European Women’s Lobby’s (EWL) discussion paper on Violence Against Women in European Law

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The EWL Policy Action Centre on Violence Against Women intends with the present paper to provide background for discussing the adoption of a comprehensive European legal instrument to eliminate violence against women. The discussion’s purpose would be to examine the demonstrated need for European legislation on VAW while developing added value argumentation, to conclude on the type of European commitment needed and how to proceed for obtaining it.

1. Overview of current situation

From the early 1990s onwards, significant public and political awareness of the issue of violence against women and children has taken place. Political commitments were undertaken with the adoption of documents in the context of the United Nations, the Council of Europe and the European Union, bringing about consensus that violence against women (VAW) is an obstacle to the achievement of the objectives of equality, development and peace, and a violation of women’s human rights and fundamental freedoms.

In 1992, the CEDAW Committee established to monitor the 1979 Convention on the Elimination of all forms of Discrimination Against Women, adopted general recommendation 19, which defines gender-based violence as violence directed against a woman because she is a woman or that affects women disproportionately and declares it to be “a form of discrimination against women that seriously inhibits women’s ability to enjoy rights and freedoms on a basis of equality with men”. The general recommendation makes clear that “states may be …responsible for private acts if they fail with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation”.

In 1993 the UN General Assembly adopted the Declaration on the Elimination of Violence Against Women, which describes VAW in its preamble as “a manifestation of historically unequal power relationships between men and women” and as one of the “crucial social mechanisms by which women are forced into a subordinate position compared with men”.

The UN Beijing Platform for Action adopted in 1995, serves as the reference framework for developing strategies on VAW, both at national and European level. Member states of the EU undertook a cohesive approach during the negotiations of the Beijing Platform for Action (BPA) and as a result the BPA is the point of reference, according to which European policy on violence against women (and children) is being developed.

The Council of Europe (CoE) denounces violence against women as a serious obstacle to equality between women and men that perpetuates inequality. CoE recognises that practices which may be qualified as torture or inhuman or degrading treatment and to which women are preponderantly exposed by virtue of their sex, such as physical violence, rape, genital and sexual mutilation, traffic in women and girls are still common and have
dramatically increased in some areas, both in quantity and intensity. Since 1993, the Council of Europe has made the combat against violence one of its priorities, adopting Recommendations and launching in 2006 a campaign with the involvement of national parliaments and agencies to combat violence against women, including domestic violence. Focus on domestic violence in particular is increasing.

**European Union (EU) presidency events** have followed, supporting commitments by EU Member States in relation to violence against women, leading to reporting on BPA benchmarks and the adoption of 7 EU indicators on domestic violence by the Danish presidency in 2003. Other EU actions include campaigns, European Parliament reports and commencing the DAPHNE Initiative to combat VAW and children in 1997, linked to strengthening the EU as an area of Freedom, Security and Justice. The legal basis for establishing the subsequent Daphne programmes is **article 152 of the EC Treaty**, which protects **public health**, and article 3(1)(p) of the Treaty, which requires Community action to include a contribution to the attainment of a high level of health protection.

2. Questions presented by current situation

Despite the efforts of the UN, CoE and EU to compel governments into implementing their commitments to eradicate VAW, the lack of a comprehensive legal instrument on VAW at international or regional level results in an *ad hoc* approach by member states, characterised by low prioritisation of the issue. Due to the efforts of the UN, CoE and EU to raise awareness regarding VAW, difficulties of the *ad hoc* approach in measuring the phenomenon and comparing data have come into focus, highlighting the need for a harmonised and comprehensive approach.

