

# THE PROBLEMS AND GAPS OF THE LAW OF GENDER VIOLENCE IN SPAIN

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## I Introduction

Since the entry into force in Spain, of the law of protection of victims of domestic violence in 2004, have not ceased criticisms, controversies and discussions on it. It is a law that since its start has been the subject of several resources of unconstitutionality by judges, of individuals, political parties and associations that believed that the law was unconstitutional and that affected fundamental rights enshrined the Spanish Constitution, the principles of equality of sexes and equality in the law.

The Spanish Constitutional Court, the highest judicial body in Spain and Constitution's guarantor, has tried to solve these problems with sentences<sup>1</sup>. These sentences were similarly controversial, there is no unanimity in the judgment or sentences, by some of the judges and they pronounced against this sentences, with special votes, explaining several reasons and them disagreement.

So judges like Conde Martin de Hijas and Rodriguez Zapata Pérez, they have been pronounced against such statements, writing their opinions discordant in it and explaining the reasons, i.e. such as discrimination between man and woman that makes the law is unconstitutional, as well as the punitive differs by sex and that in no case can be set as a distinguishing criterion and lastly created legal uncertainty citizens.

And that is one of the most important criticisms to the law which is only aimed at women purely and exclusively, protecting only the women and excluding the man. It is not given to man protection, nor to other types of joints when there is domestic violence regardless of the gender of the person.

In any case, we can determine that the law of gender violence in Spain suffer from five major problems that make it ineffective and does not help to reduce the victims of violence. They can fit into the following which are explained below.

### II A. Use of precautionary generically and without being sufficiently informed

The first of the problems that we can find in the law, after the complaint by the victim, is the adoption of measures generally precautionary to protect to the alleged victim by the judge, who

is correct in all cases, try to prevent and take measures that prevent the so called aggressor again affect the act violent against women.

However in Spain, court abuse of them, with a battery of standardized and automatically be imposed so that it often happens that they do not fit or are not effective for the protection of the victim and also the rights of the alleged offender all this limit unnecessarily.

This leads to not fix the supposed conflict between both sides that it becomes rather worse. This does not mean that a violent fact measures may not apply precautionary but that its adoption should respond to the principles of proportionality, motivation, safety and temporality.

By the way, i.e., in the event of a husband slaps his wife in a domestic common fight and both name calling of mild form, without psychological violence or physical, is completely abusive and disproportionate to apply measures of restraining order for undetermined period, prohibition of residence, of communication and of residence at the same house. This is most often given frequently in Spain and what causes is a desire of revenge and despair in the man which makes it often leads in fatal situations such as the death of the victim and subsequent suicide of the perpetrator.

Why should assess these measures and always try to reconcile the dispute between both sides reaching its origin to reach a solution.

### B. Fraudulent use of the law for other purposes not provided in the law

It is well known that the procedures of family, as divorce or custody of children, can extend in time considerably, along with the economic and emotional costs which carry with them. Forensic practice is seeing a dramatic increase in cases in which the alleged victim, a woman, comes to report facts without criminal relevance, exaggerating to adopt civil measures, as is the use of the family home, the child custody, parenting time, to save having to go to the civil courts with the costs involved.

This is a law fraud, since it takes advantage of the law for some purposes for which the law was not created.

So, that it is necessary that the precautionary measures that they are taken, as a result of gender-based violence, have a limited duration and in any case oblige to both sides, to bring the corresponding action through civil, because the civil guarantees are higher than in criminal proceedings, which for the alleged perpetrator is considerably limited their chances of defense and their rights.

### **C. Absence of regulation of gender violence among children**

As they advance times, each time they increase and intensify relations between minors, which are also not free of controversy, neither of which can be considered as gender based violence. Actions such as controlling in every moment the mobile to his girlfriend, asking where is at each time and with whom, or require sending intimate photos, are in Spain, reprehensible conduct the subject of illicit criminal and subject to the law of gender violence.

The existing law<sup>2</sup> does not set any action or makes reference to cases of violence against woman, with the exception of victim status when their mothers are so and as amended came into force in the year 2015<sup>3</sup>.

