

Criminalization of domestic violence and interculturalism

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1. Introduction.

A well-known sociologist named GIDDENS states that home is the most violent place to be, and the likelihood of being assaulted within the family home is much higher than the one of being killed or raped in the street at night¹⁴. My intervention in this Nanterre Colloquium will address the problems posed by interculturalism concerning the criminalization of domestic violence.

Domestic or family violence, or, to be more precise, domestic and family violence, is a very serious social issue, with excessive costs at many different levels: it imposes on society

¹⁴ GIDDENS, 2001, p. 193.

and the State extremely high demands, regarding Welfare, Housing, Healthcare, and legal support for the victims¹⁵.

None of the expressions used previously – “domestic” or “family” violence is adequate to translate this phenomenon in its full extension, so, for accuracy sake we should use both expressions combined. Domestic violence implicates the existence of some sort of cohabitation - that the victim and the aggressor live under the same roof, whether they are involved in a family relationship or not. On the other hand, if the victim and the aggressor do not live together but are bonded through a family relation, such as marriage, or parenthood, we are still in the presence of “domestic violence”, interpreted in a wide sense. I will use both this terms indistinctively.

The social-ecological model of explanation for domestic violence was introduced in the decade of eighty of the 20th century. This model considers the complex interplay between individual, relationship, community, and societal factors. It allows us to understand the range of factors that put people at risk for violence or protect them from experiencing or perpetrating violence¹⁶. The first level (individual) identifies biological and personal history factors that increase the likelihood of becoming a victim or perpetrator of violence. Some of these factors are age, education, income, substance use, or history of abuse. The second level (relationship) examines close relationships that may increase the risk of experiencing violence as a victim or perpetrator. A person’s closest social circle – peers, partners and family members – influences their behavior and contributes to their range of experience. The third level (community) explores the settings, such as schools, workplaces, and neighborhoods, in which social relationships occur and seeks to identify the characteristics of these settings that are associated with becoming victims or perpetrators of violence. The fourth level (societal) looks at the broad societal factors that help create a climate in which violence is encouraged or inhibited. These factors include social and cultural norms that support violence as an acceptable way to resolve conflicts. Other large societal factors include the health, economic, educational and social policies that help to maintain economic or social inequalities between groups in society.

So, as we can acknowledge, domestic violence is a partially cultural induced problem. Its emergence depends on the cultural acceptance of violence as a whole and the acceptance of domestic violence in particular. The slow or rapid change of social and cultural norms will directly interfere with the way as the criminal law draws the frame of State intervention.

¹⁵ MANUEL LISBOA *et al.*, 2003, p. 13.

¹⁶ *See* CORSI, 1999.

2. The incrimination of corporal punishment.

Today, in Portugal, domestic violence is a crime, stated in article 152 of the Penal Code. This article of the Portuguese Penal Code states that:

“1 – Any person who, repeatedly or not, inflicts physical or psychological maltreatment, including corporal punishment, deprivation of freedom, and sexual offenses:

a) To spouse or ex-spouse;

b) To a person of different or same sex with whom the agent keeps or has kept a dating or similar to spousal relationship, even without cohabitation;

c) To progenitor of a common descendent in the first degree; or

d) To a especially defenceless person, due to her age, disability, illness, pregnancy or economical dependence, with whom the agent cohabitates;

will be punished with a penalty of one to five years of imprisonment, if higher penalty is not applicable by another Criminal Code disposition.

2 – In the case stated in the previous number, if the agent acts against a minor, in the presence of a minor, or in the common domicile or in the victim’s domicile, will be punished with a penalty from two to five years of imprisonment.

3 – If from the facts defined in number 1 results:

a) Serious offence to the physical integrity, the agent will be punished with a penalty of two to eight years of imprisonment.

b) Death, the agent will be punished with a penalty from three to ten years of imprisonment.

4 – In the cases stated in the previous numbers, may be applicable to de defendant accessory penalties of prohibition of contact with the victim, prohibition of use of weapons, for a period of six months to five years, and obligation of frequency of domestic violence prevention specific programs.

5 – The accessory penalty of prohibition of contact with the victim shall include the withdrawal from her residence or place of work and its reinforcement shall be supervised using remote control technical means.

6 – Any person who is sentenced by crime defined in this article may, regarding the concrete severity of the act itself, and its connection with the agent’s exertion of function, be inhibited of parental rights (...) for a period of one to ten years.”

