

SWPS University

Institute of Law

THE VICTIM OF GENDER-BASED VIOLENCE. A COMPARATIVE PERSPECTIVE OF THE EUROPEAN UNION, SPAIN AND ITALY

Doctoral Thesis

Submitted by the Doctoral Candidate:
José Antonio González Costa

Doctoral Supervisor: Dr. hab. Joanna Beata Banach-Gutiérrez, prof. UWM

Second Supervisor: Dr. Iván Domingo González Barrios, University of La Laguna

Warsaw 2025

Table of Contents

List of Abbreviations

Introduction	1
Chapter I Violence of gender: Selected Aspects	5
1.1 Definitions	5
1.1.1 Violence of Gender in the legal terms	5
1.2 Differences and similarities between gender –based violence and domestic violence	7
1.3 Types of gender-based violence	13
1.3.1 Physical violence	13
1.3.2 Psychological violence	13
1.3.3 Sexual violence	14
1.3.4 Economic violence	14
1.3.5 Patrimonial violence	14
1.3.6 Social violence	15
1.3.7 Vicarious violence	15
1.4 Modalities of violence	15
1.4.1 Institutional violence	15
1.4.2 Work violence	16
1.4.3 Violence against reproductive freedom	16
1.4.4 Medical violence	16
1.4.5 Media violence	16
 Chapter II The Legal Status of the Victim of Gender-based Violence in Comparative Perspectives Italian and Spanish case-study	 17
2.1 International and European approaches	17
2.2 Towards a new common regulation in the European Union	32
2.3 An overview of Italian and Spanish Laws	34
2.4 Punitive distinction on grounds of sex in the criminal code and its conflict with fundamental rights enshrined in the Spanish Constitution and the organic law 1/2004 of 28 December	49
2.4.1 The reform of the Penal Code with the entry into force of the Organic Law 1/2004 of 28 December on measures of Integral Protection against gender-based violence	49
2.4.2 Jurisprudence and preferences to the doctrine	56
2.5 Gaps of the Spanish gender based-violence law	67
2.5.1 Implementation of measures precautionary generically	67
2.5.2 The false complaint and the simulation of crimes	70
2.5.2.1 Consequences, effects, penalties,	70
2.5.2.2 Perverse effects, use of mechanisms with fraud law or for some purposes which in principles was not conceived LVG	73
2.5.2.3 Compensation Need for an aggravated kind of art 456CP	75

2.6	Consent induced or consented	78
2.6.1	The different lines of jurisprudential study	80
2.6.2	Legal effects of the breach induced or consented to, its rigidity and its automation in the LVG	80
2.7	Need of reforming the L O 1 / 2004 of 28 of December of measures of protection comprehensive against the violence of gender "of lege ferenda"	96
2.7.1	Need to reform the current law to include all men without legal differences	96
2.7.2	Need of reforming the current law to comprise all type of unions	101
2.7.3	Solutions for gaps and inefficiencies of the current law	106
Chapter III	Towards a model of resolution of conflicts derived from the violence of gender by way not jurisdictional	110
3.1	General remarks	110
3.2	Legal delimitation Subject beneficiaries of this new	114
3.3	Phases of the procedure	115
3.4	The mediation in criminal cases, as a way of non jurisdictional legal interpersonal conflict resolution	117
Conclusions		123
Bibliography		127
1. Legal Documents		127
2. Court		128
3. Monografes, Handbooks, Commentaries		129
4. Journals		132
5. Internet Sources		133

Abbreviations

Art : Article

A P : Provincial Court

C P : Criminal Spanish Code

SC: Spanish Constitution

T C : Constitutional Court

T S : Supreme Court

**LVG: Law 1/2004 of 28 of December on Comprehensive Protection Measures
against Gender Violence**

LECR: Criminal Procedure Law

STC: Sentence of the Constitutional Court

STS: Sentence of the Supreme Court

SAP: Sentence of the Provincial Court

Introduction

Aims, motives, methods and hypothesis

The topically and scope of the DOCTORAL THESIS This thesis deals with the influence that has had the Law 1/2004 of 28 of December of Measures of Integral Protection, known as violence of gender, in Spanish law, its legal and social basis, implementation, gaps and effectiveness of it. Also, it will be shown the not only legal reasons which have led to the Spanish legislator that the law, only provides protection women excluding without limitation the man, simply by the fact of being a man and establishing differentiating criterion to the sex of the person, against several principles of the Spanish Constitution, as the equality in law or of the sexes without discrimination, either male or female.

Also studied the replies, by sentences of the Supreme Court, the highest Spanish judicial court on several issues and appeals of unconstitutionality, done even by own judges. The reasons of those sentences are not free of controversy and discussion, as has been the subject of much controversy by own judges and doctrine and also, in fact, there is huge problems of application of the law.

In addition and going deep into the law, it will be exposed if this Law 1/2004 of 28 December, is effective, actually protects the victim of so-called gender violence and if you get the ultimate goal of the law, which is to avoid any violence, physical or psychic, giving real protection and who lives in an egalitarian society where is not discriminated against females by the fact of it, as a result of historical superiority of man.

It will also examine in detail, if the measures of protection on behalf of the victim are fair, effective, and respond to the principle of proportionality, studying the consequences for the victim and alleged offender.

We will explain the different legislation about violence domestic in several European countries, explaining its procedure about violence domestic and what guaranty has every law in the same case.

In another section, we will analyse gaps, errors and inconsistencies of the law and its possible solutions. Later on, the breach induced or consented, casuistry and their consequences will be analyzed, i.e. when despite being force an injunction of protection or a ruling, which limits or prohibits the approach of the offender to the victim, the

latter voluntarily is either active or passive, access resume the emotional relationship even returning to live together

Finally, a deep change of the law, be proposed for reforming it in many aspects, ranging from better education in equality pro actively from youth to adults, that is a law for both sexes, without establishing any discrimination by reason of the sex of the offender and the need to involve psychologists, social workers and family mediators as main changes Without doubts, this reform, preventing many deaths and attacks on women and fatal outcomes that happen so often, while not increasing their number each year now Also the author defends the mediation as a tool or way to sorted out the problems about violence domestic, violence of gender and violence in the family and proposes the mediation as solution for these crimes The mediation helps to communicate between both sides and try to negotiate and to make an agreement about the future behavior in the relationship, setting red lines for aggressive or improper behaviors, avoiding that theses bad behaviors happens again

The mediation it must to be regulated by law and specially it must to make a strong distinction to know when is possible to use it and when it doesn't possible In this case the author point out that it just it is possible when there isn't important injures or damages, that means the mediation it just possible by not very important cases of violence It is very important too, that the mediation will be applied by specialist people with knowledge about law, psychologist and negotiations skills and it's need urgently to educate the society in gender equality

The object of the research With a scientific problem of this dissertation research taken into account, the object of the research is considered to be: to analyze the regulations of violence domestic or of gender in the European Union and its the mechanisms to protect the victim of violence domestic or of gender; to describe its efficiency; to propose an alternative law and defend the mediation as a tool for the settlement of domestic disputes by non-jurisdictional ways

The objective of the research This dissertation work aims to investigate the different legislations about violence domestic or of gender in the European Union, to reveal the common problems of these laws, to explain the Spanish law as a bad example about violence domestic or of gender, to analyze the efficiency of the law in the victim and to check the fundamental rights of the offender according the legislation Finally to

propose the mediation as a tool to sorted out this kind of conflicts by non jurisdictional ways

This goal will be implemented through addressing the following **dissertation work tasks:**

1 - To describe and analyze different legislation about violence domestic and the gender in several european countries, and to describe the differences and similarities between them

2 - To describe the need to reform the law of violence domestic and of gender in Spain, describing its rules against the fundamental rights and its inefficiency for the rights of the victim and the aggressor

3 - The need to harmonize and make an common legislation in the European Union about violence domestic and of gender

4 - The need of educate the society in gender equality and respect in all levels

5 - To analyze and propose the mediation as a tool to sorted out conflicts about violence domestic and as a way to resolve conflicts by non jurisdictional ways

6 - To describe the interim research results

7 - To present the main dissertation work results

8 - To formulate and give conclusions and recommendations

The location of studies is in Spain in the European Union and the research is based on the current events from 2007 to 2020

Scientific novelty of the Doctoral Thesis is: The research of violence domestic or of gender in the European countries, because it has been studied in a fragmentary way, not analyzing the problems in detail and a gap of analysis in this field is not filled with a scientific contribution by other authors, since the different laws have problems of efficiency to protect the victim and in some cases like the Spanish case, to ensure the fundamental rights of the aggressor Moreover, there is some big gaps to ensure the protection of the victims after the conflicts, that it never has been studied in a scientific way, proposing several solutions for it

Also to conduct a comparative study of the problem, analysing the different laws of the countries and how is it applied for the same case

The Doctoral Thesis is written for the first time not only with the analysis of the application of the different laws of the countries of the U E, but also supported by the

analysis of other adjoining regulations, statistics and a large amount of literature mainly Spanish and Italian authors

Thus, the dissertation work aims at filling this problems and gaps providing a comprehensive analysis of the different regulations in details and propose a common legislation for all the countries in the European union together with the mediation as tool to sorted out the conflict by a non jurisdictional way

The scope and structure of Doctoral Thesis The structure is defined by the object and subject, with the targets and missions, consisting of three chapters, which include nearly twenty paragraphs, conclusions, appendices and bibliography for the sources as well as the surveys The purpose of the study is to analyze the law of violence of gender in Spain and Italy mainly, checking all the mistakes and gaps of all them and to propose a new regulation and another ways more effectives, like the mediation, as tool to sorted out this kind of crime

The historical method, was used to study the origin and development of the Law of Violence of Gender from 2007 in Spain and the different laws of the European countries about violence domestic, describing its problems and efficiency throught the years until now

The comparative method, was used in the work analysis of various authors and rights experts on the role of the violence domestic or of gender and the courts of all instances of nation-states in ensuring the right to the victim and offender, to have a fair trial in accordance with the Constitution and international obligations of those States This method clarified common and distinctive features in the jurisprudence of the Republic of Italy and Spain

Formal-logical method, was used in clarifying certain relationships in the jurisprudence of France, United Kingdom, Spain, Italy and the Republic of Poland in the same context and in the same cases to analyze how different is the these countries in the same case and with the same facts of violence domestic and formulating the author's position on controversial legal issues

Induction method was used in the processing of empirical material, with its application the author has compiled and thoroughly examined the specific facts of the laws and judicial practice in the European countries specially in Spain and the Republic of Italy, which allowed him to make logical generalizations, which formed the basis of the author's conclusions and proposals in the field of rulemaking

Using the method of deduction, the author was able to comprehend and understand the logic of the regulations about violence domestic in every European country studied and how is been sorted out the same facts in the countries according with its laws because in every country the consequences like punishment, measures or fine are quite different To illustrate the need for a big change in all the European countries the author use the Spanish law as bad example of regulation, about efficiency, measures, punishment and inequality of sexes Also, it's analyzed the feasibility of certain provisions of law and assessment of the validity of decisions by the courts at all levels and the authors used theoretical modeling method

Chapter I

Violence of gender: Selected Aspects

1.1 Definitions

1 1 1 Violence of gender in the legal terms

It's necessary to explain that there are many definitions of the concept of gender-based violence, which it varies by country and has to do with the mentality, education, culture and traditions of that country However, there is an international definition that has been established by the United Nations and which defines violence against women as *"any act of gender-based violence that results in, or may result in physical, sexual or psychological harm to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether they occur in public or private life"*¹

In addition, efforts are being made to progressively expand the definition by extending it to cover all the people who are included in the international definition, including any victim of any crime and whatever the nature of the physical, moral or material harm that

¹ Definition adopted at the 85th plenary meeting, dated 20 December 1993.

has been caused to it, but also to indirect victims, as family members and assimilated. It is of course very difficult to bring all countries to agree on a common definition, valid for all countries. Some countries resoundingly refuse to define violence against women itself as gender-based and deny their existence². Other countries understand that all this type of violence is subsumable by domestic or domestic violence and that it does not only occur between men and women but can also occur between parents and children, or grandparents, by not accepting the definition of gender-based violence itself. This view understands that it is family-type violence and must be resolved by other means and not always through the courts.

There are other countries, such as Spain, which has a very peculiar opinion and concept of gender-based violence that clearly discriminates against men because of their sex and applies to men and women, for the same violent acts, a different regulation and other penalties, we insist, by committing the same facts, applying as a differentiating criterion the sex of the person, which should be clearly unconstitutional³.

The domestic violence occurs between members of the family nucleus with prior coexistence, and can be victims both men and women and can be defined as the violence exercised by the aggressor, male or female, on the descendants, ancestors or siblings by nature, adoption or affinity, own or spouse or cohabitant, or about minors or incapable of living with him or who are subject to the power, guardianship, guardianship, care or de facto of the spouse or cohabitation, or over-the-task person covered in any other relationship that is integrated into the core of family coexistence, as well as people who, because of their special vulnerability, are subject to custody or guard in public centre or private.

1 2 Differences and similarities between gender-based violence and domestic violence

² In countries such as England, France or Italy, they consider to be a type of domestic or domestic violence.

³ Sentence 59/2008 of the Spanish Constitutional Tribunal of 19 august of 2008. It considers that the Spanish Gender Violence Law 1/2004 is not unconstitutional, based on the social alarm and women as historically subordinate to men needed a plus of protection. This judgment has been hotly debated by jurisprudential doctrine.

It is often confused with gender-based violence and the delimitation or differentiation between the two is very difficult to explain because the two concepts are intertwined, sharing many characteristics

There is a part of international doctrine that thinks gender-based violence is the same as domestic violence, or that it is actually a subtype (Kilmartin C 2015)⁴ of it and that therefore no differentiations or types, nor subtypes can be made. However, there is another part of the doctrine that if it differs between gender-based violence and domestic violence and there is another part of the doctrine that denies that it is defined as gendered or domestic and that they are positioned as saying that violence is always violence and that it gives equal wherever it comes, you have to fight it with effective means without making distinctions for provenance

Since the 1993 UN Declaration on the Elimination of Violence against Women, international documents characterize violence against women as gender-based violence, thereby appealing to both their origin and their instrumental character discrimination against women. Thus, the most recent instrument of the European framework, the Council of Europe Convention on the Prevention and Fight against Violence against Women and Domestic Violence adopted on 11 May 2011 in Istanbul (hereinafter the Istanbul Convention) recognises *"that the violence against women is a manifestation of the historical imbalance between women and men that has led to the domination and discrimination of women by men, thus depriving women of their full emancipation", "that the structural nature of the violence against women is gender-based, and that violence against women is one of the crucial social mechanisms by which women are kept in a position of subordination towards men "*

Therefore, at the international level there is a widespread consensus in defining gender-based violence with the above concept. On the contrary, the expression domestic violence refers to that exercised in the context of domestic relations, coexistence or the like, by those who are in a position of domination against subjects who are in a situation of inferiority by reason of dependency or others. Therefore, domestic proximity and the

⁴ Kilmartin, Christopher 2015. The men's violence against women: a general view. AJ Johnson Ed., and *Religion and men's violence against women*. Pag. 15-25. Springer Science + Business Media.

superiority ratio are its essential characteristics. Relationships of coexistence or similar to it (domestic) can generate superiority-subordination relationships that are attempted to impose, sometimes through the use of violence.

The domestic framework can be a particularly suitable context for abuse, affecting violence in this case, potentially, all subjects involved in the relationship that are located, or are found for purely physical reasons, in positions of subordination: husbands, wives and couples; or children relative to parents; or parents, the elderly or not, regarding their children; or persons subjected to custody and custody, or persons interned in residences with respect to their guardians or caregivers. When the term domestic violence is used, it is understood that anyone may be the author or victim of it in certain circumstances, male or female. The domestic context is a difficult area to analyze and detect as a private sphere, social control mechanisms have less inhibiting potential for violent behaviors (it is easier for a person to show their dark side in a private context become more uninhibited⁵), as because the self-control exercised by those in dominant positions greatly hinders criminal prosecution, which makes them feel safer and, at the same time, more uninhibited.

So a personal conflict, drug use – legal or not – or a potentially violent personality can fuel violence in domestic contexts at any time more easily than in other social contexts. Women may mistreat parents or husbands, children, or minors or elderly inmates in nursing homes; children, adolescents or adults, may mistreat their parents; parents, whether male or female, can afford or tolerate the abuse of their children; husbands or partners may in fact mistreat their partners or children, or children of their spouse or partner. No person is immune from the possibility of being an author or victim of domestic violence if the circumstances are given to do so. Gender-based violence is mostly exercised in the western world in the family context or in couples, i.e. the most significant gender-based violence is domestic violence. The causes that make the family context particularly apt to generate violence also affect gender-based violence: the family, the couple, constitute a private space in which there are relationships of

⁵ European Union Agency for Fundamental Rights, 'Violence against women: an EU-wide survey'. Available at [sites/default/files/fra-2014-vaw-survey-main-results-apr14_en.pdf](https://www.fundamentalrights.europa.eu/sites/default/files/fra-2014-vaw-survey-main-results-apr14_en.pdf) [access: 03.03.2014]

dependence, in which people manifest themselves more uninhibited form. But there is another reason why the family and partner's context is the one in which more violence occurs about women: the framework of couple relationships is the privileged space for the development of the most traditional and discriminatory gender roles; that is, those who seek to reduce the role of women and female identity to functions of care of the couple and children and of subordination to male authority; the family, and more specifically the couple, is the last redoubt in which to exercise the male dominating role without which, the man anchored in the patriarchal model, considers himself to be devoid of identity. So Lorenzo thinks making clear his position on concepts (Lorenzo P. 2015)⁶

In other words, the family – and within it, the couple – is the space for which the highest expectations about their superiority over women and the patriarchal female role to be built socially in the male gender, so that the chances of a male seeing their (male) gender expectations frustrated. In other contexts, on the contrary, man's expectations are lower or he manages his frustration in a different way. Strictly speaking, it should also be understood that the concept of gender or domestic violence is also expandable to lesbian, gay, bisexual, transgender and intersex (LGTBI) groups in any context⁷

However, this kind of violence, which may also be related to sexual orientation, has a more accurate location, in general, in the context of "hate crimes", in which the individual victim is irrelevant and is elected to the because of belonging to the collective to which violent behavior is hated and on which violent behavior is projected. In statistically more significant gender-based violence, which is exercised on women in the domestic context, the victim is neither irrelevant nor randomly chosen; it is chosen individually because it is precisely over it that you want to exercise domination.

However, sexual orientation is a risk factor for additional violence against women, as evidenced by statistics on non-domestic social violence: violence on non-heterosexual women reflected in surveys of victimization (24%) is higher than that exercised on

⁶ Lorenzo Copello, P., "Do specific gender figures be needed to better protect women?", *Criminal and Criminological Studies*, vol. 35, 2015, p. 788. Madrid.

⁷ Not so in Spanish legislation that these groups are protected, excluding them from the law of gender-based violence, L.O. 1/2004 of 28 December of Comprehensive Protection Measures against Gender Violence.

heterosexual women (5%) At other times, man does not even socially express the frustration of his expectation because he assumes it individually and silently on the condition that he has another space in which to continue to develop the one he considers his male identity – his superior role and domination over women–: Accepts the female equal role in society as long as she can continue to play her dominant role in private For the reasons indicated and because the family is a particularly criminogenic context for being private and in dependency relationships, the most widespread violence on women is domestic violence and, within it, violence against the partner or ex-partner (Pérez M 2016)⁸

These are the reasons – to be the most common manifestation of violence and the one most at risk of impunity – why the Criminal Codes, historically and today, identify the domestic, family or partner context, as the framework of commission of the most gender-based violence crimes and establish specific regulations But that does not mean, that there are no other contexts in which violence is exercised against women, nor that criminal regulation has been misunderstood from gender-based violence in other contexts First, they are contexts that are revealed to be particularly suitable for the exercise of gender-based violence, all those in which victims are most vulnerable: situations of social exclusion (immigration, poverty); situations of helplessness and dependency (wars, deprivation of liberty – police detention, detention or detention in migrant centres – health problems or disability) Second, the Penal Codes Law, offers other individualized regulations where the figures have been significantly revealed or the devalue of the fact is unique and is not covered by general regulations On the one hand, in the field of work, the ill-treatment or assault of female workers is not very relevant, so it does not seem necessary to have their legal individualization and general offences are often opted for the application of general offences; but workplace or sexual harassment behaviors are more common, so their unique criminalization has occurred even if some of these behaviors fit into the generic regulations of crimes against liberty (coactions or threats) On the other hand, following international recommendations, the Penal Codes Law, also offers specific regulations on trafficking in women in all their manifestations, female sexual mutilation or forced marriages, even if there are crimes

⁸ Pérez M.: Some keys to the criminal treatment of gender-based violence: action and reaction. RJUAM, No. 34, 2016-II, pp. 17-65 ISSN: 1575-720-X

injuries, illegal immigration, the imposition of abusive working conditions or threats, illegal arrest and coercion – also applicable

Even the difference between direct and indirect victim, the direct is all that natural person who suffers the damage and harm, psychic physical injury, emotional damage or economic damage directly caused by the commission of the crime, the indirect contemplates in the case of death or disappearance of a person as a result of the crime, provided that they are not responsible for the facts, and include the spouse not legally or de facto separated and person linked to it by a similar relationship of affectivity until the children of the victim or spouse not legally or de facto separated and a person bound by similar affinity relationship who at the time of the death or disappearance of the victim lived with them, their parents, relatives in a straight or collateral line of the third degree provided that they are under their guardianship, also the persons subject to their guardianship or guardianship or under their family care Also, other relatives in a straight line and the siblings are also considered as indirect victims, giving preference to the one who has the legal representation of the victim

In Spain, the law of violence against women does not give a concept of victim of gender-based violence, in the sense that it is women who are victims and men only aggressors, there is no possibility that the male is a victim or the aggressor woman, this being a real attack on gender equality and before the law, which has so widespread throughout the world and has been recognized in the Charter of Human Rights⁹ Also in Spain are left out of the concept of victim of violence gay and lesbian couples, and cannot be conceived as victims of gender-based violence although they are victims of domestic violence (Pérez J M and Montalvo A 2010)¹⁰

However, there is an international consensus that if transsexuals are considered victims of gender-based violence, it is understood that they will assume and internalize the sex education they actually feel as their own, and that it is different from the one, Initially

⁹ At the UN General Assembly of 10 December 1948.

¹⁰ Pérez J.M.; Montalvo, A. (2010). Gender-based violence: analysis and approximation of its causes and consequences. Gender-based violence: prevention, detection and care. Editorial Group. Madrid 2010.

they had physically and with those female or male gender values they are related in pairs. Victims of sexual violence within the couple are victims of gender-based violence, because the woman has sexual freedom to decide when, as, where and with whom she has sex. This seems so obvious is not, while the right of women to decide is protected by law, society has not yet assumed this freedom of women within the couple, because of that monopoly that has been given to a man for centuries' decision on the sexuality of his partner and the concept of it as a service in favor of men while denying pleasure to women only insofar as it served the man, to meet his sexual needs. In fact, the percentage of complaints of gender-based violence caused by attacks on sexual freedom within the partner is very low, because the woman herself does not know her right to sexual freedom within the partner, when the partner is normally linked and is linked in the most of the occasions of psychological and physical violence¹¹. Victims of psychological and physical violence are usually also victims of sexual violence, but modesty and lack of awareness of their right to sexual freedom often silences this victimization.

On the other hand, the course of time after the relationship does not influence the concept of victim of gender-based violence, the law does not limit to a certain period the consideration of a victim of gender-based violence when the relationship has already ended, which I consider to be a very correct criterion of the legislature at the time and which took into account the very nature and peculiarity of the offence, and of the special connotations which occur in the taxable and active person of the crime. In gender-based violence, children are regarded as direct victims, for the damages that are caused to them, which we will see in another section. Using the term gender-based violence also means a stance on the root causes: it explains violence about women in a cultural and social key, not biological or individual. Violence against women is not explained by biological differences between women and men (male physical superiority in general, or has its greatest tendency to use physical force); it is also not explained for individual reasons – psychological, or the use or abuse of alcohol or other drugs – although these may have some statistical impact on it.

¹¹ About the figures in Spain, cfr. Government Delegation for Gender Violence «Macrosurvey of Violence on Women 2015», especially Chapter 13, "Physical violence outside the scope of the partner or ex-partner".

1 3 Types of gender-based violence

As noted above, the concept of gender-based violence includes a wide variety of attitudes and actions that can harm the person from different dimensions. After all, there are many ways to harm a person. While not all cases are assaulted on the person from all walks of life, within gender-based violence we can find the following types of violence

1 3 1 Physical violence

The most visible and recognized as gender-based violence, physical violence is considered to be any act in which physical harm is inflicted on the victim than through direct aggression. Such damage may be temporary or permanent. This type of violence includes beatings, wounds, fractures, scratches or denying medical care or forcing to use alcohol or drugs, as well as using any other type of physical force against. It can include property damage.

While sometimes trivialized or considered to occur during a discussion, shoving and shaking also falls into the category of physical violence. Physical incapacitation can occur due to the consequences of assaults, and even depending on the level of damage caused can lead to death. Some authors (Ruiz-Jarabo 2004)¹² describes quite good the meaning

1 3 2 Psychological violence

This type of violence is characterized because, while there may not be an aggression on a physical level, the victim is humiliated, underrated and psychologically attacked. Such an attack can be direct and actively carried out in the form of insults and abuses or carried out in a more passive way, devaluing the partner without the partner considering that he is suffering an attack. Psychological violence includes the presence of humiliations, threats and co-actions (in some cases using the threat of physical aggression to the victim or close to us), contempt and devaluation. Also make the person feel helpless, forced to do certain actions and dependent on the aggressor, guilty of the situation of abuse and deserving of punishment. Because direct aggression is often not perceived in the message, many victims are unaware that they are being

¹² Ruiz-Jarabo C. 2004. The violence against the woman. Ed. Díaz de Santos . Madrid. 2004. Pag. 39-50.

mistreated and do not take action against the aggressor. In virtually all cases of gender-based violence, regardless of the type and motive of it, there can be considered to be psychological violence, (Cristóbal H. 2014)¹³

1.3.3 Sexual violence

While it could somehow be considered within physical violence, sexual violence refers specifically to those types of situations in which a person is forced or coerced into performing sexual activities against his will, or in which he or she sexuality is limited or imposed by another person. There is no need for penetration or sexual intercourse; it includes the presence of rapes within the partner, forced prostitution, forcing conception or abortion, genital mutilation, sexual harassment or unwanted touching among others. Some authors (Acale M. 2019)¹⁴ point out specifically about gender-based violence.

1.3.4 Economic violence

This type of violence is based on the reduction and deprivation of financial resources to the partner or his children, as a measure of coercion, manipulation or with the intention of damaging their integrity. It is also considered as such to force the aggressor to rely financially, preventing the victim from accessing the work market by threat, coercion or physical restriction. In fact, almost all the countries of Europe, are worried about this type of violence, so in Spain the authorities have made a study about the economic violence.¹⁵

1.3.5 Patrimonial violence

Property violence is the usurpation or destruction of the objects, property and property of the person who is the victim of violence with the intention of mastering it or causing psychological harm. In many ways, these goods are the fruit of decades of work, and destroying them is a way of making it look that all those efforts have been of no use.

¹³ Cristóbal H. 2014. Gender based violence on trial. Ed. Académica Española. Saarbrücken, Germany. Pag. 22-23

¹⁴ Acale M. 2019. Gender based violence against adult woman. Ed. Reus. Madrid 2019.

¹⁵ Study about the economic violence against woman with her partner or ex partner. Ministry of Equality. Centro de publicaciones. Madrid 2023.

However, it should be noted that such aggressions can affect both others, especially the neighbors

1 3 6 Social violence

Social violence is based on limitation, control and induction into the social isolation of the person. The victim is separated from family and friends, depriving them of social support and away from their usual environment. Sometimes the victim is put against their environment, causing either victim or environment to decide to disassociate. For example, attacks on the front of the home are very characteristic of this type of violence, as they leave visible signs all over the world that the victim deserves to be attacked in the sight of all. Some authors (González M. 2021)¹⁶ pointed out that this kind of violence is very difficult to detect because it is something that is done with facts, and almost never with words.

1 3 7 Vicarious Violence

A large number of couples with gender-based violence have children. In many cases the aggressor decides to threaten, assault and even kill such children in order to harm their partner or ex-partner. This type of violence is called vicarious violence, which also includes harm caused to minors by the observation of ill-treatment between parents. Psychological impact is what is sought, through control, submission and aggression to people who are not directly involved in the core of the conflict. For some authors (Peral M. 2018)¹⁷ describes the drama that means this kind of violence and its consequences.

1 4 Modalities of violence

1 4 1 Institutional Violence

The authorities carried out by officials, professionals, staff and agents belonging to any public institution, which aims to delay, hinder or prevent women from accessing public policies and exercising the rights provided for in this law. They also include those exercised in political parties, trade unions, business, sports and civil society.

¹⁶ González A. 2021. Covert social violence against women. Ed. Bosch. Barcelona 2021.

¹⁷ Peral M. 2018. Abused Mothers. Ed University of Málaga. 2018.

organisations As the americans authors thinks (Curtin and Litke 1999) ¹⁸, it is one of the most obvious and difficult types and violence to combat by often not defining a clear author

1 4 2 Work Violence

One that discriminates against women in public or private work and that hinders their access to employment, recruitment, promotion, stability or permanence, requiring requirements on marital status, maternity, age, physical appearance or performing a pregnancy test It is also violence against women in the workplace to break the right to equal pay for equal work or function It also includes psychological harassment systematically on a particular worker in order to achieve her job exclusion It is essential that recommendations have been established for years to prevent violence by the ILO¹⁹

1 4 3 Violence against reproductive freedom

The one that violates the right of women to decide freely and responsibly the number of pregnancies or the interval between births, in accordance with Law 25 673 on the Creation of the National Program of Sexual Health and Responsible Procreation

1 4 4 Medical Violence

The one that health personnel exercise on the body and reproductive processes of women, expressed in dehumanized treatment, an abuse of medicalization and pathologization of natural processes, in accordance with Law 25 929 For the UN it is important, having clearly set out Simonovic²⁰, what it consists of and its characteristics

1 4 5 Media Violence

The publication or dissemination of messages and images stereotyped through any mass means of communication, which directly or indirectly promotes the exploitation of women or their images, insulte, defame, discrimine, dishonor, humory or attack against

¹⁸ Curtin and Litke. Philosophie of Peace, Ed. Rodopi, 1999, Boston, USA, ISBN: 90 4200004983. Pag. 214-277.

¹⁹ Repertory of Practical Recommendations on Violence in the Workplace. Ilo. Geneva. 2003.

