

# Penal populism: Negotiating the feminist agenda. Evidence from Spain and Poland

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## Abstract

It is interesting to observe how penal populism intersects with feminism when it comes to gender-based violence, as regards both anti-rape and domestic abuse reforms. There is a vast scholarship (Bumiller, 2008; Gottschalk, 2006; Gruber, 2007) in the US explaining how feminist activism turned to state power to demand more protection and more criminalization, and little focus on the European context.

This article aims to analyse the development of what might be called feminist penal populist discourse in Spain and Poland. Whereas penal populist discourse has been conspicuous in Spain, and the authorities there ally themselves with domestic feminist groups and scholars to combat gender-based violence, Poland has never embraced the feminist agenda, despite the widespread influence and effectiveness of penal populism in that country. The article attempts to answer the general question: Why are feminist demands likely to be addressed in some countries where penal populism discourse has emerged in the political and public sphere, but not in others? The analysis demonstrates that the proclivity for penal populism and selection of topics are strongly related not only to some structural factors or political culture, but also to the historical and social context of each country. In Spain, the feminist movement was incorporated and politicized by left-wing parties into mainstream politics, whereas in Poland there was no grass-roots movement for women's liberation for a long time, and the emancipatory politics during the communist era was superficial.

## Keywords

Penal populism, Poland, punitive populism, Spain, violence against women

## Introduction

The growth of comparative penology in the last decade has enriched the analysis of penal developments in countries that have been ignored by the dominance of

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Anglo-American scholarship, for example Central European countries (Haney, 2016). This article aims to analyse the development of what might be called feminist penal populist discourse in Spain and Poland. Penal populism, as explained by John Pratt (2007), describes the emergence of a new structure of penal power, the changing nature of crime control and the means of law-making in the field of criminal justice. The rise of penal populism is related to the way in which criminal justice elites steadily lost legitimacy in the post-1970s period: in the realignment of power relations that ensued, penal populism was able to become influential (Pratt, 2007: 365). Penal populism as a new trend of criminal policy-making is consistent with the considerations of three highly influential texts that have emerged within contemporary social theory to interpret the late 20th-century 'punitive turn' in US and Western European politics: David Garland's *The Culture of Control* (2001), Loïc Wacquant's *Punishing the Poor* (2009) and Jonathan Simon's *Governing Through Crime* (2007). Penal populism contributes to a description of the evolution of contemporary modes of punishment and its relations to more general tendencies of late-modernity/neoliberal culture and political economy and shifts in state governance.

Although Pratt did not explicitly define penal populism, he provided three ways in which it is usually understood. First, it can be associated with political opportunism, that is, a means of gaining electoral support by raising the topic of punishment and promising to increase it (Pratt, 2007: 3). This can be done by intentionally playing on the social fears related to crime and the negative attitudes towards offenders in line with public opinion (Roberts et al., 2003: 3). Second, penal populism refers to a change of communication forms and channels between politicians and the public in matters of crime, security, and law and order. In other words, it is a way of mobilizing the citizenry, which now has more punitive attitudes and which demands more influence over the penal policy-making process. In so doing, it calls the previous legitimacy of the elites to govern on behalf of society into question and triggers the emergence of a demand on the part of the citizenry for direct input into the policy-making process (Pratt, 2007: 36). Third (Pratt, 2007: 38), this is a general trait of a recent tendency in the field of criminal policy aimed at increasing repression and satisfying the popular expectations of justice and the victim's right to retribution.

This form of populism is seen as intrinsic to democratic structures and institutions. It does not seek to challenge democratic government itself, but rather, is used within its structures by mainstream politicians to win public support. Crime has become a red herring that thus allows them to hide the decline of state power in relation to globalization and its effects, by declaring wars on crime (Pratt, 2007). Demand for penal populist discourse is a consequence of vague common social anxieties and insecurities (Pratt, 2007: 55). In addition, however, Michalina Szafrńska (2015: 39) defines penal populism in a more complex way, as a political strategy oriented towards penal repression, and that relies on commonly shared attitudes and beliefs – explicitly or implicitly – towards crime and criminal policy, and accordingly proposes legal, political and managerial solutions. The real effectiveness of criminal policy rationales is ignored. Popular beliefs and attitudes are sufficient justification for the solutions adopted and, at the same time, constitute self-evidence of their legitimacy. The tactic is characterized by the particular communication style (simple, direct, emotional, symbolic), the limited role of

experts in criminal policy-making, and a symbiotic bond between politicians, the media and the citizenry.

It is particularly interesting, then, to observe how penal populism intersects with feminism when it comes to violence against women (VAW),<sup>1</sup> as regards both anti-rape and domestic abuse reforms. There is a vast scholarship (Bumiller, 2008; Gottschalk, 2006; Gruber, 2007) explaining how feminist activism turned to state power to demand more protection and more criminalization. This would seem a perverse alliance given that feminism was originally a critical movement that contested the legal system, criminal law and the criminal justice system in particular, seeing them as tools that perpetuated patriarchal domination and women's oppression. Yet, paradoxically, feminism, in some accounts, turned into a voice calling for increasing criminal repression, reinforcing criminal law as a means of enforcing certain collective interests of discriminated groups, especially in the field of VAW.