Specifically, the **CoE Steering Committee for Equality** (CDEG) between women and men published in July 2006 a stocktaking study on the measures and actions taken in CoE member states to combat violence against women, to which the **EWL European Observatory on VAW** instigated a *shadow* report entitled ‘Reality Check’ with the results of its mapping exercise that was conducted during the same period. As the CoE’s study was comprised by governmental responses and the EWL study by independent expert responses, a comparative reading of the two conveys interesting conclusions regarding the disparities between what is reported as progress by government employees and how this is assessed by experts working in the field. The main inconsistency involves the perceived definition of VAW: many governmental responses seem unaware of the consensus achieved and consequent obligations undertaken at the UN or CoE level, thus defining VAW narrowly or according to their own interpretation; this approach to *ad hoc* definitions of VAW results in inconsistency regarding the perceived elements of a national action plan on VAW, the components of legislation prohibiting VAW, budget allocation for implementing policies and legislation, support to women’s NGOs that provide services to women victims, and other.

Furthermore, the CoE Steering Committee for Equality (CDEG) between women and men published in July 2007 an **analytical study on implementing Recommendation (2002) 5 of the Committee of Ministers to member States on the protection of women against violence**. Central to the Recommendation is the call for a coordinated national strategy in each country, while recognizing diversity of approaches. Member states are asked to introduce, develop and/or improve where necessary national policies against violence based
on the following guiding principles: 

- a. maximum safety and protection of victims; 
- b. empowerment of victimised women by optimal support and assistance structures which avoid secondary victimisation; 
- c. adjustment of the criminal and civil law including the judicial procedure; 
- d. raising of public awareness and education of children and young persons; 
- e. ensuring special training for professionals confronted with violence against women; 
- f. prevention in all respective fields.

Following the theme of disparity of views between politics and practice, the above study compares programmatic implementation (‘on paper’) with practical implementation (‘on the ground’) and is clear in highlighting the disparities between what is reported by governments as implementation and what is experienced by women victims of violence and assisting organizations as implementation. The study underlines the difficulties in monitoring implementation due to the lack of consistency in the concepts and framing of the laws, which in a number of cases do not explicitly recognise gender-based violence, and lack of comparable statistics. For example, the lack of reporting on definitions or penalties for rape, sexual assault and other forms of sexual violence is striking, and suggests a legal situation that seriously fails to protect basic human rights of women, which is difficult to reconcile with the assurance by 29 out of 40 countries that every act of violence against women is penalised. The study concludes on recommending consideration for developing a European code of victim’s rights with an explicit gender perspective, taking account of both women’s and men’s specific or common needs when they become victims of crime.

In addition, the CoE’s European Committee on crime problems (CDPC) published in June 2007 a feasibility study for a Convention against domestic violence, favoring a legally binding document that would deal with penal and non-penal aspects of interpersonal violence. Enhancing uniformity among member states in a concerted approach is considered a necessary value, being more acute since the recent expansion of the EU and given the fragmented and widely differing approaches of the member states. The feasibility study recommends focusing on interpersonal violence between adult partners or ex-partners, and proposes using gender-neutral terminology. As a result, the study includes honor-related crimes and forced marriages as forms of domestic violence, leaving out female genital and sexual mutilation, which only victimises specifically girls.

Finally, the Intergovernmental Conference on the Reform Treaty maintains Declaration N°13 on the fight against domestic violence (page 50 of document CIG 3/07 dated 23.07.2007), which is attached to the commitment to mainstream gender into all EU activities as a horizontal principle (Art. III-116 of the draft Constitutional Treaty).

3. Basic arguments for defining VAW at the European level as a necessary added value

As VAW is a multi-faceted and multi-sectored issue, legal definitions vary between broad all-encompassing (‘organic’) approaches, to narrow and/or gender neutral approaches. A narrow definition may be limited to general criminal law provisions against violence (physical, sexual) and/ or limited to a specific form of violence (domestic violence, trafficking for sexual exploitation), using neutral language, which may address male victimisation when necessary but does not address female-specific or gender-specific victimisation, which is the norm. A broad definition of VAW recognises gender-based
violence as such, including psychological violence whether occurring in public or private life.