²⁰ Simonovic. D, was appointed Special Rapporteur on violence against women, its causes and consequences by the UN Human Rights Council with the aim of recommending national, regional and international measures and strategies to eliminate violence against women.

the dignity of women, as well as the use of women, adolescents and girls in pornographic messages and images, legitimizing inequality of treatment or building sociocultural patterns reproductive from inequality or generating violence against women. It is noteworthy the statement of the European Union, which warns of the increase of this type of violence²¹

Chapter II

The Legal Status of the Victim of Gender-based Violence in Comparative Perspectives Italian and Spanish case-study

2.1 International and European approaches

The problem of so-called gender violence, which we will study, is a topic that for decades has been the subject of study and international concern, since the 1970s and on December 18, 1979, the General Assembly of the United Nations approved the Convention on the Elimination of All Forms of Discrimination against Women (CETFDWM), having been a year's work of the Commission on the Status of Women, created in 1946 by the Economic and Social Council of the United Nations, since that Commission had made this text based on the relevant UN Declaration on the Elimination of Discrimination against Women of 1967

The purpose of the Convention was to effectively eliminate all forms of discrimination against women by obliging States to reform the laws and to discuss discrimination in the world. The article 1 defined discrimination against women as: *"Any distinction, exclusion or restriction made on the basis of sex that has the effect or purpose of diminishing or nullifying the recognition, enjoyment and exercise by women, regardless of their status civil society, on the basis of the equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other sphere, "* and therefore imposed the obligation for States that The Convention will ratify the Convention will enshrine gender equality in its national legislation repealing

²¹ Statement of 24 November 2017 from the European Commission on the occasion of the International Day on the Elimination of Violence against Women.

all discriminatory provisions of its laws and promulgating new provisions against discrimination against women²²

They should also establish courts and public institutions to guarantee women effective protection against such discrimination, as well as take measures to eliminate all those discriminatory forms practiced by individuals, organizations and companies. The Committee, in accordance with the Convention, also requested that States parties specify in their reports the legal measures they had taken to overcome the problem of violence against women, as well as incorporate an analysis of the effectiveness of these measures²³

In the same way, the Human Rights Committee, according to the International Covenant on Civil and Political Rights²⁴, requested that these countries provide information on national laws and practices related to domestic violence and other types of violence against women. In a way, it was evident the preoccupation existing in the international instances about how to eliminate from our society that discrimination against women in which gender violence is also rooted. In this sense, the General Recommendation Number 19 of Violence against Women of the United Nations Committee for the Elimination of Discrimination against Women of 1992 was considered a milestone as it gathered that States Parties would have to: ensure that laws against violence and mistreatment in the family, rape, sexual assault and other violence against women adequately protect all women and respect their integrity and dignity; and adopt all legal measures, or other measures, that are necessary to effectively protect women against such violence with the adoption of measures such as criminal sanctions or civil remedies and compensation to protect them against all types of violence

²² Article 4, December 18, 1979, the General Assembly of the United Nations approved the Convention on the Elimination of All Forms of Discrimination against Women (CETFDWM).

²³ General Recommendation No. 12 of the Committee on the Elimination of Discrimination against Women of 1989.

²⁴ According to General Comment No. 28 of the Human Rights Committee of 2000, Article 3, on the Equality of Rights between Men and Women; at least that is what is stated in the Manual on Legislation of Violence against Women, Ed. Department of Social and Economic Affairs of the United Nations, New York, 2010, p.6

One year later, by Resolution No 48/104 of December 20, 1993, the United Nations in its 85th Plenary Session ratified the Declaration on the Elimination of Violence against Women²⁵, where gender violence was equated to the category of serious attack against the human rights of women and girls. And later, on June 9, 1994, the General Assembly of the Organization of American States adopted the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women, "Convention of Belém Do Para," which reiterated this equality in its Preamble²⁶. To this tenor it is striking that both -Declaration and Convention cited- explicitly recognize in their respective articles second²⁷, physical, sexual and psychological violence as forms of violence against women, equalizing the importance of these three types of violence and responding to the clamor of the international community that had repeatedly requested this equivalence.

Similarly, the Beijing Platform for Action, adopted at the Fourth World Conference on Women - Beijing, 1995²⁸, urged governments to introduce criminal, civil, labor and administrative sanctions into national legislation in order to punish and punish repair the damage caused to the victims; Adopt, apply, review and analyze relevant laws in order to ensure their effectiveness in eliminating violence against women, with an emphasis on the prevention of violence and the prosecution of those responsible; and to articulate the necessary measures to guarantee the protection of women victims of violence, access to justice and effective remedies, including the repair of the damages caused, the compensation and cure of the victims, as well as the rehabilitation of the aggressors and that appeal was reiterated during the five-year review of the Beijing Platform for Action in 2000 where governments also committed to revise legislation and eliminate discriminatory provisions against women, and preferably to do so before 2005²⁹.

²⁵ In Article 1 "Resolution No. 48/104 of December 20, 1993, the United Nations in its 85th Plenary Session.

²⁶ In its second paragraph, June 9, 1994, the General Assembly of the Organization of American States.

²⁷ Article 2 of the Declaration of the General Assembly, "Convention of Belém Do Para,"

²⁸ Report of the Fourth World Conference on Women - Beijing, China, from September 4 to 15, 1995 - Paragraph 124.

²⁹ Resolution of the United Nations General Assembly S 23/3, Annex, Paragraph 68 b).

Also at the IV World Conference on Women of the United Nations - held on September 4 to 15, 1995 - it was recognized that violence against women was an obstacle to achieving the goals of equality, development, and peace, by violating and undermining the full enjoyment of human rights and fundamental freedoms - Ninth Paragraph And then another call was made to all the governments of the world to, in this case, promote the creation of reliable statistics including a gender perspective

Then, in 1997, the General Assembly by Resolution No 52/86 of December 12 adopted the Model Practical Strategies and Measures for the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice where it was exhorted to Member States with such important and relevant initiatives as: reviewing their laws to ensure that all acts of violence against women are duly prohibited; review their criminal procedures to ensure that the primary responsibility for initiating a criminal action falls on the public prosecutor; that the police had authorization to search homes and make arrests in cases of violence against a woman; that measures be taken to facilitate the testimony of the victims; that in all criminal proceedings evidence of acts of violence perpetrated previously be taken into account; and that the courts were empowered to issue writs of protections and injunctions; make sure that the response that corresponded to the acts of violence was given and that the police procedures took into account the need to guarantee the safety of the victim; ensure that their sentencing policies make any offender respond to the victim's actions and that the sanctions are comparable to those provided for other violent crimes; adopt measures to protect victims and witnesses before, during and following the conclusion of the process; and provide training for these purposes to the police and to the personnel of the criminal justice system according to Paragraphs 6 to 12 of the text But the problem was that few countries met these demands and those that did not carried them out with all the necessary rigor

So there are several United Nations Resolutions that have subsequently insisted to the States about the need to strengthen their legal frameworks³⁰ Thus, we must highlight, Resolution No 63/155 of December 18, 2008 on the intensification of efforts to eliminate all forms of violence against women because in it countries are urged to use best practices to put end to impunity and the culture of permissiveness regarding

³⁰ Resolutions No. 63/155, 61/143, 59/166, 58/147 and 56/128 of U.N.

violence against women through the evaluation and analysis of the effects of the laws, norms and procedures in force in relation to this violence³¹

The Resolution No 61/143 of December 19, 2006 on Intensifying Efforts to Eliminate All Forms of Violence against Women, already underscored the need to prevent and investigate acts of violence against women and punish the guilty person, to eliminate impunity and protect the victims, under the warning that if it were not done their human rights and fundamental freedoms would be violated

Finally, we must allude, due to its importance and relevance, to the Conclusions of the last annual session of the Commission on the Status of Women held at United Nations Headquarters - New York, from March 4 to 15, 2013- where the need for an international commitment to end the one he mentions as the "global scourge of violence against women" is recognized Well, as we see all these international references repeatedly insist on the different aspects that gender violence presents formulating a constant invitation to countries to strengthen their legal, regulatory, and institutional frameworks in order to achieve articulate a comprehensive system to eliminate this type of violence from its deep social and cultural roots, and with the intention of promoting the empowerment of women and gender equality

What is disheartening is that in spite of this demonstrated interest from the international institutions, it is necessary that the countries are required again and again to articulate the necessary ways to end this form of violence, and that in spite of having this international support even the fight against gender violence and the achievement of equal parameters of action in the states is a goal of such difficult reach We are aware of the impediment that the social and cultural difference of each country supposes, but before problems like the one that we analyze, the political and institutional effort should be resounding and unquestionable To complete this approach, let us now know the importance that this issue has also had in the European sphere

The statistics revealed by the Fundamental Rights Agency of the European Union on March 5, 2014 show that one out of every three European women has experienced physical and /or sexual violence in their lives, equivalent, according to estimates, to this percentage a, no less than, 62 million women Similarly, this same Agency, reports that

³¹ Paragraph 39 of the Recommendations Resolution No. 61/143 of December 19, 2006.

just over one in five women consulted - 22% - responded to the interviewers stating that they had suffered physical and / or sexual violence from a partner or ex-partner, as well as reproduced the data that two out of every three European women victims of physical or sexual violence do not come to report these facts to the Police or any other assistance service. Similarly, the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 21 September 2010 presenting the Strategy for Equality between Women and Men, for the period 2010-2015, acknowledged that between 20 and 25% of women have suffered physical violence at least once in their life. So it is unquestionable that such statistics are well worthy of a necessary treatment of gender violence from a European and homogeneous perspective for all member countries, so in the next section we will know the most relevant European provisions in this area and that undoubtedly are essential to articulate the fight against this violence from a united Europe in front of this great social problem.

In this European area, we must highlight the importance of Decision No 803/2004 / EC of the European Parliament and the Council, which approved the Daphne II Community Action Program - for the period from 2004 to 2008 - whose purpose was to prevent and combating violence against children, young people and women, as well as protecting victims and at-risk groups, establishing the position and strategy of the representatives of the citizenship of the Union, and expressly acknowledging the need to recognize the serious repercussions of violence, both immediately and in the long term, for health, psychological and social development, and equal opportunities for those affected³², whether they be individuals, families or communities. In this regard, let us remember that already in 1998, domestic violence was declared an international priority for health services. In this regard, we should also bear in mind that Decision No 293/2000 / EC of January 24, 2000, had previously approved the Daphne I Program -for the years 2000 to 2003- on measures aimed at combating violence exercised on children, adolescents and women, expressly recognizing in the Second Consideration³³ the serious repercussions

³² For its argumentation, the Multi- Country Study on Women's Health and Domestic Violence carried out by the WHO -Geneva, Switzerland, November 2005- WHO study (2005) and, in others, such as Nicaragua (WHO, 2002) - pages 18 et seq. of the Study.

³³ Daphne I Program -for the years 2000 to 2003- , pages. 4-9"

that violence implied for health, thus reflecting a special reinforcement of transnational actions for the establishment of multidisciplinary networks that would allow the exchange of information and cooperation in the community level, as well as articulating different actions aimed at raising public awareness and promoting complementary actions such as encouraging and exchanging good practices and carrying out studies in the field of violence

Also essential was the Decision 779/2007/CE of June 20, 2007, which established the Daphne III Program, for the period 2007 to 2013, as a specific plan this time to prevent and combat violence against children, young people and women integrated into the general program of fundamental rights and justice³⁴ Its objective was to achieve a high level of protection of health, welfare and social cohesion with the development of the necessary Community policies, and more specifically, those related to public health, human rights and gender equality, in addition to actions aimed at protecting the rights of children and the fight against trafficking in persons and sexual exploitation³⁵

But in our analysis of the European level if there is a text that we must highlight is the Council of Europe Convention on the Prevention and Combat against Violence against Women and Domestic Violence of May 11, 2011, also known more popularly as the Convention of Istanbul, and which has been ratified by Spain on April 11, 2014 This text is very important because it is based on the premise that violence against women is a manifestation of the historical imbalance between women and men that has led to the domination and discrimination of women by men, depriving so to the first of its full emancipation

So already in the preamble to this text there is an explicit reference to the fact that the structural nature of violence against women is based on a gender issue, and that women and girls are more exposed than men at high risk of violence based on this genre

In this regard, it is significant that Article 3 of the Convention dedicated to Definitions includes the definition of "violence against women" as a "violation of human rights and a form of discrimination against women, and will designate all acts of violence based on gender that imply or may imply for women damages or sufferings of a physical, sexual, psychological or economic nature, including threats to perform such acts, coercion or

³⁴ Decision 779/2007 / CE of June 20, 2007.

³⁵ Daphne III Program, for the period 2007 to 2013, specifically.

arbitrary deprivation of liberty, in public or private life "; the definition of "gender" as "the socially constructed roles, behaviors, activities, and attributions that a society considers proper to women or men"; and that of "violence against women for reasons of gender" by which "all violence against a woman because she is a woman or that affects women disproportionately" will be understood

The Convention was presented as a tool to devise a global legal framework of policies and measures for the protection and assistance to victims of violence, both gender and domestic, at European level³⁶ To this end, in its manifesto the obligation for the countries parties to articulate measures of various kinds such as those of an educational nature-article 14-, advertising-article 17-, civil, criminal and judicial-articles 29 and ss -, was collected, sanctioning -articles 45 and ss -, or welfare -articles 20 and ss-; and both for the protection of the victims and for the treatment and persecution of the perpetrators And although it is undeniable that its content is complete and structured, by articulating an integral protection in different aspects to cover the needs of the victims and to guide a strong policy of prevention and fight against gender and domestic violence, and present itself as well as the first instrument that is finally born globally at European level with this mission, we must also point out that, although Spain was the ninth country of the Council of Europe to ratify the Convention, it needed ten ratifications for its entry into force -according to article 75 3, which has finally been achieved on August 1, 2014 thanks to the ratification of Albania, Andorra, Austria, Bosnia and Herzegovina, Denmark, France, Italy, Montenegro, Portugal, Serbia, Spain, Sweden and Turkey; when we remember that the Council is composed of 47 member states and its main objective is to develop those common instruments of citizen protection necessary for the development of today's society "

So, we could interpret that the above is a symptom that the unified struggle from Europe against gender violence is still a pending subject for its full realization, and that the consolidation and promotion of a common European policy is still necessary hermetic, emphatic and shared unanimously by all the Member countries, and, the last Paragraph of the Preamble to this Istanbul Convention ends by expressing the desire, very

³⁶ Article 3 of the Convention dedicated to Definitions.

significant and representative of this last criticism that we point out, of: "aspiring to create a Europe free of violence against women and domestic violence"

Finally, and to end with the most current reference, let us mention that the Strategy of the European Commission for Equality between Women and Men for the period 2010-2015, which was approved on September 21, 2010, is also currently in force. The main objectives are the consolidation of a good practice of gender roles in youth, in education, culture and sports with the commitment to produce an annual report in which to reflect the progress made in this area by the coordinated action of the Parliament, the Commission and the Member States.

Likewise, and to continue with the work of the Daphne III Program that ended in 2013, the novel Rights, Equality and Citizenship has been designed for the period 2014-2020, and whose goal is to reinforce the initiatives and strategies of the European Commission for the protection, among other groups, of women, promote equality between men and women, and prevent and combat all forms of violence against minors, young people and women.

The Council of Europe's Recommendations have focused in this regard on strengthening the response of the procedural legal system to the needs of victims and protecting their interests, all in order to promote the victim's confidence in criminal prosecution and encourage their cooperation. Some differentiate the types of victims and others do not, but all of them aim to reinforce the role of the victimized in criminal proceedings, avoid victimization, and direct the process to give a comprehensive response to their needs, emphasizing the need to increase their confidence in justice.

The victim of gender-based violence has peculiar notes that distinguish them from other victims, as a result of discrimination against women because they are women, and this discrimination is evident throughout society, including in the criminal system for what is necessary to take measures and ways for judicial processes to be dealt with a gender perspective to avoid such widespread double victimization or institutional victimization of the particular victim of gender-based violence.

These recommendations include:

- Recommendation No. 8 (85) 2 on legal protection against discrimination based on sex
- Recommendation number R (85) 4 on violence within the family
- Recommendation number R (85) 11 on the legal position of the victim in the context of criminal law and criminal proceedings

- Recommendation number R (87) 18 on the simplification of criminal law
- Recommendation number R (87) 21 on victim assistance and victimization prevention
- Recommendation number R (90) 2 on social measures concerning violence within the family
- Recommendation no R (97) 13 on witness intimidation and defence rights
- Recommendation number R (98) 14 on gender mainstreaming
- Recommendation No R (99) 19 on mediation in criminal matters
- Recommendation Rec (2002) 5 on the protection of women from violence
- Recommendation Rec (2005) 9 on the protection of witnesses and collaborators of justice - Recommendation Rec (2006) 8 on assistance to victims of criminal offences
- Recommendation Rec (2007) 17 on standards and mechanisms for equality between women and men

All these Recommendations are intended for member states of the European Union to introduce into their legislation mechanisms and means to protect the victim in general and the victim of gender-based violence in particular, and with regard to this the latter requiring training for professionals involved in cases of gender-based violence, that certain judicial bodies be given exclusive powers in the field, that victims be adequately protected and safe, and that they avoid the repeated secondary victimization of victims, both in the form of hearings, in the treatment, as well as in the demand for reiteration of their testimony

Among the initiatives undertaken by the European Union to meet the objectives of the Declaration and Platform of the Fourth World Conference of 1995 that it signed together with all member states, one of the objectives of it is of vital importance in relation to one of the objectives of the same, the assistance and protection of victims of gender-based violence in criminal proceedings, Resolution A4-0250/97 of the European Parliament of 16 September 1997, and which highlights the difficulty of European women in denouncing ill-treatment by fixing the main causes in the low sensitivity of the actors involved in caring for victims of gender-based violence and in the slowness of judicial processes. States are therefore encouraged to provide specific training in gender-based violence to all legal, political, health and social actors so that they can provide comprehensive protection and response to the victim and on the other hand establish close coordination between judicial bodies, and reform judicial processes to provide women with legal certainty

The report prepared by the Committee on Women's Rights and Gender Equality "The current situation in the fight against violence against women and future actions" was the subject of the European Parliament Resolution of 9 December 2005 (A6-0404/2005), which calls on Member States to take action in their legal systems to prevent and sanction gender-based violence. Measures that give victims access to justice and a compensation system are given importance.

The opinion of the European Economic and Social Committee on domestic violence against women stresses the need to provide adequate protection for victims and witnesses, to facilitate the reporting of such crimes, in particular the establishment of measures to avoid the contradiction between measures of alienation to victims and the right of visits recognized to offenders in relation to common children, and the need that it is not the victim who has to leave the home, but that it is the aggressor who get out of it.

Regarding to victims of gender-based violence, no rules governing it in particular have been issued, if on other victims such as trafficking in human beings (Framework Decision 2002/629/JHA, Council of 19 July 2002, those on the sexual exploitation of children and child pornography (Council Framework Decision 2004/68/JHA of 22 December 2003) and forms and manifestations of racism and xenophobia (Council Framework Decision 2008/913/JHA of 28 November 2008). Council Framework Decision 2001/220/JHA on the status of the victim in criminal proceedings of 15 March 2001 is the first to address the status of the victim in criminal proceedings and to integrate the Specific Framework Decisions for certain victims in terms of assistance and protection thereof, as well as establishing the minimum standards for the status of victims in general, including victims of gender-based violence. The aim of this Framework Decision is to give the victim rights and measures to be effective before, during and after the prosecution of the criminal proceedings, as well as to give the victim homogeneous protection throughout the European territory irrespective of the State in which they are located.

Council Directive 2004/80/EC of 29 April 2004 on compensation for victims of crime supplements the provisions of the Framework Decision in economic terms where the criminal offender is insolvent or unknown. Even though rules were adopted in the laws of most Member States within the meaning of the Framework Decision, for victims to be recognized and treated with respect and dignity, to be protected and given comprehensive support, to have easy access to justice and to be compensated, they were

widely disseminated and fragmented, as well as being limited in concluding that the Framework Decision had not achieved the objectives proposed therein in the Member States, especially since the rules are ambiguous and not provide for mechanisms for bringing infringement proceedings to Member States which do not incorporate them in their fullness within the prescribed time limits. The needs of victims in the European Union were not met, and this is clear from the various reports and conclusions that are drawn up.

The objective of making a reality of the need for victims to have such recognition and treatment, protection, support, access to justice, compensation and reparation is to ensure that the Council Resolution of 10 June 2011 is issued, in order to establish minimum standards for strengthening the rights and protection of victims, establishing appropriate procedures and structures to respect the dignity, personal and psychological integrity and intimidation of victims in criminal prosecution, promote victims' access to justice, promote support services, establish processes that prevent secondary victimization or double victimization, the provision of interpreters and translation, active participation of victims in criminal proceedings by strengthening their right to information, promoting restorative justice and alternative forms of dispute resolution, to provide special attention to minors always as a guide in the interests of the child, monitoring States to provide training professionals to interact with victims and ensuring that they receive compensation. This framework shows Directive 2010/64/EU of 20 October on the right to interpretation and translation, Directive 2011/99/EU of 13 December on the European Protection Order and Directive 2012/13/EU, 22 May, on the right to information in criminal proceedings.

The Council goes further and considers the need to replace the Framework Directive providing for the status of the Victim with a new one which establishes minimum standards on the rights, support and protection of victims of crime, and which is supplemented by a Recommendation to guide Member States in the provision of support and protection to victims of crime. Directive 2012/29/EU of the European Parliament and of the Council, replacing the Council Framework Directive 2001/220/JHA, which lays down minimum standards on the rights, support and protection of victims of crime, appears on 25 October 2012/29/EU. In addition, Directive 2013/48/EU, 22 October, on the right to legal assistance in criminal proceedings and procedures relating to the European Union, and also a new Regulation (EU) No

606/2013 of 12 June on the mutual recognition of protection measures in civil matters, is also issued

The new Framework Directive 2012/29/EU gives us a broader concept of victim, it not only covers natural persons who have suffered harm and prejudice, but also the relatives of the deceased person directly as the cause of the crime and have suffered harm and harm as a result of death, albeit smaller than the concept of international victim adopted by the United Nations General Assembly that includes as a direct victim the persons who attend the victim in danger or to prevent a crime. Legal persons are also not included as victims of the new directive. The current Directive seeks to provide a better response to the needs of victims:

1 Information: This should be sufficient about their rights to exercise them effectively in criminal proceedings. They must access this information from their first contact with the State Security Forces and Bodies, and they must have minimal content regarding:

- a How and where to get Support
- b Procedures for bringing the complaint and their role in them
- c How to get protection
- d How to receive legal advice or legal assistance
- e How to access compensation
- f Right to interpretation and translation
- g Such as going to special procedures for the defence of their interests when the victim resides in a member state other than that of the commission of the crime
- h Restorative justice
- i Complaint on how to exercise their rights when they are not respected by the authorities
- j Reimbursement of expenses arising from their actions in the criminal proceedings

2 Comprehensive support. Member States should set up victim support services which they will be able to access free and confidential. These services are paramount when it comes to victims feeling overwhelmed when it comes to enforcing their rights in law enforcement and judicial authorities. They should ensure legal advice to enforce their rights against all the actors involved, and the psychological and social support necessary to overcome the aftermath and facilitate the path to recovery, all in order to avoid double victimization. Access to these support services is not subject to the filing of the corresponding complaint. They should provide you with information on your rights,

how to access them, any compensation that may correspond to them, information about your actions in the criminal proceedings, preparing you for their trial assistance, providing them with the support psychological and social

3 Participation in the criminal process To ensure an active role in the criminal proceedings of the victim, Member States are required to recognise minimum rights to victims in criminal proceedings:

- a To be heard and provide evidence during legal proceedings
- b To request that any decision not to proceed with the processing be reviewed
- c To access legal aid, where they are party to criminal proceedings
- d To request reimbursement of all expenses incurred as a result of such participation
- e To obtain compensation from the infringer within a reasonable time and to the return of the property seized from him in the course of the criminal proceedings

On the other hand, where the victim resides in a country other than the country of commission of the facts, it should be established that the possibility of giving evidence immediately after the complaint has been lodged, or of appealing for its hearing to the provisions on video conference and conference call The possibility of bringing the complaint to the judicial authorities of your State of residence should also be recognised if it was unable to lodge the complaint in the State of commission of the facts The interests of victims in reparative justice processes should also be protected, defining it as any process that allows the victim and the offender to participate actively, if they give their consent freely to do so, in the resolution of the problems resulting from the criminal offence with the help of a third party, in order to smooth the communication They include criminal mediation Mediation can help victims by meeting their goals to meet the interests and needs of victims, repair damage that may have been caused to them, and prevent any other harm

Therefore, special caution should be exercised when referring any matter to mediation and account must be taken of the nature and seriousness of the crime, the extent of the harm caused, the repeated violation of physical, sexual or psychological integrity, the imbalances of power, age, maturity and intellectual capacity, which may limit or reduce your freedom to reach an agreement with full knowledge of the cause and cause serious harm to your interests, justifying the impossibility of going to these services in cases of gender-based violence, as has been ruled out in the case-law of the Court of Justice of

the European Union, declaring the possibility for States to exclude from mediation certain types of offences or by setting it only for certain crimes. The Council of Europe Convention on the Prevention and Combating Women and Domestic Violence of 11 May 2001 already provided for the possibility for the parties to take the necessary measures to prohibit mediation or other modes of conflict resolution mandatory alternatives in crimes of gender-based and domestic violence.

4 Protection and recognition of your vulnerability. The board lays down measures necessary to protect the safety of victims and their families from the risk of reprisals, intimidation or double victimization in their involvement in the criminal proceedings. States are required to take action in relation to:

a Physical protection

b Avoid contact with the offender in the judicial premises

c Others aimed at minimizing the risks of psychological or emotional damage in the various interrogations, so they should be questioned without delay, immediately after filing the complaint, that these statements are the minimum possible, where strictly necessary, and which can be accompanied by a legal representative or any person of your choice, unless there is a reasoned decision to the contrary.

It also addresses the text of safeguarding the rights of victims who may be considered most vulnerable, establishes the possibility for victims to be evaluated on time and individually to determine their special protection needs and measures that may benefit during the course of the criminal proceedings, taking into account their personal characteristics, the type or nature of the crime and their circumstances. In cases where they are considered vulnerable, they will be questioned in units designed or adapted for this purpose, by the same persons, unless it is contrary to the sound administration of justice. In the case of sexual violence, it is anticipated that they will be carried out by people of the same sex. Visual contact between the victim and the accused will also be avoided, including during the practice of the test, allowing it to be heard without being present in the courtroom, through appropriate means, including the use of communication technologies, and to be heard ask unnecessary questions about your private life and unrelated to the criminal offence, or allow the hearing to be held without the presence of an audience. With regard to minors, which considers victims with special protection needs states that interrogations can be recorded on video and used as evidence in the criminal proceedings, allowing the right of contradiction of the in order to avoid the harm caused to them by their attendance at the oral trial, by taking up the

case-law of the European Court of Human Rights in this regard, and their non-inconsistency with the European Convention for the Protection of Rights Human Rights and Fundamental Freedoms. It is also envisaged that minors may make a statement before and before the public hearing, as has also been reflected in the case-law of the Court of Justice of the European Union.

5 Training and cooperation. All actors involved must be trained so that they can acquire skills and skills to provide an answer to the need of victims, treating them with respect, professionalism and empathy and to make them aware of the care services to which they can come for help. To achieve this, the Directive obliges all Member States to ensure the training of security forces, judicial staff, lawyers, prosecutors and judges, as well as all professionals responsible for providing support to victims and the services of promoting good practices that ensure effective protection and assistance to victims. It also envisages the implementation by States of information and awareness campaigns on the rights that victims are granted, research and education programmes, as well as follow-up actions for the assessment of the impact of the measures support and protection of victims who have been put in practice. On the other hand, the regulation of cooperation between Member States is established to improve victims' access to all their rights, including the exchange of best practices between them, consultation of individual cases and assistance of networks European companies working with the rights of victims.

This training and cooperation is a continuation of the training programmes of the DAPHNE programmes and in the promotion of cooperation of the specific "criminal justice" programmes, both integrated into the general programmes "Fundamental Rights and Justice".

2.2 Towards a model of resolution of conflicts derived from the violence of gender by way not jurisdictional

Having outlined the European and international precedents, it is clear that we need the European Union to have a uniform regulation that addresses all of the needs arising from the violence of gender, but from a point of view multidisciplinary, that they understand the fields as the criminal, social, economic and welfare of the victim.

It is note worthy that the Convention on the Elimination of all forms of discrimination against women collected that States had the duty to put in place adequate and effective laws to erradicate this form of violence. Also as also the Beijing Platform for action

called on Governments to introduce penalties in national law for the punishment of the perpetrators of the violence and for the repair of the damage caused to the victims, since they have not been created legal tools for dealing with gender-based violence from international and European institutions

The example we have closer which is the European Union which has many regulations, since each State has its own laws on this matter and has neither base nor a common approach to deal with this problem. This is why, it must try to create a uniform and homogeneous regulation across the EU

Then we will continue analyzing this issue related to the overall treatment of gender-based violence, and if these countries you have fulfilled this purpose of unification, will start with the analysis of its legal regulation in Spain, as well as later we will discuss how this violence in the European union and specially in the Spanish and Italian systems

Each EU country has its own laws in the case of gender-based violence, its regulation and treatment for a same case, can be very different. Each of them has, I think, positive things that should be taken into account to ensure a unitary legislation at the EU level

Despite all these differences, in different countries have various things in common, that they can be summarized in several points, the first positive thing, is to seek always to protect the victim and try to avoid to produce situations of risk. The second, negative thing, all of the laws of the different countries are ineffective to solve the problem. Of course is a utopian ideal that never occur criminal acts, but should at least try

Different conferences, the UN resolutions and international conventions, which for long time, has been held, have tried to fight for recognition of the role of women in society and to try to recognize it with the same rights as to men, the no-tolerance against gender-based violence, non-aggression women as historic and natural resource as a result of the submission of generations, marriages of minors, between others, which have gradually have established awareness in the population world, that women should be more protected and should have the same rights as men, without that it is incurred in the discrimination

The ideal it would be to create a common regulation within the EU, but that is not easy, because countries as France and Spain have big differences, or same case for example Latvia and United Kingdom or Italy and Germany, or Poland in basic things, not only in

the way to create laws, also in the denomination, principles and even protected persons. This is because in the E U there are different ways of thinking and different mentalities. Therefore, when it begins to make a European regulation, will not be easy and the negotiations will surely last for years until reaching a consensus between the different countries.