Why examine Spain and Poland to explore this alliance between feminism and penal populism? These countries have much in common, although they are situated at opposite ends of Europe, so similar developments in their penal policies can reasonably be expected. They are similar in size and population, both are majority Catholic, and both are fairly ethnically homogeneous (at least until recently as regards Spain). They both have an authoritarian past, have relatively similar constitutional regimes, and are now members of the European Union, after transitioning to democracy. But, as will be demonstrated in this article, whereas penal populist discourse has been conspicuous in Spain and the authorities there ally themselves with domestic feminist groups and scholars to combat VAW, Poland has never embraced the feminist agenda in the penal field, despite the widespread influence and effectiveness of penal populism in that country.

This article attempts to answer the general question: Why are feminist demands likely to be addressed in some countries where penal populism discourse has emerged in the political and public sphere, but not in others? The analysis demonstrates that the proclivity for penal populism and the selection of topics are strongly related not only to some structural factors or political culture (Tonry, 2007) but also to the historical and social context of each country. In Spain, the feminist movement was incorporated and politicized by left-wing parties into mainstream politics, whereas in Poland there was no grass-roots movement for women's liberation for a long time, and all emancipatory policies during the communist era were top down implementations.

## **Feminist penal populism in Spain, but not in Poland**

Direct political responses to certain high-profile crimes and harsher laws being passed in their wake are phenomena that can be observed across the Western world, albeit with varying intensity.<sup>2</sup> This punitive turn, combined with the politicization of criminal policy, is a manifestation of the deep transformation of legitimacy and the power to punish, particularly in terms of law-making processes and criminal justice, that contemporary Western democracies are undergoing.

In 2004, Spain adopted one of the most progressive laws combating gender-based violence, namely the Organic Law 1/2004 on Comprehensive Protection Measures against Gender Violence (*Ley Orgánica 1/2004, de 28 de diciembre, de Medidas de*

Protección Integral contra la Violencia de Género). This statute was one of the first national laws in Europe to frame domestic abuse, mainly suffered by women, as gender-based violence, that is, a problem rooted in the historically unequal power relations between men and women, a violation of fundamental rights and freedoms, a core mechanism in maintaining inequality, and a structural social problem that requires state intervention and an integrated and comprehensive response (Preamble, Organic Law 1/2004).

The adoption of the law was the culmination of efforts on the part of women's organizations, which had been working to get the issue on the political agenda since the 1980s (Valiente, 2008). When Spanish law-makers first criminalized domestic violence in 1989, they took a neutral, as opposed to a gendered, approach (Maqueda Abreu, 2010). Feminist mobilization, and subsequent politicization, of the problem intensified in the late 1990s, when all political parties, both right (Partido Popular, PP) and left (Partido Socialista Obrero Español, PSOE) acknowledged the problem (Roggeband, 2012). The murder of Ana Orantes in December 1997 was the turning point. The woman was burnt to death by her ex-husband, with whom she was still sharing a household, soon after she appeared on television and testified to the domestic abuse she had suffered for years (Maqueda Abreu, 2010). Her dramatic death provoked public outrage and sparked massive demonstrations.

A few months later, the Spanish government adopted its first national plan to combat domestic violence (Plan de acción contra la violencia doméstica 1998–2000). Furthermore, the government amended the criminal law in 1999 by modifying the legal definition of domestic violence (Organic Law 11/1999 and 14/1999) to include the forms of abuse that Ana Orantes had suffered. It broadened the definition of domestic violence to include psychological violence and violence inflicted by a partner who no longer cohabits with the victim, and introduced a new penal measure, namely the restraining order. In 2003, the government passed other legal changes aimed at protecting victims and punishing perpetrators. It criminalized lesser forms of violence (Organic Law 11/2003) and introduced protective measures, for example protection orders for the victims (Organic Law 27/2003). These changes mark the point at which the emphasis moved to punitiveness, which was continued and developed into Organic Law 1/2004 (Maqueda Abreu, 2010).

Although Organic Law 1/2004 – a set of comprehensive policy measures – also provides for public education on gender equality, prevention and support for victims, its most controversial part is the penal measures aimed at providing greater protection for women from intimate partner violence. The statute introduced new offences of lesser forms of violence that are punishable more harshly when committed against a woman by her male partner: occasional maltreatment (*maltrato ocasional*), Article 153 of the Spanish Penal Code; injury, Article 148.3; lesser threats, Article 171; and lesser coercion, Article 172.

As a consequence of acknowledging the greater vulnerability of women and providing them with greater protection, the Spanish legislature decided to set out harsher penalties for acts of intimate partner violence committed by men than for other forms of domestic violence. It thus decided to use the criminal law as a tool for asserting gender equality. The criminal law was thereby made a weapon to deploy when undertaking a 'positive action' (Laurenzo Copello, 2005: 11).

These provisions raised substantial concerns among legal scholars and the judiciary regarding their conformity with the constitutional principle of equality. In 2008, the Spanish Constitutional Court ruled in favour of these provisions (Sentencia del Tribunal Constitucional 59/2008; Larrauri Pijoan, 2009). The Court in its decision adopted the approach of the structural causes of gender VAW, though it did not recognize it as a form of discrimination explicitly (Laurenzo Copello, 2010: 23). It also recognized the alarmingly high rates of gender-based violence that needed to be addressed by the state. By these means, the admissibility of unequal protection for certain groups that had long been socially or culturally oppressed was justified.

Although the concept of gender-based violence encapsulated in Organic Law 1/2004 is understood only as intimate partner violence, it is beyond any doubt that the Spanish legislation largely meets the demands of feminism. It refers both to the gender perspective and to the tendency to broaden the scope of criminalized behaviour with respect to any form of gender-based violence, however slight (Maqueda Abreu, 2010: 117). The criminal law is being used as an instrument to fight gender discrimination (Laurenzo Copello, 2005).

