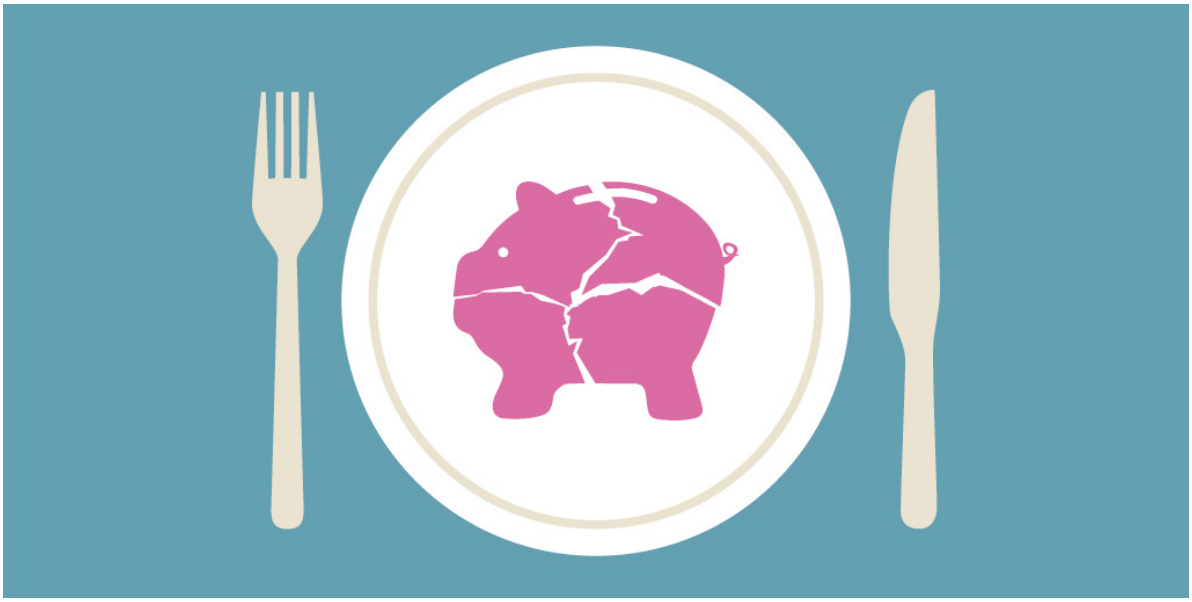
PREVENTION, THE ONGOING TASK

Economic violence and judicial proactivity

The judicial legislative initiative to promote the classification and comprehensive reparation of the damage caused by gender-based economic violence

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The recognition of economic violence as a form of violence against women

Spanish Law 5/2008, of 24 April, on the right of women to eliminate violence against women [1] recognises economic violence in its Article 4.2. *e*) as a form of economic violence, defining it as the intentional and unjustified deprivation of resources for the physical or psychological well-being of a woman and, where appropriate, of her children, in the repeated and unjustified non-payment of child support ordered in the event of separation or divorce, in hindering the disposal of own or shared domestic and/or relationship resources, and in the illegitimate appropriation of the woman's property. This

form of violence perpetuates dependency on the aggressor and reduces women's chances of escaping violence.

The Catalan law was ahead of the Council of Europe in the expanded definitions of violence against women, which —compared to the narrow framework of the national law— were avant-garde and in line with the international legal framework for the protection of women that began in 1979 with the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW Convention) [2] through the Istanbul Convention.

The amendment to Spanish Law 5/2008, of 24 April, on the right of women to eliminate violence against women, driven by Spanish Law 17/2020, of 22 December, introduces concepts (such as vicarious violence and economic violence, due diligence and institutional violence) that keep it in this well-deserved position. Despite the limitation of competence imposed on the autonomous communities by the Spanish Constitution (SC) in matters of criminal and procedural legislation (Art. 149.1.6), which is reserved exclusively for Spain, Law 5/2008 has an eminently preventive and welfarist purpose. It does not criminalise offences, but it has an important responsibility in Catalan society to prevent violence against women and to avoid secondary victimisation and, accordingly, so-called institutional violence in the context of the process.

> Economic violence is a form of gender-based violence which perpetuates dependency on the aggressor and reduces women's chances of escaping from it

Globally, economic violence is covered by the Istanbul Convention. Defining violence against women as "a violation of human rights and a form of discrimination against women", Article 3(a) specifies that it means "all acts of gender-based violence that involve or are likely to involve physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life".