2.3 An overview of Italian and Spanish laws

In Italy, as in the United Kingdom and France, gender-based violence is not specifically addressed, but treats it as a broad approach to family relations or proximity as custody, including the crime of abuse. Furthermore, according to the statistical data already cited by the Italian system, it acknowledges - in documents set out by the Osservatorio Nazionale di Violenza Domestica, that the greatest number of acts of family violence occur against women³⁷. Although the same texts also mention the existence of abuse against man, describing himself as "the male author uses physical force or harmful agents typical of the genre (fist slashes and feet, firearms etc.), while the woman as an author performs scratches, bruises and bruises by the regular use of cooking tools, especially at a time that precedes or follows after meals in common³⁸", as well as expressly noting that one third of victims of domestic violence are men.

The Italian legislator wants to strengthen the family as an elementary nucleus and as a public order institute, where there are more hopeful authors who place the object of guardianship in the integrity of the person within the framework of certain relationships. Thus, the commented on the multi-lingual nature of the Italian system and the broad conception of the family as an institution to protect makes the legislator refer to a modern family, conceived as a community of affections, what some author has already defined as the family and which is ultimately conceived as an extended family, *allargata*³⁹, that is, as a system of flexible protection whose object of guardianship are

³⁷ Violenza Domestica, Rifessioni, Riferimenti e Dati "istuzioni per l'uso", Ed. Istituto Superiore per la Prevenzione e la Sicurezza del Lavoro and Universts degli Studi di Verona, Verona, 2008, p. 25.

³⁸ *Alcuni Risultati e Valutazioni*, pág 46-49 Ed. Observatorio Nazionale Violenza Domestica, 2010, en www.onvd.org [access: 24.08.2021]

³⁹ Dolcini, E. y Marinucci, M., *Codice Penale Commentato. Parte Speciale*, Vol. II, Ed. Ipsoa, Milán, 1999, pág. 2865.

all forms of violence that can occur in the family, and which also do not require any formalism for their Consideration The family relationships to which the precept refers are thus contained in the de facto family, conceived as those people united by sentimental relationships or customs of life that watch over each other, by their assistance and solidarity, during a appreciable period of coexistence and frequency of contact; which has also been defined as relationships with a necessary solidity, or what is the same, of soundness, as expressly permitted by the case-law of the Italian Court of Appeal, and which in turn reiterates its doctrine when it comes to violence as a violence within “delle mura domestiche”

The Article 572 disciplinary powers on the victim are the linchpin of punishable action or omission, since the omissive version also fits into the structure of punishable conduct such as intimate partner violence- relegated to the expression "the person who mistreats a person of family " And this expression, "maltratta", was also criticized for the understanding that its verbal form referred only to continuous behaviors and not to those sporadic episodes of violence; and this is why the probative problem that accuses this type of crime reaches an even greater dimension in the Italian system, which also requires for its prosecution the accreditation of repeated acts of violence and threats that are connected and that they manifest an unequivocal intention to make life impossible for the victim

The Chapter IV *"Of Crimes against Family Assistance"* of the Second Book of the Italian Penal Code contains in Title XI, devoted to "Crimes against the Family", article 572 which states: *"Whoever is out of the cases mentioned in the previous article, mistreats a person in his or her de facto family or partner, or a person under his authority or entrusted to him for his education, care, surveillance or custody, or in the exercise of a profession, shall be punished by imprisonment of two to six years If the result results in a serious personal injury, a prison sentence of four to nine years is applied; if there is a serious injury, incarceration will be seven to fifteen years; and if the result is death, the incarceration will be twelve to twenty-four years "* The reference of this article to its preceding, 571, is given because the latter determines that, *"He who abuses means of correction or discipline to the detriment of a person subject to his authority, or entrusted to him on the basis of education, instruction, care, surveillance or custody, or for the exercise of a profession or trade, shall be punished with imprisonment of up to six months if the fact is derived sickness for the body or mind If*

the event results from personal injury, the penalties laid down in Articles 582 and 583 - relating to the offence of bodily injury and the aggravating circumstances thereof, respectively, reduced by one third, if death is resulted, shall apply three to eight years "

The article 572 then refers to a crime that takes place at the family level , where we must note that the nomenclature of the article already refers to Abuse against Family members, of Chapter IV, Crimes Against Family Assistance, but which extends to the gathering of relationships which, while in the domestic environment, may respond even to a professional bond, by referring to the victim as a person subject to authority, or for their care for reasons of education, instruction, surveillance or custody, or in the exercise of a profession or art

On the other hand, for another sector of doctrine, the crime we discuss protects family relationships and their deterioration, which has even been mentioned as family disharmony Nor can we fail to comment on the assessment contained in article 571 concerning that which it abuses means of correction or discipline, because it reveals a certain permissiveness of the State towards the use of violence when it is used for purposes disciplinary, which has rightly been criticized by the most majority doctrine as a tacit admission that coercive methods used against minors can be lawfully based on violence, as a justified exercise of it if its purpose is correctness or discipline

This demarcation of lawful violence for its corrective purposes has been so criticized, and rightly so, that there are many authors ⁴⁶⁸ who have insistently called for the abolition of this precept 571, to which we do not forget is expressly referred to article 572

The Italian criminal text also refers to a crime of private violence in article 610 of the Penal Code whereby, *"He who, through violence or threats, obliges others to do, tolerate or omit anything, shall be punished with imprisonment of up to four years"*; even if the reference to a private crime is not contradictory when it is regarded as a criminal offence deserving of public persecution On the other hand, and despite the seniority of the Italian Penal Code dating back to October 19, 1930, we must recognize the effort made in recent years in which progress has been made such as the adoption of the Law on Measures against Violence in Relations Relatives of April 5, 2001, Law No 154, that while still not attending to the sex of victims, ignoring the issue of gender, we must appreciate that it brings a close approach to this issue and introduces a new precautionary measure to move away from the home family member and obligation to

meet family burdens⁴⁰, as well as gives new content relating to the protective order in determining that, *"Where the conduct of one spouse or partner is the cause of serious injury to the body or morals or freedom of the other spouse or partner, the judge, if the does not constitute an offence pursuing of its own motion, upon request, may adopt a Decree with one or more of the measures referred to in Article 342 -ter⁴¹"* -Article 2 of

⁴⁰ Law on Measures against Violence in Relations Relatives of April 5, 2001, Law No. 154 Article 1 of this Act contains the precautionary measure of withdrawal from the family home and establishes what we can translate as: "1. After paragraph 2 of article 291 of the Code of Criminal Procedure, the following shall be added: 2 - (a) In the event of a need or emergency, the prosecutor may request from the court, in the interest of the injured party, the provisional measures referred to in Article 282 -a. The measure will cease to be effective if the protective order is subsequently revoked. 2. Following Article 282 of the Code of Criminal Procedure, the following shall be added: Article 282-bis (from the Distance from the family home). 1 With the decision ordered by the judge, the defendant is required to immediately leave the family home, or not to return, and not to have access to it without judicial permission. The authorization may include several types of visits. 2. The judge, in order to protect the life of the victim or close relatives, may also require the responding party not to approach certain places normally frequented by the victim, including the workplace, the home of the home of the home family or unless assistance is necessary for commercial purposes. In the latter case, the court shall lay down the implementing provisions and may impose limitations. 3. A court, at the request of the prosecutor, may also order periodic payment on behalf of persons living together as a result of an injunction. The court shall determine the amount in the light of verification of the debtor's circumstances and income as well as the conditions and terms of payment (...). 4. The measures referred to in Paragraphs 2 and 3 may be taken even after the measure referred to in Paragraph 1, provided that it has not been revoked, or if it has lost its effectiveness (...). 5. The measure referred to in Paragraph 3 may be revised if the conditions of the debtor or beneficiary change and shall be revoked if cohabitation resumes. (...)"

⁴¹ "With the decree referred to in article 342 - a, the spouse or partner who has the conduct that is harmful the withdrawal of the family home of the spouse or partner who has been harmed, and, where appropriate, the order not to go places usually frequented by the injured person, and in particular the workplace, the residence of the family of origin or other close relatives or in the vicinity of the education centres of the couple's children, unless he must attend the same places for needs working. The judge may also, if necessary, order the intervention of social services or a family mediation centre, as well as associations with the statutory purpose of supporting and accepting women and children or other persons who are victims of abuse, as well as the periodic payment on behalf of persons living together, as a result of the measures referred to in the first

the Law - as well as reinforces the punishment of the non-compliance with such an order of protection by referring to article 388 of the Penal Code which imposes on that offence a prison sentence of up to three years in addition to a pecuniary fine of EUR 103 to EUR 1,032

The legal treatment of this order is emphasized in many texts that appreciate the suitability of this measure for victims by entailing the order of termination of coexistence, focusing mainly on the non-victim leaving the family roof, as well as, if necessary, the prohibition for the author to approach places routinely frequented by the victim (work, school, etc), the intervention of social services and mediation centres, and the provision of a measure ancillary financial for the victim who could even be deducted directly from his payroll

Although some authors have also pointed out critically in this regard, that this protective order rather than complying with the will of the legislator for immediate protection of victims in practice is rather used to obtain separation between spouses by being applied only as the last ratio in already severely impaired limit situations. It should be noted that this Law No 154/2001 provides for the intervention of social services, family mediation centres and guardianship associations of abused women and minors in order to analyze whether restrictive orders are respected, because this regulation promotes in an innovative way the intervention of family mediation aimed at resolving family conflicts through professional experts

Also later, on September 29, 2008, the National Association of Donne in Rete contro la Violenza centres was created in Rome, bringing together 62 women's associations from all over Italy and born with the intention of being a strong lobbyist to influence national politics with the promotion of different gender policies in government

subparagraph, without adequate means, setting the terms and conditions of payment and indicating, where appropriate, the amount to be paid directly to the person who is entitled (...). By the same decree the court, in the cases referred to in the preceding paragraphs, shall determine the duration of the protection order, from the day of the execution of the protection order. This cannot exceed six months and can be extended, at the request of a party, unless there are serious grounds for the time strictly necessary. By the same decree the judge shall determine the method of application. In the event of difficulties or disputes relating to enforcement, the same court shall, by decree, be competent to take the most appropriate measures for the application, including the use of coercive means".

Also worthy are the latest *Misure di Prevenzione e Repressione dei Reati contro la Persona all'interno, l'orientamento sessuale della Famiglia, di Genere e ogni altra causa di Discriminazione* approved by Council of Ministers of 22 December 2006. More recently, *Law No 38/2009 of April 23 on Security, Sexual Violence and Harassment - the result of conversion into law, with amendments, of Decree-Law No 11/2009 of 23 February of Urgent Measures of Urgent Measures in the field of public safety and the fight against sexual violence*, by which it amended the Penal Code, and which in article 7 collected the introduction of a new crime of harassment for the prosecution of those threats and harassment repeated by acts such as creating in the victim a continuous state of anxiety, fear, or fear based on the safety of the victim or that person loved for her

With this latest proposal the legislature consolidated, it must be acknowledged, the fight against violence in family relations where we have to highlight the protection it provides in its second paragraph towards ex-partners to which it extends in a protectionist way its scope, so that a broad concept of family is re-emphasized that includes those with a relationship of kinship or equivalent relationship, as well as all those who live together habitually. It is also worth noting the importance that the Italian legislator attaches to moral violence, which we can equate to the psychic, with the clear intention of reinforcing the physical and psychic integrity of the victims, dedicating a unique attention to the psychologically traumatic consequences of violence⁴²

We cannot fail to appallize this equality in Italy from physical to psychological violence, even referring in official texts to a third type of violence, economic violence. Thus, this economic dependence is usually pointed out by Italian doctrine as one of the causes that cause the victim to bear the situation of abuse, but what is more original of the Italian system is that this situation of the victim is already directly identified as a type of violence, rather than as one of its reasons for being

The 27th June 2013, ratifies the Convention of the Council of Europe on Prevention and Combating Violence against Women and Domestic Violence - which we have already referred to in the Section corresponding to the European Perspective, so that the Italian

⁴² Giacomo, G., *Non Esiste una Giustificazione: l'uomo che agisce violenza domestica verso il cambiamento*, Ed. Romano, Florence, 2013, p.27.

State in compliance with it issues *Decree Law No 93 of August 14, 2013 on Urgent Provisions for the Security and Combating Gender Violence, and on the Civil Protection and Commissioner Provinces -converted into Law No 119/2013* as of October 15 of that same year⁴³ This text recognizes deterrent purposes, as expressly stated in its Explanatory Memorandum, to prepare emergency measures to tighten penalties for perpetrators of violence, and those to advance the protection of women and any victims of domestic violence. Mainly the novelties established by this Decree Law are that the crime of abuse against family members and household members - article 572 of the Penal Code- is aggravated if it is committed against or in the presence of a child under the age of 18. The article 612a of the Penal Code is also amended, increasing the punishment for harassment for anyone who threatens or harasses someone in order to provoke a serious and permanent state of anxiety or fear, or to give rise to well-founded fears of their own safety or that of a close relative or person linked by the same love relationship, or forces the victim to alter their living habits by paying special attention to the event that harassing conduct is carried out with the use of a computer or other electronic instruments. In addition, the victim's complaint becomes irrevocable, thus avoiding harassment by the victim to convince the victim to remove it.

About this, we have to point out that this decision that the allegations be irrevocable has been receptionised in a divided way by the criticism that on the one hand positively values this measure because it understands that it frees the victim from the pressure which means that the prosperity of criminal proceedings against the perpetrator after the complaint are in his hands, while another sector argues that this is a mechanism that puts more pressure on women that, on the other hand, may not report because the irrevocability of his complaint more than encourage her to deter her presentation by the insecurity and conviction about her self-guiltability and family responsibility that often characterizes women victims of gender-based violence.

The same Decree Law amends article 609 b of the Penal Code including as aggravating circumstance that includes a penalty of between six and twelve years, and not between five and ten as established by the base type, for the author of the sexual violence.

⁴³ Disposizioni Urgenti in Materia di Sicurezza e per il Contrasto della Violenza di Genere, nonche in tema di Protezione Civile e di Commissariamento delle Province.

exercised on women 5-ter paragraph, or when the author is a spouse, even separated or divorced, or person linked to an emotional relationship, even without coexistence, 5- quater This Decree Law then includes the new figure of in fraganti arrest that intensifies the immediate detention and imprisonment of the perpetrator of family violence - in cases of serious risk - as well as the urgent eviction of the family home with the prohibition of approaching places normally frequented by the victim for which he is caught in a crime of violation of family care obligations, abuse of correction, exploitation of prostitution and child pornography, or the use of children in the begging, and where there are reasonable grounds to believe that criminal conduct can be repeated by seriously and really endangering the life or physical integrity of the victim, according to article 2 of the Law which creates article 384a of the Code of Criminal Procedure It also provides protection for foreign victims of domestic violence in cases where situations of violence or abuse are verified, and a real and present danger to their safety as a result of an investigation, granting the possibility of obtain a special residence permit on humanitarian grounds

The objective of preventing violence against women through information is also set, as it ensures a constant flow of information to women offended parties in the relevant criminal process, and promoting community awareness, education and reporting against violence with the inclusion of the concept of gender discrimination in curricula, as well as improving forms of assistance and support to victims of violence, including strengthening the right to full legal care for the injured In short, as stated by the Italian Government, the intention underlying the enactment of this Law has been to combat the phenomenon of violence against women and femicide thanks to three priority objectives: to prevent gender-based violence, punish her and protect the victims But the problem is that within a few days of validity this text received constant criticism from different areas of Italian society and politics that called it unlucky in not fully establishing the necessary measures for effective protection abused women and suffer from such important aspects as the training and protection of women as it addresses gender-only, emergency and public safety violence by avoiding its cultural and structural aspect, which has less than a month after its entry into force, even its constitutionality was publicly called into question

The first law in Italy regulating gender-based violence is Decree Law No 93 of August 14, 2013, on Urgent Provisions for the Security and Combating Gender Violence, and

on Civil Protection and the Commissioner of Provinces. The Italian legislation of application traditionally extended its scope to all family victims, without specialising women as victims; and this despite the fact that in 1997 the first official investigations into domestic violence were already carried out in Italy - with the elaboration of the *Indagine sulla Sicurezza dei Cittadini*, and it noted that 26.2% of women were victims of violence at the hands of their husbands.

Likewise, at the time of this work, the official data we find yield figures as alarming as that, "Women between the ages of 16 and 70 who claim to have been victims of violence, physical or sexual violence, at least one time in life are 6 000 000 and 743 000, or 31.9% of the female population, considering rape alone, the percentage is 4.8% - and that corresponds to more than one million women. 14.3% of women report being subjected to violence by their partners, or 12% of physical violence and 6.1% of sexual assault. As for rape, 2.4% of women report being raped by their partner and 2.9% by others. Likewise, 93% of the women who claim to have been subjected to violence by their partner said that they had not reported the facts to the authority." although the absence of updated official statistics on this subject is repeatedly criticized by the country's experts and women's associations.

Even so, these are the figures that Italian doctrine has defined as the dark numbers of violence, expressly recognizing in this way and from different areas the greatest risk of this violence by women.

In Spain, the law that regulates gender-based violence is the Law 1/2004 of 28 December on Comprehensive Protection Measures against Gender-based Violence. It is a law full of problems and controversies since its beginning, since judges, doctrine and even civil society did not see it favorably, distrusting it. Unfortunately, after some time, the fears and misgivings against this law have become a reality, and it is currently one of the most criticized laws in the recent history of Spain. This law suffers from big loopholes, errors, it is sexist, because it only defends women, it goes against the constitutional principle of equality between men and women and in general it is not accepted by Spanish society as a fair and adequate law to solve the problems of gender violence. This law has a big problem of effectiveness, it does not protect the victim or his or her family adequately, rather since its beginning there has been an increase in cases of violence, including the deaths of women and children. For this reason, it is not

clear that this law helps and protects the victims, but on the contrary, in many cases it aggravates the problem, creating a serious problem in society

The problem with the Spanish law on violence is that it was done in an extremist way, leaving out men for cases of violence against them and their children and making a definition that only included violence, translating it as violence only against women, not including domestic or intra-family violence, as is the case in the United Kingdom or Italy. It also leaves men out, unlike in the UK, Italy or France, where men are also protected in the event of domestic or intra-family violence. In this case, Italian law does include different definitions of violence, covering its definition to many aspects and to different subjects and forms of unions, that is, also to couples who are not married, which is defined by Italian law as *convivencia* family, not being as restrictive as Spanish law.

It is precisely on this point that the rejection of a large part of society is focused, who do not understand that for the same case of violence the law to be applied is different, depending on whether it is a woman or a man, that is, if the woman is the victim, law 1/2004 of December 28 will apply, however if it is a man the victim, this law will not be applied, but the criminal code, applying crimes such as injuries, threats, coercion, homicides, etc.

The entry into force of the Spanish law on violence reflects the seriousness of all the above, since we are faced with a problem whose point of contention lies in the different viability of criminal proceedings, since for the same facts, the current legal procedure is different, that is, for example, if a man assaults a woman causing physical or psychological damage, with whom you have or have had an affective relationship, the law of Violence will be applied with the protection measures that it entails, where appropriate. On the other hand, if a woman assaults a man with whom she has had a relationship, with or without cohabitation, the law on violence will not apply, it will be treated as a crime or misdemeanour, as the case may be, provided for and punished in articles 147 et seq. and 617 C P respectively.

This example demonstrates the unfairness of the law, resulting in practice the opposite of what it intends, since as stated in its explanatory memorandum, one of the primary objectives is to fight for gender equality, being in practice an instrument tailor-made for the accusing parties and even for the judge, because they are given the possibility of determining the lives of several people or an entire family in a summary way and that in

most cases does not solve anything, on the contrary, it aggravates the situations, even causing unnecessary deaths and all this because of the seriousness and exaggeration of the measures that are taken and how they are adopted, which are usually in most cases summarily, as we said above and which we will adequately analyze in another section, which are the fair measure in the judge's decision-making of the protection order and other measures that go with it. This is so often because the current law does not solve problems, but rather creates them, deepening the differences between the sexes that benefit no one.

Therefore, according to the law of violence, the notion of victim can only correspond to a woman-victim who, as already explained above, suffers violence as an act of discrimination against her, and the law also requires that there be a specific affective relationship between the perpetrator of the act of violence (necessarily a man, a woman, a victim) as already mentioned) and the woman, the victim of it. Specifically, it is required:

- that the woman had married the perpetrator of the crime, even if the marriage bond had been broken (in the case of marital separation, annulment of marriage or divorce) and regardless of the time that has elapsed since the breakdown of the marriage
- That the woman had been united with the perpetrator of the crime by an affective relationship similar to marriage, even if there was no cohabitation. That is, this includes unmarried couples or simple dating relationships in which there is no cohabitation. Here, too, as in the case of marriage, it does not matter whether there has been a breakdown of the relationship between the victim and the perpetrator of the crime or the time that has elapsed since the breakdown. It can also be understood that the wording of Article 148.4 of the Spanish Civil Code, in relation to the basic type of Article 147 of the Criminal Code, would violate the right to the presumption of innocence, connected with the principle of guilt, contained in Article 24.2 of the Spanish Constitution, because a rebuttable presumption is established and therefore without the possibility of proof to the contrary that men's violence against women, linked by ties of affection, constitutes a manifestation of discrimination, as seems to be taken for granted in art 1.1 that all violence against women by their partner or ex-partners is a manifestation of discrimination, the situation of inequality and the power relations of men over women.

However, the jurisprudence has interpreted⁴⁴ the aforementioned article 1, in relation to article 148 4 and 153 of the Criminal Code, in the sense that not all injuries can be considered as gender violence and therefore aggravated types cannot be applied automatically, as has been applied on many occasions, with the unfortunate forensic phrase " any lack of injury becomes a crime," referring to the application of the LVG. Thus, the line of jurisprudence of the Provincial Courts, ratified by the Supreme Court, indicates that the generalized application of article 153 of the Criminal Code is unfeasible, because in order for it to be applied as a crime of violent abuse in the family environment, it is necessary that the acts denounced and committed by a man, start from a situation of domination or subjugation by the active subject-man over the passive subject or that they occur in a context of domination of the active subject over the weak member of the family relationship. That is why article 153 of the Criminal Code does not apply in cases of mutually accepted quarrel, since it is considered a misdemeanour. In addition, the jurisprudence indicates that the type contained in article 153 of the Criminal Code must be applied restrictively in its application, so that the conduct described in the criminal type is an evident manifestation of two requirements that must be met simultaneously: the first domestic violence and the second gender

The problem comes when you have to delimiting each concept, that is, explaining what means domestic violence and what means gender-based violence, because by now still it

⁴⁴ Sentences from Supreme Court nº 164/2008 of 8 of April; Sentence of the Provincial Court of Castellón nº 81/2008 of 26 de February; Sentence of the Provincial Court of Barcelona nº 200/06, of 29 of September; Sentence of the Provincial Court of Barcelona nº 193/06, of 13 of March; Sentence of the Provincial Court of Tarragona nº 60/06, of 30 of January; Sentence of the Provincial Court of Ciudad Real nº 87/06, of 11 of October; Sentence of the Provincial Court of Castellón nº 415/05, of 9 of December; Sentence of the Provincial Court of Barcelona nº 1110/05, of 27 of October; Sentence of the Provincial Court of Barcelona nº 1044/05, of 20 of October; Sentence of the Provincial Court of Barcelona nº 901/04, of 1 of September; Sentence of the Provincial Court of Valencia nº 535/05, of 4 October; Sentence of the Provincial Court of Barcelona nº 515/05; Sentence of the Provincial Court of Barcelona nº 535/05, of 17 of May ; Sentence of the Provincial Court of Sevilla 121/05, of 18 of March; Sentence of the Provincial Court of Barcelona nº 1222/04, of 14 of December (referring to the numbers 123, 260 y 1308/04 of the same Court); Sentence of the Provincial Court of Barcelona nº 1054/04, of 15 of November.

is not known exactly what means each concept, as they are interrelated and there is a tendency in a generic way to think that they are synonymous, even by the judges themselves

The jurisprudence itself has tried to clarify this in several resolutions⁴⁵, delimiting each concept when applying article 153 of the Criminal Code, because the concept of domestic violence is not expressly defined by the legislator in the way that the concept of gender violence is defined and configured today with the LVG. That is why he has differentiated them, dictating textually: "These are two heterogeneous concepts, although both are related by their common relationship with the domestic. The first refers to the most intense and continuous spatial and continuous spatial and affective environment in which the most intense and continuous relationships of family cohabitation determined by law are developed (generally, as a closing clause in the legal enumeration, any relationship by which the taxpayer is integrated into the nucleus of family cohabitation of the active subject). The second refers to a peculiar form of violence produced within this environment, elevated to the category of a clearly identified sociological phenomenon, and characterized by the situation of abuse or domination developed by one of the members or subjects of these family relationships, over other subjects of the same." Therefore, the meaning of domestic violence includes the manifestations of a situation of abuse, domination or subjugation of a family member over another family member and, by extension, the same situations of abuse against persons who, due to their special vulnerability, are subject to custody or guardianship in public or private centers. With regard to the concept of gender-based violence, the explanatory memorandum of the LVG begins by stating that "gender-based violence is not a problem that affects the private sphere. On the contrary, it manifests itself as the most brutal symbol of the inequality that exists in our society. It is a violence that is directed against women for the very fact that they are women, because they are considered, by their aggressors, to lack the minimum rights of freedom, respect and decision-making capacity." "We cannot forget that the *raison d'être* of the law is that "to act against the violence that, as a manifestation of discrimination, the situation of inequality and the power relations of men over women, is exercised against them by those who are or have been their spouses or by those who are or have been linked to

⁴⁵ Sentence of the Provincial Court of Castellón nº 282/06, of 12 de July.

them by similar relationships of affection, even without cohabitation ", as stipulated in Art 1 1 LVG For García⁴⁶, the line between the two concepts is so narrow that it could even be argued that it is wrong and that the violence that occurs against women in situations of inequality and as a result of domination by men cannot be limited to the private sphere or within the home, but must be dealt with in a general way in all areas and circumstances

In the case of Gil Ruiz⁴⁷, gender-based violence and domestic violence have been intrinsically linked since time immemorial, since men have historically assumed the role of guarantor of family peace and of the legitimized master of the principle of *fragilitas sexus*. This author defends the LVG and its application in its entirety to the ultimate consequences, thus believing that women will be restored to the place in society they should occupy, speaking from the point of view of rights, of which they have historically been deprived. Thus, with the application of the LVG, according to Gil Ruiz, an idea of justice and the predominance of gender equality and mutual respect will be created in society. Article 1 2 states that this law establishes comprehensive protection measures against gender-based violence, the purpose of which is, among other things, to punish manifestations of this type of violence. And, in connection with this, in Title IV of the law, on the "criminal protection" against gender-based violence, almost all the articles that are related to gender-based violence are modified. Thus, article 37 changes the wording of article 153 of the Criminal Code, under the title "protection against ill-treatment". And in various articles of this Title IV of the Law, the concept of gender-based violence⁴⁸ and crimes related to gender-based violence is used repeatedly and some articles of the Criminal Code are reformed in which the concept of crimes related to gender-based violence is expressly used. Consequently, once the above reasoning has been set out in relation to the well-deserved article 153 of the Criminal Code and its correct application, it is necessary to take into account the concepts of gender-based violence and gender-based violence as a basic principle⁴⁹

⁴⁶ García Antonio. 2014. *Revista de Derecho, Empresa y Sociedad*, Núm. 5, July 2014, págs. 145-159. Ed. Dianet, La Rioja.

⁴⁷ Gil Ruiz Juana. 2008. "The different faces of the violence of gender". *Woman and Violence domestic*. Págs. 174-230. Editorial Dyckinson. Madrid 2008.

⁴⁸ Arts. 33, 34, 35 and 40 of the Spanish law of violence of gender.

⁴⁹ Arts. 83.1^a, 84.3, 88.1 Spanish Criminal Code.

Thus, the reprehensible conduct in article 153 1 of the Criminal Code would be the manifestation of discrimination, the situation of inequality and the power relations of men over women, the basic reason for the LVG, and any mistreatment that meets these characteristics would constitute misdemeanours provided for and punished in articles 617 and 620 of the Criminal Code. Therefore, any mistreatment, even if the active subject is the man and the passive subject the woman, cannot be classified as gender violence and article 153 of the Criminal Code can be automatically applied if the reputed facts do not contain the characteristics of which we have been speaking, since the facts must entail a plus translated into discrimination or abuse by the man towards the woman in situations of inequality. In these terms, constitutional jurisprudence has pronounced itself in sentences⁵⁰ that perfectly delimit the application of article 153 of the Criminal Code, helping to clarify the confusion that has arisen with the entry into

⁵⁰ Sentence of the Provincial Court of Castellón of 4 de february of 2008,*"The very logic of the penal system, which can only justify aggravated criminalization with the will to prevent a possible future with more serious actions, derived from the will to degrade, subjugate or dominate any of the persons referred to in the precept. That is the line that the Legislator intends, since in Law 1/2004 of December 28, 2004 on Comprehensive Protection Measures against Gender Violence, it defines this violence as that used as a manifestation of discrimination, the situation of inequality and power relations... In short, in our opinion, in order for the conducts included in the current article 153 of the Criminal Code to be included in the crime established therein and not the offenses described, the action must injure beyond physical integrity and must be an instrument of discrimination, domination or subjugation of one of the subjects it comprises. Otherwise, the criminal sanction must be limited to the absence of injury, ill-treatment or threat as defined in articles 617 and 620 of the Criminal Code."*

Sentence of the Provincial Court of Castellón of 18 de february of 2007, ".... *so that the facts can be subsumed under article 153 of the criminal code, that they respond to a situation of domination or subjugation by the active subject over the passive subject, or that they occur in such a context of domination of the active subject over the weak member of the family relationship...."*

"...there are many judgments that maintain the inapplicability of article 153 of the criminal code. in cases of mutually accepted quarrel, in which it is considered that, by the very logic of things, this presupposition of the domination or subjugation of one of the relatives over the other is lacking that presupposition of the domination or subjugation of one of the relatives over the other is missing."

force of the LVG. Thus, it determines that " The action must injure beyond physical integrity and must be an instrument of discrimination, domination or subjugation of one of the subjects it comprises. Otherwise, the criminal sanction must be limited to the absence of injury, ill-treatment or threat as defined in articles 617 and 620 of the Criminal Code "

2.4 The punitive distinction on grounds of sex in the penal code and organic law 1/2004 of 28 December on Integral protection measures against gender violence

2.4.1 The reform of the Penal Code with the entry into force of the Organic Law 1/2004 of 28 December on measures of Integral Protection against gender-based violence

Wondered if the organic law 1/2004 of 28 December on comprehensive protective measures against gender violence, violate rights and freedoms recognized in the Spanish Constitution (herein after EC), since often this issue has given rise to a variety of opinions, even this diversity of views to the highest constitutional sphere⁵¹

Rights and principles such as equality, presumption of innocence and guilt or that of penal proportionality, e.g., have been discussed to the point of having raised issues and resources of unconstitutionality, to be understood that the drafting of the organic law 1/2004 of 28 December on measures of integral Protection against gender violence (in hereinafter LVG) and reforms coupled and that has meant his entry into force seriously injured these rights and that therefore such a law would be manifestly unconstitutional. Without doubt reform that has attracted more controversy by its wording seemingly unconstitutional, is the operated in the criminal Code, in articles such as the art 148.4 or article 153.1, 153.2, or the art 171 or the art 172. The drafting of the reformed article 148.4 criminal code can contradict the arts 1.1, 9, 10, 14, 17, 24.2 and 25.1 of the Spanish constitution, since invading the sphere of the principle of equality, connected with the values of freedom, the dignity of the person and justice.

