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The Interpretation and Application of the Law with a Gender Perspective in Spain: Challenges and Outstanding Issues

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Abstract: This work, situated within the Spanish legal context, presents a reflection upon the need to apply and interpret the law bearing in mind the mandate of the gender perspective contained in national and international legislation. In spite of the significant advances, in questions of gender equality, evidenced by the Spanish legal system in recent decades, these have not led to real, effective equality. In the spheres of both private and public law, this task should be prioritised and undertaken in transversal fashion by all legal operators, judges in particular. Without this commitment, the guarantee of women's human rights will continue to be hindered by the shortcomings of an androcentric legal culture that perpetuates structural discrimination against women.

Keywords: feminist legal theory; gender perspective; interpretation; Spain

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1. The Objectives of the Research Project

At this point in the 21st century, no one can deny that one of the most successful processes in the conquest of rights is the one that the feminist movement has been leading for three centuries. A process that, incomplete and subject today to chauvinistic reactions all over the planet, has led to a clear transformation of democratic legal frameworks. Since the proclamation by the United Nations of 1975 as International Women's Year, we have witnessed a gradual consolidation of legal tools that have sought to achieve effective equality between men and women. In this task, unfinished and subjected to academic and political resistance, a fundamental role has been played by feminist theorists[1] who have questioned the political and legal model inherited from liberalism, while suggesting alternatives to a social pact based on the masculine subject as a reference and on the hierarchical dualisms of the patriarchy.

It is obvious that without the contribution made by legal feminism, legislative instruments committed to gender equality would not have been approved, and a social conscience critical of patriarchal structures would not have been generated. Just as, without the continuous work of so many feminist associations and collectives, these changes would not have been driven from civil society.

Feminist legal theory has evidenced the shortcomings of a series of paradigms that, conceived of a couple of centuries ago, do not respond to the realities of the complex societies of the 21st century. The same division between formal and material equality, which continues to support much of the dogmatic construction in relation to non-discrimination against women, is ineffective in a context in which the principle of autonomy is conditioned by intersectional factors. Parity, an indispensable tenet of an advanced democracy, necessarily has to stem from a complex equality, which acts as a principle that fundamentally and transversally underpins every constitutional right.

In spite of regulatory advances, there is still evidence of limitations, such as those deriving from the absence of the coercive force required for them to be effective. In other words, one of the main weaknesses of equality laws continues to be the abuse of techniques characteristic of a soft law[2], which reduces the commitment to a question of programme, orientation or political will. A process that, in the best of cases, requires the subsequent cooperative involvement of multiple agents in order to generate the desired results.

In the specific case of Spain, the equality laws approved well into the 21st century, which draw upon advances in international law, and above all the EU's commitment to gender equality, have constituted a substantial change in a legal framework that from 1978 onwards had to undergo a radical transition from the androcentric and patriarchal parameters of the Franco dictatorship to recognition of women as citizens.

Before Franco's time, during the Second Republic, the promulgation of the Constitution of 1931 was forced to review the previous legal system, in which the woman was considered as an eternal minor, with a very limited possibility of acting and, in any case, under the guardianship of her husband or father. The 1931 Constitution recognized equal rights between the sexes in both the public and private spheres. Later, in 1932, women obtained the right to active and passive suffrage.

However, at the beginning of the Franco dictatorship, the advances of the Second Republic were repealed, and women lost their right to self-determination, being once again relegated to a permanent patriarchal power.

Certain advances in the conquest of rights by women can be found in Law 56/1961, which improves their situation in the public sphere and recognizes professional and work rights.

Until the promulgation of the Law of 2 May 1975, known as María Telo Law, women did not obtain full capacity to act in the private sphere. This law removed the duty of obedience to the husband, the marital license and the rest of the restrictions that limited their possibility of acting. And with the Law for Political Reform of 1977, the right to active and passive suffrage was restored for women.

The definitive and radical change came courtesy of of the Constitution of 1978, which is based on the dignity of the person and the free development of personality, on the prohibition of all discrimination based on sex, and on equality of rights and freedoms for men and women.

Nowadays, citizens and public authorities continue to work so that equality between men and women in the Spanish State is not only formal, but also material.

In this process, despite the frequently wavering nature of its rulings, and in spite of shortcomings in terms of the gender perspective of its work, a fundamental role has been played by the Constitutional Court (CC), whose doctrine, in turn, owes much to what the European Court of Human Rights and the EU Court of Justice have consolidated in this area. However, and despite the progress that has undoubtedly been made, we continue to live in a society that is formally equal, but in which real data continue to show how structural discrimination against women persists and is even reproduced in new forms.

Indeed, the situation caused by the pandemic has evidenced the persistence of a *sexual contract* that conditions the citizenship of women, insofar as it renders them responsible in the main for care work. The crisis experienced during recent years has shown, on the one hand, our vulnerability as human beings in need of care and, on the other, the excessive burden of responsibility and care assumed by women (Aguado and Benlloch 2020).

It is true that during the forty years of life of the Spanish Constitution (SC), there has been a positive evolution, thanks to the action of the law, to public policies and the complementary action of jurisprudence, especially that of the CC. However, the co-responsibility of men and women continues to be more an objective than a reality.

In short, the critical context of recent years illustrates the fact that we have not succeeded in transcending the power structure represented by the patriarchy or machismo as a culture. In other words, machismo is a form of a patriarchal culture and a form of

sexist discrimination based on the superiority of men and the correlative subordination of women.

In this political and cultural framework, the law is an expression of that power structure and a power in itself, in the same way that legal culture forms part of that expression of an androcentric framework that continues to define subjectivities and relationships; hence the urgent need to change a law made in the image and likeness of man, and an entire culture that marginalizes women. A situation that becomes more complex in Europe owing to phenomena such as increasing migration or cultural and religious diversity.