All European legal systems at the national level have a negative legacy of male domination, with the laws historically enforcing the male right to control women’s time, property and bodies. During the last century, laws have proclaimed de jure equality between women and men, which means that now women have the right to control their own time, property and body. In practice however, including in society at large and in domestic justice systems, the legacy and mentality of male domination continues to be applied. Current legal systems in the EU maintain non-individualisation of tax and social security systems, where women have derived rights through their relationship to men, including for access to health and pension services. Member states thus continue to be involved in the denial of full citizenship rights to women through the selective ways state services are delivered to women, including for women’s physical safety. Domestic legal systems that enforce dependency of the wife/mother are enforcing social conditions that perpetuate VAW. Although equality between women and men is a principle of European and national laws, VAW is not automatically considered a substantive equality issue, as it occurs beyond the public/private life division of legal protection. At the European level, the puzzle of de jure equality between women and men is missing the piece regarding VAW, as traditionally VAW is considered a private issue and inappropriate for the European level. European law does not explicitly challenge the traditional legal perspective of male physical and psychological domination over women whether occurring in public or private life, thus remaining silent regarding the superficial divide between public and private human activity. The CoE soft law requirements and the specific EU policy intervention of funding the Daphne programmes are not sufficient for shifting the negative legal legacies of the member states on the issue of VAW. A positive, European legal legacy is required to be put into place, in order to balance the historically unequal reception of domestic laws towards gender-based violence.

The Daphne program objective of ensuring a coordinated EU approach to VAW needs to be supported by adopting a coordinated definition of VAW, as the EU approach currently is by definition uncoordinated. The minimum therefore necessary is a broad European legal definition of VAW (that would affect criminal and civil law definitions), in order to ensure a coordinated approach and the harmonising of domestic legal systems. Furthermore, European legislation could regulate issues of prevention (awareness raising, education, information distribution), protection and prosecution (criminal and civil procedural law, support to victims, etc). The CDEG studies mentioned above highlight the need to link the different legal frameworks involved when attempting to address the issue of VAW holistically and coherently, both within the same state structure and supra-nationally.

The best example of the consequences of the ad hoc approach to European practice on VAW is the known problem of the lack of reliable data on VAW. The rates, prevalence and incidence of VAW depend on the inclusion or not of components in the definition of VAW, namely whether a narrow or broad definition is adopted. The definitions of VAW however vary widely in national legislation, thus rendering data incomparable. This gap could be closed if an EU-wide legal basis is secured, as Eurostat would have a mandate to provide annual statistics in the field (as with the annual employment/unemployment figures).

Domestic violence is the form of VAW that allows a narrow approach (less legal adjustments necessary if the general criminal provisions are used) and gender neutral
language (to cover potential male victimisation); therefore, focus on this form of VAW is promoted and States often advertise having progressed with combating VAW when all that has really happened is the State adopted a narrow and/or gender-neutral approach to combating domestic violence. The confusion regarding what is VAW and the misconception that it can be remedied by narrow and/or gender-neutral approaches will be clarified if a broad European wide legal definition is adopted, followed by the minimum measures required, or the framework actions required, in order to ensure appropriate and adequate system responses to VAW incidences.

4. Discussion on defining VAW at the European level as a necessary added value

The UN Beijing PfA defines “violence against women” as any act of gender-based violence, which may be physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, which also include withholding of economic necessities from the victim, occurring in the family, within the general community, by the State or in situations of armed conflict. The Council of Europe and EU generally adopt this definition in the politically binding, ‘soft law’ documents produced regarding VAW, which do not preclude the member states from taking an ad-hoc approach to the issue of combating VAW. The majority of EU Member States mostly adopt a narrow approach in their policy and legislation to combat VAW (See ‘Reality check’, EWL European Observatory on VAW 2007).