⁵¹ There were numerous discrepancies in SSTC, reflected in special votes carried out by judges, acting against the jurisprudential Constitution Court line and away from decisions on this subject, about the collision of fundamental rights and the aforementioned LVG.

It may be understood with this wording is discriminating adversely to man, since it is situated as author solely man by the simple fact of being a man and as a distinguishing criterion, strictly excluding women. The Spanish violence law, only refers to women as victims, understanding them as such, when it is exercised exclusively by the male, with a “vis compulsive” that it affects and impacts on the physical and/or mental health women and it have been done as a manifestation of discrimination and/or the situation of inequality and the power relations of men over women, when it exists a relationship of affection with or without cohabitation or they are or have been their spouses.

A priori, it seems, makes what is punished with a bonus added to men by the simple fact of being a man and leaves them aside and even deprives them are measures for the protection of this law, as if there were physical or psychological abuse or aggression by the woman to the man in the family or domestic level for example with or without cohabitation, which is exactly the same that regulates the LVG, but conversely, because only protects the woman, not a man as stated in article 1 of the act, that is with people that have shared a relationship of affection with or without cohabitation.

It's true that also in the assaults of this nature, statistically speaking the highest percentage corresponds to the women, being a negligible percentage men-victims of physical or psychic, assaulted by his wife or partner. However this does not always reveal the true proportions of the problem, primarily for two reasons; first, the fear of ridicule is facing the man to report crimes of this nature, since we live in a still conservative society and in certain aspects even sexist, being in many cases, the woman herself, the macho man, seeing such behavior, correct and up to fair, in which the role of the man is being a tough guy introverted in their feelings that, failing them, dominator of all situations with poise and denouncing you're a victim of abuse or discrimination by a woman would behave in the man-victim a glaring disgrace and a real challenge to confront lodged the complaint and others throughout the process which should be rigged. The second, by the own drafting of the Spanish violence law, since as stated above only dispense exclusive protection to women at the expense of the man going in our opinion, contrary to the principles of effective judicial protection and principle of equality of the sexes, in addition to those mentioned above.

The fact of the abused men represent a minority quantitatively speaking in relation to women, it should be overlooked, depriving them of defence which dispenses the Spanish law, since this means a discrimination against the male gender by the men just of fact of being a man

This is amazing and maybe paradoxical or even absurd, because it goes against what the own Spanish violence law defends⁵², whereas gender equality between male and female, no preponderance of none on the other, since this law only be eligible women, discriminated against and away on one side the men. Therefore, we can say that the Spanish law stands, discriminates against men, violating the principles of equality and of innocence, by discriminating against men because of inequality, in relation to women. There is a serious contradiction in which incurs the Spanish violence law, because when you try to help legislating, to soften the problem of inequality of sexes, advocating for a joint position in society, which it's happens is the opposite; it's protects the female sex to the detriment of the male. This is clear and evident, also goes against the principle of equality of sexes and the presumption of innocence, collected in the EC and the men itself, since if the law attending both genders equally, certainly more men would dare to denounce the mistreatment in the family, domestic sphere or any other and this would no doubt help gender equality reflected in society.

The entry into force of the Spanish violence law, reflects the seriousness of all the above, since we have a problem whose point of discord, lives in the different feasibility procesal-penal, because for the same facts, the existing legal procedures is different, searing physical or mental damage, shall apply to Spanish law with measures of protection that this is rigged in his case. On the contrary if a woman assaulted a man that has been a relationship with or without cohabitation shall not apply the Spanish violence law, it will be processed as a crime or failure in your case, provided for and punished in the arts 147 et seq and art 617 criminal code respectively.

This example shows the injustice of the Spanish law, resulting in practice the opposite of what it claims to, as recorded in his explanatory statement, one of the primary objectives is to fight for gender equality, in practice being an instrument made to the measure for the accusing parties and even the judge, because it gives them the

⁵² Exposition of Motives of the Law Organic 1/2004 of 28 of December.

possibility of that determine life frequently of several people or a family, learns summarily and that in the majority of cases does not come to resolve anything on the contrary, aggravates situations, causing unnecessary death and all this by gravity and the exaggeration of the measures to be taken and how it adopted, which tend to be in the majority of cases of summarily, as stated above, and that we will analyze properly in another section, which are the fair measure in the decision making by the judge of the order of protection and other measures associated with carrying This happens so frequently because the current Spanish violence law does not solve problems but rather the create, delving into the differences between the sexes that nobody benefits from

Therefore according to the Spanish violence law, the notion of victim only can correspond to a woman-victim that as you outlined, that suffer violence as an act of discrimination against the same and in addition the law requires that there is a relationship of particular affection between the author of the acts of violence (necessarily a male, as already mentioned) and the woman, victim of the same Specifically, it requires:

- that the woman had contracted marriage with the perpetrator of the crime, although the marriage had broken (case of marital separation, nullity of marriage or divorce) and regardless of the time elapsed since the marriage breakdown

- that the woman had been united with the perpetrator of the crime by a relationship of affection similar to marriage, even in the case that there is no coexistence That is, the domestic partners or the simple relationship of courtship in which there is no coexistence are included here Here too, as in the case of marriage, it doesn't matter that there has been a breakdown in the relationship between the victim and the author of the offence nor the elapsed time

It can also be understood that the drafting of article 148 4 criminal code in relation to the basic type of article 147 criminal code, violate the right to the presumption of innocence, connected with the principle of guilt, contained in article 24 2 Spanish Constitution, because it establishes a “presumption *iure et de iure*”, and therefore no possibility of proof to the contrary, that the male violence towards women, linked by ties of affection, is a manifestation of discrimination, as it seems to be taken for granted in the Spanish violence law art 1 1 that all violence against women by part of their partners or ex-partners, is a manifestation of discrimination, the situation of inequality and the relations of power from men over women

However the jurisprudence has interpreted, the mentioned Spanish violence law art 1, in relation to article 148 4 and 153 both criminal code, in the sense that not every injury can be considered as gender violence and therefore cannot be applied automatically compounded rate, as it has been applied not on few occasions, with little successful forensic phrase “every offense of injures becomes a crime”, in reference to the application of Spanish violence law

Thus, the jurisprudential line of the Provincials Courts, ratified by the Supreme Court, indicates that the general application of art 153 criminal code, because to be applied as a crime of violent mistreatment in the family, it is necessary that the facts denounced and committed by a man, start from a situation of domination or subjugation on the part of the active-male subject on the passive subject or that occur in a context of domination of the active subject over the weak member of the family relationship That is why the art 153 criminal code in cases of mutually accepted quarrel as it is considered as crime In addition, the jurisprudence indicates that the type contained in art 153 criminal code must be applied restrictively in its application, so that the behavior described in the criminal type is a clear manifestation of two requirements that must be given simultaneously: the first domestic violence and the second gender violence

The problem arises when it try to delimit each concept, i e , to define what is meant by domestic violence and what is meant by gender-based violence, because actually it doesn't know exactly what means every concept, because these concepts are interrelated between them and most of the people think that are the same things, even by the judges, that they aren't able to understand the differences

The jurisprudence has attempted to clarify it in several resolutions, defining each concept when applying art 153 criminal code, because the concept of domestic violence is not expressly defined by the legislator in the way that day with the Spanish violence law is now defined and configured the concept of gender-based violence Why has differentiated them dictating so textually *"It is a question of two heterogeneous concepts, although related both by their common relation with the domestic concept The first one refers to the spatial and affective scope in which the relations of familiar coexistence are developed (with generality, like clause of closure in the legal enumeration, includes any relationship for the person integrated into the nucleus of*

familiar coexistence of the active subject) more intense and continuous as determined by law The second refers to a peculiar form of violence produced within this scope, elevated to the category of sociological phenomenon clearly identified, and characterized by the situation of abuse or domination that develops one of the members or subjects of such family relations, on other subjects of the same "

Therefore, in the meaning of domestic violence the manifestations of a situation of abuse, domination or subjugation of a relative to another relative and by extension the same situations of abuse on the people that by their special vulnerability are put under custody or guarded in public or private centers

Regarding to the concept of gender violence, the Spanish violence law's explanatory statement begins by stating that "gender violence is not a problem that affects the private sphere On the contrary, it manifests itself as the most brutal symbol of inequality in our society It is a violence directed against women by the very fact of being, because they are considered, by their aggressors, lacking the minimum rights of freedom, respect and decision-making "

We cannot forget that the purpose of the Spanish violence law is to " *act against violence which, as a manifestation of discrimination, the situation of inequality and the power relations of men over women, is exercised over these by part of those who are or have been their spouses or of those who are or have been linked to them by similar relationships of affection, even without coexistence "*, as stated in Article 1 1 Spanish violence law

The line between both concepts is so narrow that it could even be considered that it is error and the violence that is given on the women in situation of inequality and as a result of the domination by the man cannot be delimited to the private scope or inside of the household, but must deal in a general way in all areas and circumstances (Yugueros García, 2008) In the case of another author (Gil Ruiz, 2016), gender and domestic violence are intrinsically united since time immemorial, since man has historically assumed the role of guarantor of family peace and legitimized the principle of embryonic sexes This author defends the law and its application of its totality to the last consequences, believing, that the woman will be given the position in the society that she must occupy, speaking from the point of view of rights, whose rights have been historically Thus with the application of the law according to Gil Ruiz will create in society an idea of justice and predominance of gender equality and mutual respect

In the art 12 it is said that this law establishes measures of comprehensive protection against gender violence, whose purpose is, among other things, to sanction manifestations of this type of violence. And, in connection with this, in Title IV of the law, on "criminal tutelage" against gender violence, almost all articles that are related to gender violence are modified. Thus, the art 37 Spanish law changes the wording of art 153 criminal code, under the heading "protection against ill-treatment". And several articles of this Title IV of the Law repeatedly use the concept of gender violence and crimes related to gender violence and reform some articles of the COP that expressly use the concept of crimes related to violence of genre.

Consequently, once exposed the previous reasoning in relation to the art 153 CP and its correct application, it is necessary to take into account as a basic principle the concepts of gender violence and gender violence. Thus, the reproachable conduct in art 153 1 CP would be the manifestation of discrimination, the situation of inequality and power relations of men over women basic motive of the LVG and any mistreatment that meets these characteristics would constitute constituted offenses and punished in arts 617 and 620 CP. Therefore, any maltreatment, even if the active subject is the male and the passive subject the woman, cannot be classified as gender violence and automatically apply art 153 CP if the facts reputed do not contain the characteristics of those we have been speaking, since the facts must carry a plus translated in discrimination or abuse on the part of the male towards the woman in situations of inequality.

In these terms has been pronounced, constitutional jurisprudence in sentences that delimit perfectly the application of art 153 CP, helping to clarify the confusion that has occurred with the entry into force of the LVG. Thus, it determines that "the action must injure beyond physical integrity and must be an instrument of discrimination, domination or subjugation of any of the subjects that it comprises. In another case, the penal sanction should be limited to the lack of injuries, abuse or the threat defined by arts 617 and 620 of the CP".

2.4.2 Jurisprudence and Preferences of the doctrine

Once defined, the concepts of domestic violence and gender violence, in the previous section for the correct application of arts 153 related to the 617 and 620 CP, arises the need to delve deeper into the problem, since although earlier we are responsible for explaining when it is possible to apply art 153 CP and when not, it is now necessary to explain the wording of sections 1 and 2 of art 153 CP because the differentiation it makes of the sexes has raised many questions of unconstitutionality for this same cause, by affecting the art 10 SC for violation of the dignity of the person, the rights of equality art 14 SC and the presumption of innocence art 24 2 SC⁵³

This punitive differentiation established by the sexes is precisely the one that has raised issues of unconstitutionality by magistrates themselves, even to the point of not having unanimity in the Constitutional Court, reflected in the ruling and formally departing⁵⁴ from it. However, currently the jurisprudence of the TC, is not exempt from controversies, there is a rich case law on the constitutionality or not of the articles that have been reformed by the LVG, interpreting how they should be understood, since from the entry into force of the LVG, have rained the appeals and issues of unconstitutionality

So, the difference existing in the wording of paragraphs 1 and 2 of art 153 C P can lead to think of its unconstitutionality, by affecting the aforementioned art 14 EC, because it differentiates between the male aggressor, causes a psychic impairment, an injury or strikes or mistreats to whoever or has been his wife or has had a relationship of affectivity or that which does not and moves in which the paragraph 1, punishes with imprisonment from six months to one year or work for the benefit of the community between thirty and one to eighty days, always with the deprivation of the right of possession and possession of arms for a year and a day to three years. On the other hand, paragraph 2 only punishes the same facts, but without offended persons being those indicated in the previous section, with a penalty of three months to one year or works for the benefit of the community between thirty and one eighty days and always

⁵³ Art.10 EC 1, and Art. 14 CE.

⁵⁴ The discrepancy between the judges of the Constitutional Court, on the constitutionality of the Spanish law of violence, reflecting its position in particular votes in their sentences as important as the 59/2008 or 45/2009.

deprivation of the right to possession of weapons from one year and one day to three years

The TC assumes that there are several ways of interpreting art 153 CP and to understand it in purity, two relevant precisions must be made; the first is that the perpetrator of the crime does not necessarily have to be a male, but a female can also be a result of the different interpretations that this art can give. The second precision is that in the text of art 153 1CP, another alternative passive subject is included, alluding as a particularly vulnerable person who lives with the author. Well, in the first precision it can be understood that the type "that" this is as part of the doctrine.

The TC, regarding the collision of art 153 1 CP with the constitutional precepts infringed, that is, arts 10, 14 and 24 2 CE, resolves it in a way not exempt from criticism, made by the doctrine and even by its own magistrates, reflected in their particular votes. The TC defends the constitutionality of art 153 CP, claiming that it does not violate art 14 EC, since it contains two differentiated principles, the principle of equality and prohibitions of discrimination, this means that all Spanish citizens are equal before the law and have a subjective right to obtain equal treatment, and the public authorities must respect it and must be citizens treated in exactly the same way in equal assumptions are treated identically in their legal consequences, and differentiation can be made only where there is sufficient, reasonable and sound justification and the consequences of which are not disproportionate.

Thus, the doctrine of the TC in relation to the principle of equality ex art 14CE, has been requiring the legislator when it intends to introduce rules that establish a differentiation that may be called into question, the said principle of equality that these rules first show a discernible and legitimate aim, secondly that the rules must be articulated with logical consistency with that aim and thirdly not to incur disproportionate treatment when different rights and obligations, or any other subjective legal situations, are attributed to different groups and categories⁵⁵

In relation to the prohibition of discrimination of the text of art 14 EC, the TC, in general, in relation to the list of grounds of discrimination, which are strictly prohibited

⁵⁵ Sentence of the Constitutional Court nº 222/1992 of December 11 or Sentence of the Constitutional Court nº155/1998 of 13 July 1992.

by Article 14 EC, has been declaring the constitutional illegitimacy of differentiated treatments in relation to those that operate or are not founded more than in the specific grounds of discrimination that said art prohibits Nevertheless, the TC admits that the grounds of discrimination that the art 14 EC prohibits can be used exceptionally as a criterion of legal differentiation, such as sex, although to judge the legitimacy of the dispute and the requirements of proportionality is much stricter, as is the burden of proving the justified character of differentiation That is to say, that on the one hand the same motifs of which he speaks the text of art 14 EC, as grounds of discrimination, they may be applied exceptionally, where the legislature considers it appropriate in a number of circumstances which are also exceptional, the latter having to provide a more rigorous proof of the reasons for the differentiation⁵⁶ That means, that on the one hand the same motifs of which he speaks the text of art 14 EC, as grounds of discrimination, they may be applied exceptionally, if the legislature so decides in a number of exceptional circumstances, which must provide a more rigorous proof of the reasons for differentiation "Finally, it is not imperative to recall that, according to the jurisprudence of this Court, when faced with equal or seemingly equal situations a challenge based on art 14 corresponds to those who assume the defense of the challenged legality and therefore the defense of the inequality created by such legality, the burden of offering the foundation of that difference that covers the requirements of rationality and necessity in order to protect the purposes and values constitutionally worthy and, if appropriate, proposed by the legislator, to which we have referred previously

Thus, it is stated in the aforementioned judgment that " Finally, it is not imperative to recall that, according to the jurisprudence of this Court, when faced with equal or seemingly equal situations a challenge based on art 14 corresponds to those who assume the defense of the challenged legality and therefore the defense of the inequality created by such legality, the burden of offering the foundation of that difference that covers the requirements of rationality and necessity in order to protect the purposes and values constitutionally worthy and, if appropriate, proposed by the legislator, to which we have referred earlier "

⁵⁶ Sentence of the Constitutional Court n°103/1983 of 22 November, Sentence of the Constitutional Court n°128/1987 of 26 July or Sentence of the Constitutional Court n°126/1997 of 3 July.

It is clear that there is a breach between equality before the law of the sexes and the prohibition of discrimination of art 14 EC. Thus, the TC holds and defends, that the legislator has exclusive competence and is free to create laws, to enact certain behaviors that may be criminal and consequently punishable, establishing the penalties that bear those typical, unlawful behaviors within the limits of EC, following the principles of legality and proportionality. Therefore, it is the legislator who has to protect legal assets and can set rates, and may add a surcharge to prevent criminal behavior and to protect certain groups that require special protection.

Thus, it is incumbent upon the TC to analyze whether the legislator in its role of creating laws has adjusted to the limitations imposed by the EC with respect to the principle of equality and not to assess whether the penalties provided are excessive, fair or that they can comply better its teleological function. Likewise, in the TC in this question has been scrupulous in determining if the principle of equality is violated, demanding that the premises of the comparison be closely delimited that should be intrinsically linked to the regulation challenged, giving it an importance notorious for the choice of "*tertium comparationis*"

It is noteworthy that the State Attorney General's Office has been pronouncing in a manner consistent with the principle of gender equality as in the mentioned STC of November 22, 1983⁵⁷, adding two concepts that are sometimes confused, since there is a difficult and fine delimitation, which are equality before the law and in the law, i.e., it is not enough that the Law be applied universally and equally with respect to all those who find themselves in equal situations, but that the Law itself comes and to establish an equal treatment for all individuals, or groups, that are in the identity of situations⁵⁸.

In other countries this problem has also arisen, for example in Switzerland⁵⁹, and our TC has treated it almost identically as regards the distinction between "equality in law" and "equality before the law", and influenced in its decisions in this case other countries like Germany or Italy.

⁵⁷ Art. 14 Spanish Constitution.

⁵⁸ See note 12.

⁵⁹ Sentence of the Swiss Federal Court of February 14, 1982.

From "equality in the Law" it has been said that "a provision is contrary to art 4 of the Federal Constitution when it lacks an objective or solid basis, without meaning or purpose, or establishes distinctions without reasonable justification in the facts " (Arrêt Bachman, March 31, 1966) Likewise," a provision violates art 4 of the Federal Constitution, either by establishing between several cases legal distinctions not justified in any important fact, or by submitting to a similar system situations which present such differences as to render different treatment necessary (Arrêt Bullet 'of 23 January 1963) Finally, "The principle of equality of the Federal Constitution requires that situations be treated in a similar way when they are similar and differently insofar as they are different; it is therefore for the legislative authorities to adopt exceptional rules which depart from the general regulation, where the difference in situations so requires' (Arrêt Graber, 23 May 1962)

The judgment that causes these comments, ends up proclaiming the unacceptability of the differentiating scales between students of different sexes, agreed by the Cantonal Government of Vaud under the pretext of maintaining a certain balance between the number of students of both sexes. It does not matter here the prosecuted fact or the character of the governmental decision, if not the opportunity to play with those two ideas of "equality in the law" and "equality before the law" since a somewhat hasty reading of constitutional texts could to conclude that only the expression "before" the Law justifies the application of the principle, neglecting the other aspect of the question in the requirement to respect the principle of equality in the Law itself, especially if when such principle which is referred to in our Constitution, has been taken as a superior value of the order and as a requirement of action by the "public authorities" and among them, for the legislator himself⁶⁰

Returning to Spain, the TC had followed this same line. Thus, in the STC of July 14, 1982, he maintained that "the general rule of equality before the Law contained in art 14 EC provides, first, equality in the treatment given by the Law or equality in the Act and constitutes, from this point of view, a limit placed on the exercise of legislative power, but is also equal in the application of the Law ' "

⁶⁰ See note 12.

In addition, there are many resolutions in which it is pronounced, such as the STC of 10 July 1981, which states that: " the principle of equality contains a prohibition of discrimination, of in such a way that equal treatment must be given equal treatment "but does not suppose or" prohibits the legislator from contemplating the need or convenience of differentiating different situations and giving them a different treatment that may even be required, in a social and democratic State of law, for the effectiveness of the values that the Constitution enshrines with the character of superiors of the Order What prohibits the principle of legal equality is discrimination that is, that the inequality of legal treatment is unjustified because it is not reasonable " STC of November 12, 1981; Sentence that is reiterated in the STC of February 26, 1982 in which after remembering that "The said principle of equality binds to all the public powers because this is strongly affirmed by art 53 1C E ", again stresses the idea that" the aforementioned article 14 EC is that relating to the right of legal equality which prohibits discrimination or, in other words, that inequality of legal treatment is unjustified because it is not reasonable " Precisely because of this requirement that inequality, so that it does not oppose the principle recognized in art 14 of the Constitutional Text, it must be justified and reasonable, the Court considers that " a special rigor should be used when considering an inequality justified " STC of 5 May 1982

Once delimited and explained the above we can enter into the possible unconstitutionality of art 153 1 CP The TC continues to defend the constitutionality of this art to understand that its normative and punitive difference, which establishes the legislator is based on the desire to punish aggressions that he understands are more serious and more reprehensible from the social point of view, because they occur within the relationships of the couple fruit of the historically existing inequality, which makes the woman in a subordinate position in relation to the man That is why the TC understands that this wording does not violate the principle of equality of art 14 EC, but according to the same jurisprudential doctrine of this art " the differentiated treatment of equal factual assumptions has an objective and reasonable justification and does not have disproportionate consequences in the differentiated situations in view of the purpose pursued by such differentiation⁶¹ "

⁶¹ Sentence of the Constitutional Court n°222/1992, of 11 of December.

Well, the wording of art 153 CP, amended by L O 1/2004, of December 28, is constitutional according to the TC itself. This law, commonly referred to as gender violence, states in its explanatory memorandum that the purpose of this law is to prevent aggressions occurring in the context of the couple as a manifestation of the domination of men over women in such a context, that the basic assets of women, such as life, physical integrity, health, freedom and dignity, are not adequately protected and for this reason it does not hesitate to repress this type of violence with several measures, including criminal measures. Therefore, the difference of arts 153 1 and 153 2 CP, in the opinion of the TC is legitimate and appropriate because it protects the woman in the relations of couple by the greater devalue and the greater gravity of the acts of violence that undermine their dignity of person and in addition that difference is functional, because it delimits the active and passive subjects of the type, attributing an exclusive penalty to the men as active subjects, being the women subjects passive.

The reason that the active subjects are only men, is because they are precisely the men who statistically commit more aggression against women, who is or has been their partner. It is this assiduity, together with the social repercussion due to the great alarm that generates, that makes the legislator based aggravating the penalty to the aggressor, in order to try to avoid the commission of this type of crime. Therefore, according to the TC, it is reasonable for the legislator to act in this regard.

Now, there are differences of the active subject, since not every aggression by the man towards the woman, will be punished with the application of automatic form according to the art 153 CP, because such aggression must respond to a "manifestation of discrimination, inequality, and power relations between men and women" and as provided by the L O 1/2004 of 28 December. That is why, with the aggravation of the sentence, the legislator, in the opinion of the TC acts in a legitimate way, because it tries to avoid that this type of aggression continues in the area of couple relationships, because the legislator understands that these aggressions in this area they represent a greater damage when the man acts according to a cultural pattern influenced by the means, trying to avoid thus new aggressions to be greater punitive consequences for the active-man subject dissuading them from committing the same acts in the future. Thus, with legislative reform, women benefit by having more autonomy to decide,

safeguarding their dignity as a person and making the principle of equality of the art 14 Spanish Constitution

Therefore the TC understands that the legislator, when creating the law 1/2004 of December 28, complies with the EC and does not transgress it, because it believes that the highest penalty is not imposed by reason of the sex of the active subject, nor of the victim, but by the commission of more serious events that constitute a manifestation of violence and inequality. Likewise, the TC understands that this legislative differentiation contained in law 1/2004 of December 28, complies with the jurisprudential doctrine of the TC, when observing the requirements of reasonableness, equality and proportionality, becoming unconstitutional in the case of in that said law would "appreciate a patent unreasonable and excessive unreasonable"⁶²

As we have already indicated, the TC's foundation of the constitutionality of the LVG and the precepts that have modified it, with its entry into force has not been free of criticism, the most important if there have been doubts have been those of the magistrates of the TC, who have been unmarked from the TC line with their particular votes

Thus, Conde Martín de Hijas, is quite critical with STC 59/2008, part of the basis that the difference established between paragraph 1 of art 153 CP and section 2, is neither correct nor constitutional, since it is based simply and simply on a differentiation made by the sexes, contrary to the principle of equality of art 14 EC, because the conduct or aggression of art 153 1 CP has greater devaluation and therefore more gravity than those of art 153 2 CP, that is to say, the aggressions that occur in the realm of the couple when they are produced by the man towards the woman are punished with a greater punishment, than when in these relations of pair the aggression realizes the woman towards the man

In addition, Conde Martín de Hijas believes that, because of the fact that human aggression against women is more frequent in this area, it is not sufficient reason to establish a greater penalty for man, since it would be purely based to the sex of the author and victim of the crime, thus transgressing the constitutional framework. For that

⁶² Sentence of the Constitutional Court nº 55/1996, de 28 de march and Sentence of the Constitutional Court nº136/1999, of 20 of July.

reason, he thinks that although in the foundation of STC⁶³, he endeavors to demonstrate and argue otherwise, it is simply the sex of the active and passive subjects a determining factor of differentiated treatments, which is totally incompatible with art 14 EC. It also criticizes the TC of course that in today's relationship there is a relationship of inequality and a subordinate position of women, as it was in a past tense. Regarding the analysis of art 153 CP from the point of view of the principle of equality, Conde Martín de Hijas believes that it does not meet the jurisprudential requirements that have been demanded. It would be enough in her judgment, not to establish in any case a typological differentiation by sex, but simply, could raise the same type contained in art 153.2 CP, to an equal or greater degree, thus solving the problem of the greater devaluation in the aggressions of the male to the woman in the realm of the couple. Therefore resolved in this way, it would not be necessary to establish punitive differences on the basis of sex, since, as is currently the case, paragraphs 1 and 2 of art 153 CP, do not meet the requirements of reasonability or functionality.

Another important opinion is that of Rodríguez Zapata Pérez⁶⁴, who criticizes that the wording of art 153.1 CP has been left deliberately open by the legislator and creates legal insecurity for citizens, being contrary to the principle of legality of Article 25 EC, because its limits are not clear enough, which means that citizens do not know exactly what is prohibited for them to try to avoid the consequences of their actions, thus leading to legal uncertainty that is incompatible with the principle of certain *lex* or imperative of taxativity.

Vallespín Pérez⁶⁵, criticizes the LVG's wording and believes that the fundamental constitutional right to the presumption of innocence conflicts, alleging that it is not possible to understand why the integral law speaks of victim and aggressor and not of presumed victim and alleged aggressor, estimating which transgresses the EC. In my

⁶³ Sentence of the Constitutional Court nº 59/2008 and Sentence of the Constitutional Court nº 45/ 2009.

⁶⁴ Sentence of the Constitutional Court nº 59/2008 and Sentence of the Constitutional Court nº 45/ 2009.

⁶⁵ Vallespín Pérez D. "Some reflections on the procedural repercussions of LO 1/2004, regulating measures of comprehensive protection against gender violence" of the Journal of Procedural Law no. 3-4 / 2008, November 2008, Madrid, pp. 181-185.

view, the LVG, as it is drafted, transgresses the EC framework, since it is not possible to establish a punitive difference on the basis of sex, even though there is statistically more aggression on the part of men towards women. I fully agree with the opinion given by Conde Martín de Hijas and in the sense that it does not comply with the jurisprudential requirements that have been demanded to alter art. 14 EC, as well as that of Vallespín Pérez, and Vázquez Sotelo, between others authors, referring to the principle of presumption of innocence. With the entry into force of the LVG, the problems that the society allegedly demanded, a regulation that ended violence, badly called to my understanding of gender, nor the aggressions or the deaths of women at the hands of their partners or former partners.

All this is in my view, because of the poor approach and defense mechanisms against men and women, since there is often an "abuse" of measures often unjustified and most of the time excessive or disproportionate, which contributes to a covert rebellion of the punished, because of the condition that the LVG has operated in various regulations such as criminal or civil, leading to deaths not only women but also the family around them, many times. In addition statistically with the entry into force of the LVG, as we have said previously nothing has been solved and there has not been an evolution to leave this scourge behind. At the foot of the street is not understood the LVG nor the defense that is made, with the reasons defended in STC 59/2009 or in STC 45/2009, in the sense of punishing the aggressor man with the reformed art. 153.1 CP, when you attack a female who is or has been his partner, but not vice versa applying art. 147 CP, which includes the crime of injury or, if applicable, a fault recorded in 617 CP.

As Vázquez Sotelo⁶⁶ has pointed out, in an inordinate effort to protect the female sex, an organic and economic effort has been made to create specialized courts only for battered women (sometimes allegedly assaulted, given the fraudulent use of the Law to

⁶⁶ Vázquez Sotelo, J.L. Prologue to the work of Prof. Vallespín "The connection in the criminal process", Cims Editorial, Barcelona, 2007, p. 15. In the same direction of thought Sánchez, C. Prologue to the work of Professor Del Pozo Pérez "Domestic Violence and Misdemeanor Trial", Ed. Atelier, Barcelona, 2006, p. 17.

prepare divorce petitions), which can only be attended by the battered woman, but not the cohabiting man if it turns out to be the one attacked or when the aggression has been mutual. Apart from what was previously explained, what has not contributed at all to the solution of the aggressions as a couple has been the massive and indiscriminate application of the precautionary measures that has brought the application of the LVG. For example we have normally, that after formalizing the complaint and at the time of decision by the Court, they dictate coupled measures precautionary way almost summary, such as distance, communication ban order, imposition or visitation restrictions and it is here where lies one of the problems that the LVG has not succeeded and consequently not been almost eradicated the problem of gender-based violence. For example, we normally have, after the complaint has been formalized and at the time of issuing a decision by the court, precautionary measures are issued in a summary form, such as restraining order, prohibition of communication, imposition or restriction of visits and it is here that one of the problems resides that the LVG has not been successful and consequently the problem of gender violence has not been almost eradicated.

