THE PUNITIVE DISTINCTION ON GROUNDS OF SEX IN THE PENAL CODE OF SPAIN AND THE ORGANIC LAW 1/2004 OF 28 DECEMBER ON INTEGRAL PROTECTION MEASURES AGAINST GENDER VIOLENCE

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Abstract

The aim of this article is to examine the punitive differences after come into force of the law 1/2004 of 28 of december, (LVG) because this law protect only women and not men, studying the differences in the law enforcement, and what criminal consequences will have, in every single case, depending on the victim, if it's a woman or if it's a man.

In order to research the objective and fulfill tasks set the research project, the applied methods during the research progress are the following: analytical, inductive, logical, systemical. Also the method of the analysis of literature, the comparative legal method and theoretical method of research to investigate, analyse and summarize information of publications.

The methods chosen are very important in analysing the Spanish law, case law materials to opinions of legislator and law scientists.

Supported by the inductive and comparative method is used in order to make it able to analyse individual aspects of the law 1/2004 and the criminal laws its application and consequences in differents cases, from several theorethical conclusions.

The logical and analytical method was used in order to study content of the law, its protections to the victims and punishment and if with its application the society is better and secure for everyone, analyzing the effects in the citizens.

The overall object of this article *"The punitive distinction on grounds of sex in the penal code and the organic law 1/2004 of 28 december on integral protection measures against gender violence"* is a national human rights interests, however the direct object is national interests in the field of domestic violence and violence against the women, and the protection of the woman in the society and her freedom and development as a human being. Moreover the

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the application of this law creates social conflicts, make deeper the differences between man and woman and it doesn't solve effectively the problem of the violence against the women.

The subject matter of this article is the Spanish Criminal law in connection with the violence against women and its effective application and using different methods to check if the principle of equality in the law and of sexes is applied in Spain in an egalitarian and fair way. The most common cases are the physical and psychic aggressions, threats and coercion, and this is what the law 1/2004 and the Spanish criminal code try to sorted out.

Also, this law is strong criticized by many sectors, and in this article it's defended the position that this law should be applied to both sexes, without distinction and so, to try to convert the society in a space of equality and justice.

The main conclusion shows that actually in Spain, the society is suffering a very unfair law, specially for men, and does not help really to women when they are assaulted.

It must to be changed this law, being applied to everyone without exceptions, that's means, without making differences between woman and man.

Keywords: gender violence, victim, integral protection measures against gender violence.

Introduction

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 SC), since often this issue has given rise to a variety of opinions, even this diversity of views to the highest constitutional sphere[1].

Rights and principles such as equality, presumption of innocence and guilt or that of penal proportionality, 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, the reform that has attracted more controversy by its wording seemingly unconstitutional, is the operated in the Penal 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 148.4CP can contradict the arts.1.1, 9, 10, 14, 17, 24.2 and 25.1CE, since invading the sphere of the principle of equality, connected with the values of freedom, the dignity of the person and justice. You can be understood with this wording is discriminating adversely to men, since it is situated as aggressor only men, just because the simple fact of being a man and as a distinguishing criterion, strictly excluding women.

The LVG, 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 done as a manifestation of discrimination and/or the situation of inequality and the power relations of men over women, when you have had with them, 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 men and makes 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.

It's true that also in the assaults of this nature, statistically speaking the highest percentage corresponds to the women, being a small 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, 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 LVG, 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.

This is amazing and maybe paradoxical or even absurd, because it goes against what the own LVG defends[2], 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 LVG as it 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 LVG, 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 clear and evident also goes against the principle of equality of sexes and the presumption of innocence, included in the SC 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.

I 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

Spain signed the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) in 2014[3]. The main provisions were the States which ratify the Convention must criminalize several offences, including: psychological violence stalking; physical violence; sexual violence, including rape, explicitly covering all engagement in non-consensual acts of a sexual nature with a person, forced marriage; female genital mutilation, forced abortion and forced sterilization.

