

Article 3

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Introduction

This chapter examines how the Istanbul Convention defines the concepts of domestic violence, violence against women (VAW) and gender-based violence against women (GBVAW). To do that we focus on article 3 and the preparatory meetings for the convention, bearing in mind that the study of the legal treatment of these kinds of violence is complex for several reasons. First, because violence is a multidimensional reality that produces multiple effects on people against whom it is exercised, as well as there are various factors leading to the effective commission of a violent act¹. Second, because law needs a conceptual framework or a definition of the phenomenon to be prohibited, also to create measures to eliminate it. Third, gender is a dimension clearly relevant in the production of these violences, but its meaning and content remain contested. The kind of political measures, the scope of their application (both in relation to the subjects and the types of violence) and the effectiveness of the measures that are adopted to eradicate the violence will depend on all these issues. Nonetheless, when criminal law intervenes, as here, legal discourses prevail and their requirements tend to reduce the features and complexity of what can be defined as a social problem². For this reason, it is appropriate to reflect on the reasoning of the proposed theoretical positions to understand how violence is characterized and to confront the effects of its criminalization.

Antecedents

First theoretical approaches of violence focused on violence occurred within a familiar or domestic environment, and/or an intimate relationship³. The object of study and analysis then was the so-called family, domestic or intimate and partner violence. In this framework, its identifying criterion was the space in which the violent acts or the couple

¹ Larrauri, 2018.

² Palacios, 2020: 81.

³ Among others, Straus, 1999, Felson, 2002, and Straus and Ramirez, 2007.

relationship take place, representing this type of violence as the sum of aggressions and/or individual cases. These gender-neutral notions deny any specificity related to the social structures and relationships between men and women, also in relation to sexual orientation or gender identity. In fact, they were not singled out by the subject against whom these acts were exercised, except when it was found that the victims who usually face them were predominantly women. So, other approaches began to identify a kind of structural character due to quantitative reasons, still far from a power approach⁴. This initial restriction also had direct consequences on the absence of a legal prohibition of this violence in international texts and national systems, at least because it was not considered to be an act sufficiently serious or harmful to be prohibited by law, probably due to the private dimension of the domestic sphere. This is why a social, structural and political approach is needed to understand and tackle this violence.

Subsequently, and similarly to the epistemological evolution of gender studies, when this term of gender began to be used⁵, the conflict is transferred to the legal sphere by considering it as its cause. This needed to be explained because this approach introduced notions like gender or power, and changed some ideas related to the notion of violence/aggression and equality. The discussion began amongst those who said that this violence was originated from the gender structures⁶ (particularly from those historically unequal gender relations), and those who defended the so-called model of interpersonal or etiological violence⁷ (which conceives this violence as a result of the conjunction of various elements, focusing on the acts singularly considered). The main problem is how this violence becomes a crime based on notions such as gender or power.

The structural and social character of this violence began to be stressed then, although doubts still remained about which type of crime is, who may be victims, and which are the most appropriate legal proceedings to ensure the protection of victims and the prosecution of aggressors. What seemed to be pacific at that moment was the specificity of the violence, which was to be directed against women because of their gender and due to structural characteristics. However, the notion of gender and the nature of these characteristics began to be argued by different theoretical and political approaches⁸.

⁴ For instance, Johnson, 1995, Sack, 2004, or Schulhofer, 1995.

⁵ Butler, 2004.

⁶ Among others, Dobash et al., 2000, Johnson, 2005, and Larrauri, 2018.

⁷ Kelly, 1988, Schulhofer, 1995, Murnen et al., 2002, or Stagenland, 2005.

⁸ Larrauri, 2018; Palacios, 2020.

This configuration is extremely relevant when it imposes not only a (legal and criminal) language, but also shapes the field of actions and practices that the victims will have at their disposal⁹.

The concepts of violence in meetings and preparatory documents

The beginning of the discussions

In line with international commitments, on 11 May 2011 the Committee of Ministers of the Council of Europe adopted the Convention on the Prevention and Combating of Violence against Women and Domestic Violence in Istanbul, probably the most relevant legal initiative against gender-based violence (hereinafter, GBV) in the European region so far¹⁰. In relation to its subject, the Ad Hoc Committee on Preventing and Combating Violence against Women and Domestic Violence (known by its acronym CAHVIO), attached to the Council of Europe's Directorate General for Human Rights and Legal Affairs, has published the preparatory working documents prior to the final text. Here we find relevant information about the defining framework of the text, and in particular the distinction between domestic violence, violence against women and gender-based violence.