The law describes a certain number of conducts which fulfil the criminal type, such as the infliction of physical or psychological maltreatment, *including corporal punishment*, deprivation of freedom, and sexual offenses.

The first of the considerations I would like to leave here concerns to the criminalization of corporal punishment. Corporal punishment is related, of course, to one particular category of domestic violence victims – children. By children, we mean every person under 18 years of age, according to the definition proposed by the Convention on the Rights of the Child from 1989.

Today, from a legal point of view, we can only discuss if criminalization of corporal punishment is reasonable when the victim is a child, because, when we refer to adults, mainly spouses, the Portuguese Constitution of 1976, in its article 36, and later, the Civil Code Revision of 1977, have recognized explicitly the equality between spouses. In the present, the 1952 Lisbon's Court of Appeal ruling stating that the husband had a right to moderate domestic correction towards his wife would not bind by the Constitution.

This same article 36 determines the parental right to raising and educating the offspring. Whether this right to education comprehends the right to correction, or, if correction allows the use of corporal punishment, is to be discussed and it is my understanding that the answer is timely and socially determined – it is not a definitive answer¹⁷.

The incrimination of corporal punishment is very recent in the Portuguese law – it is a conquest of the 2007 Penal Code Reform – and has its origin in a complaint of the World Organization against Torture to the European Committee of Social Rights against Portugal. This Committee considered, in a decision of December 2006, that the State of Portugal was not in compliance with article 17 of the Revised European Social Charter, by not establishing explicitly in the law the prohibition of any form of corporal punishment against children. Whether this explicit prohibition should come in the form of a criminal provision or otherwise, remains uncertain, at least to me.

As we all know, Sweden was the first country in the world to abolish all forms of corporal punishment against children, but this abolition was first entered in the *Parents and Children's Code*, which consists in a civil law instrument. My problem with the Portuguese solution is, on the one hand, the acknowledgment that not only corporal punishment hurts children, and in fact, quite a few forms of non-corporal punishment tend to have deeper consequences on child development and well-being that a light, immediate and corrective spank, and these forms of violence will only fit the criminal type if they can be lead to the provision of psychological maltreatment. On the other hand – and I hope I am not misinterpreted, when I say this – I am not certain that this one-time spank, applied by a parent to a child, in considering the child's age, knowledge and health, with the use of very light force, as a last resource, with the only purpose to educate, should be criminally pursued. One thing is to legally declare, in the Civil Code, that the parental right/duty of education should be pursued by non-violent means, through example and speech, another completely

¹⁷ See FERREIRA, 2017, p. 213.

different thing is to criminally prosecute a parent that spanked, lightly, in his behind, a restless hyperactive five-year-old, jumping in bed, who wouldn't go to sleep at 12 p.m.

And here is where culture may play a decisive role again: in my point of view, considering the present Portuguese society and the current societal standards regarding parents/children relations, it is still relatively safe to say that either we consider this kind of behaviour is not comprehended in the criminal type, according to the Social Adequacy Theory, or at least we have to consider it as a cause of exclusion of unlawfulness, because the parent acted in the exercise of a correction right. Over recent years, it is possible to find a couple of Court of Appeal's rulings subscribing that theory. The main issue with this conception is where to draw the line between legitimate and justifiable use of very light force, with corrective purpose and, of course, when to consider that this use of force is light and when it is not, and in this last scenario, should give cause to prosecution.

Despite these difficulties, it seems to me that this is a more honest point of view that bares in mind the serious consequences that a criminal proceeding shall bring, not only to the offender – in this case, the parent, but also to the child and the whole family, when such cases, as the example above, are considered.

3. Public nature of the crime of domestic violence.

Another aspect in which we may find strong cultural influences concerning the criminalization of domestic violence is to whether this crime should take a public nature or not. Statute number 7/2000 established the public nature of the crime of maltreatment – the legal type that preceded the crime of domestic violence¹⁸. In general, the private nature of crimes is due to the minor importance of the juridical assets that these crimes protect, or results of a need to protect the victim's privacy. When we are considering domestic violence, one cannot acknowledge today, in the current state of the Portuguese society, the lesser relevance of the juridical asset but could easily recognize the intimate nature of these issues. Nevertheless, this intimate nature cannot hold the grounds for the criminal intervention's postponement, depending on the victim's file of complaint, because, as we previously conceded, domestic violence does not interfere with the private sphere only, but, instead, this is a rather complex phenomenon with high social costs, present and future.