Despite the fact that the Istanbul Convention has been in force in Spain since 2014 and integrated into our legal system, in accordance with Article 96.1 of the Constitution and Article 28.1 of Spanish Law 25/2014, of 27 November, on treaties and other international agreements, in the 17 years that the State Organic Law 1/2004, of 27 December, on comprehensive protection measures against gender-based violence has been in force, (LOPIVG) [3], and after multiple opportunities for reform, economic violence has not been included, nor has the amendment of the Criminal Code been compelled to expressly regulate it in Spanish law, as one of the types of violence against women. As far as the LOPIVG is concerned, gender-based violence refers "only" to physical and psychological violence, including attacks on sexual freedom, threats, coercion or arbitrary deprivation of liberty.

The crime of non-payment of child support is regulated in Article 227 of the Spanish Criminal Code, but in a neutral way, decontextualised from possible violent scenarios and not classified as gender-based economic violence, despite the fact that the available statistical data demonstrate the high proportion of women who endure some form of economic violence by their partners or ex-partners. The existence, therefore, of an international obligation to regulate it and the data available to us, prompted the legislative initiative presented below, as a concrete expression of due diligence in the exercise of judicial activity.

According to the Macrosurvey on Violence against Women 2019 [4], conducted by the Government Delegation against Gender-Based Violence, 11.5% of women over the age of 16 have suffered such violence at some point in their lives. The Spanish Ministry of the Interior included economic violence as one of the factors that shape violence against women in the Report on Violence against Women 2015-2019 [5], in which the State's security forces and bodies participated. This report includes reports from 2015 to 2019, in which 601,416 reports of women victims of violence against women aged between 31 and 40 years old were counted. Of these, 18,235 correspond to the non-payment of the court-ordered child support.

Economic violence can occur during the relationship or after the relationship has broken down, exclusively or together with other forms of violence. This includes violence through the control of the family economy, including bank accounts, through the so-called economic exploitation of women, who may find themselves deprived of access to their own wages or forced to work in family businesses without the right to wages or social benefits, and through the so-called labour sabotage, which curbs women's job expectations by imposing care tasks and roles associated with the female gender and motherhood.

Seeing one's wages garnished or losing one's home due to non-payment by the other obliged party, forcing women to continually resort to legal proceedings to obtain full or timely payment of child support or any other expense from which the basic needs of their children depend, even those that affect their education, or simply forcing them to contact the aggressor to demand payment of expenses to which he is obliged, constitute —together with other cases in which the economic relations of the couple do not end with the rupture of the relationship— various forms of economic gender-based violence. These assumptions are further aggravated by structural gender discrimination that sustains high wage gaps, occupational segregation, precariousness of female employment, a higher incidence of unemployment and informal work, and less participation in the decision-making bodies of companies and organisations in general. In judicial proceedings it can also often be seen that they may be linked to crimes of asset stripping to conceal income in the face of alimony payment obligations (Spanish Supreme Court Ruling STS no. 914/2021, of 17 March) [6].

> Non-payment of pensions or any other child support expenses, the economic exploitation of women and the labour sabotage are forms of economic gender-based violence

One of the most serious consequences is the creation or securing of a victim's economic dependence on her aggressor, which ends up affecting her capacity to generate financial resources and acquire economic self-sufficiency, not only for herself but also for her children [7] and which in many cases conditions her decision to report or to persist in the pursuit of criminal proceedings against the perpetrator. Economic violence affects both women and their children, making them dependent on the abusive father and giving them an instrument of power that leaves them at the mercy of his decisions.

Judicial legislative initiative as a legal response to state legislative omission

The Judgement of 22 July 2021 of the Criminal Court No. 2 of Mataró in Barcelona recognised economic violence as gender-based violence for the first time in Spain [8]. By means of this Judgement, as the sentencing judge, I submitted to the Spanish Government a judicial legislative initiative (Reasoned Statement) through Article 4.2 of the Criminal Code [9] for the criminalisation of economic violence (in its various forms and, specifically, non-payment of pensions) as a form of gender-based violence and for the regulation of comprehensive reparation clauses for the victims that include the economic harm effectively caused and also what is known as social harm.