Council of Europe approach to VAW: CoE Recommendation (2002) 5 of the Committee of Ministers to member States on the protection of women against violence, adopts a broad definition of VAW. Expanding on the BPA international language, the Recommendation provides for protection against: “a. violence occurring in the family or domestic unit, including, inter alia, physical and mental aggression, emotional and psychological abuse, rape and sexual abuse, incest, rape between spouses, regular or occasional partners and cohabitants, crimes committed in the name of honor, female genital and sexual mutilation and other traditional practices harmful to women, such as forced marriages; b. violence occurring within the general community, including, inter alia, rape, sexual abuse, sexual harassment and intimidation at work, in institutions or elsewhere, trafficking in women for the purposes of sexual exploitation and economic exploitation and sex tourism; c. violence perpetrated or condoned by the state or its officials; d. violation of the human rights of women in situations of armed conflict, in particular the taking of hostages, forced displacement, systematic rape, sexual slavery, forced pregnancy, and trafficking for the purposes of sexual exploitation and economic exploitation.”

The European Court of Human Rights has in a number of cases found a violation of the right not to be subjected to torture or to cruel, inhuman and degrading treatment or punishment (Article 3 of the European Convention on Human Rights), where the perpetrator was a relative of the victim. The Court has also found violations of the right to a fair trial in cases where the state had failed to respond with due diligence to acts of violence against an individual by a private individual. In addition, the European Court of Human Rights has followed the approach developing in international criminal law, which recognises coercion,
as opposed to physical force, as an element of sexual violence. In M.C. v Bulgaria, application no. 39272/98, judgment, 4 December 2003, paras 163-166, the Court said: “in international criminal law, it has recently been recognized that force is not an element of rape and that taking advantage of coercive circumstances to proceed with sexual acts is also punishable. The ICTY [International Criminal Tribunal for the former Yugoslavia] has found that in international criminal law any sexual penetration without the victim's consent constitutes rape, and that consent must be given voluntarily, as a result of a person's free will, assessed in the context of the surrounding circumstances. While the above definition was formulated in the particular context of rapes committed against the population in the conditions of an armed conflict, it also reflects a universal trend towards regarding a lack of consent as the essential element of rape and sexual abuse… the evolving understanding of the manner in which rape is experienced by the victim has shown that victims of sexual abuse - in particular girls below the age of majority - often provide no physical resistance because of a variety of psychological factors or because they fear violence on the part of the perpetrator... In the light of the above, the Court is persuaded that any rigid approach to the prosecution of sexual offences, such as requiring proof of physical resistance in all circumstances, risks leaving certain types of rape unpunished and thus jeopardising the effective protection of the individual's sexual autonomy. In accordance with contemporary standards and trends in that area, the member States’ positive obligations under Articles 3 and 8 of the Convention must be seen as requiring the penalisation and effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim". The Court also notes that the member States of the Council of Europe, through the Committee of Ministers, have agreed that penalising non-consensual sexual acts, “[including] in cases where the victim does not show signs of resistance”, is necessary for the effective protection of women against violence and have urged the implementation of further reforms in this area.

Another initiative at European level is the European Charter of Equality between women and men in local life. “a Charter for Europe's local and regional governments to commit themselves to use their powers and partnerships to achieve greater equality for their people”, drafted and promoted by the Council of European Municipalities and Regions and its partners. The Charter has been signed by 500 municipalities and regions in Europe. Article 22 of the European Charter of Equality between women and men in local life is dedicated to combating gender-based violence, as follows: “1. The Signatory recognizes that gender-based violence, which disproportionately affects women, constitutes a violation of fundamental human rights and is an offence to the dignity and to the physical and emotional integrity of human beings. 2. The Signatory recognises that gender-based violence arises from the idea, on the part of the perpetrator, of the superiority of one sex over the other in the context of an unequal relationship of power. 3. The Signatory therefore commits itself to establish and strengthen policies and actions against gender-based violence, including: providing or assisting specific support structures for victims, providing public information, in each of the mainly-used local languages, on the assistance available in the area, ensuring that professional staff have training in identifying and supporting victims, ensuring that there is effective co-ordination between the relevant services such as the police, health and housing authorities, promoting awareness-raising campaigns and educational programmes aimed at potential and actual victims and perpetrators”.

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The EU approach: Community action can be justified, according to the principle of subsidiarity, only if the objective of the proposed action cannot be achieved satisfactorily at national level and can be achieved better at Community level.

