The "insertion of behavior" and the deceptive justification of violence by the Spanish Constitutional Court

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Summary: In this essay I present a case of deceptive justification of (legal) violence through the misleading justification of an article of a law by the Spanish Constitutional Court. I also report on the surprising behavior of AI regarding a law that appears to be contrary to the Spanish Constitution and the Universal Declaration of Human Rights.

Keywords: deceptive justification of violence, intimate partner violence, Spanish Constitutional Court, Amnesty International.

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1 The "insertion of behaviors" and the Spanish Constitutional Court

In 2005, the Magistrate of Criminal Court number 4 of Murcia (Spain) argued that Article 153(1) of the Spanish Penal Code was unconstitutional. The Spanish Constitutional Court (CC) had to rule on the matter, which it did in 2008. In summary, the CC had to answer this question: "Are the following two legal texts compatible?" The first is article 14 of the Spanish Constitution (SC); the second contains fragments of sections 1 and 2 of art. 153 of the Spanish Penal Code (emphasis added):

1: Spaniards are equal before the law and may not in any way be discriminated against on account of birth, race, sex, religion, opinion or any other personal or social condition or circumstance.

2 (art. 153):

1. Whoever, by any means or procedure, causes another mental damage or an injury not defined as a felony in this Code, or who hits or abuses another by action, without causing such person an injury, *when the victim is or has been his wife, or a woman with whom he has been bound by a similar emotional relation… shall be punished with a sentence of imprisonment of six months to one year*, or community service…

2. If the victim of the offence foreseen in the preceding Section were any of the persons referred to in Article 173.2, except the persons considered in the preceding Section of this Article, *the offender shall be punished with a sentence of imprisonment from three months to a year* or community service….

(These two paragraphs from art. 153 imply that the minimum sentence of imprisonment for men who cause certain damage to their female partner is 6 months, whereas the minimum sentence for women who cause the same damage to their male partner is 3 months.)

Seemingly, the answer to the aforementioned question is "No." The justification for this answer might be as follows: "Article 14 of the SC implies, among other things, that the courts must judge and sentence people *without knowing, or as if they did not know*, their gender. According to the second text, the sex of the offender and the victim must be taken into account to determine the punishment. Both affirmations are logically incompatible."

However, the CC replied "Yes."[1]

In short, the CC justified this answer as follows: the conduct of a man aggressing his spouse (or equivalent couple) is *different* from the behavior of a woman aggressing her spouse (or equivalent couple), and these two actions are different because if the author is a man "the author inserts his behavior into a cultural pattern that generates extremely serious damage to the victims and because he endows his action with violence much greater than that which his act objectively expresses." According to the CC, the extra punishment for male offenders does not imply "that the agent of the conduct is punished for the aggressions committed by other male spouses, but for the special negative value of his own individual conduct: for his conscious insertion of that conduct in a concrete social structure to which, additionally, he himself, and only he, contributes with his violent action."

That is to say, the CC *knows* that whenever a man aggresses his wife he consciously inserts his conduct in a bad situation, and this justifies the extra punishment. In other words, the CC is telling convicted men: "We do not impose extra punishment on you for being a man but for inserting your conduct in a bad situation and for doing so consciously; and for us to know that you consciously inserted your conduct in a bad situation it is necessary and sufficient for us to know that you are a man." How does the CC know it? If we discard the fortune telling we are left with the alternative of *logical deduction*: the insertion of bad conduct is logically deduced from the essence of men, that is to say, it is deduced from what individuals whose identity documents state that they are male necessarily are.

But if the extra punishment is based on what men *necessarily* are, the assertion that it is not imposed on account of gender is misleading. If men inevitably insert their behavior in a bad situation, the extra punishment imposed by art. 153.1 may be justifiable; however, that does not prevent it from being logically incompatible with art. 14 of the SC.

This trickery is disguised by accusing male offenders of a hypothetical action *that is never defined* as, according to the (reference) dictionary of the Real Academia Española (Royal Spanish Academy), the Spanish wording that I have translated as "insert behavior in a cultural pattern" literally means nothing. It might have some metaphorical meaning but until the CC explains the literal meaning of the metaphor (which would expose the falsehood of its claim) there is no definition of the hypothetical action whose conscious realization justifies the extra punishment.