This is the complex challenge to which the research project *GEN-DER, Generando una interpretación del Derecho en clave de igualdad de género*[3] has attempted to respond. This project arises from the confirmation of how the legal system continues to be interpreted and applied with a patriarchal bias. Therefore, we have examined the extent to which the mandate established by Article 4 of Organic Law 3/2007, for effective equality between women and men (LOIEMH)—"Equal treatment and equal opportunities for women and men is a reporting principle for the legal system and, as such, will be integrated and observed in the interpretation and application of legal standards"—is being applied by those whose function it is to apply and interpret the legal system.

2. Justice with a Gender Perspective and Effective Safeguarding of Women's Rights

To begin with, however, we should clarify what is involved by taking into account that mandate in the jurisdictional function, i.e. how law with a gender perspective should be applied and interpreted. This involves, firstly, understanding how liberal thinking articulated a political and legal model based on a dual system, on the division between the masculine and the feminine. A dichotomy that implies hierarchy, since men and the masculine are regarded as superior. That is to say, everything linked to men and masculinity has more social value than everything related to women and femininity.

This resulted in unequal protection of the experiences of men and women. Initially, there was an attempt to correct this inequality by means of instruments based on equating men and women, which left social structures unaltered.

Within the sphere of the European Union, the struggle against gender inequality has passed through different stages. On the basis of the two-fold dimension of the principle of equality, the formal and the material, the last phase can be identified with the mainstreaming of gender. A technique that aims to address the structural inequalities between women and men.

Justice with a gender perspective would be the transfer of gender mainstreaming to jurisdictional activity. Judging with gender perspective is a holistic and contextualised analytical technique that obliges courts to adopt interpretations in accordance with the principio pro persona, via equitable solutions to unequal gender situations. Ultimately, it is a method of legal analysis to transcend the stereotypes that maintain the subordination of women (Poyatos i Màtas 2021, p. 19).

This methodology should be present in every jurisdiction (civil, penal, contentious administrative, social and military). It renders it necessary to contemplate the legal conflict in contextual fashion and bearing in mind the power relations that protect gender asymmetries. The right to equality implies equality in the use and enjoyment of other laws and freedoms in every context of life, and that involves contextualised interpretations (Rubio Castro 2019, p. 232). Moreover, it is necessary to interpret legal standards and the terms and concepts contained within the latter in connection with the context and social reality of the time in which they are to be applied (Art. 3 Civil Code). The present moment demands a review of what really matters, which is caring for and attending to people, as has been made extraordinarily clear by the healthcare crisis caused by COVID-19.

In this context, we can also see how equality is violated when the law restricts itself to undertaking a process of assimilating women to men, integrating them within the legal standards historically established by men and for men, hence the importance of contextualisation and of the incorporation of the gender approach. Otherwise, the law itself

might turn against equality. The absence of this approach has meant that many significant regulatory initiatives, such as those related to rights of conciliation, have had contrary effects to those initially intended, by being interpreted as rights directed essentially at young working mothers and not as rights the ultimate objective of which is the promotion of the co-responsibility of men and women in housework and care work (Rubio Castro 2019, pp. 212–16).

In Spain, the administration of gender justice is not the general rule. This continues to be a minority methodology, rarely used by the Supreme Court or the Constitutional Court. Among the elements that hinder justice with a gender perspective, one can highlight: (a) the lack of training in questions of gender and international anti-discriminatory law; (b) excessive adhesion to formal and positivist justice; (c) the cognitive influence of the stereotype that hampers our identification of naturalised discriminatory regulatory impacts; (d) the overloaded judicial system and cognitive fatigue as an objective factor that may hinder its integration because this methodology requires additional legal reasoning that must be constructed case by case.

Under the androcentric cover of the law, falsely objective and neutral, there continues to be a legal culture that hinders the defence of women's rights in the courts. The presence and influence of gender stereotypes within the Spanish justice system is an obstacle to the correct protection of women's interests and, furthermore, renders the latter an unreliable institution for the resolution of problems arising from a patriarchal society. For instance, the last macro-survey on violence against women in Spain (Delegación del Gobierno contra la Violencia de Género 2019) revealed that over half of the women in Spain have suffered some kind of physical, sexual, psychological or economic violence during their lives. However, only 8% of the women who had been victims of sexual violence outside their relationship with their partner had reported this violence. When the violence occurs within the relationship, the percentage of denunciation is only 32.1%. In any case, the average time lapse between a woman suffering gender violence and requesting some kind of help or reporting that violence is eight years and eight months, increasing significantly when the female victim has some kind of disability or is elderly. Among the reasons for postponement of verbalisation of this situation are fear of the aggressor (50%), the belief that they can resolve the situation alone (45%), not identifying themselves as victims (36%), lack of economic resources (28%) or fear and lack of knowledge of the legal process (19%).

When the barrier of denunciation is overcome, the obstacles faced by women continue. Several studies have documented, among others, numerous cases in which women have not been correctly informed of their rights, with inadequate assistance provided by the legal aid representing them. There is also evidence of less ex-officio encouragement on the part of the judge or public prosecutor during legal proceedings involving women's rights. It is also common, in courts of law, for there to be perception only of violence of a physical nature, it being more difficult for judges to assess economic, sexual or psychological violence. Another of the practices detected is the continuous questioning of the testimonies of female complainants, to the point of ridiculing and re-victimising them (Amnistía Internacional 2012, pp. 1–15; 2018; Rodríguez Luna and Bodelón González 2015, pp. 119–21).

