

A LOOK AT DOMESTIC AND GENDER-BASED VIOLENCE IN PORTUGAL: FROM LAW TO DISCOURSES

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ABSTRACT

Despite legislative advancements, domestic violence is still today a crime considered as "minor" by many, or often the actions that materialise it are not even recognised. The first steps in Portuguese legislation were taken by the Penal Code approved in 1982, which typified the crime of ill-treatment between spouses, and by the Law n.º 61/91 of 13th of August, which guaranteed "adequate protection to women victims of violence". However, only in 2007, was the crime of Domestic Violence created, which shows, from 1982 until then, a long path of hesitations and slow social evolution concerning the consciousness of this crime's seriousness. Until 2007, the crime of spousal abuse was integrated in a broader criminal arrangement, characterised by the abuse of persons. In 2009, with the typification of the crime of Domestic Violence and with the publication of the legal regime applicable to the prevention, protection, and assistance of victims, denominated as Law of Domestic Violence, a more consolidated phase was inaugurated, in both legal treatment and social intervention. Despite these evolutions, Portugal continues to witness an attitude of "social and collective consent" to some forms of Domestic Violence, oftentimes disguised in the acceptance and normalisation of gender inequalities. We have seen news stories where judgements are presented, within the scope of Domestic Violence cases, where discriminatory ideas against women and excuses for the crime of Domestic Violence are manifested. This is proof that some of the representatives of justice (the judges) do not accept what has already been legally approved in the Portuguese legal system. Similarly, recent studies on the population's perception of domestic and gender-based violence show the abiding ideas and understandings of acceptance and normalisation of domestic and gender-based violence in Portuguese society. We intend to present the evolution of the typification of the crime of domestic violence in Portugal. Then, we intend to understand how this phenomenon has been perceived in Portuguese society. Therefore, we will be able to understand the continuities and ruptures between the legislative body and the social body in what concerns Domestic Violence and Violence against Women in Portugal.

Keywords: *domestic violence; violence against women; social perception of violence; judgments on domestic violence*

INTRODUCTION

In Portugal, the legal submission of women to the power of their husbands was present during the 20th century. The social and cultural perception of the woman was that of wife, mother, housewife, submissive and obedient to her father and then to her husband. The latter could use physical violence as a way to educate and punish, and until 1852, the husband's right to aggression against his wife was enshrined in Portuguese law. This situation is also visible in the Penal Code in force in 1886, in which an attenuating factor was established in case the husband committed murder against his adulterous wife. During the First Portuguese Republic (1910-1926), social and cultural changes were felt due to the republican secular stance, to the appearance of feminist movements, and to the First World War with its consequent change in women's role in factories and in society. With the end of the First Portuguese Republic and the establishment of the military dictatorship in 1926 and "Estado Novo" in 1933 (-1974), we witnessed a regression of women's rights: they lost equality in marriage and within the family; they became once again dependent on their fathers and husbands for a set of actions (e.g. travelling, opening a bank account, signing a work contract, etc.); education was again segregated according to gender; and they could no longer integrate some professions (e.g. diplomatic careers or judiciary). For 48 years, women lost their rights, being that their social status of submission and the absolute power of men over them have been established and reinforced [1].

With the Carnation Revolution of 25 April 1974, we witnessed a change in the social and legal status of women in Portugal. In 1974, the prohibitions related to women's participation in certain careers were removed, and, in the following year, the Concordat between the Portuguese State and the Holy See, which restricted women's rights to request divorce, was revoked. Finally, in 1976, the principle of equal rights between men and women was constitutionally consecrated and was, it is hoped, the legal and ideological basis for the legal changes that ensued.

It was necessary to wait until 1982, with the approval of the Portuguese Penal Code, for the crime of ill-treatment between spouses (I underline that only between spouses) to be typified. This crime was thrust in a broader framework: the ill-treatment of persons, and was a public crime.

Only in the 1990s (Law n. ° 61/91 of 13th August) we witnessed the "adequate protection of women victims of violence", namely in crimes of violence whose motivation was "the discriminatory attitude towards women" (Law n. ° 61/91 of 13th of August). Still in that decade, in 1995, the psychological (Decree-Law n.° 48/95 of 15th March) ill-treatment is now included as ill-treatment. Also on that date, there was a widening of the aggressor's concept, from being only the spouse to include those living in a similar condition to that of the spouse and, in 2000 (Law n. ° 7/2000 of 27th May), it was again extended to the parents of common first-degree descendants.

In 1995 (D-L n.º 48/95 of 15th March), the transition from a public to a semi-public crime was made. Three years later, in 1998 (Law n.º 65/98 of 2nd September), the Public Prosecution Service obtained the possibility to initiate the diligences and procedures when the victim's interest so requires, and provided that there is no opposition from the victim before the indictment.