What happens is that in Spain, in the law of gender violence, not regulated or even referred to children and cases of violence among children and therefore does not apply them law to not record with the age of majority. Then you can quickly see the problem, and how applied to safeguard the victims, what measures can be adopted, restrictions can be set to the alleged attacker to prevent further violent episodes and all this without losing sight of the act.

It is clear and evident that in the above-mentioned act not has regulated nothing by the legislator and that is evident, the loophole of the law itself.

Therefore you must reform both the act and the violence against women act to have accommodated the violent acts that occur among children under and always taking into account the peculiarities and intrinsic characteristics of the child, especially in imposing measures precautionary.

The method that seems more appropriate, not only for the children but also adults, case is the social education of values such as respect, tolerance and equality of the sexes in the law. In addition to education, it is necessary that the re-education of the violent and society, be guided by professionals such as psychologists, workers,

social educators and also for the case of convicted of own courts which shall ensure the social reintegration of inmates.

You will only be eradicate gender-based violence reeducate society and of course changing the law, which effectively protect victims and not rehabilitate and re-educating the abusers, because of the contrary, continue with the problem of the law of gender violence, not only in Spain but in all Europe, whose criticism or major defect is the lack of effectiveness of the same.

### **D. False report**

To the thread of what mentioned in the section concerning the fraudulent use of the law by the victims, second, also You can see a substantial increase of false reports, for either damage to the partners or ex-partners for different reasons, subjective, either for judicial benefits with the adoption of measures in favour of the alleged victim.

The false report consists of reporting a person originating from events or actions that is not guilty of knowingly false.

This conduct from all points of view reprehensible and immoral apart from being constituent of crime<sup>4</sup> sets out all the judicial mechanism using in vain and useless and what is worse, to do that there is an erroneous judicial decision.

What's not in the law, it's the compensation to the man who has been charged unjustly and against that is a judicial process continued and on which have been criminal and civil measures such as them prohibition reside in the family home or the submission to a system of visits to see his children with loss of the custodian like a example.

It is clear that when false complaint is committed, the results produced should be recovered somehow, thus re-establishing the rights that you have private or restricted to which has been unjustly accused.

Therefore, we must establish a mechanism to regulate these situations by reforming the law of gender violence and the criminal code.

### **E. Breach induced or consented**

Another problem seemingly insoluble in the law, is the breach of a sentence or measure precautionary, helped or with the acquiescence of the victim, i.e. when actively or passively way woman let to his attacker to breach the sentence or measure precautionary.

These cases tend to give most often, i.e. and without going any further, we have it when man is sentenced by a judgment for beating his wife

and establishes the prohibition of communicate and live together for a certain time normally one year. Because in many cases the woman decides to skip the sentence and start living together with their husband, forgiving him, despite the sentence or when the man is who takes the first step and begins to communicate with his wife or fiancé, all that with the blessing of her. In both cases induced or consented to breach occurs.

Far from getting an answer clear and effective by the courts on this issue, the fact that there is a unity of criteria, including the Court Supreme trying to give reasons why those who breach consented to these cases should be decriminalized, citing the right of human beings to regulate their lives private and intimate, on the basis of the principle of freedom and decide at any moment with who you want to be attached to the private sphere. This Court recently claiming that in these cases *ius puniendi* of the State must not be implemented because it would damage a good senior legal which is the right to freedom and private life and that if women decide to resume cohabitation can not apply a ruling which would restrict constitutional basic rights.

Of course in this law in Spain, it not regulate anything about this case and only refers to the code criminal and this applies to the previous example articles dealing with the breach of sentence or measure.

With regard to the ordinary courts or in the second instance, the previous course, would judge also as a breach, despite the numerous criticisms of various social sectors as the feminist collective, family and even by judges who see unfair punishment.

It is clear that there is no unity of criteria when deciding on the breach consented to by the Spanish courts, thereby giving a poor image inside and outside the country.

It is also important to note that *ex officio* police or anyone who knows that there is a conviction and witness of their breach, can bring to the attention of the courts and proceed to the imputation of both, man and woman, despite them willingness to be together.