This data reveal part of the long road still to be travelled in questions of safeguarding women's rights. Although Spain ratified the CEDAW[4] in 1983 and recognised the competency of its Committee in 2001, much remains to be done in order to eradicate the institutional violence that threatens women and children. For example, various UN rapporteurs (Naciones Unidas 2021) have reiterated their denunciation of the existence of a structural pattern in Spanish justice that reproduces gender stereotypes in cases related to the custody of children of divorced parents.

To transform Spanish justice into a reliable and effective instrument for the protection of women and girls, it would be sufficient to heed the warnings issued by the CEDAW Committee. Let us recall that its General Recommendation n.º 33 declares the existence of significant obstacles preventing women and girls from accessing justice under equal conditions to men. Among them: the persistence of stereotypes among staff in the Admin-

istration of Justice; the existence of laws with discriminatory mandates, normally from an indirect perspective; patriarchal cultural norms that detract from the credibility and importance of women's denunciations and testimonies; or lack of consideration with regard to intersectional discrimination. The Committee recommends increased sensibility to gender issues on the part of justice systems, and opposition to the gender stereotypes that impregnate legal standards, practices and dynamics. A warning that, however, courts have yet to take seriously. It is demonstrated by an analysis of both CC and ECHR jurisprudence. In the same way, the response of civil or criminal jurisdiction to certain conflicts is found to be lacking, as well as the response of courts to questions of private international law. The following pages will be dedicated to this analysis.

3. The Scant Relevance of Gender Perspective in the Protection of Fundamental Rights

3.1. The Constitutional Irrelevance of the Gender Perspective

In its 40 years of existence, the CC has played an important role in the gradual incorporation of Spanish women into the status of citizenship. It should be remembered that they had a long history of subordination, translated in legal terms into a civil law that considered them to be minors and a criminal law that for centuries imposed upon women different behavioural guidelines based on gender and penalties of a moral nature, related in particular to their bodies and their sexuality. Despite this long history of discrimination, women barely appear in explicit fashion in the Spanish Constitution (SC), which opts for a "universal" masculine language that excludes them. Women only appear in their role as wives (Art. 32), mothers (Art. 39) and subjects discriminated against in relation to the possibility of becoming Head of State (Art. 57). In spite of this absence, the principle of equality, in its two-fold dimension, the formal (Art. 14) and the material (Art. 9.2), has been the interpretative key that during the last four decades has made it possible to remove legal structures built upon the reference of the male subject and, in parallel, upon the subordination of women. This gradual, and on occasions excessively slow evolution, began within the framework of civil law, via the review of the patriarchal laws that defined family law and continued in spheres such as criminal law or labour law (Balaguer Callejón 2005). During the early years of the SC, priority was given to policies of equality of opportunities, which paid particular attention to the work environment. A key role in this process was played by international law, through the UN commitment following the adoption in 1979 of the CEDAW, and by a Community Law that incorporated this objective among the foundations of the European project. To all this should be added the crucial role of the feminist movement and women's associations.

However, it should not be forgotten that our legal system did not take a qualitative leap forward in issues of gender equality until the 21st century. Organic Law 1/2004, of 28 December, of Comprehensive Protection Measures against Gender-based Violence (LOVG), and OL 3/2007, of 22 March, on effective equality for women and men (LOIEMH) represent a turning point insofar as they are two laws that seek to transcend the schemas of a sexual contract still in force and of a legal system articulated with masculine subjectivity as reference and feminine as "circumstance" which continues to give rise to discrimination[5]. It was these two laws that, explicitly, introduced gender perspective into our law, in transversal and principal fashion.

Throughout this long process, the CC has been far from an authority that has transformed "rules of the game" made in the image and likeness of men. The gender perspective has not been frequent in a jurisprudence excessively weighed down by a formal conception of equality and by the tension between the latter and its material conception. Rarely has the CC borne in mind the structural nature of feminine discrimination. All this within abundant jurisprudence on the principle of equality and non-discrimination on grounds of sex, among which we find such "surprising" decisions as that which in 1987 endorsed the primacy of the male over the female in the transfer of aristocratic titles (STC 126/1987), or the one that more recently legitimated state aid for schools that segregate pupils according to sex (CCRs 31/2018 and 74/2018). There is no doubt that the scant presence of

female magistrates in the body—currently, only three of a total of twelve members—has contributed to the prevalence of an androcentric vision that evidences little sensitivity to gender: *"the Court does not employ a specific definition of gender, but refers indiscriminately to sex and gender (CCR 159/2016), although there does appear to be a certain awareness of the difference in CCR 59/2008"* (Gómez Fernández 2019, p. 79)[6].

This does not mean that the CC has not made a significant contribution to the gradual recognition of the citizenship status of women. The reforms of the Civil Code and other laws allowed the overcoming of a legal order in which women were considered as some kind of minors.

What is noteworthy is the absence of a structural analysis of their status in rulings as significant in relation to women's rights as, for instance, 53/1985, which addressed the issue of abortion. In this case, its analysis focuses more on the protection of "the legal interest of the embryo in the utero" than on the reproductive autonomy of women. In the same sense, there is a striking absence of this perspective in a far more recent case, in which there is support for the conscientious objection of a pharmacist who refuses to dispense what is known as the "morning after pill" (STC 145/2015).