Only in the beginning of this century, in 2000, this crime assumes again a public nature - Law n.º 7/2000 of 27th May - an important change that places this crime as a responsibility of each of us, as well as of society. The victory for the establishment of the crime as public, although consolidated in law, still has a long way to be internalized by society, in general, and by magistrates, in particular. In fact, in 2008, the then President of the Portuguese Bar Association defended in the Portuguese Parliament that the crime should no longer be public, as he considered that "women should be free to choose [whether to withdraw the complaint], as long as the consequences of violence are not irreversible", alleging that "There is a kind of impertinent feminism in these laws"(Botelho, 2008) [2]. This shows a lack of knowledge of this reality and an attempt to destroy and annul all the legislative progress made in recent years, based on the much-repeated saying in Portuguese society: "entre marido e mulher ninguém mete a colher" (it could be translated into English, as "No one should poke their nose into a husband-and-wife fight"). The importance of this crime being considered as public is reflected in the numbers presented by the APAV's 2020 Annual Report [3], in which in about 20% of the cases, references of the crime are made by the Criminal Police Bodies, and in about 14% by friends, acquaintances and/or neighbours.

Despite these advances and the growing visibility of the problem, only in 2007 the crime of domestic violence was created - Law n.º 59/2007 of 4th September. It was necessary to wait 25 years since 1982 for this crime to be typified, which reflects a slow process of evolution of the social and legal conscience of the gravity (and dimension) of the crime of violence. It was in the same year, 2007, when the 2nd national survey on domestic and gender-based violence was carried out, more than a decade after the first one. In 2009, the so-called Law of Domestic Violence (Law n.º 112/2009 of 16th September) appears, updated in 2020, which establishes the legal regime currently applicable for the prevention of domestic violence and for the protection and assistance of its victims.

DISCOURSES ON DOMESTIC VIOLENCE

Despite all the progress made in preventing and fighting gender-based violence and specifically domestic violence, the truth is that this problem, this crime, is far from being overcome. In 2020, according to the APAV's Annual Report [3], 14.854 crimes of domestic violence occurred. According to data collected in the media (from January 1 to November 15) by the Murdered Women Observatory of the Women's Alternative and Response Union, 30 women were

murdered, 16 of them in the context of intimate relationships (in current relationships – 9 women; past relationships – 6 women; or intended relationships – 1 woman) (OMA-UMAR, 2020) [4]. In more than half of the situations (63%), there was already previous violence and, in 40% of the cases, there was already a complaint, as well as death threats. When compared with the same period in 2019, the number of victims decreases (from 21 in 2019 to 16 in 2020). However, femicide attempts have increased from 24 to 43 (OMA-UMAR, 2020) [4]. According to the Homeland Security Report 2020, there were already 27,637 reports of domestic violence last year, within which 85% were directed at the spouse or equivalent. Most of the victims (75%) are women and 81.4% of those reported are men.

If on the one hand, the recent advances in policies and measures to protect the victims of domestic violence have been considerable, we know that old beliefs remain in society, blocking action and intervention in this field. The list of sexist, misogynistic judicial decisions, without any respect for the victim, is long and demonstrates the permanence of a culture of contempt for women.

31 years ago, in 1989, the Supreme Court of Justice considered that two tourists, kidnapped in Faro and raped by two men, were partly to blame for what happened. The four judges of the Supreme Court said in the Judgement: "the two offended women contributed a lot to the occurrence (...) a young girl, but grown woman who: a) Being a foreigner, does not hesitate to come to the road to ask for a lift from passers-by; b) It is impossible that they did not foresee the risk they were running" (Ruling of the Supreme Court of Justice).

In 2013, a judge of the Lisbon Court of Appeal, faced with a case of a woman's aggression with a punch on the nose and a bite on the hand while holding her newborn child in her arms, considered the case as not revealing "special censoriousness or perversity". In the ruling, it is read that: "it is clear that this conduct of the defendant, even taking into account that the assistant [the victim] was holding her child (then 9 days old) in her arms, is not sufficiently serious to state that, with it, the personal dignity of the applicant was degraded and, therefore, that her physical and emotional well-being was intolerably damaged" and that "the fact that, on several occasions, the defendant, in the course of discussions between them, called the assistant a "whore" adds little or nothing to the seriousness of that conduct. Thus, the decision of the appealed court to convert the incrimination into a crime of common assault and battery does not merit censure"(Ruling of the Lisbon Court of Appeal).

In the Porto Court of Appeal, in 2016, the judge uses bible passages to justify domestic violence and blames the victim for having committed adultery (which is not a crime in Portugal): "a woman who commits adultery is a false, hypocritical, dishonest, disloyal, futile, immoral person. In short, she lacks moral probity (...) it is not surprising that she resorts to deceit, to farce, to lies to hide her disloyalty and this may include the imputation of ill-treatment to her husband or partner (...)