So, today, according to our criminal procedure law, the actions described in the current criminal type may be taken, by any means, to the knowledge of the competent authorities - to

¹⁸ About the contributions brought about with the entry in force of this Statute, see FERREIRA, Maria Elisabete – *Algumas considerações acerca da Lei n.º 7/2000, de 27 de maio que torna público o crime de maus tratos a cônjuge - como instrumento de combate à Violência conjugal*, in *Comemorações dos 35 anos do Código Civil e dos 25 anos da Reforma de 1977*, p. 711-723.

the Police or the Public Prosecutor – regardless of who communicates the wrongdoing. Public Prosecutor’s Office will be compelled to initiate the criminal procedure and even if this communication took place with a formal complaint filed by the victim, the plaintiff will no longer have the power to drop the charges against the defendant once the complaint is filed.

4. Spousal refusal to testify.

Although the crime of domestic violence has a public nature under the Portuguese criminal law, the fact is that the good use of two criminal procedure rules can translate into the Defendants impunity. On the one hand, the Defendant has the constitutional and legal right to silence (article 61, number 1, d) Criminal Procedure Code. And, on the other hand, article 134 of the Criminal Procedure Code determines that...

“Article 134

Refusal to testify

1 – The following persons may refuse to testify as witnesses:

a)(...)

b) Whoever has been the defendant’s spouse or who, being of another or of the same sex, cohabits or has cohabited with him as though they were spouses, regarding facts occurred during the marriage or cohabitation.”

This means that, when domestic violence takes place indoors, and leaves no physical marks that may point out the identity of the aggressor, and there are no witnesses aside from the victim, the conviction of the Defendant depends almost entirely on the victim’s cooperation and testimony. In that case, if the Defendant since the first time he was questioned exerts his right to silence and the victim is or has been the defendant’s spouse or, being of another or of the same sex, cohabits or has cohabited with him as though they were spouses, will have the right to refuse to testify as witness, regarding facts occurred during the marriage or cohabitation.

This is a silent way to contradict the public nature of the crime of domestic violence, a way to obtain impunity through criminal procedure rules conceived to ensure the protection of other rightful interests. That is why it is questionable that this privilege should stand at least when the witness has herself filed the complaint against the aggressor.

This privilege has itself a cultural background: the reason why this privilege was conceded was for the protection of a certain relation of spousal (and similar) trust and intimacy which could be in jeopardy if the spouses should be forced to testify against each

other. Instead, the law preferred to concede the possibility of refusal of testimony, to protect trust and intimacy within family relations.

It seems to me that, when the victim herself filed the complaint against her spouse, it no longer makes any sense to maintain the right to refusal of testimony, since there is not an underlying interest worth protecting any more. It is thinkable to fit this action of the spouse, who complains and, later in the game, at trial, refuses to testify, into the category of abuse of rights. Nevertheless, if our criminal procedure law stays untouched, this is a spouse's given right that we cannot compromise.

5. Interculturalism – the Istanbul Convention and the criminalization of domestic violence in Portugal.

The Istanbul Convention was created on the 11th of May 2011, signed by Portugal, approved by the Portuguese Parliament by the Resolution Nr. 4/2013 and ratified by the President through the Decree Nr. 13/2013. The Istanbul Convention recognizes the structural nature of violence against women as gender-based violence and violence against women as one of the crucial social mechanisms by which women are forced into a subordinate position compared with men. Recognises with grave concern that women and girls are often exposed to serious forms of violence such as domestic violence, which constitute a serious violation of the human rights of women and girls and a major obstacle to the achievement of equality between women and men and aspires to create a Europe free from domestic violence. The Convention aims to promote international co-operation with a view to eliminating violence against women and domestic violence and provide support and assistance to organisations and law enforcement agencies to effectively cooperate to adopt an integrated approach to eliminating violence against women and domestic violence. Parties under the Istanbul Convention should take the necessary legislative and other measures to promote and protect the right for everyone, particularly women, to live free from violence in both the public and the private sphere.

The entry in force of Istanbul Convention did not impose a substantial number of changes in Portuguese criminal law concerning domestic violence. Prior to the entry in force of the Istanbul Convention, Portugal already possessed a very satisfactory legal framework¹⁹. But in other member parties, important legal changes were introduced. This means that, due to the entry in force of the Istanbul Convention, we may now find common grounds trough out all member parties, towards a more unanimous approach towards domestic violence. However, the migration movements from countries outside Europe pose defying challenges

¹⁹ See FÉRIA, 2016, p. 185-210.

concerning the criminalization of domestic violence in European countries, because, in general, these migrants do not share the same cultural standards.