The gender perspective is only clearly evident in CC jurisprudence upon analysis of the unequal treatment accorded to men by criminal legislation in cases of gender violence. In sentences that, from Ruling 59/2008 onwards, responded to the multiple questions of unconstitutionality posed in relation to the LOVG, the CC argues in favour of regulatory differentiation on the basis of the "relational context" in which gender violence takes place. Thus, it speaks of the "subordinate position" of women, of the deep-rooted nature of this violence that, in turn, is a *"manifestation of a serious and entrenched inequality"*. The ruling attributes greater gravity to aggressions by men towards a present or former partner in "*a deep-rooted unequal structure that considers her to be inferior, a being with fewer competences, capacities and rights than those that any person deserves*". Nevertheless, once again, the CC fails to provide a concept of gender and endorses the constitutionality of the differential treatment as if it were a positive action.

However, gender perspective was not present, or at least not with the centrality demanded by the question, in the ruling that confirmed the constitutionality of the balanced presence of men and women in electoral candidatures[7]. The CC does not address the question from the perspective of parity. It restricts itself to arguing the constitutionality of positive actions on the basis of the joint interpretation of Arts. 14 and 9.2 EC. Moreover, as Art. 44 bis of the electoral law only establishes a mandate of balanced participation of both sexes and not a parity law, the ruling merely justifies the reasonableness of breaking with formal equality based on the historical discrimination against women in representative positions. The key line of argument should have addressed the continuity of a political and legal framework that excludes women and, in parallel, has assigned men a position of dominance.

The CC does not develop its reasoning in Ruling 13/2009, in which it ruled on the objection of unconstitutionality lodged against the Basque Law 4/2005, of 18 February, on equality of women and men, which expresses the requirement for parity in elections in that territory. The ruling makes the mistake of endorsing constitutionality by arguing the temporary nature of this provision. It seems clear that if the constitutional basis is parity, it would not make sense to speak of temporariness, as we would be referring to a structuring principle of the constitutional system and, therefore, of a foundation that is not limited in time.

The CC's "fragile" jurisprudence on regulatory provisions aimed at "removing the obstacles" that still prevent women from acceding to public office under equal conditions finds its maximum expression in Constitutional Court Order 119/2018, of 13 November 2018.

This order rejects the *writ of amparo*[8] lodged by María del Pilar Alonso Saura against the General Council of the Judiciary Resolution, of 16 October 2014, and the subsequent judicial resolutions confirming the latter. The complainant, who had submitted her candidacy for the position of President of the Supreme Court of Justice of Murcia, alleged violation of her

fundamental right to effective legal protection (Art. 24.1 EC) and to not suffer discrimination on grounds of sex (Art. 14 CE). In relation to this second ground, the complainant maintains that she should have been appointed to the post in view of the measures of positive action in favour of women provided for in Art. 16 LOIEMH, and in various regulatory standards of the judiciary.

The key to this question resides in how the margin of discretion contemplated in the appointment appealed against negatively influences the incorporation of women into senior positions in the judiciary. As is explained by the dissenting vote formulated by Juan Antonio Xiol Ríos, to which Fernando Valdés subscribes, the fact that reasons are not given for why the merits of the male candidate prevail over the undoubted objective merits of the female candidate provides evidence of a possible misuse of power; consequently, the CC should have admitted the appeal. The magistrate underlines the possible existence of a prejudice that considers men to be more suited to positions of responsibility. The conclusion of this dissenting vote points to the task ahead for the CC: transcend the conception of positive actions as detrimental to the principle of equality and understand them as part of the right to non-discrimination on grounds of sex.

In any case, the gender, or better still, the feminist perspective, is far more patently evident in the dissenting vote of magistrate Mª Luisa Balaguer, who insists on the opportunity missed by the CC to comment on a question of clear "constitutional importance" in two aspects: (a) the discretion that governs appointments to certain positions in the judicial profession on the part of the General Council of the Judiciary Branch; (b) parity between men and women at the highest level of the judicial system. The magistrate asks "*whether there might exist a problem of systemic or structural discrimination against women in the legal profession*". From this perspective, it should be borne in mind

> "whether, when evaluating promotion to government posts, the Council takes into account elements of candidates' curriculum that underpin gender bias, such as prior presence in governmental posts or stays abroad, at child-bearing age or periods of upbringing and education of children, it is engaging in a practice that constitutes, de facto, indirect discrimination".

It is no coincidence that in recent years it has been this magistrate who has systematically incorporated the gender perspective into several dissenting votes. Mª Luisa Balaguer specifically alludes to the latter in her dissenting vote against CCO 119/2018 and criticises the way in which "*the lack of consideration of the gender perspective in the interpretative activity developed in the resolutions of the majority of the Court ignores the mandate of Art. 4 LOIEMH . . . "* This occurred in Rulings 31/2018 and 74/2018, in which the CC endorsed single-sex education (Gómez Fernández 2019, pp. 12–13). In the same way, neither did the CC consider the gender perspective in Rulings 11/2018, 117/2018, 138/2018 and 2/2019, which dismissed appeals calling for assimilation of maternity and paternity leave. In this case, instead of advancing in the recognition of the rights/duties of co-responsibility, the CC opts for argumentation that reinforces the structures we should transcend. The basis for its reasoning lies in the different purpose attributed to maternity leave—protection of the working woman during pregnancy, birth and puerperium—and to paternity leave—promote the reconciliation of personal, family and working life. In this case, the only dissenting vote is formulated by Balaguer, who, responding to the demand for "situated knowledges" characteristic of feminism, observes how rights-based maternity measures

> "represent a clear entry barrier against those who are outside and an obstacle to the promotion of those who are within, because they will generate a disincentive effect upon employers that only affects women, and that, therefore, contributes to the perpetuation of job discrimination".

This is why there is a need to discriminate between measures of protection of the biological fact of motherhood and those aimed at guaranteeing equal treatment in the labour market and promoting the reconciliation of working and personal life. A differentiation

that requires consideration of the gender perspective in the application or interpretation of law.