This approach of the Spanish legislature, however, has been criticized, even by feminist legal scholars, for excessive criminalization and for creating a rigid and repressive system of penal intervention that is often harmful to women (Larrauri 2007; Laurenzo Copello, 2008). The law is predicated on the notion of female victimhood, that is, it treats women as helpless victims who lack autonomy and who are infantile and unable to make their own decisions (Larrauri, 2007: 111; Laurenzo Copello, 2010: 28, 35). Therefore the state, through its punitive measures, rescues them from their partner-oppressors. The inflexible criminal justice system cannot address women's specific psychosocial situations. Moreover, it disregards their wishes and criminalizes or victimizes women who fail to meet its expectations (Cubells and Calsamiglia, 2018).

Patricia Laurenzo Copello refers to this as 'punitive paternalism' (2010: 35). Furthermore, the skewed enforcement and application of the law has occasionally been called into question, because it has not brought about any immediate decrease in the rate of violence. And finally, many critics have raised doubts as to whether criminalizing social problems is the proper way to solve them (Larrauri, 2007; Laurenzo Copello, 2010; Machado Ruiz, 2010; Maqueda Abreu, 2010).

This excessive recourse to penal measures to deal with intimate partner violence, on the part of both the feminist movement and politicians, has been dubbed 'punitive feminism' by Elena Larrauri (2007: 68). It also fits into the framework of penal populism. Similar to *carceral feminism*, which is widespread in the US (Bernstein, 2012; Richie, 2012), this trend is characterized by excessive reliance on the criminal justice system to eradicate VAW.

The high-profile killing of Ana Orantes turned out to be a landmark case that shaped the political response to domestic abuse for years. Since that event, domestic violence, and intimate partner violence in particular, have been acknowledged as serious social problems that require an adequate – that is, tough – response on the part of the state. Since that time, Spanish law has gradually been made more punitive. Although the killing occurred six years before the passing of Organic Law 1/2004, several other penal measures were passed during that period. All the legal measures adopted were

accompanied by a broadly shared political consensus that domestic violence should be recognized as an important social problem, and the underlying assumption was that the most effective way to protect women from abusive partners was via the criminal justice system (albeit not exclusively). Politicians did not question these criminal policy rationales, because they believed that supporting punitive measures towards VAW was the best way to demonstrate their commitment to the cause.

The Spanish political establishment's populist strategy of increasing punishment as a remedy to a social problem is obviously not restricted to VAW. Spain became fertile soil for the development of penal populism. It has embraced the feminist agenda, though framing crime as a serious threat by the mass media and then using it in a political debate concerned other crimes as well and started at the end of 1990 and intensified until 2004, for example, juvenile offenders, recidivists and indeterminate sentences (Antón-Mellón et al., 2017). It is worth noting that, at the beginning of the 21st century, penal populist discourse was employed by the PSOE, which was then in opposition, to decry the ruling PP as passive in the face of increasing crime rates (Antón-Mellón, et al., 2015: 38–9). The two major political parties adopted the language of anxiety, advocated prison as the best solution, focused on the centrality of the experience of the victim, and passed punitive laws in 2000–4 (Peres Neto, 2009: 241).

Another country where punitive populist politics has proliferated is Poland, where both public and political debate have been very prone to penal populist discourse. Several cases have become the subject of penal populist rhetoric and have triggered political campaigns and the passing of more punitive laws (Czapska and Waltoś, 2007; Sienkiewicz and Kokot, 2009; Szafrńska, 2015). This has been the case with paedophiles, dangerous offenders,<sup>3</sup> legal highs, drunk drivers, football hooligans, and so on. Politicians of all mainstream parties have been willing to use penal populism, although the ultra-conservative right-wing Law and Justice Party (PiS) has been most inclined to use this rhetoric. In fact it was PiS that introduced law and order ideology in Poland.

Yet, despite this general tendency in Polish politics, neither VAW nor the feminist agenda have been brought to the table. And this is despite the fact that excessively lenient sentences in rape cases have recently been in the spotlight. The penalties imposed by courts, once the cases are fortunate enough to be tried, are often lenient and conditionally suspended. This is even true of aggravated assaults occasioning bodily harm and gang rapes. The following two cases, which attracted nationwide attention, illustrate the problem.

In 2015, a rape sentence handed down in Elbląg, a town in northern Poland, sparked feminist protests. Two paramedics had been convicted of raping and sexually assaulting a female translator during a training trip (Kopińska, 2015). The victim (named Aleksandra) was a translator who had been contracted to translate for emergency medical services staff on a training trip to Kaliningrad. Aleksandra was under a lot of emotional strain, because she had had a miscarriage two weeks previously. During an evening party, one of the perpetrators began to harass her. He touched her breasts and proposed sexual intercourse. To get rid of him, she went to her hotel room. The other perpetrator followed her. Pretending to be concerned about her safety and feelings, he entered her room while she was in the bathroom and locked the door. When she came out of the bathroom, he threw her on the ground, overpowered her and brutally raped her. While she was being

raped, the victim had an epileptic seizure. However, this did not stop or interrupt the rapist. The perpetrator raped her again the same night.

Soon after she got back to Poland, the victim went to the police to report the rape and pressed charges. The police officer she spoke with, a woman, asked her whether she was sure she did not want it (that is, to be raped) and implied that she would have resisted more had she been in the victim's place. Even though the victim presented the results of a medical examination as evidence, the police sent a motion to the prosecutor to close the case. The victim's lawyer objected and the case was reopened. During the pre-trial proceedings and the trial, the defence lawyers attempted to show that the victim was mentally unstable, questioned her on her dress, and insinuated that she had provoked the accused.