Take, for instance, the case of the female genital mutilation practices²⁰. These practices may occur in family context. The Istanbul Convention, article 38, addresses this human's rights issue and demands all State-parties to take the necessary legislative or other measures to ensure that the following intentional conducts are criminalised: excising, infibulating or performing any other mutilation to the whole or any part of a woman's labia majora, labia minora or clitoris; coercing or procuring a woman to undergo any of the acts listed above or inciting, coercing or procuring a girl to undergo any of these acts.

So, what if an African migrant is caught performing female genital mutilation on his or her daughter, is brought before de Courts and claims while in trial, that he or she was unaware of the prohibition of these kinds of practices in our country (Portugal)? Should this claim be relevant to exclude his or her criminal responsibility, admitting these practices are socially accepted in his or her country of origin?

The Portuguese criminal law provides the answer in article 17 of the Penal Code: *Error Juris*. An error concerning the unlawfulness of a certain behaviour shall only be relevant to exclude fault and, consequently, the criminal responsibility for an agent's actions when that error is not censurable. That means that the exemption of responsibility is difficult to be acknowledged in cases as the reviewed above, because, considering the nature of the rights involved – the right to individual sexual freedom and self-determination – the law assumes that every citizen ought to know that we are in the presence of natural, inalienable rights which admit no violation.

The problem here lies on one ground: the fact that the agent was born and raised in a different society with different values and culture, so, he or she may not be aware that in his or her host country, these kinds of practices are forbidden.

The same line of thinking may be applied to the infliction of corporal punishment to children. Some cultures are more tolerant to these practices than others, and in some countries, corporal punishment is an accepted and legal means of education. So, depending on the migrant's country of origin, he or she may not be aware of our standards of education towards children, so, once again, it is thinkable that the migrant might inflict a corporal punishment to a child convinced that is behaviour is accepted by the law.

The definitive answer to these problems, however, will be given regarding several factors, such as the time during which the agent has been living in Portugal, the level of integration in the Portuguese community and the language barriers. This last factor is not relevant when considering African communities, because they are Portuguese speakers. So, it is my understanding that, when we are in the presence of reasonably well integrated

²⁰ See FARIA, 2016, p.99-128.

individuals, living in Portugal for some years, the exemption of responsibility based on *error juris* is not precedent.

6. Conclusions.

Domestic Violence is a highly culturally determined phenomenon and the legislative evolution regarding this social issue was set by the slow changes in the thought and understanding regarding the family and relationships, as well as the relative value of women and children.

In the present, in and out flows of people, migrant movements, pose new and difficult challenges to the law and the Courts. Although our constitutional system highly considers and respects the fundamental rights of the defendants, we must not forget that the relevance of the rights threatened or violated in this domain require a firm hand because domestic violence is, above all, a human's rights issue.

BIBLIOGRAPHY

CORSI, Jorge (Comp.) – *Violencia Familiar, una mirada interdisciplinaria sobre un grave problema social*, Buenos Aires: Paidós, 1999.

FARIA, Paula Ribeiro de – *A Convenção de Istambul e a mutilação genital feminina*, in *Combate à Violência de Género – Da Convenção de Istambul à nova legislação penal*, Porto, Universidade Católica, 2016, p. 99-128.

FÉRIA, Maria Teresa – *O crime de violência doméstica: o antes e o depois da Convenção de Istambul*, in *Combate à Violência de Género – Da Convenção de Istambul à nova legislação penal*, Porto, Universidade Católica, 2016, p. 185-210.

FERREIRA, Maria Elisabete – *Algumas considerações acerca da Lei nº 7/2000, de 27 de maio que torna público o crime de maus tratos a cônjuge - como instrumento de combate à Violência conjugal*, in *Comemorações dos 35 anos do Código Civil e dos 25 anos da Reforma de 1977*, p. 711-723.

FERREIRA, Maria Elisabete – *Violência parental e intervenção do Estado: a questão à luz do direito português*, Porto: Universidade Católica, 2016.

GIDDENS, *Sociology*, 4th edition, Cambridge: Polity Press, 2001.

LISBOA, MANUEL *et al.* – *Os custos sociais e económicos da violência contra as mulheres*, CIDM, 2003.