3.2. The Fragile Gender Perspective of the ECHR

The ECHR does not appear to have taken "gender mainstreaming" very seriously either. Let us recall that the European Convention on Human Rights (ECHR) enshrines the prohibition of discrimination on grounds of sex in Art. 14:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

This article does not enshrine the general principle of equality, but establishes the prohibition of discrimination only in the enjoyment of the other rights and freedoms recognised in the Convention[9]. For this reason, it has been described as a "parasitic", "subsidiary" and "insipid" principle (Radacic 2008).

The Convention does not refer to gender equality, but merely includes sex among the grounds that cannot give rise to discrimination. The same thing happens with most of the international treaties on human rights that still speak of sex as grounds for discrimination, although the term gender[10] has been consolidated in social sciences as more explanatory of reality than sex (Carmona Cuenca 2018, p. 312).

The principle of non-discrimination on grounds of sex has been used by the ECHR to prohibit direct legal discrimination, in other words to declare that those laws that, with an objective and reasonable justification (the so-called *"very weighty reasons formula"*), establish different and unfavourable treatment for one of the sexes are contravening the contents of the ECHR[11]. Moreover, it has repeatedly pointed out that *"references to traditions, general assumptions or prevailing social attitudes in a particular country are considered to be insufficient justification for a difference in treatment on grounds of sex"*.

In this sense, it should be pointed out that the ECHR has criticised member states that signed the Convention for discriminating against both women, in the majority of cases, and men. In general, an evolutive line of case law favourable to full understanding of gender equality has been followed. In this sense, it has been sensitive to the social changes of recent years, which advocate a change in traditional roles, which situated men in the public sphere and paid employment and women in the sphere of the household and caring for the family. This understanding of equality has been evidenced in many of its rulings, in such varied areas as labour and social benefits, the use of surnames, medical practice or gender violence. In the letter, the ECHR understands that in the case of sexist violence in which it has been proven that the authorities did not act with due diligence, discrimination on grounds of gender exists[12].

Significant, too, is the number of cases in which the ECHR has determined the existence of direct discrimination on grounds of sex in relation to men. In most cases, the existence of this discrimination is derived from national administrative laws or measures that clearly evidence the different gender role attributed to men—suppliers—and women—carers.

Sometimes, however, the Court's positive jurisprudential approaches have been tarnished by gender stereotypes that operate in subtle fashion and are not easily detected[13]. A reality that alerts us to the need for the ECHR to take the gender perspective more seriously.

4. Violence against Women: The Gender Perspective in the Criminal Sphere

Gender violence is the sphere in which shortcomings in the legal safeguarding of women's rights are most apparent. This is one of the most profound forms of discrimination, resulting from a patriarchal system that subordinates women in a structural way. This system of oppression finds support in the hierarchical division between the public and the private spheres of society (Amorós Puente 1997, p. 84), and in the consideration of women as weak beings in need of protection. This is the consequence of a strategy of dominance

exercised by males, as the paternal, marital authority and guarantors of family stability (Maqueda Abreu 2009, p. 6). Acceptance of these sociological prejudices has promoted the erroneous idea that that gender violence belongs solely to the family milieu. This approach has led the Spanish legislator, with the LOVG's approval, to attempt to combat this violence from within a restrictive model, limited to relationships between couples or of similar affective nature, in spite of the fact that in actually setting out the grounds, the law recognises that this violence "*is directed against women for the fact of being women*". Spain, then, is still some way removed from the commitment acquired with the ratification in 2014 of the Istanbul Convention (Council of Europe 2011), omitting from the protection provided by this law other forms of sexist violence, such as forced prostitution, forced abortion, marriage and sterilisation, female genital mutilation, sexual aggression outside the couple and sexual and workplace harassment. Nevertheless, implementation of the gender perspective in the analysis and interpretation of legal standards (Art 4. LOIEMH) in recent rulings delivered by the Second Chamber of the Supreme (Criminal) Court—such as, for instance, 247/2018, of 24 May—has in fact constituted a gradual broadening of the concept of gender violence. A practice that demonstrates to us how important it is for judges and courts, even beyond what is provided for in laws, implicit in gender.

In its Ruling 172/2017 of 22 March, the Supreme Court (SC) eliminated one of the main stereotypes of legal practice: the absence of credibility in testimony given by a female victim of gender violence, when she decides not to file a complaint immediately upon commitment of the crime. In this respect, the Second Chamber states that this silence

> *"does not equate to not telling the truth in the description of events, given the generally accepted notion that this delay in filing the complaint is in any case the manifestation of fear on the part of the victim, who at that moment found herself in a state of domination"* (Ruling 38/2019 of 30 January). *"This context may be framed within what the Court terms "resilience of the victim" or "fortitude beyond resistance" understood as the capacity of human beings to adapt positively to situations of diversity, impacting negatively in this case, since it prevents victims from finding solutions to the abuse they are suffering"* (Ruling 658/2019 of 8 January).

In view of the absence of reforms in procedural matters, the waiver of the obligation to declare regulated in Art. 416 of the Criminal Procedure Code allows the victim, after filing the complaint, to exercise the right not to declare against the aggressor. This is a true guarantee in the interest of the accused, who on occasions uses it as an instrument of pressure and silent coercion. Recently, the SC (Ruling 389/2020 of 10 July) has considered the appearance of the victim as private prosecution in the legal proceedings the key element for non-recovery of the right to waiver when filing the complaint.

Another fundamental element in the application of the gender perspective in the criminal sphere is the aggravating factor of discrimination on grounds of gender (Art 22.4 of the Criminal Code). The evolution of case law suggests that this factor will be applied in cases in which the author has committed the deeds against the female victim simply because she is a woman, with the SC insisting upon its application beyond the sphere of relations with a partner or ex-partner, whenever there is an attack on the woman based upon domination (Ruling 565/2018 of 19 November).