In the Elements for discussion published in 2009¹¹, the committee remarked the main issues to discuss in order to establish the defnitory framework. Thus, in the section dedicated to the purpose of the text and its definitions, it was suggested that domestic violence should be the concept on which this instrument ought to be about. However, it seems that this was not sufficient, at least because some mentions referred to "specific forms of violence against women". Then, a distinction began between two phenomena - domestic violence and another violence against women -, hesitating whether they might be addressed jointly or not. While some representatives gave relevance to those connections between them, other focused on their differences, standing out what was called as "other forms of violence against women" outside the domestic sphere¹².

⁹ Palacios, 2014: 220.

¹⁰ In this regard, mention should be made of the Declaration on the Elimination of Violence against Women (known as DEVAW) and the 1995 Beijing Declaration and Platform for Action. Both provide that "violence against women" means 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. In short, the defining criterion of violence is deduced from the heading "based on membership of the female sex", although it should be understood according to the framework of relations of inequality that are mentioned in the respective preambles.

¹¹ CAHVIO(2009)3.

¹² Paragraph No A3.

They finally agreed that there is a common content in both of them, at the same time that each one has an autonomous content. While a broad definition of each form of violence was included in section IV, the reference to the gender dimension stands out. When referring to domestic violence, the committee recognized that this type of violence is directed against women and men in heterosexual and homosexual relationships, but it actually occurs to a greater extent, disproportionately, against women and girls. No specific mention was done about how relevant sexual orientation was, but this reference to homosexuality seemed to include those same-sex relationships and families, and all kind of domestic abuse, or family violence against LGBTIQ members. As we will see, there will be few other references in this regard in following meetings although this topic will not be further either comprehensively developed.

The former writing meant that a quantitative criterion characterized violence, but it was immediately observed that this violence is both a cause and a consequence of inequality between men and women¹³, linked to those historically unequal gender relations¹⁴, suggesting then a common ground: the structural nature of violence against women, which is also characteristic of sexual violence and harassment. A different issue was the different impact that violence may have depending on who is victimized because of the roles and social meanings given to women and men¹⁵.

In other words, when violence is defined, it circumscribes the boundaries of what is understood as violent and determines who can be its victim. In this sense, when gender is introduced as a relevant dimension of violence, the committee referred to specific forms of violence identified as acts exclusively faced by women, which seemed to identify gender with women. This was the case of female genital mutilation, explicitly differentiated from male circumcision, or some types of violence in times of armed conflict such as mass rape, forced pregnancy or sexual slavery¹⁶. It therefore gave gender a similar meaning than that of the international texts, saying that there is a common ground to the different types of violence.

In this regard, we wonder if the gender approach insists on a sexualized notion and whether gender is completely interchangeable with women¹⁷. Gender would become an

¹³ Paragraph No 43.

¹⁴ Paragraph No 45.

¹⁵ Paragraph No 47.

¹⁶ Paragraph No 48.

¹⁷ Charlesworth et al., 1991, Charlesworth, 1994, Coomaraswamy, 1994, Bunch, 1995, Friedman, 1995, among others.

element of identity, since only that kind of violence exclusively directed against them is prohibited/considered - as VAW or GBV -, independently of any other dimension. Unlike domestic violence, which is characterized by the environment or space in which it is committed, VAW is characterized by the gender of the subject over whom it is perpetrated. In fact, from the features enunciated and the general sense of the text, it is possible to say that violence against women is a "specific" violence based on gender. Even if the nuance lies in the structural character that emanates from the historically unequal power relations between the genders, this may create confusion about how to prove this violence happens when it becomes a legal concept. Another question arising then is if this may situate women in a position of (permanent) victim due to their gender and connects GBV with inequality, creating a universalistic or homogeneous content of gender¹⁸.