Therefore, in my opinion, the LVG suffers from two defects that makes it ineffective in reducing victims. The first defect is the punitive differentiation between the sexes, which in my opinion goes against art 14 CE, since it is not constitutional that different penalties are applied in different articles, depending only on the sex of the aggressor. In my opinion, if the same aggressions were penalized equally without regard to sex as a differentiating object, the LVG would be more effective, since the aggressors of both sexes would be punished equally and would be imposed in their case same precautionary measures, not being used as is often done in practice with a purpose other than mere protection in cases of aggression or situations of non-equality or abuse of power. The second of the defects is in my opinion, the massive, undue and indiscriminate application of precautionary measures, against the man who has been denounced, subsequently charged and finally convicted.

The application of these measures, such as a restraining order, a ban on communication, the restriction of the visitation regime or the prohibition of residing in the family home, are measures of great juridical and social importance because they imply a difficult burden to cope with the scarcity of means that generally characterize aggressors.

In addition, there are often cases in which, as I have already explained, for example the alleged victim uses the LVG to obtain a way out of a controversial situation in his home, removing the alleged perpetrator from the environment, establishing measures that we talked about earlier such as the prohibition of the use of the common family home or the imposition of a regime of visits in a very short time, or being used for an express divorce. One can thus see how far the question is posed from the theme of the principle of equality conceived in its deepest ethical sense in the function of eliminating arbitrary discriminations that postpone a person by reason of a personal or social condition that does not legitimize such discrimination. Another problem of the LVG is when the complaint is false or when the conduct denounced, does not enjoy criminal reproach and the accused is acquitted or the case is overturned after reported the allegedly unlawful acts, which, in any case, will be studied in another section.

2.5 Gaps of Spanish gender-based violence law

2.5.1 Implementation of measures precautionary generically

It is necessary to consider whether, when the precautionary measures are adopted during the criminal proceedings, the different principles that the CE proposes are respected and safeguarded, such as the principles of equality, freedom, dignity of the person and justice⁶⁷, since there are few doctrinal theories and jurisprudence that these principles are respected in their purity, since the LVG and other concordant provisions, such as arts 148,153,171CP, invade the sphere of these principles, favoring the victim of gender-based violence, almost instantaneously, to the detriment of the accused.

The LVG in its provisions, both in the explanatory statement as already in its art. 1, it appears that it discriminates positively against the woman and the male discriminates them negatively. We say it seems, because there are theories like TS and TC that have been positioned besides the LVG, in the sense of defending that these principles are not transgressed, instead there are others that if and even, this difference of criteria, in different judgments such as those of SSTC 41/2010 of July 22, 2010, in which particular votes of the judges have been issued, expressing their disagreement with the sentence when thinking radically the opposite. Thus, for example, in this same sentence

⁶⁷ Articles.1.1,9,10,14,17,24.2 and 25.1 CE.

the judges Jorge Rodríguez -Zapata Pérez and Ramón Rodríguez Arribas depart from the ruling, disagreeing with the line of the court and its reasoning

Linked to the above, of the intrusion and the attack of the LVG to the fundamental rights collected in the CE, the problem of the adoption of precautionary measures, within the LVG, arises, the application of which has been very similar discussed and controversial. The main problem of the application of precautionary measures in LVG is the generic application of the same, almost automatically, that are imposed on the accused to protect the victim. In the court practice, measures such as the prohibition of communication and of approaching the victim, attribution of family housing and the attribution of custody of children are adopted. These measures must be taken to ensure the integrity of the victim and must be subject to the rule "*rebus sic stantibus*" and of course must be based on the convenience and application of the court. This is to guarantee protection, we insist on the victim and to avoid a return to produce a relevant illegitimate aggression, on the one hand. On the other hand, we have the aggressor, who is the subject to which the precautionary measures are imposed, in order to avoid as we have already said that an aggression.

The adequacy in the application of precautionary, that means, which is the reasonable measure in a case, which is the right intensity, is where the most problems are, because in practice we often see the unfairness of such measures, since after the imposition of the same, we see fatal outcomes, such as the death of the victim and of the other relatives and on a few occasions a suicide. The reason underlying these measures is the harshness and injustice of the aggressor or alleged aggressor, because there is a general trend in public opinion that such measures are not fair nor proportionate, because although it is understood that an attempt is made to protect the victim with different means, does not understand the punishment so brutal in many cases that involve such measures. As an example, we can find that when the family is given the family home and the custody of the children to the victim, the aggressor must automatically leave the house and will be imposed, in the best cases, a visit regime for the children, as well as patrimonial measures to help the victim. It is in these cases by statistics, when these fatal outcomes happens, when the aggressor is on the street, alone and helpless, revealing himself against everything and especially against what has been imposed on

him, which he believes to be disproportionate. In many cases they are well-deserved measures to protect the victim but in others not so much.

Precisely this is a serious failure of the LVG to function, because it does not prevent death or aggression or that the victim enjoys real protection. That is why the LVG is not effective as it is written, because if it were not there would be as many deaths as unfortunately we see on a daily basis.

In my view, precautionary measures should be applied more moderately, and would introduce other measures such as electronic control of the aggressor. Likewise, and as I anticipate will be the object of study in a later section of this work, the problem of precautionary measures of the effectiveness of the LVG, will only be solved when a reform of this law is undertaken from various points of view and matters, assigning a predominant character to other professionals such as psychologists, psychiatrists, social workers and educators, who will address the issue of gender violence from a social perspective, and the parties can turn to these professionals on a voluntary and free. Until this factor is taken into account, the LVG will never be successful and will be an ineffective and failed law.

On the part of the doctrine, it is already clear that the solutions of the LVG when applying the precautionary measures are not completely effective, as for example in the opinion of Mallandrich Miret⁶⁸ or Dotú i Guri⁶⁹, which says that "Consequently, the restraining order constitutes an inadequate measure for the work of crime prevention, although it attempts or is constituted as a way of significantly reducing or even eliminating the risk or danger of repetition of new situations of violence, its essence must be found in its function as a measure of effective protection of the physical and moral integrity of the victim, consequently even if it meets the requirement of the "fumus boni iuris", would be lacking the requirement of guarantee of removal of the

⁶⁸ Mallandrich Miret Nuria. "The procedural treatment of civil precautionary measures in case of gender violence" pp. 435-458. Journal of Procedural Law number 1. January 2012.

⁶⁹ Dotú i Guri, Maria del Mar "Special mention to the order of removal and to the prohibition of residence as a limiting measure to the right to freedom", p. 237-242. Fundamental Rights: Right to freedom from criminal precautionary measures. Editorial Bosch. Barcelona 2013.

accused's justice, is to say “periculum in mora”, since such measure is extraneous to the own accused being a right of the victim”

According to Delgado Martín⁷⁰, precautionary measures should be applied as the last ratio and understand that the same in application of LVG, are not effective, or correct, nor solve the problem of gender violence itself

2 5 2 The false complaint and the simulation of crimes

2 5 2 1 Consequences, effects, penalties

Another of the weak points of the LVG are the false report and the simulation of crime, that's means, when the alleged female victim accuses a man with whom he has or has had a relationship of affectivity, for facts that he hasn't committed, or makes him responsible for some events that have not occurred, which are or would be considered a crime. When the alleged victim reports the man, as an aggressor, by facts that it have not happened, being falsely accused of illicit and punishable actions, produces such perverse effects that we must analyze, at least in detail. It is also necessary to analyze, why false reporting and simulation of crimes in the area of gender-based violence occur relatively frequently, without all the attempts of the alleged victim to criminalize facts that are not constituting crimes, in the courts and are outside the scope of the LVG.

For example, it is possible to put the case of a normal and simple domestic discussions between husband and wife, naturally without physical or psychic aggression, which are later criminalized, reporting and ending in the courts, finishing later, being archived a large part of them and not passing another part, the filter of the judge, going further and only discovering the true entity of the report, which in the end is false.

Fortunately, more and more judges are specializing in detecting what is legally and criminally relevant and what is within the scope of LVG and what not, applying this

⁷⁰ Delgado Martín, «Solutions of the Law of Procedure. Civil to the. Violence. Domestic, Studies on Family Violence and Sexual Assault, II. 2002, edited by the Center for Legal Studies of the Administration of Justice and the Institute for Women, Madrid, 2002, p.22.

"filter", discarding complaints that do not meet the minimum requirements for are considered relevant within the legal scope gifted with the LVG⁷¹

The types of the false report and the simulation of crimes are included in art 456 CP⁷² and 457 CP⁷³ respectively, establishing itself as an element of the type for the alleged false claim, that who with manifest and reckless disregard for the truth impute a person with false facts that have not been committed. For the simulation of crimes, the element of the type would be the one that pretends to be responsible or a victim of a criminal offense or crime or denounces facts that do not exist and legal proceedings are initiated. The perverse effects of false reporting and simulation of crimes are undoubtedly the subject of analysis in this chapter. The first of these, occurs when accusing a person of some unlawful facts and susceptible of criminal reproach, which he did not commit, being totally alien and innocent of them. We must remember that in the area of LVG only occurs by complaint of the woman, alleged victim against man, alleged aggressor. When proceeding to make the report, the hold judicial mechanism is put in place with its means and resources to safeguard and protect the alleged victim. These include a wide range of precautionary, restrictive measures such as restraining order, prohibition of communication with the alleged victim, prohibition of living in the family home or deprivation of liberty⁷⁴

This means that measures will be taken by the court against the alleged perpetrator, who is totally innocent and unaware of the facts that are imputed to him, which will have legal consequences, with harmful and unjust effects for man, which in practice they produce even worse effects than that of the false report itself. All of the above defeating the constitutional principle of the presumption of innocence set forth in art 24 CE, with the judge supporting the alleged indications of criminality, for which he must have previously made a criminal trial to know whether there are a priori elements incriminating enough against the accused.

⁷¹ Article 1 LVG.

⁷² Article 456 C.P.

⁷³ Article 457 C.P.

⁷⁴ Articles 544 LECR and 173 CP.

As an example, it is not uncommon to listen sadly, news every day in which a man who has been or is immersed in a procedure of gender violence, murder or fatally outcome the woman and then end up taking life, many times killing in passing other close relatives as the children or ascendants, completely alien to the problem itself or the couple and we must realize that precautionary measures are often applied in favor of the victims in an automatic, general, summary, without examining case by case the need for its application, which reverts in a peculiar situation to qualify it of some

In this way, under the pretext of safeguarding the victim, on a few occasions, there is a lack of protection and protection for the man, when such precautionary measures are applied, for example, the prohibition of living in his house, on which there is an imputation or accusation of false report, being totally innocent That is why, seeing themselves in a dark and bottomless pit, they see no other way out, erroneous on the other hand and in no way reasonable, than to act in a fatal way

This way of acting, of course cannot be justified in any case, but nevertheless if we must take it into account, proceeding to study and revise the LVG, improving weaknesses or gaps, so that there are not cases as painful as these, which has not happened partly, and the legislators settled in complacency and in the stubbornness of rigid normative immobility

For this reason, I understand that the application of the precautionary measures by the judge should be reviewed, observing with more diligence its application, assessing the consequences that could impose over the man, for that reason we see fundamental a reform in this sense, being highly it is recommended that the judge, based on specialists such as psychologists, psychiatrists, social workers, transmit and support the judge in the need or not of the measure and its consequences, all in the personal and social, not legal, this should only be the judge in charge

Therefore, precautionary measures must be applied also taking into account the consequences that will occur on both sides, on the victim-woman and on the supposed aggressor-man, trying to achieve an effective legal balance, in which the victim is protected from the different modes of aggression and the aggressor or suspect, not to be weighed against ineffective or abusive measures that lead to dramatic situations

Thus I firmly believe that there would be a decrease in cases of deaths of gender violence in any case, this issue of reform of the LVG will be studied in a later section

2 5 2 2 Perverse effects, use of mechanisms with fraud law or for some purposes which in principles was not conceived LVG

One of the black spots and of course a problem of the LVG is, that it gives an erroneous image for what it serves and should be used, being repetitively made a misuse of it to achieve purposes that although contemplated in the LVG itself, are intended, that is to say, a use of LVG is made distinct from the spirit of the same that is contained in his statement of reasons⁷⁵ and is that the LVG is used for cases in which should be managed by the channels of the corresponding trial declarative⁷⁶

Secondly, from the outset, it has been seen that prosecution in the field of gender-based violence is much faster than in ordinary courts, when measures are taken swiftly in cases of couples conflicts, whether married or not, avoiding long waits to which the courts have accustomed us to obtain a resolution, partly by the immense volume of work supported and partly by the few means of which they are endowed

This is so, because many alleged victims have used or used the LVG as a means to accelerate family procedures, such as divorce or custody of children or the right to use the family home, among others, knowing that if it is uses the channels of the LVG, in a very short time will come to take precautionary measures to resolve it, even temporarily, until the divorce procedure is followed, for example, that the Court of Violence against Women⁷⁷, that is, without spending a long season for its processing, and taking into account that the man must wait and comply with all the precautionary measures that have imposed to him until a definitive resolution, which can take at least a year, and all this knowing the falsity of the proceeding of the report

⁷⁵ Article. 9.2 CE.

⁷⁶ Articles 248 et seq. LEC.

⁷⁷ Title V, Chapter I art. 44 LVG.

Therefore, this misuse of the LVG should be avoided in any case, by which favorable pronouncements are obtained for the alleged victim-woman on matters such as the attribution of the family home, custody of the children and, where appropriate, visits to the supposed aggressor-man, in case he is not deprived of it

In practice we see that in the Women's Courts, they are full of cases such as false accusations or criminalization of simple domestic disputes that are not relevant from the criminal point of view and attempts to save themselves from family proceedings with the consequent expectation that is rigged

This misuse of the LVG, which it is not uncommon, constitutes a real fraudulent law because it uses a regulation that is not adequate to obtain a result, if it's licit, that should have been managed by other kinds of process. The consequences are immediate for the both sides; for the alleged victim in a day, may enjoy measures that would have taken years in many cases, such as discussed above, such as removal order, attribution of family housing, children, or alimony. For the alleged perpetrator are also immediate effects of the measures, e.g., the must to leave the family home, should find another home to be far away to the alleged victim, loss of custody of children and attribution of a visit regime in their case, duty to pay food and prohibition of communication with the victim and order of removal.

All this may seem reasonable in the real cases of gender violence in order to protect the victim and to prevent future attacks, but when these measures are taken on the basis of a false complaint, things change radically, since already is the alleged perpetrator-man who becomes a victim, being the woman and in principle alleged victim the offender, object of criminal reproach, committing an offense foreseen and punished in art. 456 CP and therefore object of criminal reproach.

To be fair, we must also place ourselves in the position of the man who is falsely denounced by a woman for a case of domestic violence, from a triple optic, psychological, legal and social. From a psychological point of view, it is hard enough when you are accused of something that you have not done without that accusation has a criminal relevance, the more it will be, when the facts that are imputed can be qualified as bully, oppressor and such things. From the social point of view, for the society, he is created a prejudice that he would call social, because it affects his reputation, in his name, that damages his morality and his quality of being human, being

subjected to a parallel public trial condemnatory, unjust situation in the absence of any unlawful act. From the legal point of view, since the woman presents the report, it already has ipso facto consequences for the man, since he must appear as a complaint, initiating a procedure against him that can easily end in conviction along with other measures that involve, such as deprivation of liberty and restrictions of various kinds, such as the enjoyment of children, housing and movement, all of which we remember without having committed the facts that are imputed to him.

As the LVG is drafted, a man who is denounced for gender-based violence has his defense too difficult and we can even say that, in a few cases, he must prove his innocence, reversing the principle of burden of evidence, that whoever denunciation must prove the facts reported, having little chance of not taking any action against it, at least to be able to be argued from the courts that the complainant has been protected, thus using precautionary measures as a kind of safeguard of the own judges, so in cases of fatal outcomes, to be able to say that the victim had measures that protected her since she made the complaint and requested protection.

2.5.2.3 Compensation Need for an aggravated kind of article 456 CP

These perverse effects that are brought about by the false report and which have been described in general terms should be repaired, but if we ask if the LVG predicts this, the answer is negative. Therefore we understand that for these cases the LVG should have a regulation that would compensate in all senses the victims of false denunciation and that they would not be limited to cancel all the measures and sentences because the damage caused is much greater than it seems, then, think of the ordeal that must be passed on to those who accuse him unjustly, since from the time of imputation and the beginning of the investigation phase, several years can pass and infinite measures can be adopted, such as deprivation of liberty or impossibility in many cases of seeing their children, loss of work, parallel social judgment, loss of housing among other effects.

Well, this must be compensated, with legal measures to that effect and, as far as possible, restore the man from the damage caused and, as far as possible, place him in the same situation prior to the false complaint.

As for the woman, who will knowingly know of its falsity, in addition to the sentence attributed in art. 456 CP, in my opinion should also include other measures such as loss

of custody of their children, in favor of the husband if he asked for it, attribution of family home and compensation for moral damages, among others ways to compensate

What is clear is that, once the complainant has been detected and subsequently convicted that has declared a false LVG procedure, it should not be allowed to allow the already convicted to comply only with the sentence currently in the art 456 CP, since I understand that there must be legal consequences, both criminal and civil, for the offending woman that the LVG does not foresee. The opposite would not be fair, that is to say, not proceed to reproach anything from the criminal point of view, nor can it be claimed by civil means or as currently regulated in art 456 C P which is punishable by penalties ranging from three to twenty-four months imprisonment and a fine of twelve to twenty-four months⁷⁸

This would be a slight punishment, which results in the factual inefficiency of the aforementioned law, because, as explained above, it would be a deterrent and at the same time it is certain that victims of gender violence will go to court when acts denounced are relevant from the criminal point of view and no attempt is made to criminalize domestic fights that any citizen may have, without this being qualified as a crime of aggression in any of its variants, by appealing to the Court on many occasions to denounce facts irrelevant to the application of the LVG

However I understand that in cases of gender violence this art 456 CP is short because it does not include other auxiliary measures, aimed at the restitution of the affected rights of the victim-man, that is to say, in the cases we have previously expressed, in cases where parental authority or custody of children, or for example in cases of prohibition of residing in the family home, in these cases can not be idle and only be limited to the penalty that art 456 CP attributes to go a little further and try to restore in the as far as possible the legal effects that the false report has brought with it

The false report by the woman in application of the LVG, from my point of view, should have a type aggravated by three reasons, because first, it is used the lie, the falsehood or the reckless contempt to the truth, the second because the same LVG and his purpose, and the third are used in law fraudulently, because if measures have been taken that have harmed the man alleged to be the aggressor and then the victim and the

⁷⁸ Note 2.

family as a whole, he must be punished with a bonus, precisely because he has taken such measures against an innocent person and because the whole judicial machinery has been set in motion, taking it as a mockery and for an end in which the proper way is used

So, in my opinion the aggravated type of art 456 CP could be worded as follows: "When the false report has been committed on the occasion of the Gender Violence, the penalty of the previous section raised in its upper half will be imposed"

Therefore, we understand that this aggravated type will prevent false allegations from proliferating, while at the same time serving as a filter so that it is generally known in society that the falsehood and the attempt to use the LVG will be punished fraudulently and on the other hand that is used as a deterrent measure to prevent further false allegations being made

Here I agree with the arguments put forward by Von Hentig⁷⁹ in relation to his teleological vision of criminal law to avoid crimes such as the one that affects us today of gender violence. I also believe that the conclusions of the same author are very useful in one of his works⁸⁰, whose theories could be extrapolated to the problem of gender violence to better understand their casuistry

This measure of punishing with a plus the false accusation and may seem a priori a little exaggerated, but unfortunately the ordinary person on many occasions only takes seriously the laws when they are punished harshly for fear of sanction or legal consequences which they carry, such as the traffic sanctions in our country, in which after the hardening of the penalties, the accident rate, the victims and the infractions have dropped significantly. Thus little by little the awareness of the society is being achieved and avoiding behaviors that once had been understood normally and legal and even well seen. Not with this is advocated repression but rather as a last solution and a means of deterrence so that no more crimes are committed. I also agree with the Marquis de Beccaria, who said that penalties must be proportional and fulfill their

⁷⁹ Von Hentig Hans. *The Crime*. Madrid: Espasa-Calpe, 1971-72. Original: *Das Verbrechen*. Berlin, Springer, 1961.

⁸⁰ Von Hentig Hans. "Studies about criminal history". Ed. Christian Helfer. Stämpfli, Berna 1962.

purpose, avoiding with their application that they commit this crime again, so says in his work in relation to the penalty that " the penalty must be proportionate to the offense committed. The proportionality of crimes and penalties is required, not for the sake of retribution or atonement, but for the same general prevention. More effective than cruel and harsh punishment is the certain punishment, prompt and proportionate to the crime. "

For that reason and returning to our subject, of putting into practice this measure, of hardening of the type of art. 456 CP, I have no doubt that there would not be so many false accusations in our courts, nor would the attempt to criminalize domestic irrelevant domestic fights and, on the other hand, help reduce the number of fatalities, in a few cases men kill their partners or ex-partners, having in many cases been the subject of measures in fair appearances, based on false accusations. In any case in later chapters it will be explained how in my opinion the types should be reformed.

2.6 Consent induced or consented

One of the obscure and obviously objectionable aspects, when the LVG came into force, occurs when the breach of penalty or precautionary measure is done by the will of the victim herself, woman, or at least with her consent. The solution posed by the current regulation is insufficient, contradictory and lends itself to misunderstanding easily. Even from the doctrine there is no unanimous criterion that is followed by the majority, since this problem is treated by the doctrine itself from diametrically opposing points of view, which are reflected in diverse disparate theories in relation to the induced or consented breaking.

There is also no unanimity of criteria on the part of the jurisprudential doctrine, which has led the same court to issue contradictory sentences between themselves, when the factual assumption is the same, sometimes applying the precepts in a well defined line and in other cases applying another totally opposite. Thus, we can find cases in which the disruptor, man, is acquitted and the victim, woman, too; other cases in which the disruptor and victim are condemned and others in which only the disruptor is condemned.

Therefore, these various and contradictory types of solutions demonstrate the serious legal uncertainty that exists, since it does not seem logical or reasonable that the same facts can be considered judicially in such a crazy way, which happens when legal regulation is not satisfactory to the conflict that the demand and manifests itself unable

to solve it. Therefore, in the face of such disparate doctrinal and jurisprudential appraisals, which at least astonish our own and strangers, we must analyze the point of departure or what is the same, the precept that has given rise to this problem.

The art. 468.2 CP⁸¹, punishes the breach of sentence, precautionary measure or security measure, although often the victim, woman, does not want to be punished or condemned, as often said brokenness has been propitiated by the woman or at least with their consent. That is why we are faced with the repeated complaints from citizenship who do not understand, that even with the firm will of the woman, (when resuming cohabitation or having a rapprochement of the woman to resume the relationship) not to punish by breaking the man, in practice is punished (sometimes not, according to the line of the different courts). On the other hand, we find that the state is the guarantor of individual rights and freedoms, being an obligation to defend them with all the legal weapons at their disposal. Thus, in a democratic and plural state such as ours, the legislature creates laws of mandatory compliance for all and more specifically, through criminal law are regulated the different types with their aggravating and attenuating that will be applicable, such as to the issue that deals with gender violence. In addition, another of the singularities of the criminal law is, that it is not a part-time right, that it is not possible to request protection and later to reject it along with its arranged measures when it is wanted or to extract what to each one suits to him.

It is also well known, the duty to comply with laws and sentences without excuse, although the reasons may seem reasonable and fair. However, in this case of consent or induced disruption, when this assumption is given, some judges usually apply legal mechanisms to attenuate the law trying not to harm more if the victim-woman in a situation of which he wants to leave without prejudice to her or for the alleged man-breaker. However, there are other judges who choose not to complicate life, claiming

⁸¹ Article 468.2 CP. “In any case, a prison sentence of six months to one year shall be imposed on those who violate a penalty referred to in Article 48 of this Code or a precautionary or security measure of the same nature imposed in criminal proceedings in which the offended party is one of the persons referred to in Article 173.2. as well as those who violate the probation measure”.

that sentences and final decisions cannot be turned out, simply because the alleged victim wishes

The problem lies, in my view, in the inadequate wording of the types of penalties and, above all, in the terrible drafting of the LVG, which, far from being an effective and infallible mechanism to assist victims of gender violence, and in many cases it is rather a drag because it is not effective, becoming a clumsy attempt to protect them at all costs, imposing measures in a generic way, without looking at each case in concrete form and the consequent origin or not of them and what is more important without measuring the consequences that will occur in the case of the woman victim and in the case of the man. Likewise, because of the poor wording of the LVG, which causes the alleged victims themselves to misuse the LVG, they incur fraudulent or false reporting, by including in the same measures on the family, such as attribution of custody of children, visitation or adjudication to the victim of the family dwelling, among others, when the accusations are often not criminal and should be ventilated through other procedural channels, such as a divorce petition in a court

2 6 1 The different lines of jurisprudential study

The Supreme Court has maintained a common line of jurisprudence in relation to cases of induced or consensual breach of a precautionary measure or penalty of removal with the consent of the woman-victim, arguing that such consent was irrelevant and therefore typical, unlawful and guilty, punished according to art 468 CP

However since the STS dated September 26, 2005, this line, which had been maintained in a more or less solid form, is completely broken, radically changing that line, producing a before and after, since that STS marries the sentence of an instance that condemned the man-aggressor for breach of precautionary measure, absolving him. The reasoning given by STS is contradictory and in some cases illogical, when it collides head-on with basic legal reasoning

The STS starts from the premise that the effectiveness of the sentence or the precautionary measure is influenced by the necessary and essential will of the woman-victim to maintain its validity always and at all times. In the first place, the STS maintains that if a firm, constant maintenance and without any fissure of the effectiveness of the measure is chosen, this would lead to an understanding or interpretation, that the woman who consents to coexistence could be considered as a co-

author by necessary cooperation less by induction "..., since its will have relevant effects facing the crime of breach In the opinion of the High Court this" would produce such perverse effects that it is not necessary to reason, by supposing an intrusion of the intolerable system into the privacy of the couple whose most relevant right is the right to "live together"

In addition, it maintains that the validity or annulment of a measure cannot be left to the discretion of the person whose protection it is granted, primarily, for two reasons⁸²: first, because it would generate absolute legal uncertainty for the man who would practically be cataloged as responsible author of the breach according to the exclusive will of the protected and secondly, because it would suppose to leave the effectiveness of the judicial pronouncement to the decision of an individual, which does not consent to the public nature of the measure However, this position is not maintained by TS and is refuted by other arguments The first of these arguments is that the will of the female victim over the penalty or security measure, since they have been dictated for the protection of women and their firm will determines the unnecessary protection and is translated made in the non-application of the measure of final form All this because "it seems the most prudent decision" and understanding, we mistakenly believe that with this the public nature of the measure and the respect to the inviolable framework of its freely determined self-determination are made compatible

It also tries to convince by justifying and explaining textually that "the resumption of coexistence proves the disappearance of the circumstances that justified the measure of estrangement, so that it must disappear and is extinguished, without prejudice to a new sequence of violence can be requested and obtain, if necessary, another restraining order " That is why the TS argues that "the term of the measure fixed by the judicial authority, would be conditioned to the will of that," which we understand to be a serious contradiction and an unfortunate decision with which it enters the field of legal insecurity, because we insist we cannot leave to the will of private individuals compliance and enforcement of penalties and security measures However, and as we

⁸² Resolution Humans Rights, Viena 1993. <https://www.ohchr.org/en/about-us/history/vienna-declaration> [access: 25.06.1993]

will show later, we see that there is something that does not house, that would squeal legally, because the normal thing would be that the TS ruled that any consent or induced disruption is considered as a typical behavior and therefore punishable ex art 468 CP. However, in my opinion TS does not do it because it understands, in the background or in its legal subconscious, that as it comes drafted art 468 CP, presents serious problems in its application because there are many unfair situations that has led to the writing of the LVG. And that is why he incurs contradiction because he sees that reality is different.

I understand and agree with other accredited authors of the doctrine that the type of art should be changed 468 CP and to make easy the security measures, changing the rigidity of which it is affected. What can be criticized to the Supreme Court, is its lack of legal coherence and its unusual reasoning in its STS dated September 26, 2005, in which it overlooks concepts such as the necessary cooperation of women in consented breach. Thus, we do not share or understand, how cannot observe a criminal offense as evident as the cooperation required at least by induction of the woman who has allowed the man-aggressor to have broken the sentence or measure with his explicit authorization or less with their consent and all this without arguing, passing by this problem, we insist so evident.

Nor do we agree with the reasoning that makes this sentence, that with this is an intromission of the criminal law intolerable in the privacy of the couple whose most relevant right is the right to live together. It seems that what is wanted is to exempt at all costs from criminal responsibility to women, giving rise to my judgment, an overprotection that incurs positive discrimination in favor of women to the detriment of men, which goes against the principle of equality of the sexes and non-discrimination, enshrined in art 14 CE, since the same is not the case when man is condemned. Moreover, it does not take into account the TS that said intrusion, already took place at the same moment in which the criminal procedure was initiated, as Montaner Fernández⁸³ points out, from the moment in which the machinery of the Administration of Justice is working, the protection of the victim is subtracted from the private sphere.

⁸³ Montaner Fernández R. “ Violation of penalties or protective measures for victims of domestic violence. Criminal responsibility of the woman who collaborates or causes the

Fuentes Soriano⁸⁴ indicates that the relevant and primordial right to live together can be enjoyed only insofar as a judicial decision does not prevent it in a legal and legitimate way, that is, adjusted to law and also says that the right to live as a right life is more important than the rights to live together

Another criticism that must be made and which cannot be ignored in any way is the statement made by the TS in its sentence that the measure or penalty will be fixed by the will of the woman herself and explains textually " decision of the woman credibly accredits the unnecessary protection, and therefore de facto supposes the decay of the measure in a definitive manner " This from a legal point of view is a real nonsense because in other words the TS is saying that judgments and judicial decisions can be fulfilled or not according to the will and desire of the victim and also adds that "the term of the measure fixed by the judicial authority, would be conditioned to the will of the one " It could be understood that the TS gives rise to a civil rebellion or disobedience, making it clear that failure to comply with judgments and judicial decisions, or breach of them, remain unpunished or that incitement or inducement to break them would not lead to any legal consequences

A little further on, we try to justify the TS by saying that it is the most advisable, since if the measure were maintained without the victim's desire, it would be causing almost irreparable damage to the family and more specifically to the couple, so that the interest of the family prior to the fulfillment of any sentence

In this way, the TS considers, although erroneously, in my opinion⁸⁵, that the respect for the public nature of the measure and respect for the inviolable framework of the decision of freely-determined women can co-exist Another criticism that should be noted is a mistake that is committed in the ruling systematically, since it confuses the

violation?" Ed. In *Dret Revista para el análisis del Derecho* 4/2007 –format digital–, cit., p. 18, 2007

⁸⁴ Fuentes Soriano, O. "The restraining orders" Madrid, Ed. Colex, 2006, p. 10-18.

