



Principle of Effective Jurisdictional Protection [Prejudices and Stereotypes] in Gender-Based Violence

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**Abstract:**

The concept of gender is based on the roles built by society, based on beliefs, principles, norms, and/or models that over time have designed the actions expected by both men and women and have an impact on individuals' perceptions and perspectives. Based on an analysis of the jurisprudence of the European Court of Human Rights, this paper aims to understand the phenomena associated with gender violence, in particular intimate partner violence, and to what extent violent acts are based on and encouraged by sociocultural learning of gender roles, contributing for a critical reflection on the challenges of gender asymmetries and stereotyped discourse.

**Keywords:**

Gender violence, jurisprudence, gender norms, stereotypes, human rights.

**Resumen:**

El concepto de género se fundamenta en los papeles construidos por la sociedad, a partir de creencias, principios, normas y/o modelos que a lo largo del tiempo han diseñado las acciones esperadas tanto por hombres como por mujeres e impactan en las percepciones y perspectivas de los individuos. A partir de un análisis de la jurisprudencia del Tribunal Europeo de Derechos Humanos, este trabajo tiene como objetivo comprender los fenómenos asociados a la violencia de género, en particular la violencia en la intimidad, y en qué medida los actos violentos se basan y fomentan en el aprendizaje sociocultural de los papeles de género contribuyendo a una reflexión crítica sobre los desafíos de las asimetrías de género y los discursos estereotipados.

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**Palabras clave:**

Violencia de género, jurisprudencia, normas de género, estereotipos, derechos humanos.

**1. INTRODUCTION**

Gender violence despite being a serious violation of human rights is also an issue of public health, equality, and respect, that has severe consequences far beyond visible physical and psychological injuries that may persist long after the violence has ceased. Despite the existing data showing the (real) prevalence of women victims, when compared with male victims, gender and domestic violence do not only affect women. Men are also victimized, reporting, however, less, which could lead to a biased view of the statistical data.

This paper intends to problematize how social roles and gender norms affect gender-based violence perceptions in intimate relationships and to what extent the violent acts are based on and encouraged by socio-cultural learning of those gender roles. Besides an exhaustive analysis of the dogmatic type of violence, we will focus on the understanding of whether gender roles influence the legal reality, drawing attention to some of the problems arising from the legislative and judicial options.

Since it is a complex topic, we propose to address the essential points to understand this phenomenon. This article is, therefore, divided into two main parts: firstly, the introductory and conceptual theoretical contextualization, and secondly an approach to stereotyping by analyzing the theory and judicial discourse, pointing out to what extent is subject to these pre-judgments and how this affects the pursuit of a fair and equal process.

**2. GENDER-BASED VIOLENCE: BRIEF THEORETICAL FRAMEWORK**

Gender-based violence can be defined as all violence committed against a person based on their gender or sex, including acts that inflict physical, mental, or sexual harm or suffering, threats of such acts, coercion, and other deprivations of liberty (European Institute for Gender Equality - EIGE - 2021). Underlying this type of violence are discriminatory cultural beliefs and attitudes that perpetuate inequality and powerlessness, particularly of women and girls. According to data from the World Health Organization (WHO), 1 in 3 women has suffered some type of physical or sexual violence at some point of her life, in most cases perpetrated by an intimate partner (García-Moreno *et al.* 2002). The last big study conducted in Europe by the European Union Agency for Fundamental Rights (FRA) concluded that 33% of women reported having suffered physical and/or sexual violence from the age of 15. In 8% of these cases, this violence was experienced in the 12 months before the study (FRA 2014). Concerning other types of violence that disproportionately affects more women and children, the United Nations Office on Drugs and Crime (UNODC 2018) warns that these groups represent almost two-thirds of trafficking victims globally and, for almost all cases, sexual exploitation has been the main objective of trafficking. Similarly, female genital mutilation is also a concern, estimated to affect 6,576 girls over the age of 15 in Portugal, and over 200 million women/girls especially in Africa, the Middle East and Asia, where the number are considered more significant (UNICEF 2016).