The facts prosecuted in the Judgement have a specific context of gender violence. It is a case in which the defendant was convicted twice in previous criminal proceedings for crimes of violence against women committed against the mother of his daughter (complainant of non-payment of pensions in the case analysed). However, later, in civil proceedings, the family proceedings were handled under the guise of a "divorce by mutual consent", which made invisible the judicial trace of gender violence that in reality existed, and which should be taken into account in accordance with Article 31 of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence of May 2011 (Istanbul Convention) [10].

The reality we see in the courts is that this subsequent repeated and unjustified non-payment of child support usually serves —also in the other forms of economic violence— to perpetuate a situation of control over the partner, typical in gender-based violence. In these cases, they are subjected to stress and psychological suffering, which increases the vulnerability of underage and dependent children and becomes a form of vicarious violence.

On the other hand, in cases in which the duties of care and financial support have fallen exclusively on one of the parents, usually the mothers —as in the case under analysis, in which the father had not only failed to provide care, but also to contribute financially to his daughter— the consequences of the offence cannot be reduced to the mere quantification of the unpaid child support payments, but to the impact and/or harm that this non-payment has caused in the personal, educational or social areas (food, pharmaceuticals, hygiene, clothing and footwear, medical treatment, cultural activities, leisure, additional education or school materials).

In these cases, the mother has exclusively taken care of subsistence and welfare, which also has a direct effect on her personal, family, social and employment relations and their related economic expectations. This last aspect, moreover, increases the situation of economic dependence of the woman on her aggressor and thus channels the perpetuation of the exerted gender-based violence, now exclusively in the economic realm through the non-payment of the child support, and which is —paradoxically— supported by structural and systemic reasons of discrimination on grounds of sex attributable to the State.

> When suffering economic violence, women are subjected to stress and psychological suffering, which increases the vulnerability of dependent children

The aforementioned Judgement posits a legislative change and, therefore, culminates in the praxis of prosecution with a gender perspective —and of children, as the case affects the daughter of both parents— because it identifies the context of gender-based violence, in which the non-payment of the maintenance obligation takes place, and its instrumentalisation by the father to achieve the economic strangulation of the mother and the daughter. It thus manages to shed light on how a situation of gender-based violence is perpetuated through economic violence.

This Judgement is a pioneering one in Spain. It is the first time that a judicial legislative initiative has been effectively proposed in the field of gender-based violence. It also has a symbolic power that is felt in two aspects. Firstly, it demonstrates that the judiciary can also contribute positively and from within to the transformation of the justice system by championing legislative changes in line with the social reality. Secondly, it vindicates the “legal voice” of female judges, who until 1966 were prohibited from exercising this profession, and now, although we form the majority of the judiciary, we endure, as in all other professions, a thick glass ceiling that keeps us partially invisible in the higher judicial bodies. However, as grassroots female judges, we can also activate the lever of change that Article 4.2 of the Spanish Criminal Code translates into, because this article makes no distinction as to who, judge or magistrate, lower or higher body, single-person or collegiate body, can exercise the initiative.

The formal legal grounds for the judicial legislative initiative presented are to be found in Article 4.2 of the Spanish Criminal Code, which indicates to the judiciary what they can and must do when, as in the aforementioned case, they detect a conflict between the demands of material justice and the dogma of legality when prosecuting an act. The material basis is found in the State Pact Against Gender-Based Violence approved by the Congress of Deputies in 2017, Article 14 of the EC relating to equality between women and men, which also imposes a proactive attitude of all public authorities for its effectiveness (Article 9. 2 EC) and in the requirement of due diligence to prevent, investigate, punish and redress crimes classified as violence against women (Art. 5 and 45 of the Istanbul Convention), which is also provided for in the Catalan Law 5/2008 (Article 3. h) and Article 5. 6).

From this point of view, the legislative initiative aims to fill a legal gap in the regulation of economic violence as a form of gender-based violence and seeks to achieve comprehensive reparation for the harm caused, which goes beyond the non-payment of child support.

Indeed, along with the classification of economic violence as a crime of gender-based violence, I also requested that civil liability and the best reparation for the harm caused (integral reparation) be regulated through social harm. This concept refers to the injury or impairment that a person suffers in their social role (personal, family, social and occupational life) as a result of something unexpected in the course of their daily life. In criminal/criminological terms, it is the injury that a victim suffers to specific fundamental rights (to life and physical integrity; to health; to civil and political rights; and to economic, social and cultural rights) as a result of the criminal act.

