NEW SPHERES OF GENDER-BASED VIOLENCE

The recognition of institutional violence: a new tool to demand women's rights

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The term *institutional violence*, coined by human rights organizations, has a great communicative power and aims to leave behind the paradigm of the individual offender in order to focus on administrations. It also aims to leave behind the model of formal recognition of rights to move onto one where these rights are effectively enforced. The inclusion of this new field of violence involves the recognition of a historical debt to women's and feminist movements, a conceptual advancement and a tool of great transformative potential.

First step: building a compliance and assessment framework based on the due diligence standard

The inclusion of institutional violence can only deploy its rights-generating potential if the obligations of each part of the administration have been specified in advance, so that women can know and demand them. The conceptual basis on which the framework of positive obligations and the framework for assessing the performance of public administrations in addressing sexist violence should be built is the standard of due diligence.

The standard of due diligence was created internationally within the framework of the great demands of women in the early 1990s. The strategy of legalising their demands sought to use the weight of the law to force states to deploy public policies that address sexist violence, and to place the State in the position of guarantor of women's rights. The State was thus subjected to a permanent and transversal duty of proactivity, speed and quality in its interventions. The standard of due diligence was achieved as a conceptual category, but was not translated into a number of specific and scheduled obligations for states.

Key actors in determining obligations arising from the standard of due diligence

CEDAW Committee recommendations

Since 2000, the realisation that having legal instruments on women's rights was not enough to specify those state obligations. In 2010, the Committee for the Elimination of All Forms of Discrimination against Women (CEDAW) published its Recommendation No. 28 [1], which analysed the nature and scope of states' obligations. The Recommendation mentioned sexist violence perpetrated or condoned by the state and stressed that the actions of the administration did not require intentionality to be considered discriminatory. In 2017, Recommendation No. 35 was published [2], which made a number of recommendations at legislative, executive and judicial level, and which is still considered the road map for achieving due diligence in addressing gender-based violence.

Reports by the United Nations rapporteur on violence against women

The United Nations, through its successive rapporteurs, has also made an important contribution to developing specific obligations arising from the general obligation of states to eradicate sexist violence. Its 2006 report [3] emphasised the potential of the due diligence standard as a tool for establishing a framework of obligations. In 2013, it analysed the standard of due diligence as a tool to demand accountability from states in their actions towards sexist violence and to build a framework to assess the degree of compliance with the administration's actions and omissions.

International Court judgements

International courts have also been key players in the implementation of the obligations of states. The Inter-American Court of Human Rights (IACHR) was a pioneer court in extending the legal basis of administration responsibility. In the judgement of González et al. ("Campo Algodonero") v. Mexico in 2009, concerning the feminicides of Ciudad Juarez, it defined the so-called *risk and complicity doctrine*. According to this doctrine, the state is also responsible for the patterns of violence affecting subordinate groups. The state has a position of guarantor of rights that stems from the ability or the possibility to prevent or avoid a real and immediate risk.

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In Europe, the rulings of the European Court of Human Rights (ECHR) inspired the wording of the 2011 Council of Europe Convention on the Prevention and Fight Against Violence against Women (Convention of Istanbul), which in article 5 lays down the obligation of due diligence. Its case law has been defining specific obligations on a wide range of aspects, among others, effective protection and investigation. For example, in the case of J.L v. Italy in 2021, the Court found that sexist stereotypes and victim-blamers create secondary victimisation of women and constitute a violation of article 8 on respect for private life.

Strategic areas of due diligence

Since the 1990s, at the international level, analyses and recommendations on the conceptual approach and best practices have been generated in a number of areas where it was essential to act if discrimination and gender-based violence were to be eradicated. Some references are Recommendation 5 from April 30, 2002 by the Committee of Ministers of the Council of Europe on the protection of women against violence, the so-called Recommendation 35 on gender-based violence by the CEDAW Committee in 2017, the 2030 Agenda for Sustainable Development by the United Nations or the Council of Europe Gender Equality Strategy 2018-2023 [4].

Referencing due diligence in Law 5/2008

Law 5/2008 contains a very useful definition of secondary victimisation or revictimisation that already determined key axes: the fact that damage could be caused directly or indirectly; that deficits could be qualitative or quantitative, and that actions of the subcontracted private sector were also included. Article 11 also included the so-called *duty to intervene*, which consists of the obligation for all health professionals, social services and education, to intervene when they are aware of a situation of risk or evidence based on sexist violence, an obligation that also linked private entities that are subcontracted.

Two great new features in Law 17/2020 to demand the effectiveness of women's rights

A first mechanism by which the reform of Catalan law aims to achieve greater strength in the demand for women's rights in administrations is the incorporation of due diligence into the concepts defined by the law, in its aims, in guiding principles and in the incorporation of the duty to intervene.