The court found the accused guilty, but their penalties were inordinately lenient. The first was found guilty of sexual assault – an offence punishable by up to eight years in prison – and was sentenced to eight months in prison, with a conditional suspension of execution of three years. The second was found guilty of rape – an offence punishable by up to 12 years in prison – and was sentenced to two years in prison, with a conditional suspension of execution of five years. The prosecutor was satisfied with these sentences.

The case became high profile when it was covered by *Gazeta Wyborcza*, Poland's most popular liberal daily newspaper, in June 2015. It immediately sparked protests from women's rights activists and attracted the attention of other media. As a result of this nationwide attention, the court of second instance set aside the judgment and remanded the case to the court of first instance for retrial. In June 2018, in the final judgment, the first defendant was found not guilty of sexual assault and the second one was guilty of rape and sentenced to two years of imprisonment with no suspension.

The second rape case that attracted widespread attention was the gang rape of a 16-year-old girl in Żywiec, in the south of the country. The victim was raped in December 2013 by a group of six youngsters (one of whom was an acquaintance) she had met a couple of hours earlier in a local pub. They invited her to one of their houses and raped her there all night. The girl was drunk at the time. Next morning, they left her at a nearby bus stop, so that she could get back home. The victim's mother pressed charges. The accused adolescents pleaded not guilty. They claimed that the victim had consented to the intercourse. In April 2016, the court in Bielsko-Biala sentenced the accused to one or two years in prison, with conditional suspensions of five years. The judge explained that the penalties were lenient because of the victim's self-induced intoxication.

The leniency of the penalties was controversial. The new Minister of Justice and Prosecutor General, Zbigniew Ziobro, from the PiS party,<sup>4</sup> personally intervened and launched an internal investigation to establish whether the prosecution's actions had influenced the leniency of the sentences. Local women's rights organizations combating VAW also held protests. The prosecution appealed, and after re-examination, two of the six defendants were sentenced to three years in prison.

What these two cases have in common is that they were brought to the attention of the public by the media. The media coverage was fairly high and coincided with the 2015 parliamentary election campaigns. The dominant media narrative was of a faulty system – Aleksandra, the victim from Elbląg, was revictimised by a biased and sexist criminal

justice system. As she put it, she had been as humiliated during the process as she was during the rape. The sentences handed down by the courts were deemed too lenient for the offences.<sup>5</sup> The lack of proportionality for sexual violence indicates in fact the level of misogynist logic (Manne, 2017) that permeates the Polish criminal justice system. Such excessive leniency and indulgence towards perpetrators of serious sexual assaults was equated with impunity.

The protests by feminist organizations were widely commented on in social media and can be said to have influenced, to some extent, the subsequent judicial decisions. Nevertheless, politicians took little action as a result. Only in the second case did the Prosecutor General personally intervene, which resulted in the verdicts being quashed and the case re-examined. The activism and mobilization of the feminist movement, combined with high media coverage, led not to any increase in the punitiveness of the system so far as rape and sexual assault were concerned, but merely to reviews of the sentences.

It is worth noting that, although these cases apparently met all the necessary conditions to become yet another stimulus for penal populist discourse and politics, they failed to do so. Despite the short interval between them, and their being brought to public attention, provoking social protests, and coinciding with an election campaign in a country where politicians are highly sensitive to these trends, they did not spark any legislative action. Politicians both from the then ruling Civic Platform Party (which was struggling to hold seats) and from the main opposition party PiS (famous for its penal populism) failed to seize this opportunity to win votes. VAW and sexual assault obviously did not inspire them to show themselves as being 'tough on crime' and sensitive to the harm inflicted on victims. Polish politicians deliberately chose to disregard sexual VAW in their penal populist agenda.

This lack of legislative response to a gang rape, despite public outrage in Poland, stands in stark contrast to a similar case in Spain. In April 2018, the Spanish court in Pamplona held that five men who called themselves La Manada ('the pack of wolves'), accused of gang raping an 18-year-old girl during the San Fermín Festival in 2016, had not committed rape because they had not used violence to force the victim to have sexual intercourse and they had not intimidated her, and convicted them of the lesser charge of sexual abuse. The La Manada ruling sparked public outrage and mass protests throughout the country. It also sparked a fierce debate over the definition of sexual violence and the treatment of sexual violence survivors by the criminal justice system. The politicians of the right-wing ruling PP announced that they were amending the legal definition of rape (sexual aggression is defined in Article 179 of the 1995 Spanish Penal Code) to include all non-consensual sexual intercourse (*El País*, 2018).

## **Feminism and the penal state**

Feminist theorists have begun to explore how the feminist movement in modern democratic societies has helped to facilitate the carceral state and has been used to legitimize and justify the expansion of the crime control agenda and the punitive policies of the contemporary state (Bernstein, 2012; Bumiller, 2008; Gottschalk, 2006; Gruber, 2007). This tendency towards excessive reliance on the criminal justice system to eradicate



VAW has been dubbed ‘carceral feminism’ in the US (Bernstein, 2012) and ‘punitive feminism’ (*feminismo punitivo*) in the Spanish-speaking world (Larrauri, 2007). These terms denote a ‘feminism’ that calls for the criminalization of the perpetrator and the harshening of the punitive response towards any acts of VAW. The underlying logic is premised on increased policing, legal frameworks, state intervention and harsher punishments as appropriate responses to prevent VAW, and disregards other non-punitive, social measures to prevent such violence.