The legal instrument establishing Daphne III [Decision No 779/2007/EC of the European Parliament and of the Council of 20 June 2007 establishing for the period 2007-2013 a specific programme to prevent and combat violence against children, young people and women and to protect victims and groups at risk (Daphne III programme) as part of the General Programme Fundamental Rights and Justice], without providing a specific definition of VAW, acknowledges the elements of a broad VAW definition. It recognises that physical, sexual and psychological violence against children, young people and women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life, constitute a breach of their right to life, safety, freedom, dignity and physical and emotional integrity and a serious threat to the physical and mental health of the victims of such violence. It states that “violence against women takes many forms ranging from domestic violence, which is prevalent at all levels of society, to harmful traditional practices associated with the exercise of physical violence against women, such as genital mutilation and honor-related crimes, which constitute a particular form of violence against women ... the effects of such violence, being so widespread throughout the Community, constitute a genuine health scourge and an obstacle to the enjoyment of safe, free and just citizenship” and that “it is important and necessary to recognise the serious immediate and long-term implications of violence against children, young people and women for their physical and mental health and for their psychological and social development, as well as for the equal opportunities of those concerned, for individuals, families and communities, and the high social and economic costs to society as a whole”. The Decision continues to explain that the fight against violence should be placed within the context of the protection of fundamental rights, as recognised by the Charter of Fundamental Rights of the European Union and the accompanying explanations, which recognises, inter alia, the right to dignity, equality and solidarity and that a high level of human health protection is necessary in the definition and implementation of all Community policies and activities.

The aim of the Daphne III programme is to contribute to the protection of children, young people and women against all forms of violence and to attain a high level of health protection, well-being and social cohesion. Without prejudice to the objectives and powers of the European Community, the general objectives of the Daphne III programme contribute, especially where it concerns children, young people and women, to the development of Community policies, and more specifically to those related to public health, human rights and gender equality, as well as to actions aimed at protection of children’s rights, and the fight against trafficking in human beings and sexual exploitation.

The Decision for the Daphne III program mentions: “with regard to the prevention of violence, including abuse and sexual exploitation perpetrated against children, young people and women and the protection of victims and groups at risk, the European Union can bring added value to the actions predominantly to be undertaken by Member States by the following means: the dissemination and exchange of information, experience and good practices; the promotion of an innovative approach; the joint establishment of priorities; the
development of networking as appropriate; the selection of Community-wide projects including projects supporting free-phone child helplines and hotlines for missing and sexually exploited children; the motivation and mobilisation of all parties concerned; and Europe-wide awareness-raising campaigns against violence. These actions should also encompass support for children, young people and women who are victims of trafficking in human beings”… “Since the objectives of this Decision, namely to prevent and combat all forms of violence against children, young people and women, cannot be sufficiently achieved by the Member States because of the need for an exchange of information at the Community level and for the Community-wide dissemination of good practices, and can be better achieved at Community level due to the need for a coordinated and multidisciplinary approach and by reason of the scale or impact of the programme. the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Decision does not go beyond what is necessary in order to achieve those objectives”. The Decision for the Daphne III programme is explicit in abolishing the divide between the public and the private sphere, as regards the occurrence of VAW and where EU intervention is necessary.

Conclusion

VAW is understood as a form of gender discrimination and considered as such explicitly by the CEDAW Committee and the soft law of the CoE and EU, including the Council of European Municipalities and Regions. The prohibition of gender discrimination and the ensuing obligation of member states to ensure substantive equality require member states to adopt measures to combat VAW. However, explicitly counting VAW as a form of gender discrimination is absent in European law, and present in only three national legal systems (Spain, Sweden, Germany).

The key objective of EU policy regarding equality between women and men is to eliminate inequalities and promote gender equality throughout the European Community in accordance with Articles 2 and 3 of the EC Treaty (gender mainstreaming) as well as article 141 (equality between women and men in matters of employment and occupation) and article 13 (sex discrimination within and outside the work place). De jure equality between women and men at the European level still mainly refers to the public sphere, although the European Court of Human Rights has recognised the positive obligation of member states to act protecting private individuals from acts of violence against private individuals. The legal basis prohibiting gender inequality in EC law is sufficient to introduce VAW legislation, if VAW is explicitly interpreted as a form of gender discrimination, according to the CEDAW Treaty obligations that all EU member states have ratified.