⁸⁵ As a large part of the doctrine, that it is not compatible or legal to have the law in this case, that is, whether the sentences are applied or not according to the will of individuals, since they are unavailable rights.

breach of penalty and the measure of precautionary measure. In some occasions it separates them from one another by pointing out that they are two different assumptions and in others it equals them, as if it were speaking of the same assumption. This raises another problem because the constitutional principle of equality before the law is not fulfilled, since for a same case of breach of sentence or measure, an acquittal or conviction will occur, depending on whether the breach occurred in the family context or not, that is, if the breach is related to gender-based violence in the family context with the consent of the victim, understanding that TS must be acquitted to the disruptor and, if applicable, the victim as a potential inductor, because the measure or penalty depends on the will of herself. Not so if it occurs in another area, because then the art 468 CP in its entirety at this point I fully agree with Fuentes Soriano's vision.

In the sentence, the TS absolves the disruptor, when it appreciates that a reasonable doubt exists on whether or not the cohabitation resumed and, consequently, on the victim's will in relation to the rapprochement. This TS thesis is difficult to sustain, because the victim's will would be part of the element of the criminal type of art 468 CP. In this way, it is explained in the sentence that "the maintenance of the will of the former companion that the appellant did not approach him, it is enough and exceeds this situation to estimate that there has been no breach of measure, nor therefore a crime of art 468 of the CP". Thus, "*motu proprio*", changes legislation, the core of the criminal type of art 468 CP, by including the will of the victim not to approach, so that reasonable doubt about its maintenance determines the non-existence of crime.

Of course this view is not without criticism⁸⁶, so Giménez Díaz believes that, by granting the degree of element of the type to the will of the victim in a crime that protects an institutional legal right is a grave error, the case that it is understood to be a pluri-offensive crime and that the protection of the protected person is protected by the Administration of Justice, the public side of the protected object prevents any kind of relevance to the consent of the woman, even when it is also considered a liability subject to the breach.

⁸⁶ Giménez Díaz María, Article "Some reflections on induced or consented breach, Ed. Un.La Rioja, 2012, p. 335-419. Journal of criminal politic.

Another objection to this thesis, would be related to the previous one, since in a case of breach, the legally relevant facts are those that constitute the actual breach, that is, the neglect of the imposed restraining order, with the consequent approximation of the victim, which undoubtedly took place. Therefore, in a case in which it is not proven that the resumption of coexistence was consented to by the victim, the aggressor of the breach, which is proven, by the *in dubio pro reo*, is interpreted in the same critical

Another part of the doctrine, like Fuentes Soriano⁸⁷, says that doubt must revolve around legally relevant facts and in this case the principle in *dubio pro reo* was in no way applicable. After the STS quoted in 2005, the TS has issued other resolutions on the breach, such as the SSTS of January 20, 2006 and of November 3, 2006, and of January 19, 2007 and September 28, 2007, creating important contradictions between them.

The first, the STS of January 20, 2006, deals with a case of breach of a precautionary measure, on which the Complainant alleges an error of prohibition by erroneously believing that the order was not in force, because he had two orders of distance and one of them, at least, had been revoked, believing that the second would equally be. The TS considers that in any case, it would be a type error and not a prohibition as claimed by the appellant, since he was perfectly aware of the scope of the criminal type, as a prohibition to approach his victim, having been informed when notifying the order and accepted its consequences.

Regarding the consent of the woman-victim to resume coexistence, the TS estimates, as opposed to its STS line of September 26, 2005. Thus, it states that "only a firm and relevant consent on the part of the victim, can be appreciated for the purposes concerned by the appellant", it is at this point that it is deviating from the line it gave in the previous STS of September 26, 2005, in which it was sufficient that there was a reasonable doubt about the consent of the woman to proceed to the acquittal of the disrupter.

It is noteworthy that in the STS of September 26, 2005, the offender is acquitted, based on the reasonable doubt of consent by the victim, considering that the will to not approach is part of the essence of the criminal type of art. 468 CP. However, it also

⁸⁷ Note 73.

indicates that such firm and unequivocal consent could be given as an invincible error of the kind, although it would be equally objectionable, because even if it were agreed that the absence of will was an element of the type, the thesis of the error would only be plausible in the opposite assumption given by the TS, that is, when the disrupter believes that there is a firm and unequivocal consent without having actually given the victim

What is surprising is that there are no particular votes of any magistrate, despite the obvious change in their line and the disparity of motivations given for the same subject. This is not surprising, however, for another radical and incomprehensible change, as for example in the STS of November 3, 2006, in which it considers that there has been a breach of the restraining order, based on this ruling that the breach occurred before acceptance of the coexistence by the woman-victim and therefore the crime was consummated before the consent of the woman. Well in this sentence is contrary to the reasoning and thesis of the much merited STS of September 26, 2005, since, we remember that it is based on the fact that if the consent of the victim had been given before the consummation of the offense, that is, of the breach of measure or penalty, would not condemn the offender and would therefore be acquitted.

However, the TS again changes its reasoning and its thesis in a random way and to my understanding without criterion, since it has not been consistent with its different judgments, as well in STS of January 19, 2007 and disagrees with the foundations given in the Judgment commented on above, arguing that the consent of the woman-victim is not relevant in any case, and that it could not eliminate the criminal essence of the fact, because the consent was not free and was vitiated by family pressures and because the validity of the measures cannot be applied whether or not the woman-victim has given her consent regardless of whether it was before or after the breach, since they are not legal assets available to her, since it is really the principle of authority of the courts that is in question, this conduct always reprehensible from the criminal point of view.

If we look, this thesis goes radically against the one given in the STS of September 26, 2005.

Another important STS is dated September 28, 2007. This sentence confirms the sentence imposed for breach of a sentence in a case in which the woman-victim had consented to resume living with their partner, which the TS is again dismissed of other

previous faults to similar cases, incurring incongruity, because it does not have a fixed and linear criterion for the same assumptions

That is why, when the TS realized that it had something radically contrary to what it had applied in its previous Judgment of September 26, 2005, it is justified by explaining, not in a very methodical or rational way, establishing a difference between security measures and the penalties, because it says that the former can only be applied at the request of a party or victim and its validity or termination can be agreed upon if so requested before the judge, since it has a preventive function. In relation to the latter, this is to penalties, are mandatory, is not a right available and cannot in this case the victim request their non-application or suspension

This substantial difference in their postulates in reference to the irrelevance of the consent of the victim in the breach of the STS September 28, 2007, with respect to that adopted in the STS 26 September 2005 of relevance of consent and de facto differentiation between the breach of measure and that of punishment and that is the fulfillment of the latter which is unavailable, is undoubtedly objectionable for two reasons:

In the first place, because it was not correct to maintain in STS of September 26, 2005 its thesis that the violation of a precautionary measure and of a penalty are different, being interpreted that compliance with the measure is available, while that of a penalty it is not. Nor has he been right because, despite the fact that it was a breach of precautionary measure, he intermixed both terms throughout his exposition, referring most often, indistinctly, to the two types of breach of measure and penalty. That is why STS itself of September 28, 2007, realizing that it is in disrepair that it finds and arranges to fix that mess, refers to the 2005 STS: "Although it is also true that" obiter dicta "was referred to in the same Resolution also to the penalty of similar content "

Secondly, as Marti Cruchaga⁸⁸ points out, the distinction made between measure and penalty by the resolution under consideration must be irrelevant to the effects of the crime of breach. That is to say, although in fact a precautionary measure and penalty are of a different nature and it is true that it can be judicially lifted or revoked while the imposition of it is inexorable with the exception of pardon, for the execution of this crime both institutions must be equal and their breach must be considered constitutive

⁸⁸ Note 72.

of the figure in question Moreover, with art 468 in the hand, the penalty in either case is identical, a matter with which, however, I show my disagreement, because I understand that its different legal nature should be considered for the purpose of imposing a lesser penalty on the disruptor of a caution

Subsequently the TS has tried unsuccessfully to revise this thesis, seeing that its rulings are obviously contradictory to each other and consequently and unfortunately there are endless interpretations that in some cases give relevance to the consent of the victim and acquit the author for the breach⁸⁹ and in others it is proceeded to acquit by applying the error of prohibition So numerous interpretations that depends on each judge In other cases they condemn both the disruptive and the female victim as an inducer and cooperator necessary to induce and consent to the breach⁹⁰

Subsequently the TS has tried unsuccessfully to revise this thesis, seeing that its rulings are obviously contradictory to each other and consequently and unfortunately there are endless interpretations that in some cases give relevance to the consent of the victim and

⁸⁹ In this sense, Sentence of Provincial Court of Zaragoza of February 27, 2006 (JUR 2006 \ 133490); Sentence of Provincial Court of Granada of April 7, 2006 (ARP 2007 \ 232); Sentence of Provincial Court of Zaragoza of June 23, 2006 (JUR 2006 \ 253224); Sentence of Provincial Court of Cantabria of July 18, 2006 (JUR 2006 \ 245621); Sentence of Provincial Court of Barcelona from February 28 (JUR 2007 \ 138063) and 22 March (JUR 2007 \ 136792), both from 2007; and Sentence of Provincial Court of Madrid on 7 May 2007 (JUR 2007 \ 261593). It is interesting to note the arguments of the abovementioned Sentences of Provincial Court of Barcelona of February 28 and March 22, 2007, which acknowledge that they have changed their criteria because the STS thesis of September 26, 2005 cannot be considered isolated, to have issued the High Court subsequent resolutions maintaining the same position and, therefore, consider that at present "it is atypical the infringing conduct of a precautionary measure of prohibition of approximation when the cohabitation (or the relation) has been voluntarily renewed between the obligor by the precautionary measure and the person protected by it. "

⁹⁰ This is the current line of interpretation of the courts. In this case both must to be punished because both have been breaking the sentence or precautionary measure.

acquit the author for the breach⁹¹ and in others it is proceeded to acquit by applying the error of prohibition⁹² So many interpretations that depends on each judge

In other cases they condemn both the disruptive and the female victim as an inducer and cooperator necessary to induce and consent to the breach⁹³ In others sentences, only the offender is punished and they omit or do not want to know about the responsibility of the woman who causes the breach⁹⁴ or declare the criminal irresponsibility of the same⁹⁵ In others, the distinction between breach of sentence and precautionary measure is different, alleging that they are different assumptions, to absolve when it comes to

⁹¹ In this sense, Sentence of Provincial Court of Madrid on 7 May 2007 (JUR 2007 \ 261593).

⁹² SAP of Cordoba of February 7, 2006 (JUR 2006 \ 185727), SAP of Madrid of February 16 (JUR 2006 \ 199758) and of June 30 (JUR 2007 \ 32822), both of 2006. Highlight that there are more numerous resolutions applying this solution to the prohibition error prior to the existence of the STS of 26 September 2005 (see, inter alia, SAP de Soria of 1 June 2002 - ARP 2002 \ 456; SAP of Badajoz of 23 February 2004 -JUR 2004 \ 83518- and SAP of Orense of April 7, 2005 -JUR 2005 \ 158255-).

⁹³ AP of Barcelona of February 21, 2007 - JUR 2007 \ 138369 - is condemned to the man as author of the crime of breaking and to the woman as an inductor and necessary cooperator of the same.

⁹⁴ In this line, Sentence of Provincial Court of Madrid of May 17, 2007 -JUR 2007 \ 170126- (according to which, the penalties are only extinguished by the causes foreseen in article 130 CP, between which the consent is not found of the victim to resume the relationship) Sentence of Provincial Court of Vizcaya of March 8, 2007 -JUR 2007 \ 137486- ("Recognizing that the consent of the aggrieved person could imply the impunity of the conduct would be equivalent to exposing it to possible coercion or pressure so that it would render ineffective what was judicially agreed, when its validity, constraints and pressures that completely with which the legislature has wanted to banish remain establishing to its self-determination establishing prohibitions with the broken one "-sic.- and

Sentence of Provincial Court of Madrid of June 18, 2007 -JUR 2007 \ 258633 ("the complainant appearing before the Court ... stating that he wishes to withdraw the complaint and order of protection since he has arranged and wants to continue the relationship with the accused, with whom he returned to In spite of this manifestation of the victim, it was not agreed to cancel the order, being that once the accused was notified, the same was notified on the occasion of his judicial declaration ... No part and In particular, the defense appealed the order of removal, which is not left to the will of the injured party, having not agreed to cease ").

⁹⁵ In this line, Sentence of Provincial Court of Vizcaya of March 8, 2007 -JUR 2007 \ 137486.

breach of a precautionary measure and there is consent of the victim or to convict when it is a breach of penalty, although consent⁹⁶

2 6 2 Legal effects of the breach induced or consented to, its rigidity and its automation in the L O 1/2004 of 28 of December

The LVG was presented with the aim of being a useful means of combating gender violence, establishing a series of mechanisms to defend the woman-victim from the aggressions produced by men, as a result of domestic violence and gender violence have happened since remote time. Its purpose was to reduce the cases so dramatic that they happened and that seemed that they had no end, which unfortunately is still happening at the present time. To this end, several articles of the CP were amended by establishing penalties and auxiliary measures in order to provide protection to the victim. Crimes against gender-based violence are distinguished from other crimes by attempting to protect their victims, even in a quasi-preventive manner, through the cessation of such violence and its future avoidance.

However, as already indicated in previous sections, far from solving the problems with the entry into force of the LVG, the truth is that it has caused more problems, such as compliance with penalties and precautionary measures, interpretation and last but not least to depreciate its importance that the number of victims has not fallen, being a real problem still far from being solved.

Faithfully, is that it was never thought, neither by the legislator, nor by the Courts, nor by the accredited doctrine that in practice would originate or cause so many problems with its application. Actually, we have cases of the application of precautionary measures and/or penalties that are then requested by the victim, so that they become void, or when, for example, the measure or penalty is in force and is not complied with of the victim itself, then the consent or induced breakdown occurs, which occurs when the victim himself takes part in his protection circle, breaking it down, with inducing or consenting behavior of a breach of remand or precautionary measure.

⁹⁶ Sentence of the Provincial Court of Barcelona of 23 March 2007 (JUR 2007 \ 136706) and Sentence of the Provincial Court of Madrid of 17 May 2007 (JUR 2007 \ 170126).

This represents a real challenge for judges when judging whether there has been a breakdown or not, since they must weigh whether the consent given has been free or influenced by various causes such as fear, guilt, family pressure, by an erroneous perception of the feelings of the aggressor before promises of behavior change, by economic necessities and even, due to the emotional dependence caused by the suffering of psychological disorders derived from the own traumatic experience that has supposed the aggression continued sometimes for years

Even taking into account all of the above, it is not uncommon for judgments not to offer a solution that will please all parties involved. The problem lies in the rigidity of the regulation of art 153, in accordance with art 57.2 and 48.2, all of them of the CP, since an act constituting a crime entails the prohibition of approximation of art 48.2 CP by mandate of art 57.2 CP and it is precisely this rigid automatism of the law, which makes that in a frequent way both aggressor and victim are jumping the judicially imposed measures, wanting both to resume coexistence. What is clear is that the principle of proportionality of penalties breaks down, since penalties and measures are often violated by both parties because they think that they are disproportionate and that they prevent their fundamental right to privacy and to live together, that therefore these measures instead of helping seriously limit their personal freedom to be with whom they want when they want.

On the other side and without any justification, we find that the social scourge of gender violence has claimed many lives and has fatal outcomes. Because of this and given the great social alarm that has arisen, has made that the legislator has been extreme protection of the woman-victim of gender violence in a clear attempt to stop the aggressions and deaths for this reason.

However, this attempt to protect, no doubt praiseworthy, has been flawed as we have already mentioned before, since the new regulations have not meant a change that will help and solve the eradication of gender violence.

This is why we are talking about rigid implementation, which is undoubtedly a serious problem to combat, since measures for gender-based violence are not effective and serious episodes of violence continue to occur without actually being able to say that since the in force of the LVG and the changes that this brought with it, it can be affirmed that it is ending the gender violence.

In my opinion, and as I have already explained, it is necessary to reform the LVG by making it more efficient, which must be done immediately, softening the measures and adopting them not in a generic way but on a case by case basis and supported by specialists such as psychologists specialized in family. Anyway, I think that if the woman-victim goes to court and decides voluntarily and freely to dispense with the measures, her request must be heeded, except when there is a serious history or when the situations advise against it, in the opinion of the specialists. Not so in terms of penalties, because I have the full conviction that they are legal assets unavailable by the parties and the principle of authoritative state would be trampled, and in any case any citizens can decide, whether to comply with a penalty or to comply with the law or no, which would lead to absolute legal anarchy. For this reason, it is always necessary to comply with the law without exceptions and it is not possible to leave to the will of the victim - the woman or the disruptive the fulfillment of the same.

This being so, I think it is a serious error, the thesis given by the commented STS of September 26, 2005, because this gives predominance to the will of the victim on the law, regarding the mandatory compliance with penalties and measures. That is why I understand that the consent of the victim-woman should be irrelevant when applying the resolutions and should be subject to criminal reproach, given, the objective elements of the type of breach and therefore, should be punishable in both cases, that is to say, not only and obviously in the case of the victim who consents, encourages or with active behavior, induces the man to break the measure or penalty, but also in the case of the man who infringes violating the resolutions, except that a prohibition error is detected. Therefore, the judicial decisions to be in force must be complied with in all cases without their compliance can be enervated, for subjective volitional reasons.

Undoubtedly as we have discussed previously in the work, induced or consented breach is a serious problem of LVG and concordant regulation, which do not have legal tools sufficiently effective to solve these gaps. However this rigidity and automatism in the application of the LGV, I understand that causes problems, without going further in the cases of the precautionary measure of estrangement.

It is necessary to create, by reforming the LVG, an articulation that softens the current regulation in the sense that there is the possibility that the woman-victim can request the

extinction of such a measure when it is freely and determined their will, thus avoiding the problems of LVG application and concordant regulation. In addition, in order to ensure that the measure falls on the victim's request, I believe that, apart from the judge, it should of course have the binding opinion of non-legal specialists such as psychologists who value the case and pronounce on the propriety of to leave without effect, we insist on this concrete case, valuing both parts and their problems, thus avoiding a problematic coexistence⁹⁷

So this is in my way, would be to attack the problem of gender-based violence, because often the parties in a relationship are not objective in their differences and cannot see their problems clearly to solve them. That is why many couples coexist for years in a constant underground tension, not knowing how to solve their disagreements and often have unexpected fatal outcomes.

Let us think that on a few occasions the woman reports her husband with intention, not to break the relationship, or to cease coexistence, but to chastise him for an action or several that he did not like and as a remedy to stop this disturbing attitude, in the opinion of the woman, uses the complaint and the regulation of the LVG, as a last means of trying with a serious corrective that that situation of the couple changes.

That is why it is essential that couples be educated with both jurisdictional and non-jurisdictional mechanisms, so that couples can resolve their conflicts without having to reach undesirable ends by anyone. It is therefore essential to address the root problem by helping couples with problems solve them by this way, educating by specialists. Likewise and in order to soften the current regulation, it is necessary to reform the art 57.2 of the CP, allowing an optional imposition of measures other than punishment, depending on the existence or not of an objective situation of risk for the victim. In addition, art 468.2 CP, precisely to separate clearly the penalty, of the precautionary measure, since in the same it is punished in the same way both cases⁹⁸

However, although the essential element of the type of breach is the breach of a penalty or precautionary measure, I believe that it should be criticized with a greater penalty to

⁹⁷ Sentence of the Provincial Court of Granada of May 25, 2007.

⁹⁸ Art. 468.2 C.P.

the breach of penalty than that of a precautionary measure, the latter being of minor importance. However for Valeije Álvarez⁹⁹ the breach of penalty and precautionary measure would be an aggravated subtype within art. 468.2 CP that consequently would have a greater penal reproach.

For Giménez Díaz, it would constitute a crime different from that provided in art. 468.1 CP, without distinction of the previous author based on an aggravated subtype.

I believe that in this case legal mechanisms should be created, in the form of a reform of the current regulation, in order to allow the woman-victim to request the suspension or lifting of a precautionary measure that she has requested, in a clear, free way and determined. At this point, if I agree with the thesis held in the STS of September 26, 2005, in which it is stated that the will of the victim is decisive in order to continue applying the precautionary measure or not and when it requests it in a clear and undoubtedly, must be fulfilled with his will, since the private sphere, his right and freedom to be with the person he chooses at any moment, and the coexistence if he wishes to do so a measure at all times that is no longer wanted, neither effective nor complies with the requirement of the precautionary measure itself that is the effectiveness to protect the physical and mental integrity of the victim.

On the other hand, I believe that it should be emphasized, when both the precautionary measures and penalties are adopted that are mandatory and that the measures have been adopted, they cannot be changed even with the express will of the victim, since otherwise and according to the current regulation, would be object of criminal reproach specifically of an offense of breach envisaged and punished in art. 468 CP. This would be avoided, I believe, to a large extent, episodes in which the disruptor appears as criminal responsible, when they have already resumed coexistence by mutual agreement, avoiding unnecessary trials, costly for the parties and for the state whose only defense has been the error of prohibition or the error of law and lastly the way of pardon.

As regards the criminal responsibility of the woman who induces or consents to the breach, the drafted law, must be imputed as an inducer or necessary cooperator of the

⁹⁹ Valeije Álvarez I., *Journal of Studies Criminological*, n°26, Madrid 2006 p. 342-354.

crime of breach. However, as in the previous case of the disruptor could be defended by alleging error of prohibition or right by the diversity of judicial opinions, so that these judicial measures are no longer effective. He could also apply for pardon for the oppressor.

So, in short, the law of gender violence has many problems and loopholes that it has not been resolved and anyway the law remains in force yet, unless these problems are rectified. The first problem happens with the measures precautionary that they are adopted in a case of gender violence, because they go against or injure fundamental human rights, violating constitutional principles such as the principle of equality, of dignity and justice, even they forget completely about them. That way of application generic and massively, without looking case by case and see if that particular fact is susceptible or not of one or more measures, but not all at the same time, without an order, objectivity or need. This leads that today, we have more problems, than before the entry into force of this law, which even have more deaths, this 100% ineffective law to solve any problem for which it was created.

This law will be successful, only if it focuses and treated from a multidisciplinary point of view, and especially if it focuses on the social point of view, helping and educating the society in fairer values between sexes and ways who can consult and ask for help as psychologist, social workers or family mediators, specialists.

Another serious problem of this law, is also the false report by the woman, to harm the man and take advantage of the measures precautionary and benefits that the law gives them. We can think in a very common example, when a woman wants to get divorce, must go to the civil way and apply along with custody of children and for the home of the family, which can easily take between one and two years.

To save this long procedure, women often reports the man, for any small fight domestic not important or simply and claiming that, she is the victim of psychological abuse, and so she obtains protection in a single day, as it may be, custody of children, attribution of the family home, and a restraining order of contact or approach. This is certainly a fraud law, by using the law in an illegitimate form. For this problem there has been no solution. Nor, is there no solution to the compensation to the man who had been falsely reported and seen their rights limited, loss of children's home, etc. normally for a long time, until he can until show that he is innocent.

Therefore, there is a reform of the penal code, with an aggravated kind that punish the false complaint of domestic violence in this case and in addition a number of measures of redress in favour of the man who has been accused of unfairly. This law will succeed only if it focuses and treated from a multidisciplinary point of view, and especially if it focuses on the social point of view, helping and educating the society fairer values between sexes and ways who can consult and ask for help as psychologists, social workers or family mediators, specialists

Also there is not solution to the problem of the breach consented to or induced, that happens after the sentence or measure precautionary and when they, man and woman, agrees in doing the opposite of what the sentence order. The most common example happens when, an order restraining or communication is established and or man breach approaching women or start again to live together or to communicate, with the active permission from the woman, or is the woman that breaks the sentence and go to where man is and voluntarily start to live with him, or to communicate. Well, this case occurs often and courts sentencing differently this conduct, sometimes, not condemn neither, man or woman, sometimes only a man leaving to women free of charge and sometimes condemns both of them, the man to break the sentence or measure and the woman by cooperative necessary to promote either active or passive brokenness. No doubt this creates legal uncertainty, because for a same case sentencing to form different and unequal, depending on the court, what is truly nonsense. We do not see clear protection to the actual victim, to avoid that the aggressor not to continue with violent actions, since it is very easy for the aggressor break any measure, and where appropriate take the law into their own hands, killing women, that happens very frequently. It is that the law is completely ineffective because it prevents not that these cases be taken looking society helpless way the murder of women which has tried to protect

2.7 Need of reforming the L O 1/2004 of 28 of December of measures of protection comprehensive against the violence of gender "of *lege ferenda*"

2.7.1 Need to reform the current law to include all men without legal differences

In this chapter we will discuss the reform of the LVG, specifically of certain arts of the LVG, in order to give them greater efficiency and create others, giving a greater response to the problems that are repeated in practice, such as the failures of

precautionary and security measures in relation to deaths, induced consent, the criminalization of domestic fights, as example, betting on radical changes, which in my opinion will result in a greater effectiveness of LVG to avoid ineffectiveness of the same and its side effects in the family

Firstly, I understand that you must start by changing the art 1, in the sense that it is not a law that protects purely and exclusively women and not men, so the LVG would also provide protection for men in the same situations that the law protects women. Thus, women would no longer be considered victims and men as aggressors, both sexes being potential victims and aggressors, without differentiating between the sexes.

Of course this would clash head-on with the arguments set out in the STS of September 26, 2005¹⁰⁰, which defends, among other reasons for its application, the social alarm created by the serious cases of violence against women and the absence of the breach of the constitutional principles of equality before the law and of the sexes¹⁰¹

Another important consequence of the proposed reform is that it would end with punitive¹⁰² differentiation between the sexes for the same criminal case, in my opinion contrary to law, common sense and the much-desired egalitarian society, which would undoubtedly result in greater effectiveness of laws that advocate equality¹⁰³, ultimately for a parity society without any discrimination in any of its forms. This would provide legal coherence in relation to the principle of equality of the sexes and before the law that is gathered in art. 14 EC, contrary to what the STS of 26 September 2005 and part of the doctrine contradict. In his controversial sentence in which he defends that man and woman are not equal and opposes openly against the constitutional principles cited above arguing reasons of social alarm.

This has contributed regrettably and without furthering that the LVG is used in a manipulative or improper way to achieve purposes that should be obtained through other legal channels.

¹⁰⁰ STS No. 26 of September of 2005.

¹⁰¹ Art. 14CE.

¹⁰² Art. 147CP.

¹⁰³ Law 3/2007 of 22 March.

The main reason for this reform is that I understand that in couples relationships, as in many other fields, the idea of equality before the law and of the sexes. It must in all senses predominate and be a solid base from which to build and develop the law.

Some authors such as Centenera Sánchez-Seco¹⁰⁴, who openly defend the reform of the LVG, ask themselves whether the quality of the rules contained in the law could be improved.

Aranda Álvarez¹⁰⁵, believes that a reform of the current LVG is necessary since gender violence is a problem that encompasses different disciplines and it is not possible to be seen only from the legal point of view. It says, *"but without a doubt that the integral and transversal character of the Law is the most innovative and positive resource, which makes the Law encompass aspects as important and varied as the preventive, educational, social, health, procedural and penal, and for which the Comprehensive Law sets in motion all the springs of the State."*

Therefore, in the case of unlawful and standardized actions that are subject to criminal reproach, they should be punished in the same way and must have the same legal consequences, both for men and women, which evidently with the current writing of the LVG.

So, I understand that a new wording of art. 1, would be as follows:

Article 1 Purpose of the Law

1. The purpose of this Law is to act against violence which, as a manifestation of discrimination, the situation of inequality and the power relations of men over women and viceversa, is exercised over them by those who are or have been their spouses or those who are or have been linked to them by similar relationships of affection, even without coexistence.

The first criticisms that could be made to this wording would be that women are those who have traditionally been subordinated to men and have suffered throughout the history of inequality and that today even today there are many more men who hold positions relevance and power of women and that there is almost no discrimination against men.

¹⁰⁴ Centenera Sánchez-Seco A. "Could we have had a better Law of Gender Violence of higher quality?" *Revista Derechos y Libertades* nº 25. June 2011, p.237-268.

¹⁰⁵ Aranda Álvarez E. "Studies on the Comprehensive Law against Gender Violence" Ed. Dyckinson. Madrid 2006.

This criticism, very common in various forums, has a crass error since its inception, since it is scarcely substantiated, since precisely what it is trying to construct is a just society to achieve equal treatment between men and women from equality, not from resentment, inequality and discrimination of relationships that has existed throughout history. That is why it is clear that much progress has been made in the equality of the sexes, of opportunities between both sexes and the equality of value between both sexes to carry out any work, although it is a long way off, so that this reality effectively materializes in society. Nor can we, in any way, fall into the error of trying to repair a historical inequality, creating a current legal inequality that is embodied in the LVG. For this reason, I am convinced that it is not possible to allow this, that is to say, to create equality and defend women are created laws like the one of LVG that establish for the same typical factual assumptions, different legal, punitive and process¹⁰⁶

This can not be allowed, because I insist, would be to fall into the same errors that historically have incurred men. We must build a fully egalitarian society in law, freedoms and opportunities without any exceptions, legal or social and fight because we end up favoritism and laws unwise, for the sake of achieving equality, as the highly commented and controversial law of equality of 2007. As an example we can name the lists for the 2008 elections of the PP by the municipality of Garachico in Tenerife, whose candidature was formed exclusively by women¹⁰⁷ that was not accepted based on the controversial resolution of the TC in this regard¹⁰⁸

I believe that it was a mistake not to accept this candidacy formed entirely by women, first of all for logical reasons, specifically, if the party considered that those people, in that case women were the most suitable to form that candidacy, I cannot understand why it did not prosper and was not allowed to freely attend elections. If there were no other men who wanted to appear or who met certain requirements, knowledge or professional practice and it was only women who if they met those characteristics or were simply voted by their local group to form the candidacy, I think should have been allowed, it seemed to me very well that they were just women.