This alliance between feminism and the state has produced some very mixed results – particularly in the area of domestic and sexual violence, where second-wave feminism viewed the state as an oppressor and upholder of patriarchal dominance and the subordination of women (Gruber, 2007: 754). The public denial of certain forms of VAW and the silence around the issue have been viewed as complicit with other forms of patriarchal control over women (Bumiller, 2008: 2; Gruber, 2007: 754) and as part of the broad discrimination that women face in society (MacKinnon, 1989: 161). Notwithstanding the political recognition of the harms women suffer as a result of domestic abuse and rape, public commitment to prosecute domestic violence coincided in time with the rise of conservative-inspired tough-on-crime policies in the 1970s and 1980s and the emergence of the victims’ rights movement (Gottschalk, 2006; Gruber, 2007).

Some of the enacted penal measures have also produced mixed results in Spain. Lawmakers adopted the assumption that every occurrence of violence should result in the relationship being terminated and the partners separated in order to protect the woman from abuse. The discretionary issuing of protection and restraining orders led to the criminalization of women who violated them because they wished to continue the relationship (Laurenzo Copello, 2010: 35). Implementing a ‘zero tolerance’ policy on domestic violence took discretion away from battered women, imposed a criminal justice ‘resolution’ on them, and pushed them into a system that had no respect for their decisions or autonomy and that even criminalized them for breaching penal injunctions intended to protect them. Expanding the scope of criminalized conduct by including lesser forms of violence and enacting rigid measures expands the regulatory function of criminal law as a primary tool of regulating individual conduct in the private lives of the citizenry and contributes to the construction of a neoliberal penal state (Wacquant, 2009).

Here, however, the feminist agenda on domestic sexual violence has been appropriated and incorporated into conservative and neoliberal ideology so as to enforce and legitimize the expansion of the penal state. Feminist demands have thus been included in the punitive (and populist) strategies of the political responses to social problems. Just as neoliberalism, together with its excessive willingness to use penal power, is constitutively corrosive of democracy (Wacquant, 2010: 218), this willingness to use penal power to stop VAW is dangerous to feminism and gender equality.

Framing VAW as a predominantly legal and law enforcement problem has been helpful in terms of drawing attention away from the shrinking social functions of the state and the inefficient use of state resources that could address the needs of abused women more effectively and in a much less constraining way. By embracing harsh criminalization policies and having recourse to the penal apparatus of the neoliberal paternalistic state, without addressing any of the broader social issues or underlying conditions that are the root causes of VAW (economic empowerment, education, gender stereotypes),

the state reinforces more than it dismantles inequality. It thereby strays from the core values of the feminist movement, namely, the equality and autonomy of women. Needless to say, this is not about using criminal law to combat VAW in itself, but rather about using only criminal law without accompanying it with other public policies to address the structural root causes of VAW.

However, this inclusion of the feminist agenda in the penal and crime control framework can also be seen as a symbolic recognition of the importance of the problem by policy-makers. In a time of late (Giddens, 1990) or liquid (Bauman, 2000) modernity, when the power of the traditional sovereign state is in visible decline, criminal law is all the state has left to assert its power. Globalization and neoliberal policies have increased the exclusion and hardship of specific social groups, thereby creating new law and order problems and new fears and anxieties (Garland, 2001: 153). The criminalization of social problems, when social policies and resources are no longer available (and certainly not as effective and spectacular) to address the social conditions that produced them, has become the easiest way to assert the power of the state (and the efficacy of politicians) and its concern for the well-being and safety of the citizenry.

Addressing VAW as a predominantly criminal matter is yet another exemplification of 'governing through crime'. It in effect means making crime (criminal law, crime control, popular crime narrative) available outside its limited original subject domains as a powerful tool with which to frame and interpret all forms of social action and as a problem of governance (Simon, 2007: 17), for example, drug use, dangerous offenders, juveniles, reckless drivers. And when something is framed as a problem of governance, this suggests that the problem can be solved by direct political measures.

Using the criminal law to 'address' certain issues can therefore be seen as a positive sign that they are at least recognized as a problem. The use of penal populist discourse by the media and politicians when discussing high-profile cases of VAW and including VAW within the penal policy agenda is in a sense a way of acknowledging the problem. Even if activists do not call exclusively for more punishment, the state response may well stress such an approach. This is because the public response to a problem is shaped by institutional alignments, by prevailing structures and by the discursive fields of various social actors and law-makers.

On the other hand, this emphasis on a criminal approach to VAW leads to more state intervention in personal relations and to more punitive measures, which thereby enhances the state's control over people's private lives and reduces freedom. It also downplays the broader structural context of domestic and sexual violence, which is indispensable to understanding and eradicating it. To echo David Garland's comment that 'the old-fashioned sovereign state can deliver punishment but not security' (2001: 200), the neoliberal late modern state cannot provide women, especially poor women, with equality and social justice (that is, to regulate and ensure equality and prevent domestic abuse and sexual violence in the social, economic and private spheres), but it can still deliver punishment.

The political position of the feminist movement and the inclusion of its agenda in mainstream political programmes would appear to be critical to understanding why penal populist politics embraced domestic and sexual violence in Spain but not in Poland, a country whose politics is similarly prone to penal populism.