The affirmation of gender as a common element to different types of violence reiterates its conception as an element of inequality, but power relations implies something different¹⁹, and somehow also deeper than correction measures in terms of distribution²⁰. Apart from the introduction of this violence within the scope of the non-discrimination paradigm and politics, there was a consensus on defining it as a crime. This was supposed to overcome the private sense that excluded its regulation previously and to recognize the seriousness of the harm and its consideration as a violation of the most basic rights. However, its criminalization had a twofold immediate effect: a) criminal law focuses on the effects of this violence, and it intervenes after its commission, becoming the legal and judicial the only procedures accepted to manage this violent phenomenon. It leaves the connection with the social structure aside of the measures, criminalizes conflicts between men and women, and reproduces somehow the gendered binominal protector/men/state vs victim/women²¹; b) this logic (of criminal law) requires to establish the elements of the crime and accommodate the legal and social response to it. This means: first, violence is reduced to particularly considered acts of aggression²²; second, it becomes compulsory to report the violence and to suit exactly with the legal requirements to be legally recognized as a victim. Only then a victim is entitled to access to protection, social and assistance services.

¹⁸ Larrauri, 2018.

¹⁹ Mackinnon, 2012.

²⁰ Young, 2000, Fraser, 2004.

²¹ Maqueda, 2005; Laurenzo, 2005.

²² Coll-Plana et al, 2008; Biglia, 2007: 32.

On the one hand, focusing on violence eludes a more comprehensive and holistic approach suitable to confront other forms of violence and the logic of power and inequality. This tendency has been understood as a logic of punitivism, which relegates into a secondary place those legal and extralegal mechanisms needed to confront that logic of power beyond the cases of violence. At the same time, it is not helpful to maintain the identification of gender with women because it implies a reduction of the political character with which gender was initially constructed. The second stage of this reduction is that GBV is identified with those acts agreed to be understood like that: for instance, there are still some misconceptions in some legal frameworks, like the Spanish one, where GBV is reduced to interpersonal violence (hereinafter, IPV). When the concept is broader, rarely, acts against women in prostitution or victims of institutional racism are included, even when gender have a clear impact on²³. If it is understood with a universal and homogeneous content and sense, this will leave behind not only other forms of violence related to gender but also some experiences of victims who can confront the violence from different positions²⁴.

On the other hand, to avoid the depoliticization of gender it is needed a deeper reflection on the effects that the construction of gender identities and relations produce in the commission of violence. Again, the inclusion of GBV as a crime in penal codes is probably a step in the recognition of the effects that this violence has on victims, but we should address that continuum amongst the different kinds of violence. GBV includes structural violence, as well as other types of violence with a dimension that goes beyond the individual level (we think of poverty, economic or symbolic violence). If so, its content cannot be reduced to violence in interpersonal relationships and we need to look for instruments beyond this punitivist logic. In other words, it is essential to clarify the link between inequality, gender and violence, not only regarding the definition of violence, but also in relation to the measures with which it is addressed.

The current criminalization of violence has determined the capacity for agency and/or the autonomous management of conflicts²⁵, and when some other dimensions coincide this may even get worse. For example, a migrant status or a situation of poverty may limit or expand the possibilities for action and/or practices. An undocumented nonregular migrant will probably face many obstacles to report a case of GBV against

²³ Palacios, 2020.

²⁴ Larrauri, 2018.

²⁵ Larrauri, 2018: 25.

her, because its irregular administrative status may probably be the reason of an administrative sanction. In other words, it is important to go deeper into what means that gender relations cause violence, and how gender can be addressed in relation also with its incidence, its prevalence, and how it affects the management of the violent situation.

Preparatory works

The first meeting was held earlier in 2009, and the "First Meeting: Report of the 1st Meeting - Strasbourg 6-8 April 2009 (CAHVIO (2009) 5)" was issued including a section on conceptual issues or "terms of reference". In this first report, VAW and domestic violence were mentioned separately²⁶, and the committee highlighted its interest in seeking the common elements of the regulations that member states have on these violent phenomena²⁷. In fact, the paragraph on substantive issues indicated that most delegates agreed that the instrument finally adopted should cover the greatest number of acts of VAW as possible²⁸, and thus advance the struggle for gender equality. To this end, they worked on an approach called of the three Ps²⁹, which meant that the measures contemplated must tend to guarantee prevention, protection and prosecution. This led them to promote an instrument aimed at combating not only the violence actually committed, but also the reasons or structures from which it originates. In other words, there was an intention to include provisions to combat the unequal structural relations that give rise to violence and not to focus only on the violent cases.