> The reparation of the harm can't be only limited to the economic sphere, since this type of violence severely conditions all the vital spheres of the mother

There are cases such as the one analysed in the Judgement in which the economic precariousness in which the women and her children, now a single-parent female family, find themselves, determines the quality of life and the future expectations of the children harmed, but also severely conditions all the vital spheres of the mother. To limit the reparation of the harm to the merely economic, when it goes beyond the strictly economic, is not coherent here with the existing will in other criminal categories of integral reparation of the harm caused, nor is it appropriate to the international standards set out above.

Conclusion

In conclusion, this Judgement sought to shed light on another dimension of gender-based violence, which is a complex phenomenon with many intertwined facets, whose economic aspect is the most visible for the victims, but the least addressed by the legislation. It also highlights the role of the judiciary which, in fulfilling its due diligence obligation, assumed through the legislative initiative presented the mission of guaranteeing that economic violence —present in the lives of many victims of gender-based violence— does not also infringe on their right to access to justice.

REFERENCES AND FOOTNOTES

1 — Official Gazette of the Government of Catalonia (DOGC, *Diari Oficial de la Generalitat de Catalunya*), no. 5123, May 8, 2008; Spanish Official Gazette (BOE, *Boletín Oficial del Estado*), no. 131, May 30, 2008. Consolidated text [available online].

2 — Spanish Official Gazette (BOE, *Boletín Oficial del Estado*), no. 69, May 21, 1984, pp. 7715 to 7720 (6 pp.) [available online].
3 — Spanish Official Gazette (BOE, *Boletín Oficial del Estado*), no. 313, December 29, 2004 [available online].
4 — *Macroencuesta de violencia contra la mujer 2019* (Macrosurvey on violence against women 2019) [available online]. Spanish Ministry of Equality; General Directorate of Awareness, Prevention and Studies of Gender Violence; Delegation of the Spanish Government against Gender-based Violence.
5 — *Informe sobre violencia contra la mujer 2015-2019* (Report on violence against women 2015-2019) [available online]. Spanish Ministry of Interior; State Secretary for Security; Coordination and Studies Office.
6 — Judgement of the Supreme Court, Second Chamber, no. 914/2021, March 17 [available online].
7 — This means that economic violence, through the instrumentalisation of children to generate psychological suffering in mothers, becomes vicarious violence, according to the concept introduced by the Spanish Law 5/2008 in the reform carried out by Spanish Law 17/2020, Article 4.2. *h*).
8 — For further information, read the article “Un juzgado Penal de Mataró solicita tipificar la ‘violencia económica’ como modalidad de violencia de género” (“A Criminal Court in Mataró requests to classify ‘economic violence’ as a modality of gender-based violence”), published on poderjudicial.es on October 8, 2021 [available online].
9 — Article 4.2 of the Criminal Code: “In the event that a judge or court, in the exercise of its jurisdiction, mentions any action or omission that, without being punished by law, deems worthy of repression, it must refrain from any procedure on this action or omission and must explain to the Government the reasons why it believes that it should be subject to criminal sanctions”.
10 — Spanish Official Gazette (BOE, *Boletín Oficial del Estado*), no. 137, June 6, 2014, pp. 42946 to 42976 (31 pp.) [available online].



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Lucía Avilés Palacios is a judge since 2009, assigned to Criminal Court no. 2 in Mataró. She is an expert in gender-based violence. She has given training in criminal matters, gender-based violence, sexual violence and prosecution with a gender perspective in the European Parliament, the Government Delegation against Gender Violence, the Ministry of Equality and the General Council of Judiciary, as well as in bar associations, security forces bodies, and several national and international universities. She has been appointed as an expert in the implementation of Spanish and international regulations on violence against women. In 2020, she was appointed to appear before the Parliament of Catalonia in relation to the Proposal for a law amending Law 5/2008 of women's right to eradicate male violence. In 2017, she participated in Brussels to the European Commission's work group for the Implementation of the Protection Order. In 2022, she participated in a working session on the Proposal for a directive of the European Parliament and of the Council on the fight against violence against women. She is a co-author of the book *Justicia en clave feminista: reflexiones en torno a la inserción de la perspectiva de género en el ámbito judicial* (2021) and the book *Análisis de la justicia desde la perspectiva de género* (2018). She is a founding member of the Association of Female Judges of Spain and an honorary member of the Gender Studies Institute of the Argentine Constitutional Institute (2017).