Increasing punishment for rape and/or domestic abuse indicates that the neoliberal state cares about women and protects them from VAW, even if the outcomes of these policies are uncertain so far as women's autonomy and social position are concerned. When the state, that is, the political establishment, denies or downplays the problem, it sends a symbolic message that protecting women is not important. The emphasis on family values on the part of politicians and the Catholic Church does not include protecting women from VAW. This approach transfers to law enforcement agencies and the judiciary and translates into high attrition rates, the re-victimizing victims by the criminal justice system, excessively lenient sentences for perpetrators, and the perpetuation of gender bias.

### **Why are Poland and Spain so different?**

Despite the above-mentioned commonalities, penal populism has evolved differently in the two countries: Spain has embraced the feminist agenda, whereas Poland has not. This may seem all the more surprising given that Poland and Spain share many penal policy determinants, according to a study conducted by Michael Tonry (2007). Spain and Poland have proportional representation, so their general political culture, at least theoretically, can be characterized as consensual – in contrast to the first-past-the-post system in, for example, the US, which according to Tonry (2007) is associated with more punitive than consensual penal policies. They have similar constitutional structures. Prosecutors and judges are not political appointees but are selected on merit. Neither country is part of the Anglosphere. Given that both countries have proved to be susceptible to penal populism, they even share similar populist conceptions of democracy. Also, in terms of income distribution, Poland and Spain are much closer than in comparison with old Western democracies.<sup>6</sup> According to Tapio Lappi-Seppälä (2008: 355), social inequality is also a substantial risk factor for punitive penal policies. And finally, following democratic transition, both countries experienced similar penal policy developments – a combination of relatively low crimes rates and prison population increases (Brandariz-Garcia, 2018; Krajewski, 2013).<sup>7</sup> Nevertheless, although these factors may all be useful in explaining the punitiveness of penal regimes, they appear irrelevant in explaining the penal populist agenda and the reasons why VAW is not on it in Poland.

There has to be some additional explanation to account for the different development of penal populism in Poland and the exclusion of the feminist agenda from populist penal policies there. Since Poland and Spain underwent similar transitions from authoritarian regimes to liberal democracies, it would be reasonable to assume that their subsequent political developments have likewise been similar. However, the political development of having the feminist agenda incorporated into mainstream politics has proceeded in opposite directions in the two countries.

In Spain, gender equality was an essential and indispensable requirement on the democratization agenda. Because the Franco regime, of which the Catholic Church was an ideological pillar, was characterized by rampant discrimination against women in every aspect of social relations (Ruiz Franco, 2008), the decline of the regime was accompanied by a rejection of the nationalist Catholic ideology that had been oppressing women and by a shift towards liberal democracy and gender equality (Valiente, 2008).

Feminist mobilization and the efforts of women's organizations to get the issue of domestic violence on the political agenda began immediately after the democratic transition that followed the death of General Franco.

Feminist demands were initially included in the left-wing PSOE programme in the 1980s, because the feminist movement was an integral part of the Socialist Party (Astelarra, 2005: 128–9) and feminist activists became integral party members. In 1989, domestic violence was criminalized as a separate provision of the Penal Code. The feminist mobilization intensified after the death of Ana Orantes, and the right-wing PP put the issue on its agenda as well (Roggeband, 2012: 794). It is worth noting that, in Spain, domestic violence was framed from the outset as a problem rooted in unequal power relationships, as a structural social problem related to the economic dependence of women and cultural patterns (Roggeband, 2012: 790). This shaped public responses to the problem, which were never limited to crime control strategies and the penal field, albeit so-called 'official feminism' (for example, the public agency Instituto de la Mujer) was calling for more 'tough on gender crimes'.

In Poland, the situation has evolved in the opposite direction. During the democratic transformation that followed the collapse of communism in 1989, there was a significant regression in women's rights. The communist regime formally pursued gender equality as a key plank of its ideology. Women were legally equal to men, had their reproductive rights guaranteed, and had broad access to education and the labour market. However, although women were incorporated into the labour force, they were still subject to conservative and traditional gender roles and patriarchal domination in the private and moral spheres (Fidelis, 2010). Moreover, they were denied access to political decision-making and positions of power. The economic empowerment of women was not accompanied by their emancipation from traditional gender roles. Furthermore, women's rights were implemented by the regime in a top down fashion during the communist period. They were certainly not the result of any hard-won battle by the feminist movement, which was in any case precluded by the system (Mishtal, 2015: 28).

Women nevertheless played an important role in the democratic opposition movement during the 1970s and 1980s (Penn, 1994). They constituted half the membership of the massive *Solidarność* (Solidarity) movement, and carried out organizational, logistical and communication tasks. When male leaders were imprisoned or in hiding during the 1980s, women took on the mission of maintaining and expanding the movement. However, these women regarded feminism as either an unfulfilled Party promise or a Western capitalist indulgence (Penn, 1994: 57). On the one hand, women's rights were thus not among the rights that the Solidarity movement was fighting for, and, on the other, the contribution and role of women was silenced during the democratic transition, and they were excluded from the construction of democracy.<sup>8</sup> Solidarity, which began as an independent trade union, became a political force allied with the Catholic Church in the 1990s. The Church shaped the new order in democratic Poland. As such, it reminded women of their natural maternal, caregiving and homemaking duties and demanded the criminalization of abortion.