¹⁰⁶ See chapter 2. In relation to arts. 148 and 153 CP.

¹⁰⁷ Note 4.

¹⁰⁸ STC 12/2008 of January 29, 2008.

The opposite would be undemocratic and absurd, that is to say, forcibly filling a quota for sex without taking into account the individual preparation of each member, arriving nonsense to such an extent that lists could be formed, not by the best people prepared without distinction of the sexes, but by unprepared people and "stuck" in those lists by force¹⁰⁹, simply because, it is believed that with equal lists, whose differentiating criterion is purely and exclusively sex, a more egalitarian society is promoted

Among the jurisprudential doctrine there has been evidence against positive discrimination based on historical debt to women like Rodríguez-Zapata Pérez. This makes a good critique of the reasons why he does not agree with art. 44 bis of Organic Law 5/1985, of 19 June, of the general electoral system, introduced by the second additional provision of Organic Law 3/2007, of March 22, for the effective equality of women and men, based on to consider constitutionally valid that political parties can accept clauses in their statutes that ensure women's participation in electoral lists. However, Rodríguez-Zapata Pérez¹¹⁰ argues that in our constitutional model, the imposition by law of parity or electoral quotas violates the principle of unity of political representation and the ideological freedom and self-organization of political parties, resulting in the right of passive suffrage of the candidates proposed who are excluded from participating in the electoral process as a result of the application of the rule in question.

In my opinion, it is absurd, scrupulously respecting other opinions, because in the lists of parties should not prevail sex as a differentiating criterion, but rather the capacity of the person, his experience, knowledge and value, irrespective of sex. Thus I saw that in the elections of 2008, a specific political party for the municipalities in Garachico was the entire list of women, which was not admitted, I understand, I reiterate in an improper and unfair way. I sincerely believe that if these women were on the lists, it had to be, among other reasons, because they were the most capable and prepared for that task and that if at that moment no man of the same characteristics was found as the women, or if was found a candidate, but was not voted that candidature democratically.

¹⁰⁹ Court Administrative No. 1 of S/C de Tenerife.

¹¹⁰ Rodríguez-Zapata Pérez, Judge of the TC, in his special particular vote of STC 12/2008 of January 29.

elected within the party and that other only composed by women was a winner, should be considered adjusted to law

So it would have been a lamentable error besides a sovereign nonsense, that to cover the quota of fifty percent, put men who had no idea of anything and no knowledge, simply to cover the legally established quota

This previous example is shown to make it clear that if we want to build a just and equal society between the sexes, we should not start by creating laws that call into question this balance or simply create laws that defend positive discrimination of the woman with respect to man or in an unrealistic assumption and vice versa

2 7 2 Need of reforming the current law to comprise all type of unions

Thus, in view of the previous section, the reform of art 1 of the LVG, would aim to defend and regulate all problems, of mistreatment, physical and psychological aggression, between men and women, without distinction as to why sex. Undoubtedly, this would be the same regulation, in the cases of conduct classified as illicit, irrelevant to the sex of the aggressor

Likewise, and after the entry of gay marriage¹¹¹, I believe that it is also necessary to give it legal coverage, including them in this reform, when the same anti-legal behavior occurs, that is to say any type of aggression that occurs in people who have or have had a relationship of affectivity with or without coexistence and also that this anti-juridic fact occurs as a consequence of an attempt of domination, restricting the freedom of the other, since otherwise it would not be coherent. This legislative change would be positive for the sake of greater efficiency of the LVG, which has been strongly criticized by many sectors, being characterized in two points of extreme importance:

1 - Teleological-educative function, there would no longer be differences of legal treatment by reason of sex and all aggressions of any kind would be treated in the same way, from the criminal point of view. Furthermore, I am convinced that the law would not be used so much to obtain civil measures "à la carte and in a generic way" that would deprive the alleged offender of housing, or deprivation of custody of minor children, by taking measures precautionary measures and, of course, would help to

¹¹¹ Law 13/2005, of 1 July.

alleviate the violent deaths that unfortunately happen, without a sign of cessation, all this by way of example

2 - Guarantee function of the public rights and freedoms, recognized in the EC, in particular the rights of equality, before the law and equality of the sexes, contributing a more egalitarian society

Well, these reforms would be directed to all those who are or have been linked with or without coexistence by a relationship of affectivity, without losing sight of the main motive of the LVG commented on in the explanatory memorandum, which is respect for the person intrinsically linked to the private, domestic and affective sphere. Thus, there is already a history¹¹² such as the law of domestic violence promulgated before the entry into force of the current

As for the guiding principles set forth in art. 2, I understand, as in the previous article, that the protection of LVG must also be dispensed with for men, to be equally victims of violence in any of its variants, and especially domestic violence, both physical and psychic and threats, coercion for example, giving legal coverage in this case and that I believe should be changed. This is not a simple whim, I firmly believe, as previously mentioned, that in order to significantly reduce cases of violence, the law must protect both sexes equally, so it will be known that anyone who commits any type of violence will have the same legal consequences, applying the same law, regardless of sex, that is, whether the man or woman is the aggressor. In addition, this would help to create a conscience in the citizen of equal treatment in the law without exceptions and without differentiations by reason of the sex. Likewise, on the occasion of the entry into force of same-sex marriage and same-sex unions, I understand that the law must equally provide protection under the constitutional principles of equality before the law and non-discrimination on grounds of sex.

One of the criticisms that could be made of this reform suggested in this chapter, namely that of including unions of gay couples or marriages within the scope of the

¹¹² Law 11/2003, of September 29, on Concrete Measures on Citizen Security, Domestic Violence and Social Integration of Foreigners; the Organic Law 15/2003, of November 25, amending the Organic Law 10/1995, dated November 23, of the Criminal Code, or Law 27/2003, of July 31, regulating the Order of Protection of Victims of Domestic Violence.

LVG, is that there is no dominion, abuse and inequality on the part of the man towards the woman or that historically the woman has always been subjugated to the man and that now must be compensated more to the woman for this reason or that when being unequal subjects it is also necessary to give him special protection and an unequal regulation, in view of the social alarm¹¹³ that has been generated. In this sense, since the TC has pronounced in its STC of May 14, 2008 and in which the judge¹¹⁴ gives reasons the normative differentiation of sexes in a positive way and defending the LVG, thus textually defends that "reasonableness of the normative differentiation questioned - that which occurs between the arts 153.1 and 153.2 CP - not only requires justifying the legitimacy of its purpose, but also its adequacy to it. It is not only necessary that the norm seeks greater protection of women in a given relational area because of the greater devalue and the greater severity of acts of aggression that, considered in the first of the mentioned precepts, can depreciate in their dignity, but it is equally necessary that the before mentioned criminal law should prove to be functional for this purpose in the face of a non-differentiating alternative. A typical differentiation will be necessary, including, as others factors, a different delimitation of active and passive subjects of the type of crime: that it is appropriate to the legitimate purpose pursued that the most severe type of penalty restrict the circle of active subjects - in the interpretation of the questioning judge, which, as already noted, is not the only possible - and the circle of passive subjects

However, these opinions are exempt from a global vision, by not contemplating their social and private side, that is, they do not take into account that the violence that develops in the domestic sphere or when there is or has been an affective relationship, other factors at stake. Thus, the LVG, as we have said in other sections, is suffering from a total lack of effectiveness, since its implementation, serious cases of violence, with fatal outcomes, have not diminished, and that if it were effective they would have decreasing or even disappearing cases of violence, now unfortunately still far from disappearing. For these reasons it is necessary to address the problem from a social point of view and not just legal. The form or method will be the object of study in the

¹¹³ STS of September 26, 2005.

¹¹⁴ Judge Pascual Sala Sánchez, STC of May 14, 2008.

next chapter, but we advance, that in order to eradicate the violence that begins or predominantly occurs in the private, family or couple, a gradual reeducation of society, this being achieved first, the laws being the same for all without distinction of sex, translating this into equality of treatment before the law and in the courts with the measures to be applied in their case, second formation of an idea of generic treatment and equality with the same consequences in the same cases for both sexes and for any type of union and third and last, but not least, the general and free possibility to consult support organizations for the family and couples with problems, that help them to solve the conflicts of couple and interpersonal without going to the judicial route. In the case of same-sex couples or homosexuals, they must have the same opportunities as heterosexual couples, since when the legislator equates these marriages with marriage, with all the legal effects that it entails, it would be nonsense that were not included within the scope of the LVG and in particular of the proposed reform. They would also go against the constitutional principle of equality, since the same serious mistake would be made as the current LVG, by including only women as victims and only men as aggressors in all cases, without the possibility of apply to them or benefit from this law, even if they have suffered any kind of aggression from their female partner.

This is the legal basis is relevant and diaphanous in this sense, because after the reform of art 44¹¹⁵ of the Civil Code, which, after the law 13/2005¹¹⁶, allows the contracting parties to marry regardless of whether they are of the same or different sex.

The rest of the concrete changes of the sixteen articles of the Civil Code, are limited to adapt the verdict of the CC to the new text of art 44 CC, for purely stylistic reasons. First, the wording of articles 66, 67, 637, 1343, 1344, 1348, 1351, 1361, 1365, 1404 and 1458 have been modified, all of them of the Civil Code, the first two, on the rights and duties of the spouses, the following on the donations made to the spouses, and the rest, on the matrimonial economic regime, except for 1458 that establishes in the sale and sale the ability of the spouses to sell goods reciprocally. Thus, in these precepts, where it was formerly called "husband" and / or "woman", it is now said to be a spouse "or" spouses. "In the second place, arts 154,160,164 of the Code, concerning parental-filial

¹¹⁵ Art. 44.2 CC, after the reform.

¹¹⁶ Law 13/2005, of 1 July.

relations This second adaptation essentially involves changing the generic terms to "father" and "mother", by mentioning "parents" (arts 154 1 and 160 1) or simply mentioning art to exercise parental authority

In this way, it is envisaged that homosexual marriages may have common children, which will not naturally be the result of sexual relations, but the children of one of the spouses adopted by the other, those adopted jointly by both spouses and marriages between women, those resulting from the techniques of reproduction assisted by one of the women, with the consent of their spouse In addition, there is a "broom clause" in the First Additional Provision, which provides: *"Legislative provisions containing a reference to marriage shall be deemed to apply regardless of the sex of its members"* However, the oversight of art 110 CC, which goes on to say that "the father and the mother, although they do not have parental authority, are obliged to care for the minor children and to provide them with food"

Third, the law has amended arts 175 4 and 178 2 CC in matters of adoption, so that the possibility that same-sex couples can jointly adopt as marriage is now essentially derived from art 44 2 CC, in connection with arts 175 4 and 178 CC Thus, Law 13/2005 gives a new wording to the first paragraph of art 175 4 CC, which provides: '4 No one may be adopted by more than one person, unless the adoption is carried out jointly or successively by both spouses

Marriage after adoption allows the spouse to adopt the children of his consort This modifies the previous art 175 4 CC, which stated that "outside adoption by both spouses, no one may be adopted by more than one person" The rule therefore allows the joint adoption by both spouses during marriage and adoption by a single person who then contracts marriage, in which case the now spouse can also adopt It is doubtful, however, whether the individual adoption by one of the spouses may be consistent with the marriage, and at a later time the adoption of the other consort takes place The interpretation "sensu contrario" of art 175 4 is against this possibility, although surely the best protection of the adopted son pleads for the opposite solution

For its part, the new redaction of art 178 CC has suppressed the requirement that the adopter be a person of different sex to that of the legally determined parent, so that the

filiation with respect to the mother can determine if another woman can adopt the child without the ties with the birth mother being extinguished

The substantive issues that are fundamentally involved in the reform are in my opinion two, although both are closely related. The first is positive, and affects the constitutionality of the reform. It will be tried to discern according to the rules of pure legal technique if Law 13/2005 has respected the Spanish Constitution, both as regards the literality of art. 32 EC and in relation to the protection of the family, provided for in art. 39.1 EC, and that of the children, provided for in art. 39.2 EC. The second is a value or axiological question, but it has indissoluble links with the previous one, since the background assessment of same-sex marriage and its ability to jointly adopt a minor will affect the consideration of the legitimacy of the reform, and, ultimately, may lead it to consider it contrary to the constitutional values and principles enumerated above. Therefore, after the pure legal argumentation bears a whole battery of questions and previous ideas that we all have about the conception of marriage and, therefore, of the family, since the law supposes with respect to this institution the rupture with a legal tradition, sociological and political. The ethical assessment of the reform then very much conditioned its confrontation with the Constitution, which also relies on certain values and principles elevated to the rank of constitutional because they are common in society.

On the part of the doctrine such as Garrote Fernández-Díez¹¹⁷, homosexual marriages must have the same rights as heterosexuals, according to art. 32 EC.

Thus, the need for homosexual marriages to be accommodated within the LVG protection wing, given the same problems and conflicts as in heterosexual couples and marriages, an incongruence that is not included after the approval of the marriage with people of the same sex.

2.7.3 Solutions for gaps and inefficiencies of the current law

At this point, the problems of the LVG are already evident, which has not been a remedy to stop the conflicts of coexistence especially the physical aggressions that

¹¹⁷ Garrote Fernández-Díez Ignacio. 2005. Legal Magazine of the Autonomous University of Madrid. No.13. June 2005. Pages: 133-164.

happens in the level of interpersonal relations. Unfortunately, it is common to find news in which there have been deaths of women by their partners or former partners and a subsequent suicide of these or aggressions of any kind in the domestic sphere. Of course, the legislator never thought that with the entry into force of the LVG, the problems were not solved and that this law remained half way, constituting itself as a non-effective law, a repressive of freedoms and the most important does not ensure in full the safety of the victim.

For this reason there has been from the beginning by the doctrine discordant voices with the LVG with its wording and have advocated a reform to regulate certain obscure aspects, such as those already discussed in chapter three, which are for example the complaint false and crime simulation, induced or consenting breach, generic application of precautionary measures, lack of effectiveness in protecting the victim among others. In my opinion and as I have repeated throughout this work, the main error of the legislator is not to have provided the LVG with a social plan, putting as a reference to the person, i.e. as a center and interpersonal relationships between if it has only legislated automatically without taking into account the social character of interpersonal relations, nor has it endowed this law with means of resolving non-judicial or mixed conflicts, or at least resting on them to resolve.

For example, Arangüena Fanego¹¹⁸ has raised this problem, advocating opening the door to criminal mediation and especially in cases of gender violence, thus highlighting the limitations of the LVG and criticizing that medication in the violence of gender is prohibited. Likewise, she believes that the problem of gender violence cannot be approached from a single point of view and must be combined with other interdisciplinary means, that is not only legal.

Aranda Álvarez¹¹⁹, is another author who has noticed the inoperative of the current LVG because the entry into force of this law says, has failed to address deaths or violent

¹¹⁸ Arangüena Fanego María. *The criminal mediation in the field of gender violence, the time has come to rethink its prohibition? Preventive means of conflict resolution in the criminal area.* Editorial Bosch. Barcelona 2014, Pag. 145-162.

¹¹⁹ Aranda Álvarez Elviro. *"Study on the Comprehensive Law against Gender Violence".* Editorial Dyckinson. Madrid 2006, Pag. 163-170.

aggressions and argues in his work that we must address the problem of gender violence from an integral and transversal point of view. Thus in his work, in which I fully agree with her point of view when estimating that the problem of gender violence must be addressed from a wide range of disciplines and with the involvement of different agents. Thus says in his work verbatim " *but undoubtedly the integral and transversal nature of the Law is the most innovative and positive resource, which make the Law encompass aspects as important and varied as preventive, educational, social, welfare, sanitary, procedural and criminal, and for which the Comprehensive Law sets in motion all the springs of the State*"

Other authors such as Mallaina García, Alguacil González-Aurioles, Entrena Vázquez, Rodríguez Armas, Ballesteros Moreno, Surgeon Campano¹²⁰, agree with the opinion of Arangüena Fanego and Aranda Álvarez and among which I include, in which the current law of violence from other perspectives by being out of focus and not solving the problems for which it was created.

Thus it is obvious the need to reform the current LVG to improve it and provide it with greater efficiency, so "lege ferenda" suggest some reforms which will be addressed in the next chapter and that mainly bets on a mediation in cases of psychic violence or physics in particular in light cases, creation of consultative bodies and interdisciplinary support to non-judicial specialists such as psychologists, psychiatrists, social workers, educators and therapists, among others, all of this gratuitously to gradually create an idea of egalitarian society, re-educating violent behaviors and eradicating abuse of one sex over another.

In addition, and as it is already advanced, I firmly bet on the resolution of judicial conflicts through non-judicial channels, and such as gender violence, whose model is proposed in the following chapter. It's clear that the need to reform the law of gender violence, to make it more effective and avoid the negative side effects.

¹²⁰ Mallaina García Carmen. 2006. The rights of women victims of violence. Estudios sobre la Ley Integral contra la Violencia de Género / rew. por Elviro Aranda Álvarez, 2005, ISBN 84-9772-786-X, pag. 61-88

Certainly first need to change the art 1 for protect both sexes in identical situations, thus ending the punitive differences that affect both sexes, respecting the constitutional principle of equality in the law without make different because the sex of the human being This would be positive for society to create an idea of gender equality in the law and in society, without discrimination of any kind, nor positive towards women, is that it is wrongly making the law of gender violence discriminated against the man by his condition

In addition should include all kinds of relationships with or without cohabitation in which violence happens This will reinforce the idea of impunity for women Words or expressions, which say that the man is the only offender or aggressor and that the woman is the only possible victim, must of course be removed and deleted Also should change the law so that the unions of homosexual couples, may be called, marriage, because this word can only allude to a man and a woman, another type of relationship, it cannot be considered as marriage These other types of marriages or relationships with or without cohabitation must always be covered for the law, when there is violence

It should be reformed the law, to resolve gaps and mistakes, as induced or spoiled, brokenness of sentences or measures precautionary or false reports and create a harmonic law, looking all assumptions, so that would avoid different interpretations of sentences for a same case

It is necessary to put the law on the right track, because at the moment is completely out of focus, because when it was created for several reasons, the law wanted to sorted out many problems, but actually the law does not sorted out any of them, even had been created another problems without give a solution The new wording of the law should include the creation of agencies and professionals that help to solve the problem of family violence in society, helping with psychologists, social workers, family mediators and educators involved in programs and courses for re-education of the society values such as mutual respect, equality of sexes and non-discrimination, and at last to give a relevant role to mediation, to solve in a no judicial way the problems of domestic violence

Chapter III

Towards a model of resolution of conflicts derived from the gender or gender-based or domestic violence by a not jurisdictional way

3 1 General remarks

One of the conclusions that we can draw from all the exposition contained in the previous chapters is that, firstly, that the law on gender violence is not effective, suffers from many failings, gaps and is not suitable and therefore is obvious and would appreciate the need to reform it. Now how to do it is how to proceed to that reform, what legal or non-legal ways to choose to eradicate the current problem that seeks to resolve the law on gender violence is the key issue.

In my view, as things stand today, in clear reference to their effectiveness, as we have said many times before, the only feasible and effective way that would help eliminate this problem or at least reduce it is a method that opens the door to methods of resolving legal disputes by non-jurisdictional means or other than those traditionally used.

The fundamental reason is that in issues such as family, divorce, gender violence, it is more than necessary to find specialists other than the judge, who reach the bottom of the problem or the origin to be able to treat and solve it, i.e. resolution of the problem by non-legal means and by non-jurisdictional means.

So the difference with the judge is very deep, because the judge tries to solve a problem at the end of the road and when there have already been a series of events that is led to the report or in a tragic situation and the subsequent action of the judge, and in many cases acts when there is no remedy, or an understanding is not possible and a solution can not be reached or it is very difficult to reconcile the parties because their claims are very conflicting or it is just too late to have a fatal outcome. Thus the judge decides and takes action at the end, being common that this resolution is not contented to any of the parties involved or that does not really help to change the previous conflict situations.

To the extent possible, attempts should be made to reform the law on gender violence, improving it and attempting to tackle the root problem with different means.

Cuello Contreras and Cardenal Murillo¹²¹, for example, have pointed out that the current legislation to protect the victim of gender-based violence is insufficient to solve the problem of gender inequality and all types of aggression precisely of that inequality. Their proposal is to change the LVG in the sense of expanding with social media and not only with criminal law, as the last ratio as a criminal law repressive, but rather with this reform seeks a social solution of the problem. It is that the legislator has incurred in overprotecting women to the detriment of men and breaking the constitutional principle of equality. Thus there is a clear link between what is protected by criminal law and the way in which a specific society is structured, favoring the establishment of discriminatory situations for women, starting from the process of typification itself, continuing with the application and interpretation of the rules. In this line, discriminatory treatment has been given even by typifying conduct carried out exclusively on women, with a false hyperprotection¹²²

On the part of another prominent author, Gimbernat Ordeig¹²³ has pointed out how it has been a social rule that man has fixed the scope and intensity of the criminal protection of women, not so much according to the feminine interests, as in function of the strictly masculine, yet qualifying, *"has not been the man without more, but a man of a mentality and scale of values very determined that has decided the contours of the protagonism of the woman as author or victim of crime"*

In the case of gender-based violence and focusing on the specific case of gender-based violence, the problem is even greater since the judge in most cases decides to take action on a situation that has arisen at that time, but for nothing pays attention to the causes that have originated that situation and focuses only on that conflict immediately and separating the parties. Of course and for there to be no misunderstandings or misunderstandings of the above, is that of course the judge's work is necessary to stop

¹²¹ Cardenal Murillo Alfonso. "Good Legal Protected and Legal Technique of the Criminal Protection of Women and Other Victims of Domestic Violence", University of Bristol 2012, p. 251-272

¹²² Acale Sánchez, M. The crime of physical and psychological abuse in the family. Ed. Tirant Lo Blanch Valencia, 2000, p. 61.

¹²³ Gimbernat Ordeig, E., "Women and the Spanish Penal Code", in Criminal Law Studies, 3rd ed., Madrid, 1990, pp. 78 and 86.

situations and conflicts, avoiding that they reproduce in the future, especially in violent cases. However, as we have already commented, in order to make effective the law on gender-based violence, so as to avoid situations and fatal outcomes, to fight for a truly egalitarian society and to progressively educate society in parity and mutual respect, it is necessary to change the law, modifying some article, adding a new procedure, of course regulated, where non-legal specialists and a way to solve problems from the root

In connection with the above, there are authors like Meléndez Sánchez¹²⁴ who criticize the automatism, which is not very effective and which gives the face of the social aspect of the problem to gender violence and saying that " *the profile of the so-called abuser has no effect or preventive, nor eradication, nor reeducation of the aggressor, since the population in general is not affected by the harshness of the sanction to not affect these punishable acts, by not identifying with the profile of abuser, and in turn, those who have predisposition to the criminal commission of these crimes do not fail to carry it out, given the situation of obsession and inconsequential for criminal purposes, to do harm to a particular person. This also affects the lack of resocializing effects, re-educators, or eradication of this type of behavior. The abuser returns again and again in an obsessive way, regardless of how hard the penalty is to impose, in fact, during the fulfillment of the same, would reaffirm even more in the animosity of carrying out new aggressions* "

Likewise, Acale Sánchez¹²⁵ agrees with Meléndez Sánchez in that for him the optimal solution " *will not confuse social policy with criminal policy and the integration of the interests of the victim within the purposes of criminal law in a subaltern to act on the offender* " Consequently, in the first place, I understand that, in order to make the current law on gender-based violence more effective, it should be modified, starting with providing specialists such as psychologists, social workers, psychiatrists and family mediators, to help solve interpersonal conflicts, through non-jurisdictional ways

¹²⁴ Meléndez Sánchez A. "The aggressor as a victim. On the subject of zero tolerance for gender violence ", Ed. Dyckinson 2008, Madrid, p. 1253-1259.

¹²⁵ Acale Sánchez, M., The crime of physical and psychological abuse in the family, Ed. Tirant Lo Blanch, Valencia, 2000, p. 61.

until the problem is solved by solving it, beginning with its origin, revealing the reasons for the conflict and providing solutions to restore normality Secondly, and in order to reinforce this, it is essential that the parties follow and undergo individual and group therapies The specialists proceed to follow up, detailing the evolution and ending with a complete opinion explaining the causes, methods employees, the solution if there is or will be and the measures that it deems appropriate for the protection of the victim in its case making it reach the judge for its consideration, deciding subsequently the measures, if applicable to apply for the protection of the victim

We always talk about the case, because it is possible that with a good orientation and work of the specialists, many of the cases of gender violence that cram the courts, can be ventilated and resolved through other channels I am convinced of this last point, since in the courts, proceedings are initiated, in which simple domestic fights are criminalized and irrelevant from the criminal point of view, psychologist or family mediator could work in this sense

Another of the characteristics that this new procedure must have, is that it be positioned as a general voluntary procedure for risk situations, or in other words that the general idea is that any individual can go to these non-legal professionals in a way free of charge, even before a relevant criminal situation occurs, thus establishing itself as a form of prevention to prevent cases of gender-based violence

Well, this general voluntary procedure will be established for several purposes, the first as a way to resolve interpersonal conflicts by non-jurisdictional means, the second as education in the values of equality, mutual respect between the sexes, tolerance and freedom, third as prevention of cases of gender violence and the fourth as a means of educating society and consulting It is undoubtedly not only advisable but also obvious that more attention should be paid to ways of resolving legal disputes through non-jurisdictional methods or methods and, of course, creating bodies where couples can turn to these non-legal operators or specialists to resolve their conflicts and for free

The LVG argues in its explanatory statement and in its first articles that it is necessary to educate¹²⁶ arts to citizenship in equality and gradually to instill in society, the values of equality, non-discrimination, tolerance and respect between the sexes, that we have commented previously. However, the LVG, is half way, as it generalizes too much by not proposing in a clear and effective way how to do or means to do so. That is why we understand that it is necessary to go deeper and concrete in the measures to be taken and not only to enumerate some actions as principles and not to advance further.

3.2 Legal delimitation: Subject beneficiaries

This new procedure is configured as an open procedure in which any subject can go regardless of their sex and the way in which they have been established as a couple or marriage, that is to say, the unions and homosexual marriages. This represents a great difference to the current LVG, since homosexual couples of both sexes are totally excluded totally, as well as the men to whom the benefits are barred or the simple application of this law, when they are victim, having been determined by the legislator as a differentiating criterion the sex of the subject, which goes against our opinion of the principle of equality of sexes and before the law collected in the EC.

Thus, with this reform and in this procedure will not be any person excluded simply by their sex, being a real guarantee of the principles of equality provided in E C are fulfilled and applied without restrictions. Another of the undoubted benefits is that drastic reductions in cases of gender violence that overflow the courts and at the same time have an educational role and consultant society to create a more egalitarian and tolerant society. For this reason, in the LVG, a complete regulatory framework must be created in which the possibility of effectively resolving the problems of gender-based violence outside the courts is opened.

Already by the doctrine and authors in numerous articles have been referenced this possibility of need to look for other alternatives to sorted out the problem, trying to take another ways, as a non judicial like the mediation.

¹²⁶ Art.3 and 4 Organic Law 1/2004 of December 28 of Measures of Comprehensive Protection of Gender Violence.

3 3 Phases of the procedure

The procedure, like the one in force, will be initiated by report of the victim or ex officio. However, unlike the current law, this law will be applied universally, without distinction of sex or sexual orientation that delimits or limits the principle of equality of the sexes and equality before the law.

In this reform for which bets, we must differentiate in this new procedure between two assumptions, when there has already been a physical or psychological aggression, serious or very serious and when the entity of the aggression is slight.

For the first case, for serious or very serious assaults of any kind, I understand that it is indispensable the figure of the judge and, of course, the judiciary, to stop the situation of violence or conflict and take measures to protect the alleged victim, such as restraining order, deprivation of residence in the same dwelling, for a reasonable time or until the risk situation for the victim has disappeared and even imprisonment for the alleged perpetrator. At the same time, in this moment, non-legal or judicial specialists are given, by order of the judge, to delve, as we have already explained, in the causes and motives that have happened until to aggression and proceed to evaluate the personal situation in an extensive way.

In the second case, in the case of minor assault of any kind, or when there has not been any physical or psychological aggression that causes fear for the integrity of the victim, or in the case of doubt, I understand that it should be granted non-judicial specialists in such a way that, in the first place, the judge determines the necessary measures and that are necessary to avoid subsequent conflicts, and then the parties will be subject to surveillance and compulsory sessions with the various non-legal specialists. In this case, non-legal operators should have a leading role in the procedure, unlike the previous assumption. Of course, for these assumptions will try to follow the procedure in its almost all by a nonjudicial route, provided that the typicity is none or of little or little relevance.

Likewise, in the event that a judicial proceeding has already been initiated for report, in this new reform it is proposed that the proceedings may be suspended in the court, as long as it is feasible and does not present any risk to the victim and all of this until the above-mentioned reports have been prepared by non-legal specialists.