In recent years, gender violence has assumed greater projection, not only because of the frightening numbers that are reported every year but also due to the broad intervention and prevention policies that have been adopted.

Given the worrying reality preliminarily demonstrated, a set of international agreements, resolutions, policies, conventions, laws, and guidelines have been developed to formally guarantee human rights to all citizens and, at the same time, eradicate gender violence. Some of the most important are the Convention on the Elimination of All Forms of Discrimination Against Women (1979), the Vienna Declaration and Programme of Action (1993), the Beijing Declaration and Platform for Action (1995), and the European Convention on Preventing and Combating Violence Against Women and Domestic Violence, commonly known as the Istanbul Convention. This last convention defines in its article number 3, al. a) that violence against women should be “understood as a violation of human rights and as a form of discrimination against women”, encompassing “all acts of gender-based violence that result, or are likely to result, in harm or suffering of a physical, sexual, psychological or economic nature to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether in public or private life”.

As a European country, Portugal has signed and ratified many international agreements, policies, directives and made efforts to eradicate violence, incorporating these indications into national policies and strategies. This undeniable advance is even more relevant since Portugal left a dictatorial regime just over 40 years ago.

Currently, there is in Portugal a National Strategy for Equality and Non-Discrimination, named Portugal + Equal 2018-2030 (Resolution of the Council of Ministers No. 61/2018 of May 21). This strategy comprises three action plans: Action Plan for Equality of Men and Women; Action Plan to Prevent and Combat Violence Against Women and Domestic Violence; Action Plan to Combat Discrimination against Sexual Orientation, Gender Identity and Expression and Sexual Characteristics.

From a legal point of view, one of the most notable changes in the Portuguese Criminal Code dates to 2007 - Law No. 50/2007 of 4 September - when the crime of domestic violence (art. 152.º CC), gained autonomy, which means that, from this date on, there was no longer the need for the victim to file a complaint, belonging to the State to follow up on the complaint. Another of the most significant changes concerned the elimination of the need for reiteration of acts, being enough the consummation of isolated acts of violence/abuse/aggression to fulfill the legal type of domestic violence (Carneiro and Guerreiro 2016).

Despite being a public health problem (Beyene *et al.* 2019, Gama *et al.* 2021), gender violence is also a social problem, due to its prevalence and impact (Beyene *et al.* 2019), needing a multifaceted and multidisciplinary approach. The latest study developed by the European Institute for Gender Equality on the costs of gender-based violence in Europe (EIGE 2021) demonstrates the various impacts that this typology of violence entails, whether in terms of health services, the criminal justice system, other specialized victim support services or, among others, the costs related to the physical and emotional impact of the victims. This underlying social impact cannot be dissociated from the - different - gender socialization of men and women, and consequently from the social gender roles attributed to them (Castro 2000). Gender is thus understood as a complex and multilevel

cultural construction that determines the meanings of being a woman or a man in a particular context, also determining a social position that attributes less power, privilege, and resources to women, when compared to men (Anderson 2005, Hamilton and Russo 2006).

With a particular focus on the influence that gender socialization has on the performance of the justice system, it is important, first, to clarify that this system is constituted by people who were educated according to a set of beliefs and dominant social stereotypes of society and, thus, complete rationality is nothing but an unrealistic idea (Braman 2012, Botelho and Gonçalves 2012, Castro-Rodrigues and Sacau 2014). The literature has been pointing out that gender differences in judicial decisions present themselves at three levels: i) softer treatment of women by the justice system; ii) differential treatment based on multifactorial explanations (Daly 1994); and iii) harder treatment for women (Payne *et al.* 2004). The more lenient treatment is based on an idea of chivalry, conceptualizing women as less important than men and as weak – because they are women – which results in the need for protection from the hostile environment experienced in prisons and the attempt not to punish the children in their care (Castro-Rodrigues and Sacau 2014), and, therefore, the punishments are less severe (e.g. Butcher *et al.* 2017, Nowacki 2019). Secondly, the differential treatment based on multifactorial explanations is intrinsically related to the fact that there are several factors, such as women being more responsible for domestic and childcare, being less threatening, and more prone to rehabilitation, which will have an impact on a lower conviction (Stacey and Spohn 2006). Finally, the third perspective is related to the greater severity of conviction when women are involved in criminal practice, which means that they have double deviance – legal and social (Carlen and Worrall 2004, Matos 2007). In addition to the criminal offense committed, when they reach the justice system, women would also be punished for going against the social gender expectations that the social group has attributed to them (Matos 2007).