Despite women's protests, parliament enacted anti-abortion laws in 1993. This is considered a milestone in the transition to the new ideological order. The fact that Pope John Paul II was a Pole and the Polish Catholic Church was the self-proclaimed main force

that defeated communism had huge political impact, which produced ambiguous results. The conservative ideology of the Catholic Church took over the public sphere (and neo-liberal ideology took over the economic sphere) and shaped gender and gender politics in democratic Poland – a sort of *cato-neoliberalism*. Women's rights were discredited and associated with either the outworn legacy of communism or the decadent West. The political influence of the Church in the 1990s led to the establishment of a new 'gender order' enforced through the radical restriction of reproductive rights, an increase in moralizing political rhetoric, and calls for a return to the kind of 'femininity' that was restricted to the traditional roles of mother, wife and homemaker, and that presumably had been lost during the communist period when women worked outside the home (Mishtal, 2015: 37, 67).

Because reproductive rights became a major public platform for the Church to reassert its political and ideological dominance (Mishtal, 2015: 68), domestic violence was initially dismissed as irrelevant. The Act of 29 July 2005 on Counteracting Family Violence, enacted by a left-wing government over strong objections from right-wing parties (Spurek, 2011), did not contain any penal measures. When the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (the Istanbul Convention) was ratified in 2012, the Polish Catholic Church provoked a moral panic around a 'gender ideology'. This was portrayed as a threat to Polish traditions and family values (Graff, 2014; Grzyb, 2014). The campaign was predicated on the assumption that domestic violence was not a problem in Poland and denied that structural and cultural factors were the root cause of VAW. The ultra-conservative PiS immediately came on board and endorsed the Church in its campaign. That campaign in fact distorted the whole public discussion around the Convention and the seriousness of VAW.

The ratification of the Istanbul Convention in 2015 itself was a great success of feminist activism and grass-roots organizations, but in the following years it did not bring any substantial legal changes, except for the modification of the rape prosecution mode from *ex parte* to *ex officio*, that is, elimination of the victim's request in pressing charges for rape. It did not, however, bring the necessary modification of the legal definition of rape to adjust it to the Istanbul Convention's standards (Article 36) (Płatek, 2018). Nor did it introduce new measures and increased resources for the prevention system. The victory of PiS in 2016 has since slowed down any progress in the field and made it even harder for the civil society sector to do its work.

Although penal populist discourse has been widespread in Polish politics since 2005, it has never taken the women's agenda or the issue of VAW into account. This is simply because the political party that most vigorously imposes penal populism and governing through crime strategies has been in denial about these issues. Because domestic violence and sexual violence have never been on the mainstream political agenda, politicians have never seen these issues as appealing enough to be addressed through harsh criminal sanctions. Even had they done so, they would have faced strong disapproval from the Church, which would have undermined their political position. Politicians from the two major parties – the moderate Civic Platform and the ultra-conservative PiS – have consistently shown themselves eager to increase punishment in response to every high-profile case that comes up and to display a tough-on-crime stance, but they have

been reluctant to put VAW on the political agenda or even acknowledge its gravity and pervasiveness.

The predominant political approach sends a symbolic message that the state does not take these crimes seriously. This leads to the perpetuation of gender bias in the criminal justice system, frequent negligence in prosecuting these cases, excessive leniency in sentencing, and a prevailing public conviction that perpetrators of domestic abuse and sexual violence are treated with impunity. Most seriously of all, however, it leads to a lack of protection from VAW.

## **Conclusion: Pitfalls of a rigid penal intervention**

In Spain, the punitive turn and penal populist discourse embraced the feminist agenda on VAW, although the political responses to VAW were never limited to the penal field. Politicians from both right- and left-wing parties readily used VAW as an excuse to increase punishments. In Poland, however, politicians completely ignored it, while exploiting other issues and employing penal populist strategies in other areas.

Using criminal justice to advance gender equality, however dubious or misguided this might seem, is a symbolic assertion of political commitment to the cause. It is worth noting that penal populist discourse and fighting crime are not confined to right-wing politicians and neoconservative politics, as Michael Tonry (2004) and David Garland (2001) claim, but rather, as Loïc Wacquant (2010: 209) argues, are a project that can be enthusiastically embraced by politicians of the right or the left. Exploiting feminist demands on a punitive populist agenda, which is characteristic of left-wing politicians, traditionally committed to women's rights and gender equality, is likewise embraced by conservative politicians.

One explanation of why VAW has not been embraced by this punitive turn in Poland is that the propensity of national politics to 'govern through crime' and employ a penal populist discourse might not be the most crucial factors. Given that the two countries analysed here share this tendency, the key factors appear to be a political recognition of feminist demands and a commitment to gender equality and its consequent inclusion on the political agenda. The state can exert pressure on feminist groups to espouse punitive strategies as a public response to the problem, but feminism can also be incorporated into state structures; that is, there can be an 'official feminism' push for these policies.

In Poland, in contrast, the denial of women's rights and the regression in gender equality that has been observed since 1989 have led to the gender dimension being excluded from punitive penal policies and penal populist discourse. The influence of traditionalist ultra-conservative Catholic ideology on policy-making and the compliance of politicians, from both left-wing (albeit to a lesser extent) and right-wing political parties, seem to be the main reason why politicians refuse to acknowledge the importance of gender equality, women's rights and, last but not least, the need to reform the criminal justice system. Modern penal development, that is, the rise of penal populism, which has hampered the adoption of modern punishment principles in many societies, may well result in the most reasonable and justifiable demands in respect of VAW being dismissed (Pratt and Miao, 2017).