Thus, it is very likely that in most cases with good advice and guidance from non-legal specialists, the situation is resolved and there is no need to go to court, which would undoubtedly help to discharge them from work and do of a sort of filter to ventilate in the courts of violence against women, the real cases that are relevant from the criminal point of view, that is to say in cases where there has been a situation of discriminatory violence

In the intermediate phase, in cases of serious and very serious, will be studied by non-legal professionals, through appointments and various tools, such as personal interviews, evaluations, tests and analysis of personnel and the environment if possible the re-emergence of the conflict situation and a re-education of the parties involved

Thus, psychologists, social workers, psychiatrists and family mediators will begin a thorough evaluation of the alleged offender and the alleged victim, paying particular attention to the personal social and economic situation surrounding the parties, but focusing on the individual profile of each one of the parts, to know the deficiencies and virtues of the relation In this way, the parties will be subject to the examinations of the specialists in various sessions, which will give a picture of the situation and put it in a report that will contain the guidelines or ways to follow to redress the conflict situation and the measures that will suggest to the judge to adopt

These specialists will also determine if there is risk for the alleged victim and if after practicing the therapies and sessions the parties will be able to live together normally or if the risk persists The measures and the final opinion that are indicated in the different reports of the specialists and that will be transferred to the judge, will have character of skilled expert and in any case, the judge will have to take into account those reports to decide If the opinion of the judge is contrary to that of non-legal specialists, they must meet with the judge and try to arrive at a consensual solution, in a way that is most convenient for the parties to the conflict In the event of failure to reach an agreement, the judge will have a casting vote, that is, he will have the final word on the measures to be taken

Non-legal specialists for this assumption, will be relegated to the background, given the seriousness of the aggressions, being as traditionally sold in the current procedure

Not so for mild cases, which will decide these professionals in any case, if a regular and controlled follow-up of the participants is sufficient or if, on the contrary, judicial

intervention is needed, which will be communicated immediately, both to the court competent authority and the interveners

In the same way, it will be registered in a legal support, in which the legal non-legal professionals, the judicial bodies and state security bodies have access, so that the case of a breach or non-follow-up of the non-judicial regime that know the performance that has been carried out with the subjects

3 4 The mediation criminal, as a way of non-jurisdictional legal interpersonal conflict resolution

As we already know, mediation is strictly prohibited in the LVG, specifically in art 44 5, but one wonders whether this prohibition is correct or not correct and even if it is necessary. The response by the doctrine and the judges themselves has been clear, and in which I include in the sense of favoring that the mediation be implemented in a general way

Gender violence is a problem that encompasses and integrates the family, its interpersonal relations, placing the human being in the foreground, leaving in the background legal aspects

As we have said before, the courts of violence against women are saturated with criminalization of domestic fights lacking criminal relevance, which could well be resolved by alternative means such as mediation or by a new procedure, as pointed out in the previous sections, alleviating the courts and filtering in part the cases that are relevant from the criminal point of view. As an example, we have the cases of divorce, in the parties go to court throwing all kinds of goodwill and reproaches through lawyers, with the aim of revenge for personal situations, fair or not, but the judge does not will enter to assess, simply its work will consist in knowing if there is cause of divorce and the eminently legal measures to take. Everything else what the spouses throw away and reproach themselves is irrelevant and the judge will never enter the personal terrain of the spouses. This is unfortunately not understood by ordinary people

Nor is the figure of mediation well known, that if it can enter the personal terrain, with the advantage over the traditional method such as the courts, that mediation can get to

know the subject at any time, that is, before of the judicial phase, during and at the end of the execution phase

Unfortunately, as we have indicated, it is not very well known, but it turns out that it is one of the means or methods that should predominate to govern interpersonal relationships. What is more, I do not understand how it has been given a more relevant character within our judicial system relegated to a fourth or fifth position, since it is clear that the judicial procedure is very limited and almost never resolves conflicts of a personal nature

On the occasion of the entry into force of Law 5/2012, of July 6, which has completed the procedural aspects of the 15/2005, of August 8, which reformed the divorce, the pilot mediation experiments promoted by family courts

And it is that the judges have realized this problem and in many cases are the main defenders of the mediation and also from the own General Council of the Judicial Power, when approving the study on reduction of the litigiousness part of two premises: 1º The litigation has to be the "last ratio" of all conflicts of interest and 2º the litigiousness is clearly oversized and has a high cost. It also highlights the important role of mediation in reducing litigation and contributing to the effectiveness of justice by endorsing the guidelines or strategic guidelines set by the Council of Europe in 2007 for its achievement and grouped under three broad themes: "availability, accessibility and sensitization" problems they try to solve through such mediation

As regards the case law, it has favorably ruled on mediation as a way of handling family disputes in court. Of particular note are the pronouncements contained in sentences of the Constitutional Court emphasizing the specialty of the family processes and the role of the judge in these processes in comparison with the civil declarative process. This is exemplified by the STC of January 4, 2001. On the part of the Supreme Court, there have been pronouncements on mediation as an alternative form of conflict resolution, but it has done so on a few occasions and in relation to succession proceedings¹²⁷, in all cases the Supreme Court refers to the importance of mediation in family disputes and alludes to the state and European regulations to justify the advisability of going to this

¹²⁷ STS 1st of July 3, 2009. STS 1st of September 17, 2009. STS 1st of May 20, 2010 and STS of January 19 2012.

mechanism, to avoid lawsuits that expire over time and do not produce satisfaction for the parties

On the part of the doctrine as Utrera Gutiérrez¹²⁸, he regrets that the application of mediation by the integral law in cases of gender violence since its root, is the interpersonal conflicts of the pair so the methods of mediation is an effective remedy to prevent situations of domestic violence and, in particular, violence against women

To a greater extent, psychic or physical aggressions are often due to a conjugal crisis and it has been shown that statistically the greatest number of cases of violence against women occurs during coexistence, during courtship and even in very later times of separation. However, in my opinion, there are times when mediation has no place, or only after judicial intervention as a remedial means, which are in the serious or very serious cases that we deal with in previous sections¹²⁹, with physical or psychological aggression in situations of imbalance of power

The Council of Europe on Family Mediation, through its Recommendation¹³⁰ that the mediator will pay particular attention to whether there has been violence between the parties or whether it may occur in the future, as well as the effects it may have on the situation of the parties to the negotiation, and examine whether, in these circumstances, the mediation process is appropriate

In relation to other countries¹³¹, Spain has a slight delay in the application of mediation, in the practice of the society of these countries an improvement in the resolution, the

¹²⁸ Utrera Gutiérrez J.- "Protocol for the implementation of intra-judicial family mediation in the courts that hear about family matters" and in his article of the Journal of Mediation 2014, vol. 7, No. 1, pp. 24-35.

¹²⁹ Section 5.4.

¹³⁰ Recommendation No (98) 1, of the Council of Europe on Family Mediation, in its paragraph 3.9.

¹³¹ Ministry of Equality.-In chapter II of "Preventive measures of conflict resolution in the criminal field. Has criminal prosecution in the field of gender-based violence ever come to be banned? Page 145-162. Work carried out in March of the research project of the National R & D & I Plan of the Ministry of Economy and Competitiveness (DER 2012-31549). The Statute of the victim. Proposals for the incorporation of European Union legislation.

courts are not so saturated and a gradual awareness of conflict resolution through non-legal channels

Therefore once we have verified the above, we understand that it would be advisable to have mediation in the LVG, or better leave the door open to try to help resolve conflicts, as we have already discussed have an interpersonal root. This cooperation with the LVG judicial method, always in light cases and after a pronouncement and measures in serious and very serious cases, is also advisable as necessary. Let us simply think of the number of conflicts that can be solved through mediation, as for example in Austria or Norway and together with the new procedure proposed above in the previous sections, in which legal operators will take part in the violence procedure of gender, with evaluations, meetings and sessions with those involved, without doubt all this will result in a notable decrease in cases of gender violence, as society gradually learns, contributing in the same way to the decongestion of the courts of violence, which will know practically of the serious or very serious cases.

To reiterate this, the legislator in drafting the LVG, defacts its objective, since although in the explanatory memorandum of the LVG itself, it sets some goals in order to protect the victim, it is disoriented to the point that it loses its objective end, which is to protect the victim is to say a person, but does not. Only uses purely legal tools, forgetting that in a problem of and between people where the root are interpersonal relationships, they are can solve a problem with rigid rules and laws, but you have to look for other ways such as non-legal operators or mediation to solve problems. Precisely one of the failures of the LVG is this, that of not focusing on the person and approaching the resolution of conflicts with legal means mechanically, leaving aside and completely oblivious the personal side of relationships, i.e. interpersonal relationships.

On the part of the most qualified doctrine, it has been questioned, that mediation has no place in the LVG, so for example Aranguena Fanego¹³² says, that it is indispensable that mediation is not essential to resolve conflicts of gender violence, making it and here I fully agree with the author, in which only for cases in which the facts are of a mild nature, sporadic or occasional and in summary those that are not serious.

¹³² Aranguena Fanego C.Revista Anual Redpe, Art. The European directives on the harmonisation of procedural guarantees for persons under investigation and accused persons. Its implementation in Spanish law. Madrid 2019. Pag.5-40

" Mediation can be accepted as a suitable instrument to contribute to the solution of some conflicts related to gender violence, especially for those who are in an initial stage, episodic or occasional assumptions and of minimal severity although for various reasons they have been elevated to the condition of crime, and in which there is no appreciation of a relationship of special vulnerability in the victim and there is also a willingness on both sides and a reasonable prospect of continuing to live together Undoubtedly, outside of these limited cases, this solution is not feasible to remain a situation of real inequality between the victim and the perpetrator, which would make mediation impossible because such inequality impedes the dialogue, consensus and agreement of both¹³³ "

Barona Vilar¹³⁴, on the other hand, defends the mediation in the field of gender violence, as an extra jurisdictional procedure in which both parties, victim and aggressor voluntarily, undergo mediation as a means to settle their criminal conflict, proceeding to reparation of the damage, to the satisfaction of the victim and to the fulfillment of the sentence imposed on the offender, indirectly benefiting the state to a much cheaper and fast¹³⁵

It is important to mention a part of the doctrine that criticizes the rigidity of the LVG and its lack of scope for mediation in which it excludes the mediation of criminal mediation, making in the chapters that are dedicated to the competition of the courts of violence against women, so that this ban could be considered as referring to mere civil matters, which Gomez Colomer¹³⁶ denies in a categorical way

So in the doctrine¹³⁷, there are those who have argued that the LVG has only referred to the criminal and civil aspects in relation to the exclusion of mediation but the majority

¹³³ In chapter II of "Preventive measures of conflict resolution in the criminal field. Has criminal prosecution in the field of gender-based violence ever come to be banned? Page 145-162. Work carried out in March of the research project of the National R & D & I Plan of the Ministry of Economy and Competitiveness (DER 2012-31549). The Statute of the victim. Proposals for the incorporation of European Union legislation.

¹³⁴ Barona Vilar S. Article Revista de Derecho Penal, ISSN 1576-9763, no. 26, 2009, pp. 20-21 Journal of Criminal Law, ISSN 1576-9763, no. 26, 2009.

¹³⁵ Barona Vilar S. Journal of Criminal Law, ISSN 1576-9763, no. 26, 2009, pp. 25 et seq.

¹³⁶ Gomez Colomer J. Journal of Criminal Law, ISSN 1576-9763, no. 26, 2009, pp. 25 et seq.

¹³⁷ Barona Vilar S., «Criminal Mediation as part of the system of criminal protection in the XXI century. A further step towards resocialization and restorative justice ", in Revista de Derecho

sector advocates the revision of the LVG in this sense being its application in both areas civil and criminal

On the other hand, Salvador Concepción¹³⁸, advocates a legislative homogenization at European level that has the same regulation, procedure and penalties and in which mediation plays an important role as and all this through a Legislative Directive, making reference to the text of the Council of Europe Convention on the Prevention and Fight against Violence against Women and Domestic Violence

In addition, as the author points out, progress has been made in this respect with the adoption of Directive 2011/99 / EU of 13 December on European Protection Order, which, as mentioned above, in any Member State referred to as the executing State, a protection order issued by another Member State - which is called the Issuing State - could be enforced, without the need to initiate a new procedure for the execution and effectiveness of that order

Likewise, Directive 2011/36 / EU of the European Parliament and of the Council on the Prevention and Fight against Trafficking in Human Beings and the Protection of Victims, which, being confined to the field of trafficking in human beings, criminalizes

Penal, nº 26, January 2009, 11-53 and, from the same author, Criminal mediation. Fundamentals, ines and legal regime, Valencia, 2011; CASTILLEJO MANZANARES, R., "Mediation in the process of minors", in Revista de Derecho Penal, nº 32, enero 2011, 9-28; DURBÁN SICILIA, L., "Mediation, Opportunity and Other proposals to optimize criminal instruction", Criminal Law No. 73, July 2010; ESQUINAS VALVERDE, P. Mediation between victim and aggressor in gender violence, Valencia, 2008; FERNÁNDEZ NIETO, J. and SOLÉ RAMÓN, A.M., The impact of mediation in cases of gender violence, Valladolid, 2011; GONZÁLEZ CANO, I., «The criminal mediation in Spain», in BARONA VILAR, S., (right), The criminal mediation for adults, Valencia, 2009; MANZANARES SAMANIEGO, JL, Mediation, reparation and conciliation in the Criminal Law, Granada, Comares, 2007 and, of the same author, "Mediation, reparation and conciliation in Spanish criminal law", in Diario La Ley, nos. 7232 of 2 September 2009 and No. 7255 of 5 October 2009; MARTÍNEZ GARCÍA, E., «Criminal mediation in the processes for gender violence», in Revista de Derecho Penal, nº 33, May 2011; PÉREZ GINÉS, C.A., "Mediation in the field of gender violence (or difficult protection orders)", Criminal Law No. 71, May 2010.

¹³⁸ Salvador Concepcion R. Gender Violence in Spain United Kingdom, France and Italy a global concept? Pag. 136-161. Editorial Dyckinson, Madrid 2015.

offenses related to this treaty establishes the minimum penalties that the States will have to impose on the authors, as well as regulates different issues like its sanctioning regime art 2 et seq or measures of support and assistance for victims, art 11 ff It concludes by leaving the door open to both mediation and other means that attempt to homogenize and unite criteria regarding gender violence

Therefore, and as a summary, it is possible to verify the need for mediation in the LVG to play a more relevant role, not only to deal with civil matters but also with criminal matters, although with the exception that, in the criminal sphere, slight in occasional assumptions and that are of little importance, since outside of these cases could not be addressing the root problem, as it is in the case of inequality of real, since this inequality prevents the dialogue and the consensus between both parties of real form

For this reason the art 44 5 LVG is clearly unwise in its drafting, given its inefficiency and its difficulty of understanding when solving conflicts of a personal nature, where the common denominator in all is the affectivity of the parties It is therefore necessary to know whether there is an inequality or imbalance between the aggressor and the victim in order to apply the mediation If not observed and according to Barona¹³⁹ " *the victim of gender violence could become an instrumentalized victim for the sake of gender justice, preventing access to other avenues or channels such as mediation that the rest of the victims may have* "

Conclusions

The main question stimulating this research is the absence of regulation in the EU on domestic violence, why there has been no agreement after so many years, the great differences between countries in reaching an agreement, studying the laws of Spain and Italy as example and if it is possible to continue without having a European regulation to solve the problems of gender violence or intrafamiliar or if it is effective in protecting

¹³⁹ Barona Vilar S., «Criminal mediation as a restorative instrument ...», op.cit., Revista de Derecho Penal, Nº. 26, 2009, p. 11-53

victims of domestic violence, that each country has its own law or if the rights of the parties are enough guaranteed in this way and finally if the decision taken in one country is fully applicable in another

The reason for choosing this topic has been to find a way to resolve conflicts of intrafamily, domestic or gender violence in the European Union which it can be used as a single model in all EU countries, so that there are no differences in criteria for the same case. Also we study the Spanish and Italian laws about violence domestic and we explained what are their differences and similarities

The findings of the research allow to formulate us the following conclusions:

- 1 The concepts and definitions of domestic violence, of gender and intrafamiliar are different and also confused in each country. The court in their decisions use them for the same case and never helps to resolve the differentiation
- 2 In some countries, the protections of the law of violence domestic, intrafamiliar or of gender is just for the woman, not for the man. The children or grandparents or any other persons has no protection. In other countries, the victim can be any person regardless of his gender and the protections is just giving to the people who lives in family
- 3 There is no common legislation in the European Union, each country has its own domestic violence law and even some countries do not exist include a specific law about this matter, but in a general way like any other crime
- 4 Despite the fact that there are Recommendations by the authorities of the European Union for the application of the several international treaties and conventions on violence and women such as the Beijing, Istanbul or the Daphne program, the countries are currently applying almost none of these Recommendations
- 5 It is obvious, that the law of violence of gender in Spain must be reformed, since it is an ineffective law and is full of legal flaws and loopholes that harms with its application and validity to people living in Spain, both Spanish and foreigners. It must begin by correcting the Law that it applies to both sexes equally, without the distinctions that the

current one makes, which only grants protection to the woman only for the fact of being, as a victim, to the detriment of the man, who does not granted protection of any kind, also simply by the fact that it is a man, establishing as a differentiating criterion the sex of the person, an extreme exceptionally forbidden in the Spanish constitution, which establishes as fundamental principles the equality of the sexes and in the law, which obviously is not fulfilled, absolutely breaking those principles

6 It is necessary to have a common law to regulate the violence intrafamiliar in Europe, effective and with legal tools to guarantee the freedom and physical and mental integrity of the victims and this is one of the several solutions that is given to sorted out the main questions of the thesis

7 As for the answer given in relation to induced or consenting brokenness, (sentence or protective measure) neither their explanations nor the consequences that they entail are satisfactory, because they have failed in different ways This is undoubtedly one of the issues that must be solved effectively in the law, because even today remains a big problem, which after a conviction or a precautionary or protective measures, both parties, woman and man, decide freely to resume the coexistence

The research results allow us to put forward postulates for solving the problems that have arisen under Spanish law

First of all the thesis proposes a different solution which is the possibility that these measures will be without effect, at the request of the victim, with the exception of the final sentence that can not under no circumstances be postponed or avoided, because the Spanish criminal law is not a menu "*a la carte*" to the extent of the victim's convenience

8 It is defended and given as solution, that gender violence is a problem that must be addressed from a multidisciplinary point of view, not only the juridical but also the sociological one, the medical especially, counting on the indispensable support of the government So it is certainly true that, from a legal regulation that is reinforced by psychologists, family mediators, social workers, will attack the scourge of gender violence In practice and before taking any action, except for the victim's own safety, the problem must be analyzed by the judge, but at the same time by non-legal professionals, psychologists, family mediators and others, who assess the personal

situation of the parties and arrive at the origin of the problem itself. These non-legal operators can undoubtedly help solve if it is a problem of the couple or education of values itself, proposing a solution to the judge in the form of measures, such as family, social and moral re-education programs that tend to correct violent and aggressive attitudes.

9 Also as solution to the problem of violence intrafamiliar, domestic or of gender, is that the mediation must be a tool to help to solve the juridical conflicts by non-judicial ways and as solution to sort out the problems in the family, society and in the relationship not just for the cases about violence domestic but also in general conflict in the society to avoid to go automatically to the court.

Bibliography

1. Legal Documents

Law 1/2004 of 28 of December on Comprehensive Protection Measures against Gender Violence

Law of Civil Procedure 1/2000

Law of Criminal Procedure Real Decreto de 14 of September of 1882

Programme Daphne

Criminal Code L O 10/1995 of 23 of november

Civil Code Real Decreto of 24 of july 1889

Council of Europe Convention on the Prevention and Fight against Violence against Women and Domestic Violence adopted on 11 May 2011 in Istanbul

Law No 38/2009 of April 23 on Security, Sexual Violence and Harassment - the result of conversion into law, with amendments, of Decree-Law No 11/2009 of 23 February of Urgent Measures of Urgent Measures in the field of public safety and the fight against sexual violence

Chapter of Human Rights UN General Assembly of 10 December 1948

Recommendation No 8 (85) 2 on legal protection against discrimination based on sex

Recommendation number R (85) 4 on violence within the family

Recommendation number R (85) 11 on the legal position of the victim in the context of criminal law and criminal proceedings

Recommendation number R (87) 18 on the simplification of criminal law

Recommendation number R (87) 21 on victim assistance and victimization prevention

Recommendation number R (90) 2 on social measures concerning violence within the family

Recommendation no R (97) 13 on witness intimidation and defense rights

Recommendation number R (98) 14 on gender mainstreaming

Recommendation No R (99) 19 on mediation in criminal matters

Recommendation Rec (2002) 5 on the protection of women from violence

Recommendation Rec (2005) 9 on the protection of witnesses and collaborators of justice

Recommendation Rec (2006) 8 on assistance to victims of criminal offences

Recommendation Rec (2007) 17 on standards and mechanisms for equality between women and men

Council Directive 2004/80/EC of 29 April 2004 on compensation for victims of crime
Law on Measures against Violence in Relations Relatives of April 5, 2001, Law No 154

Decree Law No 93 of August 14, 2013 on Urgent Provisions for the Security and Combating Gender Violence, and on the Civil Protection and Commissioner Provinces - converted into Law No 119/2013 as of October 15 of that same year

Resolution Humans Rights, Viena 1993

2. Court Decisions

Sentence 59/2008 of the Spanish Constitutional Tribunal of 19 August of 2008

Sentence from Supreme Court nº 164/2008 of 8 of April

Sentence of the Provincial Court of Castellón nº 81/2008 of 26 de February

Sentence of the Provincial Court of Barcelona nº 200/06, of 29 of September

Sentence of the Provincial Court of Barcelona nº 193/06, of 13 of March

Sentence of the Provincial Court of Tarragona nº 60/06, of 30 of January

Sentence of the Provincial Court of Ciudad Real nº 87/06, of 11 of Octobre

Sentence of the Provincial Court of Castellón nº 415/05, of 9 of December

Sentence of the Provincial Court of Barcelona nº 1110/05, of 27of October

Sentence of the Provincial Court of Barcelona nº1044/05, of 20 of October

Sentence of the Provincial Court of Barcelona nº 901/04, of 1of September

Sentence of the Provincial Court of Valencia nº 535/05, of 4 October

Sentence of the Provincial Court of Barcelona nº 535/05, of 17 of May

Sentence of the Provincial Court of Sevilla 121/05, of 18 of March

Sentence of the Provincial Court of Barcelona nº 1222/04, of 14 of december (refering to the numbers 123, 260 y 1308/04 of the same Court)

Sentence of the Provincial Court of Barcelona nº 1054/04, of 15 of November

Sentence of the Provincial Court of Castellón nº 282/06, de 12 de July

Sentence of the Constitutional Court nº 222/1992 of December 11

Sentence of the Constitutional Court nº155/1998 of 13 July 1992

Sentence of the Constitutional Court nº103/1983 of 22 November, Sentence of the Constitutional Court nº128/1987 of 26 July or Sentence of the Constitutional Court nº126/1997 of 3 July

Sentence of the Swiss Federal Court of February 14, 1982

Sentence of the Constitutional court nº 55/1996, de 28 de march and Sentence of the Constitutional Court nº136/1999, of 20 of July

3. Monografies, handbooks, commentaries Literature

To write this thesis, the followings literature have been read and used as support and lead:

Acale Sánchez, M The crime of physical and psychological abuse in the family Ed Tirant Lo Blanch Valencia, 2000, p 61

Acale M 2019 Gender based violence against adult woman Ed Reus Madrid 2019

¹ Study about the economic violence against woman with her partner or ex partner Ministry of Equality Centro de publicaciones Madrid 2023

Aranda Álvarez Elviro "Study on the Comprehensive Law against Gender Violence" Editorial Dyckinson Madrid 2006, Pag 163-170

Arangüena Fanego María The criminal mediation in the field of gender violence, the time has come to rethink its prohibition? Preventive means of conflict resolution in the criminal area Editorial Bosch Barcelona 2014, Pag 145-162

Aranda Álvarez E "Studies on the Comprehensive Law against Gender Violence" Ed Dyckinson Madrid 2006

Cardenal Murillo Alfonso "Good Legal Protected and Legal Technique of the Criminal Protection of Women and Other Victims of Domestic Violence", University of Bristol 2012, p 251-272

Centenera Sánchez-Seco A "Could we have had a better Law of Gender Violence of higher quality?" Revista Derechos y Libertades nº 25 June 2011, p 237-268

Cristobal H 2014 Gender based violence on trial Ed Académica Española Saarbrücken, Germany Pag 22-23

Curtin and Litke Philosophie of Peace, Ed Rodopi, 1999, Boston, USA, ISBN: 90 4200004983 Pag 214-277

Delgado Martín, «Solutions of the Law of Procedure Civil to the Violence Domestic, Studies on Family Violence and Sexual Assault, II 2002, edited by the Center for Legal Studies of the Administration of Justice and the Institute for Women, Madrid, 2002, p 22

Dolcini, E y Marinucci, M , *Codice Penale Commentato Parte Speciale*, Vol II, Ed Ipsoa, Milán, 1999, pág 2865

Dotú i Guri, Maria del Mar "Special mention to the order of removal and to the prohibition of residence as a limiting measure to the right to freedom", p 237-242 *Fundamental Rights: Right to freedom from criminal precautionary measures* Editorial Bosch Barcelona 2013

Fuentes Soriano, O "The restraining orders" Madrid, Ed Colex, 2006, p 10-18

García Antonio 2014 *Revista de Derecho, Empresa y Sociedad*, Núm 5, July 2014, págs 145-159 Ed Dianet, La Rioja

Garrote Fernández-Díez Ignacio 2005 *Legal Magazine of the Autonomous University of Madrid* No 13 June 2005 Pages: 133-164

Giacomo, G , *Non Esiste una Giustificazione: l'uomo che agisce violenza domestica verso il cambiamento*, Ed Romano, Florence, 2013, p 27

Gil Ruiz Juana 2008 "The different faces of the violence of gender" *Woman and Violence domestic* Págs 174-230 Editorial Dyckinson Madrid 2008

Gimbernat Ordeig, E , "Women and the Spanish Penal Code", in *Criminal Law Studies*, 3rd ed , Madrid, 1990, pp 78 and 86

Giménez Díaz Maria, Article "Some reflections on induced or consented breach, Ed Un La Rioja, 2012, p 335-419 *Journal of criminal politic*

González A 2021 *Covert social violence against women* Ed Bosch Barcelona 2021

Kilmartin, Christopher 2015 *The men's violence against women: a general view* AJ Johnson Ed , and *Religion and men's violence against women* Pag 15-25 Springer Science + Business Media

Mallaina García Carmen 2006 *The rights of women victims of violence* Estudios sobre la Ley Integral contra la Violencia de Género / rew por Elviro Aranda Álvarez, 2005, ISBN 84-9772-786-X, pag 61-88

Aranguena Fanego C *Revista Anual Redpe*, Art The European directives on the harmonisation of procedural guarantees for persons under investigation and accused persons Its implementation in Spanish law Madrid 2019 Pag 5-40

Montaner Fernández R “ Violation of penalties or protective measures for victims of domestic violence Criminal responsibility of the woman who collaborates or causes the violation?” Ed In Dret *Revista para el análisis del Derecho* 4/2007 –format digital–, cit , p 18) 2007

Laurenzo Copello, P , "Do specific gender figures be needed to better protect women?", *Criminal and Criminological Studies*, vol 35, 2015, p 788 Madrid

Mallandrich Miret Nuria "The procedural treatment of civil precautionary measures in case of gender violence" pp 435-458 *Journal of Procedural Law* number 1 January 2012

Peral M 2018 *Abused Mothers* Ed University of Málaga 2018

Pérez J M ; Montalvo, A (2010) *Gender-based violence: analysis and approximation of its causes and consequences Gender-based violence: prevention, detection and care* Editorial Group Madrid 2010

Pérez M : Some keys to the criminal treatment of gender-based violence: action and reaction *RJUAM*, No 34, 2016-II, pp 17-65 ISSN: 1575-720-X

Ruiz-Jarabo C 2004 *The violence against the woman* Ed Díaz de Santos Madrid 2004 Pag 39-50

Rodríguez-Zapata Pérez, Judge of the TC, in his special particular vote of STC 12/2008 of January 29

Salvador Concepcion R *Gender Violence in Spain United Kingdom, France and Italy a global concept?* Pag 136-161 Editorial Dyckinson, Madrid 2015

Simonovic D, was appointed Special Rapporteur on violence against women, its causes and consequences by the UN Human Rights Council with the aim of recommending national, regional and international measures and strategies to eliminate violence against women

Utrera Guitérrez J - "Protocol for the implementation of intra-judicial family mediation in the courts that hear about family matters" and in his article of the *Journal of Mediation* 2014, vol 7, No 1, pp 24-35

Valeije Álvarez I , *Journal of Studies Criminological*, nº26, Madrid 2006 p 342-354

Vallespín Pérez D "Some reflections on the procedural repercussions of LO 1/2004, regulating measures of comprehensive protection against gender violence" of the *Journal of Procedural Law* no 3-4 / 2008, November 2008, Madrid, pp 181-185

Vázquez Sotelo, J L Prologue to the work of Prof Vallespín "The connection in the criminal process", *Cims Editorial*, Barcelona, 2007, p 15 In the same direction of

thought Sánchez, C Prologue to the work of Professor Del Pozo Pérez "Domestic Violence and Misdemeanor Trial", Ed Atelier, Barcelona, 2006, p 17

Von Hentig Hans The Crime Madrid: Espasa-Calpe, 1971-72 Original: Das Verbrechen Berlin, Springer, 1961 Von Hentig Hans "Studies about criminal history" Ed Christian Helfer Stämpfli, Berna 1962

Gouvernement Delegation for Gender Violence «Macrosurvey of Violence on Women 2015», especially Chapter 13, "Physical violence outside the scope of the partner or ex-partner" Repertory of Practical Recommendations on Violence in the Workplace Ilo Geneva 2003

4. Journals

Journal of Procedural Law number 1 January 2012

Revista para el análisis del Derecho 4/2007 –format digital– Ed In Dret cit , p 18) 2007

Journal of criminal politic Ed Un La Rioja, 2012, p 335-419

Journal of Studies Criminological, nº26, Madrid 2006 p 342-354

Legal Magazine of the Autónoma University of Madrid No 13 June 2005 Pages: 133-164

Journal of Criminal Law, ISSN 1576-9763, no 26, 2009

5. Internet Sources

Alcuni Risultati e Valutazioni, pág 46-49 Ed Observatorio Nazionale Violenza Domestica, 2010, en www.onvd.org

Conclusions of the Annual Session of the Commission on the Status of Women, Ed UN Women, New York, 2013, in www.unwomen.org

Data on Complaints, Criminal and Civil Proceedings registered, Protection Orders requested in the Courts of Violence against Women and Sentences issued by the Jurisdictional Bodies in this matter of the Observatory against Domestic and Gender Violence, Ed General Council of the Judiciary, in www.poderjudicial.es

European Union Agency for Fundamental Rights, 'Violence against women: an EU-wide survey' Available at sites/default/files/fr-2014-vaw-survey-main-results-apr14_en.pdf

Joint us all around the world, Ed ONU-Mujeres, New York, 2013, en www.un.org/es/women/endviolence

Kolb, C , *Le Misure contro la Violenza Intrafamiliare: aspetti giuridici e sociologici*, in *Ricerche de L'Altro Diritto*, Ed Centro di Documentazione su Carcere, Devianza e Marginalità, in www.unifi.it

Last datum about violence of gender Ed Ministry of Sanity, Social services and equality, 2015, en www.msssi.gob.es/

Leganés Gómez, S , *The Evolution of the Crime of Abuse in the Family and the Treatment of Aggressors*, in www.porticolegal.com

Report of the Working Group on the Issue of Discrimination against Women in Law and Practice, United Nations Edition, 2012, in www.ohchr.org/Documents

Speech by the Secretary of State in the House of Commons, 22 June 2004, in www.parliament.uk

Study on All Forms of Violence Against Women, Ed United Nations General Assembly, New York, 2006 in www.un.org/es/women/endviolence/documents.shtml

The Main Advances Strengthening the Protection of Women Victims of Intimate Partner Violence Ed Ministry of Social Affairs, Health and Women's Rights, 2015, in <http://stop-violences-femmes.gouv.fr/Les-chiffres-de-reference-sur-les.html>

Stampa su Web e Violenza in Famiglia, Ed Osservatorio Nazionale Violenza Domestica, 2008, en www.onvd.org

Violence Against Women Guidance, Ed Crown Prosecution Service, London, in www.cps.gov.uk

Wolf Report, *Acess to the Justice*, en The Interim Report, London, 1995, en www.legco.gov.hk