Regarding the concepts, in the appendix of this first report a distinction is made between VAW, GBV, and domestic violence. To do so the Committee refers to Recommendation (2002) 5 of the Committee of Ministers to Member States for the protection of women against violence, the Declaration on the Elimination of Violence against Women (DEVAW), the Beijing Platform for Action and General Recommendation No. 19 of the Committee on the Elimination of Discrimination Against Women (CEDAW). It is in relation to VAW that the Committee resumed the criteria of belonging to the female gender or being disproportionately affected, including various types of acts. In any case, the reductionist view of gender is maintained even in recent reports. When the concept

²⁶ Paragraphs No 5 & 6, Item 5 of the Agenda.

²⁷ Paragraph No 9, Item 6 of the Agenda.

²⁸ Paragraphs No 3 & 4, Appendix on the Definitions of violence against women and domestic violence in international legal instruments.

²⁹ Paragraph No 10, Item 6 of the Agenda & Paragraph No 2, Appendix on the Definitions of violence against women and domestic violence in international legal instruments.

of domestic violence is discussed, the Committee backs to these same documents, approved to combat violence against women, and some norms approved for the protection of children's rights. It should be noted that regarding domestic violence, the victimization of women is emphasized when no other reason is given, except that of quantitative reasons, but also because it is limited to the subject against whom it is exercised hiding other patterns or dimensions than gender³⁰. As seen, tensions resulting from the ambiguity of the concepts or the terms used are not only theoretical, but also have political and legal consequences.

In the second report of the "Second meeting: Report of the 2nd Meeting Strasbourg 25-27 May 2009 (CAHVIO(2009)31)", some other divergences arose. Although the majority defended a position in favor of including all forms of violence against women, some delegates insisted on focusing only on domestic violence. The committee finally opts for the majority position and focuses on an instrument to combat VAW and advocates for a special attention to domestic violence because of its disproportionate impact on women. Due to these divergences, it calls for the inclusion of a typology of acts that fall into this category, provided that a neutral generic form is adopted.

Paragraph No 13 refers to the specific acts of violence to be included in the convention, which are (i) all those based on gender, that (ii) result in acts that cause physical, sexual or psychological harm, as well as their threats or coercion, regardless of whether they occur in the public or private sphere. Likewise, specific acts are female genital mutilation or crimes of honor, but also some acts of deprivation of liberty, unlike those referred to in the "Elements to be discussed".

In its third appendix, the committee insists on the convenience to include a broad concept that contributes to an effective protection of human rights, referring to the 1993 Vienna World Conference on Human Rights, when it was stated that GBV is a serious violation of human rights and an essential obstacle to equality. Therefore, it reiterates the thesis of the three Ps meaning the need to: i) prevent, which means that states have the obligation to prevent gender violence; ii) protect the victims of such violence; and, iii) prosecute, this is, to investigate and sanction appropriately all types of violence against women, which is understood as the principle of due diligence in international human rights law. This highlights that violence is linked to a serious violation of rights, which means that the subject is not the only element that distinguishes it, but also its

³⁰ Palacios, 2014: 219.

effects. However, the scope of policies does not extend to the structural conditions that cause discrimination, despite the fact that the origin and common element of the different types of violence is the historically unequal relations between men and women.

In the so-called “Interim Report”³¹, the committee states that the final text should focus on VAW, again, paying attention to domestic violence because it affects women disproportionately. Furthermore, this report adds a fourth “P” to the priorities in the fight against this violence, referring to policies that should be inclusive, holistic and coordinated³². This last reference is relevant for the purpose of establishing the responsibilities and obligations of States to combat this violent phenomenon and to reach equality. This measure reiterates the link between violence and inequality, allowing also to address both of them. For instance, other grounds of vulnerability are incorporated, referring to the influence of social contexts and the grounds of discrimination, and their intersection.

In the report “Third Meeting: Report of the 3rd Meeting Strasbourg 1-3 December 2009 (CAHVIO(2009)34)”, the committee sets out the agreements on the content of the draft and the issues still outstanding. Thus, some delegations consider the content of the draft too detailed, and others too broad, insisting on the advisability of adopting a multidisciplinary approach that would ensure a series of binding measures for States. In this sense, a series of measures applicable to combating domestic violence is included, distinguishing them from those aimed at combating VAW. With regard to conceptual issues, the Committee emphasizes the advisability of linking these measures to the “empowerment” of women, the notion of the victim, and in particular how sexual orientation and gender identity have to be understood and included within the scope of domestic violence³³. This may be useful to understand family and domestic violence against LGBTIQ people but more information should be provided, at least from a legal perspective. For instance, what would happen when same-sex relationships are not legally recognized, or whether violence against lesbians, bisexuals, trans... can be considered “non-normative with regard to gender and/or sexuality” (Donovan & Barnes, 2019), and to what extent this may influence the same concept of gender .