A second mechanism is to incorporate the "reversal" of the standard of due diligence,

namely, the responsibility arising from its non-compliance, which is institutional violence. Article 5 of the law incorporates these acts as a new areas of gender-based violence. To define them, the law draws inspiration from the field of human rights, namely the formulation of the concept of torture, which can be committed by a single serious act or by the accumulation of less intense acts. Another reference is the Mexican Law on Violent Gender-based Violence in 2007, which was the first to incorporate a definition of institutional violence.

The concept of institutional violence in Catalan law rests on a number of key elements: it constitutes a form of male violence committed or tolerated by administrations. It may arise from action or omission by the same. It may come from a quantitative or qualitative deficit; both civil servants and contracted personnel may be responsible, and must have the purpose of delaying, hampering or preventing access to rights and services provided for in the regulations. Rather than the term “purpose” the term “effect” would have been more appropriate, since, for responsibility to be asserted, the civil service or the administration itself do not need to act intentionally or deliberately.

> Institutional violence not only results from the response of administrations, but also from the creation of laws

Institutional violence not only results from the response of administrations (executive power), but also from the creation of laws (legislative power), or their application and interpretation (judicial power). The law rests on an idea of gearing and shared responsibility between these three areas of power.

The distinction between secondary victimisations and institutional violence

The delimitation between the two is difficult as they are placed in a line of continuity and both generate a grievance that legitimises women to claim and redress the wrongs done to them. Institutional violence responds to a pattern of violations of rights by the administration. The violence caused to that specific woman or group of women overflows the individual case and constitutes a “symptom” or manifestation of structural deficiency. This violence does not come from a one-off individual professional decision, which can be revictimising, but is framed on a conceptual basis, a model, a rule, a protocol, a methodology, an interpretative criterion, a practice or an organisational form created or endorsed by the Administration.

The system of liability arising from institutional violence

The new article 76 bis of Law 17/2020 sets out the system of liability in two mutually compatible strata: the individual disciplinary responsibility of the active professionals and

the responsibilities of the administration, which must always be responsible for their actions and which, in the final analysis, is the guarantor of women's rights. The responsibility of the administration will come from its normal and abnormal functioning if damage has been caused. If there are several responsible administrations, they will all respond in a spirit of solidarity. As far as the civil service is concerned, its responsibility must be intentional, wrongful or negligent, and it will depend on whether its conduct fits into any of the disciplinary infringements provided for in state and autonomous legislation regulating the civil service and the collective agreements of its professional sector. Its responsibility does not exclude that of its superiors. This disciplinary responsibility is compatible with criminal and civil liability, if applicable.

The law sets out a number of parameters that help to define the responsibility of administrations, such as the intensity of the action, the impact of the action and the risks of administrative action on women's rights. It also mentions that the reparation for acts of institutional violence will comprise the elimination of the act, as far as possible and not revictimising the woman, and the review of the practice that resulted in institutional violence, that is to say, the guarantee of non-repetition.

The complexity of the fact that the administration itself sanctions its conduct and its staff behaviours suggests the need to create an independent body which can perform this role. If the administration does not respond to the complaints made by aggrieved women, women's organisations should be the ones to push for accountability in court. These organizations should act strategically in areas where it is more effective to intervene to subvert the patterns of conduct that are violating women's rights in a more powerful way.

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There is also a third stratum of responsibility, the institutional one, which is more linked to the democratic dimension, to accountability, to public redress of grievances and to the establishment of guarantees of non-repetition, which are the most transformative. The new law provides for prevention measures, such as the elaboration of a new model of non-victimising care or accountability, by annual assessment of the victimisation of women and their children.

Indicators about the responsibility of administrations

Institutional violence has an individual dimension that affects a woman or group of women. At the same time, it has a structural or a macro dimension, which affects the effectiveness of women's rights in general terms. The assessment of the responsibility of the administrations will have to analyse both these levels and the relationship between them.

The first level of analysis will consist of a sort of “structural test” of the degree of general compliance of the Administration in its obligations to sexist violence. An analysis that can be mirrored in official evaluations of organizations such as the Group of Experts on Action against Violence against Women and Domestic Violence, GREVIO [5] or the CEDAW Shadow Report [6]. The second analysis will seek to assess the link between the violence committed against that woman or group of women and the structural deficiencies identified in the previous analysis.

Conclusions

The introduction of institutional violence as a new area of sexist violence, if it is to be an element that encourages improvement in the management of sexist violence, must strike a balance between the responsibility of the administrations and their civil service, along with the establishment of accountability measures and guarantees of non-repetition, which will always have the most potential to transform structures that provoke and reproduce sexist violence.

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