Finally, I admit that I do not understand what is meant by the assertion that when a man inserts his conduct in that bad situation "he endows his action with violence much

[1] The answer is the judgment 59/2008, of May 14, 2008 on the question of unconstitutionality 5939-2005, published in the "BOE" number 135, of June 4, 2008, pages 14 to 35. Quotations are my translations.

greater than that which his act objectively expresses." Therefore, I am not in a position to affirm that the assertion is deceitful, nor can I discard the possibility.[2]

2 Law 1-2004 and AI's surprising behavior

The wording of article 153 of the Spanish Penal Code, to which I have referred, was established by article 37 of Law 1-2004. Law 1-2004 creates a new offense, called "gender violence" which has the extraordinary characteristic that it can only be committed by men and suffered by women.

During the Nazi government, in Germany one could accurately predict how a newborn would be treated under the Nuremberg laws by counting how many of their four grandparents were Jews. In contemporary Spain, it is possible to predict with a high degree of certainty how newborns will be treated under law 1-2004, by looking at their genitals. If they are masculine, a newborn may develop into a criminal but not into a victim; if they are female she can become a victim but not a criminal. If the genitalia are intermediate, the prediction depends on which of the two possible legal categories he/she is placed into. All these cases are dependent on there not being any gender reassignment. If a person who was legally a woman undergoes a legal change of gender and becomes a man, his behavior will immediately and automatically be at risk of being inserted in a bad situation and he may become a criminal but can no longer be a victim.

I have read some of Amnesty International (AI)'s documents dealing with law 1-2004. None of them states that this law is contrary to the Universal Declaration of Human Rights (UDHR). On the contrary, one of them, in relation to the implementation of this law, cites the "persistence of gender-based discriminatory prejudices in the criminal justice system, expressed in the belief of the falsity of the victim's complaint[3]." This document states that this persistence is a conclusion of another AI publication[4]. This other document cites accusers who complain that they were not deemed (sufficiently) credible, but no evidence is cited and it is also not asserted that male defendants were granted more credibility than their female accusers. Although the document recognizes the right to the presumption of innocence, it is not clear that its authors understand how to apply it: they frequently call claimant and defendant as victims and aggressors, e.g.: "Amnesty International is greatly concerned about the practice, documented through cases, of the counter-prosecution of the aggressors against the victims for injuries resulting from the defense of women who were being attacked, or even without such injuries"[5].

In view of this[6], I cannot discount the following, surprising hypothesis: It is likely that there are legal cases in which the only available evidence is the declaration of the

[2] The words "the author inserts his conduct into a cultural pattern that generates extremely serious damage to the victims and because he endows his action with violence much greater than that which his act objectively expresses" were not carelessly written and later regretted. I have found 10 subsequent judgments of the CC in which those words are cited (81/2008, 99/2008, 45/2009, 107/2009, 127/2009, 178/2009, 179/2009, 202/2009, 41/2010 and 45/2010).

[3] Amnesty International (2014), my translation.

[4] Amnesty International (2012).

[5] Amnesty International (2012, p. 12), my translation.

[6] On March 20, 2017, I sent an email to AI-Spain, an association of which I was a member at that time, asking them to tell me (1) if any of their documents states that Law 1-2004 is contrary to the UDHR, and (2)

claimant and that of the defendant. It is possible that in some of these cases the judges pass a "not guilty" sentence, implying not that the defendant is innocent, but that it could not be proved that he was guilty. It is possible that, in these cases, some claimants erroneously think that the judge has believed the defendant's declaration but not theirs. It is possible that in coming to the aforementioned conclusion AI has accepted this erroneous interpretation.

3 Final reflection

It is possible that the CC wanted to protect a law that is seemingly endorsed by the published opinion and electorally beneficial to a certain political party, without daring to criticize art. 14 of the SC. It is possible that AI wishes to defend a law which is supported by many AI members without realizing, or in spite of having realized, that it is contrary to the UDHR which it claims it defends.

Scientific research has shown how easily expedient beliefs are acquired[7]. In view of this, people who are willing to discover the reality and for that reality to be known may resort to logical deduction, a process which is believed to produce correct conclusions from correct premises. However, the facts discussed in this paper are more evidence of how little the holding or defending of a belief is hindered by the lack of logic of that belief[8].

on which evidence the above-mentioned discrimination claim is based. To date (July 6, 2017) I have not received a reply.

[7] Cortizo Amaro (2009, pp. 116-193; 2014a, chapters 9 and 10).

[8] See, for example, the experiments by Tversky and Kahneman (2006), and by Kahneman and Tversky (2007), or my paper on the scientific search for something that cannot logically exist (Cortizo Amaro, 2014b).

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