The Convention states, that sexual harassment must be subject to "criminal or other legal sanction". However, Spain through the Law

1/2004, mentioned above, (pioneer in Europe, was the first one) and the Criminal regulation (Código Penal, herein after CP), it punished already almost all the offences from the Istambul Convention of 2014, and it wasn't any new thing for the Spanish authorities. Despite, Spain usually sign all the Council and agreements in Europa's frame, inside its borders, this is another thing, because there are big differences between man and woman, how we have been explaining, because the Law 1/2004 (LVG) just gives protection to woman and not to the man, without any juridical acceptable raison, in about domestic violence.

The entry into force of the LVG, reflects the seriousness what we have been explaining, since we have a problem whose point of discord, is in the different feasibility procediment- criminal, because for the same facts, the existing legal procedures is different, searing physical or mental damage, shall apply to LVG 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 LVG, 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 C.P. respectively.

This example shows the injustice of the LVG, 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 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 frequently because the current LVG does not solve problems but rather the create, doing bigger the differences between sexes that nobody benefits from.

Therefore according to the LVG, 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 CP in relation to the basic type of article 147 CP, violate the right to the presumption of innocence, connected with the principle of guilt, contained in article 24.2 CE, 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 LVG 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 LVG art.1, in relation to article 148.4 and 153 both CP, 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 LVG.

Thus, the jurisprudential line of the Provincials Courts, ratified by the Supreme Court, indicates that the general application of art. 153 CP, because to be applied as a crime of violent mistreatment in the family, it is necessary that the facts reported 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 CP in cases of mutually accepted quarrel as it is considered as crime. In addition, the jurisprudence indicates that the type contained in art. 153 CP 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 CP, because the concept of domestic violence is not expressly defined by the legislator in the way that day with the LVG 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 LVG'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 LVG 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 LVG.

In the art. 1.2 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, art. 37 LVG changes the wording of art. 153 CP, 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 mentioned 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 criminal 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".

II Study of jurisprudential and doctrinal lines

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 EC for violation of the dignity of the person, the rights of equality art. 14 EC and the presumption of innocence art. 24.2 EC[4].

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 departing[5] from it. However, currently the jurisprudence of the Constitutional Court (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.

Without going further, 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 deprivation of the right to possession and possession of weapons of 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 SC, since it contains two differentiated principles, the principle of equality and prohibitions of discrimination, this means that all Spaniards 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 contained in art. 14 SC, 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 categories[6].

In relation to the prohibition of discrimination of the text of

art. 14 SC, the TC, in general, in relation to the list of grounds of discrimination, which are strictly prohibited by Article 14 SC, 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 SC 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 SC, 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 differentiation[7].

That means, that on the one hand the same raisons of which he speaks the text of art. 14 SC, 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".*

It is clear that there is a breach between equality before the law of the sexes and the prohibition of discrimination of art.14 SC. Thus, the CT 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 SC 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, 1983[8], 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, ie, 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 situations[9].

In other countries this problem has also arisen, for example in Switzerland[10], 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.

Returning to Spain, the TC had followed this same line. Thus, in the STC (Sentence of Constitutional Court) 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 ...".

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. 53.1SC...", again stresses the idea that" ... the aforementioned article 14 SC 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 ... ".

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 SC, 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 differentiation"[11].

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.

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 CE.

Therefore the TC understands that the legislator, when creating LO 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 LO 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"[12].

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 reason, he thinks that although in the foundation of STC[13], 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 Pérez[14], who criticizes that the wording of art.153.1CP 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.

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 Sotelo[15] 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 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 SC, 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 legitimizes 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.

Conclusions

The organic law 1/2004 of 28 December, discriminates against the male by the mere fact of being so, favoring and overprotected absurdly to women against of the man.

This goes against the fundamental rights enshrined in the Spanish Constitution, and seriously violate principles such as the equality of the sexes, or the principle of equality in the law or the principle of innocence.

The violence against Women Act, establishes, as a differentiating factor, sex, to legislate unfairly, not fair nor effective, so that the sex of a person, in this case man becomes criteria determinative, when it is punished behaviors. Thus, exactly the same acts committed by a man or by a woman, who live together or have had a relationship of affection, will have a different penal treatment, i.e., if it is man will apply the law 1/2004, but on the other hand, if you are a woman It will be applied with other articles of the Criminal Code, of course more benevolent and without having rigged measures precautionary as severe as those that are in the law and disproportionate.