³¹ CAHVIO (2009)4FIN

³² Paragraphs No 7 & 2.

³³ Paragraphs No 5 et seq.

All of them are finally pending discussion because no further reference will be added in this regard, but it seems to be moving away from a gender dimension. This is, domestic violence is addressed out of any gender approach, nor is gender understood separately from the female gender. This is worrying in the case of trans, given that gender identity is not even mentioned in the convention and sexual orientation is only referred in relation to domestic violence, what can be read from a normative idea of affective relationships³⁴. Regarding trans, nothing is said about the violence caused by transphobia, either how to integrate the violence against them due to their identity, except for the explicit mention regarding the prohibition of discrimination due this ground. This would have been the moment to reinforce a comprehensive meaning of gender, highlighting what has to do with power and heterocisnormativity. In relation to same-sex relationships, this could have also been the moment to open their meaning and possibilities, but also to introduce the power or normative dimension and a reference to children within these partnerships.

In relation to the "Fifth Meeting: Report of the 5th Meeting Strasbourg 29 June - 2 July 2010 (CAHVIO(2010) 11)", we see that the "Draft Convention on Preventing and Combating Violence against Women and Domestic Violence" (CAHVIO (2009)32 REV)" took up the conceptual issues. In this regard, a proposal by the Spanish delegation, which then held the presidency of the EU, promoted that the object of the Convention was VAW. In this sense, it was agreed that the measures provided in the convention would also apply to cases of domestic violence, with particular attention being paid to women in cases of GBV. However, the provisions have been drafted in a neutral way, as agreed in the first sessions. Finally, the content of Article 1 bis on the scope of application of the Convention, which will become finally Article 2 (following the agreement reached at the 8th Meeting "Eitghth Meeting: Report of the 8th Meeting Strasbourg 13-17 December 2010 (CAHVIO (2010) 27 rev)" of the Convention, was approved. In this sense, its three paragraphs provide that:

1. This Convention shall apply to all forms of violence against women, including domestic violence, which affects women disproportionately.
2. Parties are encouraged to apply this Convention to all victims of domestic violence. The Parties shall pay special attention to women victims of gender-based violence in the implementation of this Convention.

³⁴ Palacios, 2020.

3. This Convention shall apply in time of peace and in time of armed conflict.

Other issues agreed at this eighth meeting were, for instance, the reference to international law when defining some specific forms of violence such as rape, but not others, as in the case of domestic violence; the definitions of each form of violence are maintained as held in the previous discussions, as we see below.

The concept of VAW and GBVAW in the Istanbul Convention

Purposes of the convention

The Convention finally establishes a comprehensive framework for action against violence against women and domestic violence based on the principles of equality, non-discrimination and due diligence. Thus, according to its first article, the purposes of this Convention are to:

- a) protect women against all forms of violence, and prevent, prosecute and eliminate violence against women and domestic violence;
- b) contribute to the elimination of all forms of discrimination against women and promote substantive equality between women and men, including by empowering women;
- c) design a comprehensive framework, policies and measures for the protection of and assistance to all victims of violence against women and domestic violence;
- d) promote international co-operation with a view to eliminating violence against women and domestic violence;
- e) provide support and assistance to organizations and law enforcement agencies to effectively co-operate in order to adopt an integrated approach to eliminating violence against women and domestic violence.

To this end, the treaty is based on the structure of the four "P's": prevention, protection, prosecuting and (comprehensive) policy. So, the extent of the obligations and due diligence of the states to guarantee the elimination of all types of violence (against women) is defined. When the explanatory document on the content of the Convention is made public, the meaning which the European legislator gives to the various measures envisaged and the significance of the conceptual framework becomes clear. Regarding the regulatory nature of the measures, this explanatory document emphasizes the interest of the Convention in strengthening the protection of victims; hence, paragraph 1 (c) "reflects the need for a comprehensive approach to the protection of and assistance to all victims of violence against women and domestic violence. The forms of violence covered by the scope of this Convention have devastating consequences on victims. It is

necessary to design a comprehensive framework to not only ensure their further safety, re-establish their physical and psychological health but to also enable them to rebuild their lives. This framework should be grounded on a human-rights based approach"³⁵. This makes clear that this convention still remains with a logic of punitivism and focus on the protection of victims, which it is still necessary indeed.