It might therefore seem that there are no satisfactory solutions to the problem. On the one hand, an acknowledgement of feminist demands by the state, which may be undergoing a punitive turn, leads to the political instrumentalization of gender-based violence as just another tool to expand the punitive functions of state, advance a 'culture of control' and/or a neoliberal penal state, and, as a result, undermine the plight and safety of women, particularly poor and minority women, and subject them to state control, instead of improving their safety and autonomy. On the other hand, denying and downplaying the problem, and refraining from using penal measures to address it, as is happening in Poland, is not an acceptable good solution for women either. This perpetuates the victimization of women by the perpetrators and results in secondary victimization by the system. Moreover, the excessively lenient sentences handed down by the courts fuel distrust of the justice system and confirm the worst beliefs about the sexism and misogyny of the criminal justice system.

Generally, the main precondition seems to be a political acknowledgement of, and commitment to, gender equality. The way in which politicians and policy-makers address the issue and tailor their responses, either by granting social rights, ensuring that women have equal opportunities, and promoting equality in education and employment in the public and private spheres by implementing non-punitive measures, or by relying exclusively on criminal justice responses to protect women from gender-based violence, is a combination of many factors, including current political trends, the political system, the extent of late capitalist transformations, the way the problem is framed, the position and influence of religious leaders, whether welfare or penal measures take precedence in social policy, and the history of the women's movement.

In order to fully appraise the feminist relationship with the neoliberal penal state or, more broadly, the punitive turn observed in many countries, and how mutually reinforcing gender and penal strategies come to circulate together and overlap, we need to bear in mind that the tools deployed by the neoliberal state to address social problems – namely, extensive criminalization and crime control techniques to modify and control human behaviour – are not the most effective or efficient means of enforcing a new social order of gender equality. However, not associating feminism with the penal agenda does not guarantee a more favourable outcome in terms of feminist postulates, or for women in general, in a neoliberal state.

Is relying on state power, that is, the criminal justice system, to advance women's liberation a positive step? It may be risky for feminism to rely on the criminal law and the penal state structure to accomplish its goals and provide women with what they really want – to shape their lives in accordance with their wishes, plans and capabilities. Feminism is a part of a broader struggle to transform patriarchal structures, liberate women from gender oppression, and provide them with social justice.

State commitment to gender equality also involves attempting to eradicate VAW. However, the question of how to achieve this goal, in view of all the tools the contemporary state has at its disposal to enforce social order, remains unanswered. If domestic violence and sexual assault are forms of gender oppression and constitute serious infringements of women's basic human rights, then criminalizing this sort of VAW should have universal support. However, whether increasing punishment and introducing strict punitive measures are the most appropriate solutions to the problem is

debatable. Eradicating VAW and ensuring women's safety indisputably does require the deterrent effect of criminal sanctions and the criminal justice system. However, there is no compelling criminological evidence to support the contention that increasing the severity of the punishment reduces crime (Nagin, 2013). This relates to almost all crimes, not just VAW.

The problem of VAW will therefore never be eradicated so long as the criminal justice system fails to respect women's autonomy, and does no more than criminalize female victimization, force women to press charges (whether they want to or not), and inflict severe punishments on perpetrators. But nor will VAW be eradicated so long as the system *de facto* fails to treat VAW as a crime, re-victimizes female victims who seek help, denies them protection, and leaves the perpetrators in effect unpunished.

If the criminal justice system could function as a guardian of women's safety and protect them from violence without disempowering them or using them as 'a tool' to achieve its own ends – namely, to convict and punish perpetrators at all costs – then it would be able to provide women victims of domestic violence with viable options to start new independent lives. It would also be in line with the feminist agenda.

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## Notes

1. Following Article 1 of the 1993 UN Declaration on the Elimination of Violence against Women (A/RES/48/104), I define violence against women as any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.
2. Michael Tonry (2007: 2) noted that the punitive turn in penal policy in Western countries was not everywhere the same and what appears self-evident in recent US or British experience is not self-evident elsewhere. According to Tonry, Garland's and Pratt's observations are valid only in an Anglo-American context.
3. Dangerous offenders sentenced to capital punishment before the collapse of communism (referred to as 'beasts' by the tabloid press) had their sentences commuted to 25 years of imprisonment, the severest punishment at the time. Their impending releases, beginning in 2010, were taken up by politicians as a great social threat (Krajewski, 2014).
4. It is worth noting that Zbigniew Ziobro had previously been Minister of Justice (2005–7) and had already become the most prominent representative of penal populism in Poland (Czapska and Waltoś, 2007). He can even be said to have invented penal populism for Poland.
5. Note that this excessive 'leniency', that is, penalties with conditional suspension of execution, of the Polish criminal justice system is a general problem and is not restricted to VAW. According to Ministry of Justice statistics, 80 percent of all rape convictions were conditionally suspended in 2015.



6. According World Bank estimates, the Gini coefficient, used to measure income inequality, was 32.4 for Poland in 2014 and 35.4 for Spain in 2012 (there are no more recent data). URL (accessed 7 October 2019): <http://data.worldbank.org/indicator/SI.POV.GINI?locations=ES-US&view=map>.
7. Imprisonment rates per 100,000 for 2016: Poland: 188.4; Spain: 130.7 (average for all Council of Europe countries: 127.2). *Source*: Council of Europe Annual Penal Statistics (SPACE I), 2016. URL (accessed 7 October 2019): [http://wp.unil.ch/space/files/2019/02/SPACE-I-2016-Final-Report\\_Updated\\_190207.1.pdf](http://wp.unil.ch/space/files/2019/02/SPACE-I-2016-Final-Report_Updated_190207.1.pdf).
8. As an example, it is telling that there was only one woman among the 60 representatives of the democratic opposition at the Round Table Talks.

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