Finally, the SC, in its Ruling 339/2021 of 17 March, declared that unjustified non-payment by the parent who does not have custody of the child and is required to make support payments is an act of economic violence, given that non-fulfilment of this obligation by the father has a negative effect upon the mother. In fact, there is double victimisation: of the children in need of food and of the mother, who must substitute the father in this case.

5. The Gender Perspective in Family Law: Care and Co-Responsibility

Joint responsibility in the exercise of rights of reconciliation of family and working life is a strategy to guarantee the right to effective equality between men and women (García Campá 2019, p. 14). Care should permeate the collective consciousness as a common good. It is necessary to overcome the obstacles to its universalisation (Marrades Puig

2019, p. 27) by means of public policies that place the person in the centre and provide education that transmits the values of care. As well as a legal framework and public policies, permeated by gender mainstreaming, there is a need for legal operators prepared to implement the principle of co-responsibility in their task of administering justice.

One of the legal areas in which a gender perspective is most necessary is family law, insofar as this has been one of the areas in which traditionally there has been evidence of clear gender asymmetry. Among the multiple provisions of the Civil Code that need to be read with a gender perspective, Art. 1438 serves as an example. The latter establishes the obligation of spouses to contribute to household expenses. In the case of housework, this shall be computed as a personal contribution and shall entitle the spouse to compensation upon termination of the separation of property marriage system. The fact that the Code equates housework to a personal contribution to the costs of married life is a step, albeit insufficient, towards acknowledgement of what Mª Ángeles Durán Heras (2018, p. 66) describes as "shadow salary", i.e. a remuneration for work that lacks a stable pay rate in the labour market. This, in turn, has been due to the undervaluation of care, which has been regarded as unproductive because it does not generate direct economic profit for households.

The Supreme Court, by not taking into account a gender perspective, has adopted an interpretation removed from social reality. The article, which was introduced in 1981, has remained unaltered since then, without the incorporation of the duty of co-responsibility even affecting the interpretation of the law on the part of legal practitioners. In fact, the Supreme Court Ruling of 14 July 2011 established three rules in the interpretation of Art. 1438 CC: (a) spouses are obliged to contribute to the costs of married life; (b) it is possible to contribute to the costs of married life with housework alone; (c) in order for one of the spouses to have a right to compensation, it is necessary that, following agreement upon the matrimonial property regime, "*a contribution has been made to the costs of married life only with housework*" (SCR of 14 July 2011). In relation to this latter requirement, the existence of accrual of wealth on the part of the other spouse is irrelevant (SCR 135/2015, of 26 March 2015), with the Supreme Court declaring in 2019 that "*it is a question of compensating for exclusive dedication to the family*" (STS 657/2019, of 11 December 2019).

Thus, the First Chamber of the Supreme Court established a requirement that was not initially envisaged in the law, which is an obstacle to the legal recognition of care work. In spite of the fact that the Supreme Court considers unpaid work in the home to be a contribution in kind by one of the spouses, in the form of housework and care of the children of both (SCR 658/2019, of 11 December), the requirement of full-time dedication excludes dual-income families, in particular, people who work a double shift. This requirement may be interpreted as a penalization of labour conciliation, as being in paid employment neither detracts from, nor should detract from, care work. Therefore, the SC appears to invite people not to reconcile and to dedicate themselves full time to housework (Vila Soriano 2017). This interpretation is far removed from the social reality in which families attempt to join forces in order to reconcile their personal and working life (Paños Pérez 2017).

The new family paradigm and the demands of co-responsibility require a diverse interpretation on the part of the Supreme Court, for which, obviously, it would be necessary for its magistrates to have incorporated the gender perspective into the interpretation and application of compensation for housework. Its application by the courts would avoid automatic decisions, adapting the solution to the specific case. In this way, it would not only contribute to correcting the asymmetries present in the family context, but also contribute to the social and economic recognition of care work.

6. Female Genital Mutilation: The Gender Perspective in Private International Law

Processes of migration and the globalised world oblige legal systems to address practices that have a particular impact upon women's rights. Among the multiple forms of violence suffered by women, in recent years, increasing attention has been paid to female

genital mutilation. Female genital mutilation (henceforth FGM) is defined by the World Health Organization (OMS) as the set of procedures that involve the partial or total removal of external female genitalia, inflicted for cultural, religious or other non-therapeutic reasons. It is, therefore, an attack on the physical and psychological integrity of women, which seeks to maintain them in a position of submission and obedience. FGM, which is practised fundamentally in countries of Asia or Africa, is performed by women, although the decision with regard to performing the operation or not is generally taken by the father or guardian.

One of the mechanisms available to our rule of law, to ensure observance of the fundamental rights of the individual in the different social groups that live together within our territory, is private international law (henceforth PIL). Thus, PIL shows us how the harmonising nexus facilitates coexistence between the culture of the state of origin and that of the host state. The role played by this legal discipline with regard to this harmonisation can be seen from two different perspectives:

1. Preventive perspective—As a result of the international commitments adopted by Spain, the Autonomous Communities (henceforth AC) of our country have gradually adopted different protocols fundamentally directed towards social, educational, work and healthcare spheres, with the purpose of highlighting the dire consequences of FGM among the migrant and native population and banning its practice in Spain. Fundamentally, the protocols tend to relate to health, since it is medical examinations that reveal whether girls have been subjected to FGM or may be in danger of suffering the latter. In this area, health authorities will inform the child protection service of the corresponding AC of the injuries discovered upon examination, and they, in turn, will notify the Public Prosecutor with a view to the corresponding legal action being taken, in defence of the minor. The objective is to prevent at all costs the minor from being subjected to this practice, so the different protocols contain a series of measures to this end, among which the following can be highlighted: (a) parents' obligation is to periodically present these young girls for medical examination in order to control their physical integrity; (b) if the family is planning an imminent trip to their country of origin, the parents are required to sign a document termed "the preventive commitment", in which they undertake not to perform FGM of the girl in the country of origin; (c) other guidelines adopted consist of prohibiting parents from taking the minor outside Spanish territory, confiscating their passports or prohibiting the issue thereof. Along these lines, the ruling issued by the Provincial Court of Lleida on 10 July 2017 confirms the preventive measures adopted the Public Prosecutor in relation to young girls preparing to abandon Spain to travel to their country of origin (Mali). However, analysis of the rulings delivered by our courts evidences the lack of unity of criteria with regard to the adoption preventive measures to prevent a female minor from being the object of FGM. In our opinion, it is necessary to take into account values such as the safeguarding of the fundamental rights of the child, which cannot be subordinated to contact with the country of origin.
2. Coercive measures—GM is classified in the Penal Code as a crime of wilful injury, without establishing a distinction between men and women, being equally serious in either case (Art. 149.2). In view of this provision, our courts have had the opportunity to comment on FGM practised abroad, by foreign women upon foreign girls, but the latter with habitual residence in Spain. Analysis of our courts' rulings suggests that the latter tend to ignore the gender perspective when delivering judgement. Thus, on too many occasions, our courts acquit the father, while the mother is given a prison sentence, although in some cases, the attenuating circumstance of "essential error" is applied. In our view, the gender perspective is called into question by this action, as the mother who remained in the country of origin pending reunion with her daughters was unfamiliar with our legal system and merely followed the canons of her country of origin, while the father was aware of the corresponding law and should have warned the family in the country of origin of the consequences in our territory associated with this practice. We believe that, without a shadow of a doubt,

the father should be charged as co-offender by omission. Furthermore, we advocate that our courts' competence in international criminal justice be extended, so courts are aware of cases in which the author of the crime is a foreigner, even if they do not have their habitual residence in Spain or when they are not in Spain and the victim is Spanish.

7. Conclusions

(1ª) Gender perspective in the interpretation and application of the law is an essential tool for the attainment of equality between women and men, and for the transformation of a legal culture stemming from the patriarchal schemas of contemporary constitutionalism. We can deduce a series of criteria to be taken into account from the decisions of the Constitutional Court and, in particular, from the individual opinions issued in recent years by judges such as María Luisa Balaguer and Juan Antonio Xiol Ríos. In general, the gender perspective has been absent in the Court's decisions, and we must look at the dissenting opinions of some judges (for example, Judgment 31/2018, on sex-segregated education, or 111/218, on paternity leave).

Among the tools that may contribute to the practical application of this perspective, we can refer to the following:

(a) The starting point should be consideration of material equality as an essential element of citizenship and, therefore, of "radical equality between men and women" as a guiding principle (Judgement 31/2008 on the constitutionality of women's electoral quotas). Consequently, it will always be necessary to seek an interpretation of the law that contributes more effectively to the fulfilment of this principle. This criterion should prevail when it is weighed against other interests or rights, and upon interpretation of the "principle of proportionality".

(b) There is a need for a joint interpretation of all those rights that may be affected and that might influence, in intersectional fashion, the real situation of men and women. This is the factual finding in Judgment 31/2018 on the extension of paternity leave to fathers.

(c) It will be necessary to undertake not only a historical contextualisation and consider the legal conquests that, via legislation and jurisprudence, have recognised and broadened the citizenship status of women. In this vein, it is important to take into account the contributions that have been made by the theoretical debate, and in particular by legal science with a feminist perspective. In this sense, the recent Judgment 67/2022 deals with the theoretical distinction between sex and gender.

(d) What should be borne in mind is an evolutive rather than a regressive conception of rights, so that any law, measure, or interpretation that involves or may involve a lesser degree of guarantee would, at the very least, appear "suspicious". All this added to the criterion of their indivisibility, so that in practice, no hierarchy among them might lead to a devaluated status of women. In this sense, it is crucial to consider social rights as fundamental and, therefore, priority insofar as they contribute decisively to the well-being and autonomy of women. These criteria have been essential in all cases where the Constitutional Court has had to assess the existence of indirect discrimination against women (e.g., Judgement 79/2020).

(e) It will be necessary to criticise and transcend the sexist stereotypes present in laws and in possible interpretations to which they give rise, beginning with the language used and the biases that influence such important questions as the evaluation of evidence in a trial. However, in the surprising Judgement 126/1997, the Constitutional Court confirmed, contrary to this rule, the preference of men in the succession of titles of nobility.

(f) There will need to be analysis of the attitudes, behaviour, roles or status that form a part of, or may be affected, by the law or fact in question. It will be necessary to perform a critical analysis of how, culturally, roles, stereotypes and functions have been built. In this sense, a line of evolutive interpretation should be marked by the gradual transcending of so-called "gender binarism" and, therefore, of the cultural, and, sometimes, legal construction, of men (and the masculine) and women (and the feminine) as separate

spheres. This analysis was central to the Constitutional Court's judgement on the law against gender-based violence (Judgement 59/2008)

(g) The previous rule is very closely linked to the interpretative criterion assumed on various occasions by the CC and which involves understanding the Constitution, and therefore the entire legal system, as a "living tree" (This conception was used by the Constitutional Court in its Judgement 198/2012 on gay marriage.). In other words, as a dynamic structure that has to adapt to social transformations.

