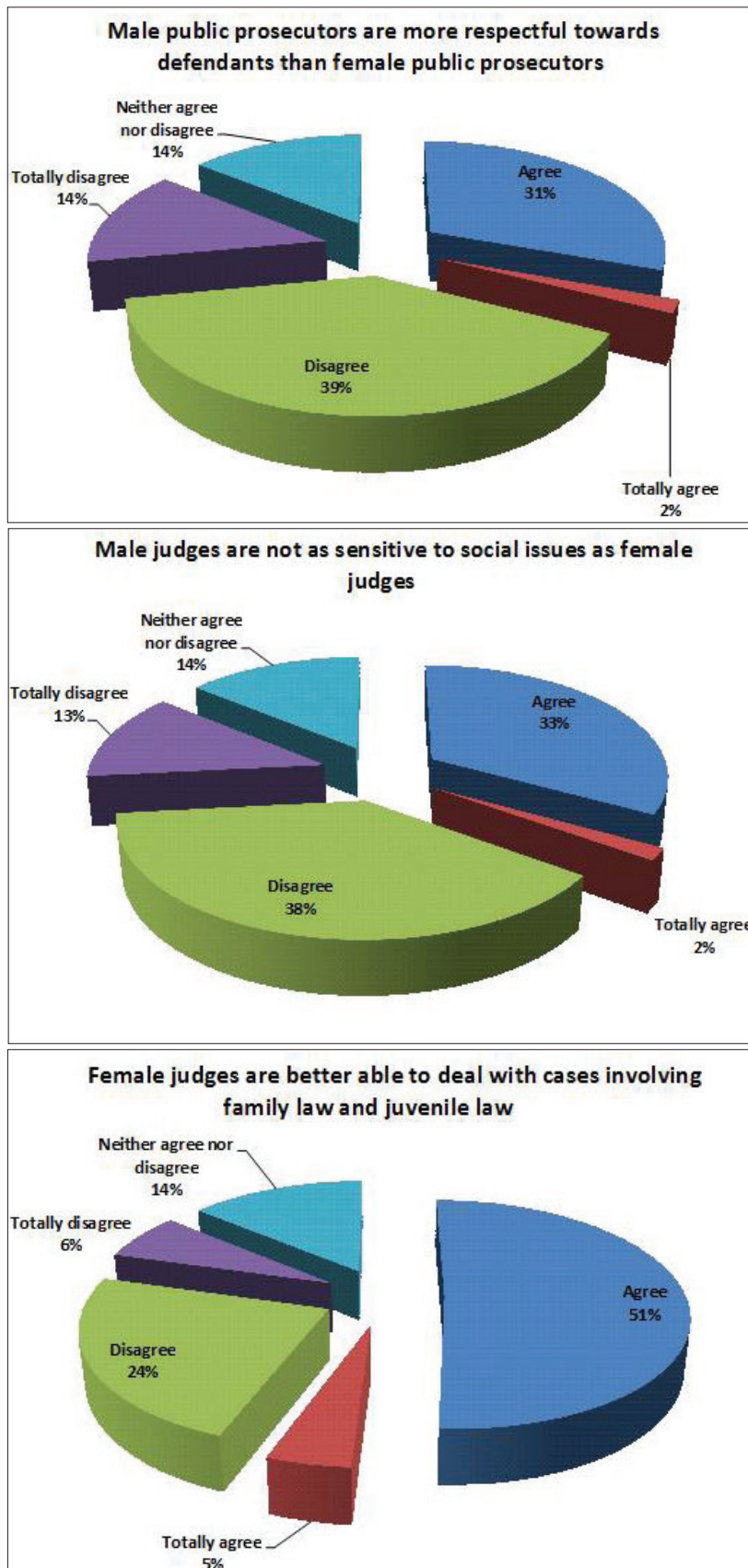
52 See Figure 4.

Figure 3 Survey of the population⁵³



53 Source: CES/OPJ.

Figure 4 Survey of the population⁵⁴



54 Source: CES/OPJ.

The prevailing discourse about the judiciary as a neutral profession in a gender perspective is visible in a particular part of our survey. We asked our respondents to imagine 3 hypothetical situations. In the first one, their best female friend had been raped by a male co-worker. The case went to court. Who would they prefer to judge the case: a female judge, a male judge or would there be no difference. Some 68% affirmed that they would be indifferent, while 26% would prefer a female judge. One curious aspect of these answers is that men were firmly convinced that it would make no difference, while women tended to prefer one of both sexes.

In the second situation, the best male friend was accused of having raped a female co-worker. The same 68% of the respondents would be indifferent as to the sex of the judge, while for 13% it would be better for the friend to be judged by a male judge, even though more respondents admitted that it would be better to be judged by a female judge (19%). In this situation, male respondents were mainly divided between a male judge or were indifferent.

In the third situation, in a case of debt collection, 82% of the respondents affirmed that it would make no difference to be judged by a female or a male judge, while 10% preferred to be judged by a male judge. It was the only situation where male judges had a higher percentage than the female professionals.

6. Discussion of the empirical data

For obvious reasons, differences between female and male judges and public prosecutors' working conditions tend to be less substantial than those presented in several studies concerning lawyers, as the former are part of a public function, whose membership depends on a public tender and whose wages are necessarily equal for the various categories. Also for the same reasons, judges and public prosecutors tend to underestimate any difference in working conditions between female and male legal professionals.

The general perception concerning these professionals is that their judicial career is a highly demanding profession in terms of its technicality and of personal availability, which complicates the management of family life. It is precisely concerning this specific topic that differences among men and women appear in the discourse mainly by female judges and public prosecutors, who claim to have the greatest difficulties in simultaneously achieving a good performance as professionals and as mothers or wives. In fact, this subject was raised by male and female judges and public prosecutors, but in different terms. As women tend to question themselves whether they can properly perform both of those two roles, men tend to wonder if their intense dedication to their work does not make them lose an important part of their family life. This different approach reveals a different attitude towards career strategies. Nonetheless, this is not seen by female judges and public prosecutors as a discrimination factor, but merely as a consequence of the so-called 'woman' condition, which imposes on women the burden of reconciling family and professional life.

Also both magistrates and citizens tend to neutralise the gender variable on judging and decision making in the judicial system. The interviews and the population survey carried out during the research reveal, however, that the neutralization of gender in decision-making tends to smooth out concerning issues that address the stereotyped characteristics of women and men.

Interestingly, professionals readily admit that a number of personal variables (such as age, social background or life experience) clearly influence the process of decision-making and the evaluation of facts presented during a trial, but they exclude the gender variable in that equation. In light of these findings one could pose the following question: is this a consequence of the realization of the fact that the category of being a woman does not entail an uniform body of people? Or is it simply evidence of a cumbersome topic? ¶