This is the path of an adulterous woman” [5]. The aggressor “won” a suspended sentence.

In the Porto Court of Appeal, a female judge and a male judge, in 2017, when judging a case of domestic violence – a case that occurred in 2015, of a woman assaulted with a wooden club with nails – justified the acts by blaming the victim: “This case is far from having the gravity with which domestic violence cases are usually presented. On the other hand, the conduct of the accused [aggressor] occurs in a context of adultery by the assistant [victim]. Well, a woman’s adultery is a very serious attack on the honour and dignity of men. There are societies in which adulterous women are stoned to death. In the Bible, we can read that the adulterous woman must be punished by death. It was not so long ago that the penal law (1886 Penal Code) punished with a penalty little more than symbolic the man who, finding his wife in adultery, killed her in the act (...) The woman’s adultery is a conduct that society has always condemned and strongly condemns (and honest women are the first to stigmatize adulteresses), and therefore see with some understanding the violence exercised by the betrayed man, vexed and humiliated by his wife” (Ruling of the Oporto Court of Appeal).

In a domestic violence trial, which began in 2016 in the Lisbon Court of Appeal – a high-profile case, since the aggressor was a politician and the victim a well-known TV presenter – the judge used expressions from the beginning of the trial that showed what the penalty, or lack of it, for the aggressor would be: “I confess that I was looking at pictures of your wedding and everything looked wonderful”; “It seems that Professor Carrilho was a man, until the birth of Carlota [the couple's second daughter], and then became a monster”; “the human being doesn't change like that” [6].

At the end of 2018, a judge removed the electronic bracelet from an offender, who was sentenced by a First Instance Court to three years of suspended prison, during which time he was forbidden to approach the victim. The aggressor, husband of the victim, punched through her eardrum and it was proven that the situation of domestic violence was recurrent, even during the victim's pregnancy, as well as the threats against her and her child. The judge, in addition to removing the electronic bracelet, reduced to one year the time during which the aggressor could not approach the victim. The judge argues that there is an exaggeration that is harmful to men: “If, for a long time and until a few years ago, the victim of domestic violence felt that it was most likely that their complaint would come to nothing (...), the truth is that, in recent times, there have been increasing signs of a trend in the opposite direction, in which the most banal argument or disagreement between husband and wife is immediately considered domestic violence and the alleged aggressor (usually the husband) is demonised and no credit can be given to him” (Ruling of the Porto Court of Appeal).

Just 3 years ago, in 2018, the Porto Court of Appeal determined to maintain the suspended sentence for the two employees of a nightclub that sexually abused,

in 2016, a 26-year-old girl who was unconscious. According to the judges: "The guilt of the defendants [although in this seat, the guilt is no longer called to the case] lies in the median, at the end of a night with a lot of alcoholic drinks, an environment of mutual seduction, occasionality (not premeditation), in the practice of the facts. The illicitness is not high. There is no physical damage [or it is minor] nor violence [the abuse of unconsciousness is part of the type]" (Ruling of the Porto Court of Appeal).

In the same year, 2018, the First Instance Court of Viseu questioned that a modern and autonomous woman can be a victim of domestic violence and acquits the aggressor of two crimes of domestic violence, a crime of disturbance of private life, and a crime of insults, to convict him of a crime of prohibited weapon's possession. The decision was confirmed in 2019, after an appeal filed at the Coimbra Court of Appeal, with the same justification given by the judge of Viseu: "In the trial hearing she denoted to be a modern woman, aware of her rights, autonomous, non-submissive, employed and with her own salary, not dependent on her husband (...) Her strong and independent character was even confirmed by several witnesses. Therefore, we believe that it would be difficult for the assistant [victim] to accept so many acts of abuse by the accused, and for so long, without denouncing them and trying to eradicate them, if necessary, by withdrawing from him" [7].

Recently, a professor of criminal law went on trial for attacking his partner. During the trial, the judge addressed the aggressor as "Mr. Professor" and at the beginning of the trial she even addressed him to reassure him: "Your Excellency, Professor Doctor, you insist on calling me a feminist, but I am not". In a report in the Público newspaper, it is highlighted that: "At the end, the judge addresses 'Mr. professor', promising him that she will schedule a session exclusively to hear him. However, this session did not take place on the scheduled date. In a seven-page petition sent to the court, Filipe [the aggressor] dismisses his lawyers. He justifies: he was 'astonished at the content of the conclusion of the fact analysis' by the lawyer, namely having said that their relationship was 'toxic from both sides'. He refers to domestic violence 'as a crime against the Church of political feminism as a branch of cultural Marxism', speaks of gender 'Nazism', of the totalitarianism of the feminist states of the West, and ends with a list of declarations of 'death': 'Death to all political commissioners of the Supreme Judicial Council!' (...) 'Death to all feminists'" [8].