The doctrine also passionate arguments with arguments for and against one or another way, have occurred in ones alleging that criminal law is not a law -menu that can be used by citizens to the will and convenience and which, in any case, the judgments are enforced in all cases and without exception since otherwise it would lead to an unsafe and anarchic system.

Another sector of the doctrine holds that it is an aberration that the person's right to is private life and to be with whom you want to constantly be limited by a right that has been made by men for the regulations of their lives and never in short can be subject to criminal law<sup>5</sup>.

### III Conclusions

Undoubtedly, gaps and problems generated by the application since the year 2004, the law of gender violence in Spain. This law is characterized by its ineffectiveness to get to the bottom of the problem and its gaps and silences in some problems which we have already mentioned above.

It is necessary to reform the law by making it more effective complementing loopholes and including new sociological and not only legal to solve aspects the problem of gender-based violence, which need to be set a non-judicial procedure to resolve personal conflicts, which is the source of the problem. Also should be regulated gender-based violence among children, compensation for the defendant for false complaint, the application of measures precautionary to prevent that they applied generic and ineffective way and finally the clear regulation of the induced breakdown.

In the case of the reform of the law, in the case of measures of general application he should begin by delimiting the assaults in several groups, according to their severity or importance, i.e. for the case in that there is no serious physical or psychological violence, you should set a new not only judicial procedure, in which specialists, such as psychologists or social workers arrive at the wing root of the problem and identify the problem and propose a solution together with the judge. This new procedure would cover not only the legal and various disciplines, just as well begin to eradicate the problem of gender-based violence and would start to become more efficient.

In the case of the false complaint by the woman, should be available with a new regulation that can compensate the man of measures that have been taken, as for example the loss of custody of children, the prohibition of reside in the dwelling against it.

Regarding the breach consented to or induced, it should establish a procedure that could leave suspended sentences, when the couple decide unequivocally start to live together again, which would be a success from the point of view of efficiency.

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### References

- <sup>1</sup> See, Sentencias del Tribunal Constitucional 59/2008 ó 45/2009.
  - <sup>2</sup> See, Ley Orgánica 1/1996, de 15 de enero, de Protección Jurídica del Menor, de modificación parcial del Código Civil y de la Ley de Enjuiciamiento Civil.
  - <sup>3</sup> See, Ley 26/2015, de 28 de julio, de modificación del sistema de protección a la infancia y a la adolescencia.
  - <sup>4</sup> See. Art. 456 CP se castigarán con pena de *prisión de 6 meses a 2 años y multa de 12 a 24 meses*, si fuese delito grave. La pena de *multa de 12 a 24 meses*, si se tratase un delito menos grave. La pena de *multa de 3 a 6 meses*, si se trata un delito leve.
  - <sup>5</sup> See, SAP de Barcelona de 23 de marzo de 2007 (JUR 2007\136706) y SAP de Madrid de 17 de mayo de 2007 (JUR 2007\170126).
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### Anotācija

Rakstā analizēta dzimuma līdztiesību nodrošināšanas problemātika Spānijas tiesās, skatot lietas par vardarbību ģimenē. Autors uzskata, ka 2004. gadā pieņemtais likums par vardarbības novēršanu ģimenē lielākā mērā aizsargā sievietes tiesības, savukārt likuma robu rezultātā vīriešu tiesības analogiskās situācijās tiek mazāk aizsargātas. Minētā disproporcija it sevišķi reljefi izpaužas krimināl-tiesisko attiecību noregulējumā. Civiltiesisko attiecību noregulējumā minētā disproporcija vērojama mazāk.

Spānijas Konstitucionālā tiesa tās nolēmumos meklē taisnīgus risinājumus lietu par vardarbību ģimenē izskatīšanā.

### Аннотация

В статье рассматривается проблематика гендерного равноправия при рассмотрении дел о насилии в семье судами Испании. Автор утверждает, что закон Испании 2004 года о предотвращении насилия в семье защищает права женщин в большей степени, а права мужчин в результате имеющихся пробелов в законе по сути остаются незащищенными, особенно это касается уголовно-правовых отношений. В гражданско-правовых отношениях такая диспропорция прослеживается реже.

Конституционный суд Испании своими решениями добивается справедливого урегулирования взаимоотношений в семье.