The approach of the policies adopted by the European legislator is hardly linked to situations of discrimination, except for the processes of protection and recovery of victims, out of the principle of non-discrimination established in article 4. Nevertheless, the human rights-based approach is noteworthy in this regard, since it insists on recognizing the effects of violence as a serious violation of human rights, as well as on linking the fight against violence with the achievement of equality. This is the strong point of this legal instrument, at least, because it becomes a first step towards combating violence without reducing it to those violent acts already committed but taking into account the situation of subordination. Paragraph 31 therefore refers to the link between the eradication of violence and inequality, and how substantive equality is one of the objectives of this convention.

What is missing in this section, it must be said, is the reference to the intersectional nature of the policies adopted. When some specific types of violence are introduced, such as FGM or forced marriages, it is made an attempt to avoid their culturalization³⁶, just as when certain situations of special vulnerability are referred to, and measures are urged to ensure the effective protection of victims' rights. However, there is no specific mention of the possibility of incorporating policies that tend to avoid re-victimization and to combat complex situations of inequality³⁷. If the gender paradigm is assumed in an appropriate manner and in accordance with the obligations assumed in this text, states must intervene to eradicate the systematic and structural inequalities from which violence originates. In other words, this affirms the state obligation to assume legal and political responsibilities for the elimination of gender inequality.

As can be seen from the reports of the committee meetings, the final choice was to include a framework with different definitions depending on the type of violence. Thus, according to Article 3:

³⁵ Paragraph No 32.

³⁶ Mestre, 2017.

³⁷ Burman, 2007: 51 & 52; Peroni, 2016: 61 & 62.

“For the purpose of this Convention:

- A) “violence against women” is understood as a violation of human rights and a form of discrimination against women and shall mean all acts of gender-based violence that result in, or are likely to result in, 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;
- B) “domestic violence” shall mean all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim;
- C) “gender” shall mean the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men;
- D) “gender-based violence against women” shall mean violence that is directed against a woman because she is a woman or that affects women disproportionately;
- E) “victim” shall mean any natural person who is subject to the conduct specified in points a and b;
- F) “women” includes girls under the age of 18.

Based on this framework, we understand that it is possible to maintain that the European legislator supports an explanatory model based on the structural nature of violence, although it then equates this phenomenon to violence occurring in the domestic sphere. This is explained in the explanatory document.

On domestic violence, this document insists on referring to the domestic or intra-family environment, stressing that this concept usually includes two types of violence; first, interpersonal violence within the couple and, second, violence against children. It insists on the neutrality of the concept to emphasize that there is no place for a victimization of a gender, and it is explicitly said that both positions can be occupied by either gender³⁸. However, the following paragraph insists on its greater prevalence when it is exercised against women, what justifies a gender-based approach³⁹. Unlike this one, when violence against women has been defined and recognized as a serious violation of human rights and a form of discrimination, emphasis is placed on the concepts contained in international texts, highlighting DEVAW and General Recommendation number 19 of CEDAW. This allows to encompass other harms like the economic violence⁴⁰.

³⁸ Paragraph No 41.

³⁹ Paragraph No 42.

⁴⁰ Paragraph No 40.

The main problem, in our concern, is that no consistent or appropriate definition on GBV is adopted, which can be seen especially by the erroneous equation of a qualitative criterion of violence and a quantitative one. This is explained in the document regarding the concept of gender, reiterating that it refers to both genders (what reinforces the binary logic and may exclude trans) and that it explains the social origin of the roles, behaviors, activities and attributes that a society assigns to each gender. In the same paragraph 43, the Committee argues that violence "needs to be addressed in the context of the prevailing inequality between women and men, existing stereotypes, gender roles and discrimination against women in order to adequately respond to the complexity of the phenomenon. The term "gender" under this definition is not intended as a replacement for the terms "women" and "men" used in the Convention". The complexity of violence is noted, as well as the need to link measures against violence to inequality, and in conjunction with the following paragraph, it is stressed that the uniqueness of GBV lies in the fact that it is perpetrated against women because they are women or because it affects them disproportionately.