### **3. IS JURISPRUDENCE SHAPED BY STEREOTYPES? A SOCIAL CONSTRUCTION OF VICTIMIZATION' POINT OF VIEW**

Stereotypes are generalized beliefs and perceptions about characteristics mentally associated with groups of people which contain information about the social roles that each category supposedly holds, influencing the emotional reactions of those who stereotype (Alencar 2016). Thus, gender is nothing more than a socially constructed category, which is closely related to the construction of personal identity according to the attributes and roles socially associated with women and men in each society. This is what Almeida (2017, p. 29) states “the core of this concept does not have to do specifically with one or the other sex, but with the social relationship that is established between both sexes in each society. This relationship has been characterized by an unequal distribution of power between women and men, which has determined a social hierarchization that consigns women to a role of discriminatory subordination”.

The literature suggests that the justice system is not immune to this social construction and is of little use to victims of marital violence, insofar as it continues to perpetuate victim-blaming attitudes and trivialize marital violence (Martins and Machado 2017). Thus, despite the growing awareness and commitment of international structures, public policies, and judges to combat this type of violence, we cannot deny that the judicial discourse remains

faithful to certain social models that regulate gender relations. This discourse can be seen every day throughout controversial decisions based on stereotyped roles which lead to significant differences in the way domestic violence cases are judicially treated, showing the complexity and subjectivity of the act of judging. The judicial discourse is not alien to the stereotyped treatment, since the law is a discipline that mirrors the social reality and is strongly subject to the permeability of the social reality. A good example of this power imbalance is the Portuguese case named *Soares de Melo* (report no. 72850/14). In this case, the family court imposes tubal ligation of a mother as part of the promotion and protection measures, subjecting her to the objectification of her body and to a practice that hurts her religious convictions. The Lisbon appeal court confirms the decision to remove the children based on the assumption of non-compliance by the woman who refused to have her tubes ligated.

Some studies that have been conducted (e.g., Duarte 2011, 2012, Garcia and McManimon 2011, Tavares 2011) that are focused on the study of the frustrations of the judicial system, conclude that it is centered, mainly, on the role of the victim, blaming her/him, since when the victim does not correspond to the system's expectation, constitutes an obstacle for its defense.

In domestic violence cases, for instance, it seems that everything is centered on the role played by the victim, and not rarely, the grounds is to discredit the victim, considering that the complaint is the result of an effective resentment, jealousy, or due to alcohol consumption. Curiously, these are also the reasons invoked to excuse the attitude of the offender, looking like that it is expected that the victim proves her innocence in the case in which she/he was victimized, observing if her/him fulfill the criteria of "ideal victim" (Zaibert 2008).

This way of thinking leads us to believe that the appeal to the reasonable victim is an idealization that evokes echoes of other legal constructions, such as the *Bonus Pater Familias*, as a parameter of an expected role of the common man and the ideal victim. For example, some research has been considering that women tend to be judged more harshly when crimes they are involved in "are not part of their nature" (e.g., Simpson 1989) or, in the case of male victims of domestic violence, normally seen as dominant in the relationship, they tend to be discredited when they expose the violent acts, they were subject to. These representations are based on different variations of the same patriarchal grammar intersected or interactable with the class origins of the victims, with their social and symbolic capital (Gomes 2016) and it is in the interaction between victim, offender, and judge that a judgment arises. *Neto de Moura* case (court decision no. 355/15.2 GAFLG.P1) is demonstrative of these misrepresentations. The polemic decision of the Porto appeal court justified a sentence based on the idea that "women's adultery is a behavior that society has always condemned, and therefore [society] sees with some understanding the violence exercised by the betrayed, vexed and humiliated by the woman". On the same way, in a decision about rape (court decision no. 3897/16.9 JAPRT.P1), the court invoked "mutual seduction" and "medium illegality" in the case of a young woman raped when found unconscious in a discotheque bathroom.