For example, if a man hits a woman that has lived or had a relationship slightly, applies it the law of gender violence with its restrictive measures, for example, the restriction approach, communicate and of course live together in appropriate, however if the woman that hits slightly to a man that has lived or had a romantic relationship, are only fined and if it must compensate economically man injury if any Needless to make more comments, in relation to

the difference in legal treatment.

This law is without doubt, a law unfair because it is not equity between both sexes and also contradicts itself because in its preamble that its reason or motive primary, is to advocate for gender equality in society between men and women and in the law. However it does the opposite, discriminates against the man by his condition of man and delves into the social and legal inequality of sexes.

The law of gender violence has not come to solve the existing problems, the contrary has aggravated these problems resulting in currently a clear in society division, there is a clear legal inequality and a law unjust and ineffective, that does not help to solve any problem.

As for the courts, have been raised numerous appeal of unconstitutionality even by judges, who see unfair and attempted against the man, resolving ultimately the Constitutional Court that the law of gender violence not contradicts any precept or principle of the Constitution, but in a situation of inequality and preponderance of man tries to apply also unequal measures to fight such inequality, which has historically benefited men what is certainly something antijuridic, not equitable, and ineffective, as it is being seen today after the entry into force of this Act, she has not been solved nothing, on the contrary, the problem has worsened.

References

[1] There were numerous discrepancies in SSTC, reflected in votes inparticular carried out by judges, acting against the jurisprudential TC lineand away from decisions on this subject, about the collision offundamental rights and the aforementioned LVG.

[2] See in Exposition of Motives of the Law Organic 1/2004 of 28 de December.

[3] The Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) is a Council of Europe convention against violence against women and domestic violence which was opened for signature on 11 May 2011, in Istanbul, Turkey.

[4] See Article 10 EC 1, and Art. 14 CE.

[5] See the discrepancy between the judges of the TC, on the constitutionality of the LVG, reflecting its position in particular votes in STCs as important as the 59/2008 or 45/2009.

[6] See STC 222/1992 of December 11 or STC 155/1998 of 13 July.

[7] See STC 103/1983 of 22 November, STC 128/1987 of 26 July or STC126 / 1997 of 3 July.

[8] See art. 14 SC.

[9] See note 12.
[10] Judgment of the Swiss Federal Court of February 14, 1982.
[11] See STC 222/1992, of 11 de December.
[12] See STC 55/1996, of 28 de March and STC 136/1999, of 20 de July.
[13] See STC 59/2008 y STC 45/ 2009.
[14] See STC 59/2008 y STC 45/2009.
[15] 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", Atelier, Barcelona, 2006, p. 17.

Anotācija

Raksta mērķis ir noskaidrot atsevišķas atšķirības un nekonsekvences, kas radās sakarā ar 2004. gada 28. decembra likuma Nr.1 stāšanos spēkā, jo minētais likums, autoraprāt, aizstāv vienīgi sieviešu tiesības, atstājot nenoregulētas vīriešu tiesības, noskaidrot likuma piemērošanas aspektus un kādas konsekvences vai nekonsekvences katrā konkrētā gadījumā rodas atkarībā no tā, vai cietusī persona ir sieviete vai vīrietis.

Lai atbilstoši pētījuma mērķim padziļināti izanalizētu pētāmo objektu, tika lietotas šādas zinātniskās pētniecības metodes: analītiskā, induktīvā un deduktīvā, loģiskā, sistēmiskā un salīdzinošā.

Raksta galvenie secinājumi saistāmi ar to, ka spēkā esošie likumi, autoraprāt, ir netaisnīgi, tie vienlīdz neaizstāv vīriešu tiesības, kā arī negarantē sieviešu tiesību aistāvību gadījumos, kad tās tiek pakļautas seksuālai vardarbībai. Autors iestājas par likumu grozījumu nepieciešamību, kuru pieņemšanas gadījumā tiktu vienlīdz nodrošināta jebkura dzimuma aizsardzība pret seksuālo vardarbību.