The need for a coordinated approach to VAW in order to enhance uniformity among member states is now considered a necessary value by the CoE and the EU, given the problems arising from the ad hoc approaches of the member states, which include lack of reliable data and gender neutral approaches. Gender neutral approaches to combating domestic violence or other forms of VAW (for example human trafficking) may also be considered indirect discrimination.
A European comprehensive law on eliminating VAW will complete *de jure* equality, which is still incomplete at European level due to the superficial distinction between protecting equality and human rights only in the public sphere of human activity. A European comprehensive law on eliminating VAW will also shed light in domestic legal processes that maintain secondary citizenship status for women and continue to apply and perpetuate the historically unequal legacy of male domination.
Notes from brainstorming meeting on VAW in European law
EWL office, 22.10.2006

Participants: Colette DeTroy (Director of EWL policy action centre on VAW), Eliane Vogel-Polsky (Professor of European law), Natasha Kazatchkine (Amnesty Int’l EU office), Cliona Sharkey (Amnesty intern), Georgia Tsaklanganos (EWL legal expert).

The brainstorming meeting was framed within the context of EWL’s ongoing work regarding a European law on violence against women, especially related to the EWL shadow Directive proposal of 2002, which has a part on violence against women. The aim of the discussion was to conclude on what type of political engagement and strategy we want; to this effect the background discussion paper on the current state of affairs was available.

A first general conclusion of the discussion is that there is legal basis for demanding European ‘hard’ law on violence against women; a Directive is most appropriate as it has easier adoption processes. In addition, as Prof. Vogel Polsky pointed out, in C-144/04 Werner Mangold v. Rudiger Helm, the European Court of Justice found that Member States should ensure the application of Directive principles by not enforcing opposite national laws, even though the date of direct implementation has not expired, therefore making the Directive principles almost directly applicable in Member States.

Other conclusions of the discussion were as follows:

● in view of the Inter-governmental conference and the newly agreed upon draft Treaty amending the Treaty of the European Union and the Treaty establishing the European Community (Reform Treaty), the main issues that arise now are the possible change in the co-decision processes for the adoption of European law and especially Directives, the text and positioning of the Charter of Fundamental Rights within the Reform Treaty, and what this means for European acquis on equality between women and men.

● the Reform Treaty maintains the principles of subsidiarity and proportionality; we need to fine-tune our argumentation that a Directive on VAW is proportional. Main arguments to this effect are included in the discussion’s background paper.

Recommendations:
1. an EWL Working Group (WG) should examine the opportunities the Reform Treaty gives us. This WG could be comprised by EWL legal experts on European law and/or violence against women, or in collaboration with the European Women Lawyers Association (EWLA). This could also become a separate Daphne project. A meeting of the European Observatory on VAW with legal experts may also be envisaged.
2. the FEMM Committee of the European Parliament may undertake preparing a report on the Reform Treaty and equality between women and men; the analysis should be examining the new legal European status quo and the acquis on equality between women and men.
3. in order to demand a Directive, we will possibly need to form a big coalition and organize a relevant petition.

- The Council of Europe’s work on VAW is concrete and with steady progress. The European Court of Human Rights (ECHR), which offers the parallel of ‘hard law’ in the CoE area, has case law indicating that Member States should be pro-active regarding issues of VAW. Therefore, we should find a process through which the ECHR in Strasburg could make the concept explicit for Member States to become more pro-active regarding the issue of VAW.

This paper has been written by Georgia Tsaklanganos and is the result of a common consultation with Eliane Vogel-Polsky (Professor of European law), Natasha Kazatchkine (Amnesty Int’l EU office), Colette De Troy (Director of EWL policy action centre on VAW). 2007