Presumptions based on individual and social beliefs affect justice policy, opening a fearful path for victims who feel discredited or opening space for victims to feel blamed for their victimization. Concerning this, Liz Wall and Cindy Tarczon (2013), regarding false

reporting on sexual crimes, state that many interconnected factors create the perception that women often lie about sexual violence, and this is due to the inclusion of social norms and gender role stereotypes.

Several studies have shown that women are more severely affected by sexist myths, stereotypes, and prejudices, despite the existence of the Principle of Equality as a fundamental axiom of the Portuguese legal system, presented in article 13 of the Constitution of the Portuguese Republic. Reflecting on this, Madalena Duarte (2016) citing Lynn Schafran (1985) explains the typology applied to the victims through the three stereotypes most reflected in judicial decisions. Firstly, the vision of women as “Mary”, the docile and domestic woman, for whom motherhood is the supreme achievement, and unskilled to take any position that implies authority over other people; secondly, the author evokes “Eve”, the eternal seducer who leads men to delinquency and who is also the active agent of her victimization, namely in sexual crimes. Finally, the “Superwoman” is the woman who is on the labor market in conditions of equal pay with her male colleagues and who has the resources to support herself and her children without the need for any help from the father of her children. This image of an independent and autonomous woman who cannot suffer violence at the hands of her partner is based on the idea that domestic violence is a problem that only exists in lower social classes, and victims are economically dependent on the offender. However, domestic violence is a crime that, transversally affects thousands of people from all social classes, especially women, religions, and ethnicities.

Some jurisprudence has been prodigious in the construction of this narrative in judgments (court decisions 88/14.6 GAVLC.P1 and 355/15.2 GAFLG.P1) creating perplexity in the most ways, first due to the argumentation used that, besides being extremely prejudiced and stereotyped, makes evident the patriarchal culture which is still very evident in our society. For instance, adultery is something that happens in both sexes, however, the argumentation used, usually, criticizes the woman as an adulteress, making the rhetoric completely extremist and oppressive, implicitly legitimizing the violence exerted on the adulterous woman. This is a clear example of a discourse in which there is an attempt to mitigate the seriousness of the behavior carried out by men because the victim's acts are considered provocative such as infidelity and worsened by the intention of leaving the family home and ending the relationship.

Gender violence has become, thus, a central concept of feminist theory to denounce the relations of gender power inequalities. The perspectives adopted are based on the idea that men have a greater tendency to engage in violent acts, as a result of a learning process, from an early age, that they put into practice to maintain power and control (Dias 2018), being women most often seen as the victim (Randle and Graham 2011). Hence, violence is rooted in the unequal distribution of power between genders in society, which is a consequence of patriarchal social structures, being used by men to exert domination and control over women and keep them in subordinate positions.

According to Duarte (2016), feminist theory has neglected the studies about how law, through laws, legal thought, and judicial decisions, contributes to creating an idea of femininity and to create and sustaining a notion of masculinity. This is an example of how patriarchy does not only serve a general and abstract male privilege, is an ideology that can also victimize men, by the inherent gender constructions, since it is due to patriarchy that males feel inhibited from reporting (Duarte 2016).

Although feminist theories have treated domestic violence based on a patriarchal framework in which men's social domination corresponds to women's subordination and control - which means that intimate partner violence is asymmetric and remains a gendered phenomenon -, the perspective sustained by family sociologists states that violent behavior can be perpetrated by both men or women (Casimiro 2008), being not only a problem that affects exclusively female and speaking up for a theory of gender symmetry. The pioneer of studies on gender symmetry is Suzanne Steinmetz, who, focusing on the "Battered Man Syndrome", affirms that, within this scope, the common caricature among family relationships is the one in which the man has not a strong and assertive posture and assumes characteristics usually considered as feminine. On the contrary, a woman assumes a dominant role (Steinmetz 1978). The author asserts that the reality is not so far from this, stating that violence against men is a reasonable proportion of intimate partner violence, and women, statistically, assume twice as many complaints as men.