Here we find the likely most important characterization for the purpose of concretizing this uniqueness. In fact, the committee begins by saying that this violence differs from other forms of violence (we understand that it probably differs from domestic or intrafamily violence) because gender is the primary ground, but this means that the violence is both the cause and the result of unequal relationships. As well as the explanations contained in other documents, this definition refers to its origin as the cause of violence in both the private and public spheres, explains it is anchored in social and cultural structures, and above all has the effect of being denied and silenced. Probably due to the influence of the international texts, it tries to differentiate the concept of gender from that of VAW, but some confusions remain if we take into account other approaches.

The Mid-Term Horizontal Review of GREVIO Baseline Evaluation Reports

In May 2021, GREVIO issued a report called “The Mid-Term Horizontal Review of GREVIO Baseline Evaluation Reports”, in which we find a comment on each article of the Istanbul Convention, as you may see in other chapters of this book. Regarding article 3, GREVIO insists on the need of accurate definitions of those key concepts “that are fundamental to the implementation of the Istanbul Convention”⁴¹. The reasoning

⁴¹ Paragraph No 16.

here summarizes how GREVIO finally understands VAW and GBVAW, emphasizing the shortages and deficits in the state's parties legislations and policies. Following this reasoning, we may say that gender-neutral definitions of domestic violence and GBV are refused because they “overlook the human rights and gendered approach of the convention”⁴². Then, according to GREVIO, any definition of this kind of violence should address violence against women.

GREVIO explains that saying the Convention covers that violence in which gender is the primary motive⁴³, meaning also that this is exercised in any case against women. That is why gender-neutral references, like domestic violence and GBV, even when this expression is used to include men, boys and LGBTIQ people, are criticized⁴⁴. While GREVIO reiterates that the rejection to the first notion lies in the refusal of any social and structural character, the main objection to the use of the expression GBV is that the lack of any explicit mention to women threatens to maintain this violence invisible and inadequately addressed⁴⁵. Even agreeing with this, it means that the Convention sustains a sexualized approach of the victim (at least). In my view, however, it neither addresses the risks of their possible victimization and the effects of its (preponderant) criminalization, nor solves the doubts related to its proof and finding in criminal proceedings. In other words, gender is generally understood as female, and this can explain why the Convention refers explicitly to women, but it does not necessarily mean that all violence against women out of these unequal power relations may be understood as such. There is still a need to reflect on how gender may be understood to create a theoretical, a legal and a policy inclusive and intersectional framework.

The last comment regarding the lack of accurate definitions has to do with the inclusion of different kinds of violence. This reminds us that GREVIO thinks of a general and inclusive concept emphasizing that all kind of VAW should be legally prohibited, like the economic violence⁴⁶, but it also requires a harmonised understanding of VAW⁴⁷.

Other approaches

⁴² Paragraph No 18.

⁴³ Paragraph No 16.

⁴⁴ Paragraph No 19.

⁴⁵ Ibidem.

⁴⁶ Paragraph No 17.

⁴⁷ GREVIO refers to the Spanish case, in which the 17 regions have different definitions of VAW, differing them significantly in scope. Paragraph 21.

Some recent approaches to GBV insist on not to neglect the position or context from which a victim faces a situation of violence. The legal framework to eradicate violence may provide mechanisms to combat structural and complex inequalities, starting from which analysis may be done to evaluate the possibilities of action and the scope of practices available to the victim. For example, when assessing access to care services, the legal mechanism should take into account the effects of the interaction of victims of violence with institutions and protection and recovery measures, but also equality policies or violence awareness and prevention⁴⁸. This probably suggests focusing on gender, social class, race, national origin, among others, and to analyze how these dimensions also determine the scope of actions, practices and possibilities of individuals. In other words, there is a need to reflect on structural issues, combining sexism, racism, lgbtqiphobia, etc., counteracting the idea of a unitary kind of victim⁴⁹, what obliges those legal and social agents to a comprehensive understanding of the social position of victims.

Intersectionality theory helps us to explain how GBV takes place as a consequence of the interaction of gender structures that provoke patriarchal relations with other structures of domination coming from other social systems. In other words, the positions of subordination are not always, and in any case, occupied by women, but it strongly depends on the meaning that the sex/gender system gives to each gender also from the interaction of this with other social systems. In short, intersectionality allows us to identify positions of power or lack thereof, depending on whether the characteristics of one group or another are shared, not in an additive or cumulative way, but rather in a unique and different form. Hence, identities can be understood as diverse as possible combinations, from which social and cultural practices legitimize and reproduce this type of violence, being also from where to approach the practices and possibilities of action of victims⁵⁰. These models should be therefore used to translate this theoretical framework into the legal, if this is possible⁵¹.