CONCLUSION

In a study prepared in 2016 by Conceição Gomes, Paula Fernando, Tiago Ribeiro, Ana Oliveira and Madalena Duarte [9], where 500 judicial decisions in cases of domestic violence are compared, it is concluded that there is a set of judgements that excuse the aggressor for factors such as the victim's adultery, making, as they say, "his [the aggressor's] guilt lighter" (p.232). Furthermore, they found that the facts' characterisation, on which the domestic violence is based,

are presented on the basis of "concepts and expressions such as 'disagreements' and 'family problems', taking the focus off the decision of the conduct's criminal nature and the damaged legal assets, and assuming that the aggressions that occurred are 'problems' to be 'solved' 'within' the conjugal life, making the victim co-responsible, familiarising the crime and removing its penal dignity and social censurability" (p.141) [9]. They remove, therefore, all social responsibility and all legitimacy of the crime as a public crime. Another issue these researchers pointed out is that the process is still so dependent on the victim's testimony and when she does not testify, "the system, because it centres its procedural strategy on her, feels 'frustrated'" (p.238) [9]. This act is perceived as an attitude of non-cooperation by the victim, which is mirrored in the outcome of judicial decisions. There is an incapacity of the system to understand the difficulty that the victim presents in testifying against the person who supports her or her children and with whom, many times, she still cohabits. In most situations the judicial response is only one part of a broader problem, so the victim's refusal to testify must be understood taking into account the social, economic, emotional, family and cultural factors that involve and characterise that victim.

The perception of the victim as a dependent and 'suffering' woman is another 'clash' between the realities of some victims and the decision-makers. Thus, victims who do not meet this requirement are disregarded, which is reflected in the decisions that are taken. From a symbolic point of view, the fact that coercion is often centred on suspended sentences without any other obligation or that, in many situations, coercion measures such as term of identity and residence, unaccompanied by any other measure, reflects a position in which the crime is considered as not very serious. This situation also occurs when this decision is accompanied by vague or impossible to implement and/or control injunctions, such as "apologies", "not to assault the victim anymore", "not to drink any more alcoholic beverages", "not to mistreat his wife in any way", etc. The sensation of lack of seriousness may leave the victim with a feeling of "abandonment" and lack of protection, which reduces the motivation to file a complaint. This misevaluation certainly has consequences for the aggressors' and the victims' attitudes and in the way society, in general, perceives this crime.

According to Boaventura de Sousa Santos, Maria Manuel Marques, João Pedroso and Pedro Ferreira (1996, pp.51-56) [10], the courts fulfil, in contemporary societies, several types of functions that go beyond the judicial field, namely instrumental, political and symbolic functions. The first, and most obvious, refers to their role in dispute resolution, in social control, in administration and in law creation. Their political function is related to their legitimacy as sovereign bodies and to the social control they are called upon to exercise. Finally, the symbolic function enables citizens to trust the functioning of institutions and the achievement of justice (p.55). The Councils that supervise the action of magistrates could have rescued this symbolic question, in the cases of the mentioned processes, through some punishment. Instead, what we verified was complete impunity and that it is often the media that ends up exposing these

cases and that exerts (symbolic) pressure on the sexist and disqualifying decisions of many magistrates.

One of the questions we should reflect on is whether these judicial decisions refer to an individual understanding of their authors or, on the contrary, whether they reflect a social and cultural perspective present in the country. If we take into account some studies in the area of domestic and dating violence, we may find this answer. In the National Study on Dating Violence in University Context [11], conducted between 2017 and 2020, the authors found that myths and stereotypes persist both about the causes associated with domestic violence and about the characteristics of the victims.

We still have a sexist justice system that places the burden of proof on the victim and that continues to misevaluate and excuse violence against women. We still have a law and a legal discourse (of judicial decisions) that move in opposite directions. This may be related to the legal and criminal system's limits, which is incapable of responding to the complexity of the phenomenon. Beliefs persist in Portuguese society, even among the youngest, that call into question the victims' rights and, particularly, women's rights. Many deny this problem as a strategy to avoid questioning the myth of the family as a safe place and a place of affections [12]. In addition, there are other myths about the women's role which favour these attitudes, namely "marriage is a lifelong commitment; in the nuclear family women should play the expressive role and men the instrumental role; in case of divorce women benefit from alimony provided by their ex-husbands" [13], among others.

Women victims of domestic violence need the law to be applied without prejudice, beliefs, myths. They also need (and demand) a society that does not judge them and that is structured on egalitarian principles and ideals.

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