In a study developed by Murray Straus (2010) in which he conducted questionnaires about the means used by men and women to solve conflicts, the author found that the rate of perpetration of aggression by male partners would be around 12% and by women 11.6%, concluding that women could be as or more violent than their partners (Straus 2010), being a social phenomenon comparable, in its nature and magnitude, of mistreated women, with both genders tending to perpetrate violent acts and to be victims in the same way. Challenging this, Almeida (2017) expressly states that this idea of gender symmetry is a myth, being a deeply erroneous understanding. The author states that this argument is not supported by any statistical data but is based on the principle that violence carried out by men may have its origin in any mischief, perfidy, bad temper, alcohol or drug abuse, ignoring the global nature of the social prevalence of violence against women. Claiming that this type of violence is not symmetrical, does not mean to deny the existence of violent relationships from one side to the other or the existence of cases in which women are active subjects of violence, but rather to establish that the conceptual nature of intimate partner violence is shaped by social gender relations (Almeida 2017).

In the legal and criminological culture, patriarchy manifests itself through the invisibility given to women, in which the criminal by default is the man. However, this is not true, since being the man, by defaults, the offender and the woman, the victim, there are crimes that are only directed to the woman, such as the infanticide, in which the woman is evidenced as the mother and, therefore, the offender. Regarding this, Beleza (2004), states that criminality is on the top of masculinity since crime evokes strength, violence, lack of compassion, insensitivity to the suffering of others. In contrast, the victim is defenseless, innocent, or provocative even without wanting to be, corresponding to a certain essence of femininity. Thus, if a woman kills her husband, she is challenging his natural authority. On the contrary, the homicide of the wife by her husband, especially when associated with her real or supposed infidelity, always had selective mercy in the law and jurisprudence (Beleza 2004).

#### 4. CONCLUSION

Violence, whether committed by men or women, is unacceptable. Studies are mainly based on the analysis of whether men and women are equally violent or suffer equal consequences in their intimate relationships.

As we have seen, the perspectives vary accordingly with the focus of the research, the definition of violence used, the sample and types of research, and the instruments used. Considering the female silence regarding the abuses suffered, that until a few years ago had not attended in the public space, the studies carried out since then mostly cover violence against women which reinforce two recognized social stereotypes: female vulnerability and male authority or domination. On the contrary, to admit and recognize male victimization is the antithesis of this acceptable order, having received little attention due to the threat it poses to male self-image and patriarchal authority.

From this theoretical reflection, we can conclude that stereotypical social values, such as patriarchal foundations, which form the basis for male violence against women, are also the basis for the lack of acceptance of the male victim. On the other hand, not having yet a position on the methodology to be adopted, because both theories show flaws to be properly studied, since this is a subject that, at least in Portugal, has not been properly evidenced, we believe that due to the potential differences between men and women in behaviors and motivations for aggression, the interventions must be more specific to achieve greater effectiveness. However, if there is not sufficiently solid training on the stereotyped gender roles, which also severely affects men, who are seen as dominant and untouchable for intimate partner violence, from young people to the professionals who deal with this issue daily, we believe that the fight against violence between intimate partners will be a timeless quarrel. To this extent, assumptions based on individual and social beliefs about sex roles influence the response that may be given in these cases, as the victims feel extremely discredited and ashamed of being victims of violence and victimized by society in general.

Lastly, it is essential to encourage male victims to search for support, mainly because the institutions that are willing to provide this service are formatted to grant help to female victims. If we continue to ignore this problem and all its particularities, we will make it impossible to pay more attention to this issue, which will translate, as has been the case until now, into a lack of support and, therefore, an obstacle to the goal of eradicating intimate partner violence in a whole perspective, and not just against women or solely against men.

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