It is important to remind that political (or legal) aspirations do not obviate the fact that the position from which we speak or self-pronounce is constituted in a relational way. It is related to Butler's consideration about how autonomy or agency has been legally

⁴⁸ Palacios, 2014: 214 & 215.

⁴⁹ Palacios, 2014: 215.

⁵⁰ Larrauri, 2018.

⁵¹ Palacios, 2014: 203 & 204.

understood, and her same idea of performativity of gender. In this sense, she affirms that the vindication of women's rights, even when it has an emancipatory purpose, re/produces gender identities because the subject has been constituted performatively and it reproduces the same position previously created by those occupying positions of power⁵². However, when she explains the debate about a possible right to gender self-determination, Butler argues that its claim becomes political and may address how gay and lesbian people experience sexuality, the gender identity or expression of trans people question the features of the subject of law, or that any medical intervention may not be required by intersex people. This glimpses a certain sense of resistance and vindication the law can embrace, particularly when these dimensions have been excluded or expelled from the normative standard by heterocisnormativity, at the same time that its inclusion and the consolidation of its legal meaning and value are promoted⁵³.

This is also an approach to rethink the concepts of gender and GBV. Gender is a dimension or axis based on heterocisnormativity which reproduces the binarism male / female and homosexual / heterosexual. There cannot be a substitution from one to another, either to elude the gender axis, but this means that identity is constructed through complex processes, and this could not entail the “structural dynamics”⁵⁴, which are also – but not only - based on a gender dimension. Likewise, in connection with the theses of Mohanty (2008), Butler remembers that, if universalist vindications based on autonomy are articulated, every subject has differentiated modes of meaning it since we constructed our identity of fixed form or at least contextualized⁵⁵. If so, contexts from which we acquire meaning should not be disregarded, so emancipation.

With a similar reasoning, the decolonial undoing processes start from this binary logic and the code of hierarchical values. The decoloniality of gender also involves a global critique of heteronormative racialized capitalist oppression generated from its roots, as argued by Anzaldúa (2016), Tamale (2011) and Lugones (2010). Legal frameworks, understood as constructions with these assumptions, need to be rethought in these terms. Being aware of these premises it is possible to identify the different and complex systems of oppression. Following Spivak, this urges to recall that subordination has

⁵² Butler, 1999.

⁵³ Butler, 2010.

⁵⁴ Palacios, 2020: 82.

⁵⁵ Butler, 2004: 47.

affected women more intensely, but it has changed the meaning of other axes such as race⁵⁶.

It is not possible then to perpetuate or maintain unequal relations towards the positions of subalternity⁵⁷. The same happens with refugees, whose protection can never be motivated by paternalistic and ethnocentric notions of vulnerability far from the rights paradigm. This should be addressed when GBV legal framework is assessed and few mentions are done in the Istanbul Convention. Hence, probably the essential challenge remains to articulate legal measures or tools that allow us to start from the social relations and structures that shape and have shaped us, for which it is first necessary to identify or determine the contexts, positions and axes that cross.

Some conclusions

If so, it becomes essential to specify the relationship between inequality and violence at the same time that the meaning of gender, and how it intersects with other elements, is questioned. A different - but closer - point is to translate this approach to the study and analysis of the commission of violence⁵⁸. As said, the influence of the other elements is crucial to understand how the victim can access other resources, services and even legal procedures. This must be linked to two ideas:

- the revictimization of victims: the creation of unitary images of victims, and also of the understanding of violence as an interpersonal phenomenon has consequences on the settings and premises of the legal and social measures. For instance, sometimes criminal charges are required to allow the access of victims to social resources.
- the idea of individuality and exceptionality: remedies made available to victims are based on the idea that judicial procedures are the "prototypical" mechanisms and there is no sign of any transformation or different kind of measures to combat the notion of inequality beyond the breakdown of equal treatment.

If this is seen as a logic of power, this needs to be the starting point.

⁵⁶ Spivak, 2011: 70.

⁵⁷ Spivak, 2011: 77.

⁵⁸ Larrauri, 2018: 25.