(h) On many occasions, it will also be necessary to perform a critical analysis of all the arguments that, frequently, in debates or tensions that affect the principle of equality, are used and described as allegedly scientific or objective. These arguments were common in debates about women's capacities to take on traditionally male jobs (STC 229/1992, on women's work in mines).

(i) Finally, and although this should perhaps be the first criterion to bear in mind, a key role should be played by the invocation of the rules of international law that throughout the 20th century have recognised and specified the Human Rights of Women, and the jurisprudence and recommendations issued by international bodies with competence in the area, such as the CEDAW Committee. These rules are fundamental, for example, in the individual opinions of the judgement of the Constitutional Court on gender-segregated education.

(2ª) We also need a feminist reading without which a structural change in modern rules of law will not be possible. All this requires projection not only in the dogmatic dimension of constitutionalism but also in its organic aspect. Hence the extremely close relationship between a review of the law from a feminist perspective and the consolidation of parity democracy.

(3ª) The incorporation of the feminist perspective means that the interpreter of the law should not only consider "the woman question", but should also bear in mind in their search for arguments that support their answers and in, for example, the act of weighing up that is essential in issues of law, all those realities that traditionally occupied a secondary position. This involves incorporating into legal reasoning keys that patriarchal logic did not consider and that involve, to begin with, overcoming the hierarchical and exclusive dualities through which the lives of individuals were defined. Anything to the contrary would constitute a serious attack upon the principle of impartiality, insofar as it would evidence how the judge partly occupies the position represented by masculinity. Feminist logic renders it necessary to take into account how any situation in which we might detect an expression of the structural discrimination suffered by women, including practices by omission, has a correlative expression of masculine dominance. Let us think, for instance, of spheres such as affective and family relationships (and they should be borne in mind when we address the gender inequalities that arise in the workplace), or how women's bodies and sexualities continue to be spaces of masculine control, exploitation and violence.

(4ª) The structural dimension to which feminism appeals requires ambitious answers, in the sense that we must act upon the "heart" of our constitutional systems to, thereby, review our entire legal system and culture. Hence the need for a constitutional reform with a feminist perspective, on the basis of parity as a constitutional principle, the latter understood in its qualitative dimension of transcending sexed citizenship (Rodríguez Ruiz 2019). To this should be added the active commitment of all the bodies that develop, execute, interpret and update this "constitutional pact" on a daily basis. Among these bodies, the judiciary has an essential responsibility since, in addition, as a state authority, it should also be permeated by the logic of parity, in both its quantitative and qualitative dimension. Requirements that, of course, should also serve as a basis for the composition and actions of the Constitutional Court.

(5ª) All the above calls for the consolidation of new paradigms, a task in which an essential role should be played by all legal operators, but by the judiciary in particular. This should be a priority at a time when, within the framework of a rigid and guarantee-based constitutionalism, the possibilities of action on the part of legislative and executive powers

are limited. It would be a question, ultimately, of articulating a different way of "creating" law, in far more cooperative fashion between the different actors that participate in its gestation and application. This mandate demands greater commitment on the part of all public powers in the effective implementation of equality understood as a guiding principle (Ferrajoli 2019, p. 15). This commitment will not be possible without a radical change in processes of selection training of those who will judge and execute the law. The objective would be to have legal operators who understand the law as a tool of social transformation and personal emancipation. It is necessary for this conception to generate thinking habits and consolidate the commitment on the part of judicial bodies to the effective implementation of equality, in cooperation with other public powers, in permanent conversation with social agents and citizens (Barrère Unzueta 2019, p. 265).

(6º) Without this active engagement on the part of legal operators, it will be very difficult to guarantee women's access to the judiciary in the terms established by CEDAW Recommendation no. 33 (Naciones Unidas 2015). Therefore, there is an urgent need for the gender perspective and feminist legal theory to be incorporated into the contents of law degrees, into all postgraduate studies in law and, in far more detailed fashion, into all training programmes required for access to the judiciary, for the exercise of advocacy or, in general, for any function that involves interpreting and applying the law. In this sense, we should not forget the role played by the staff of different public administrations. This perspective should in turn be borne in mind in relation to the minimum requirements of merit and capacity for access to any public office.

(7ª) If the ultimate goal is to overcome a patriarchal legal culture, we would have to add different strategies that would affect the various spheres in which the law is not only created but is also "thought". Hence the urgent need for the incorporation of the perspectives analysed, with official guidelines, into teaching and research. This involves taking them into account in the training of this staff and, therefore, introducing them in obligatory and prominent fashion into accreditation ad selection processes, and into processes of evaluation of research activity. It is fundamental that the "doctrine" should incorporate the axis represented by gender and the solution offered by feminist research. A requirement that, obviously, not only has to be understood in terms of the specific issues related to women, but also needs to be transversally projected onto any subject under study. All this without forgetting that the law, understood in the broadest sense, is not only created and interpreted by jurists, since society as a whole participates in its (re)definition. Hence the importance of working on these questions in all stages of education, and of incorporating them into the work of agents, such as the media, essential for the functioning of a democratic society.

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1 Among others, it is necessary to highlight the contributions of theorists such as Catharine Mackinnon, Andrea Dworkin, Katharine T. Bartlett, Frances Olsen, Carole Smart, Alda Facio, Malena Costa o Tamar Pitch. In Spain, we must highlight the contributions of the researchers of the Feminist Network of Constitutional Law (Red Feminista de Derecho Constitucional).

2 For example, in the Organic Law 3/2007 on effective equality between women and men, many of its provisions are not mandatory, but contain recommendations. This is the case of Article 16, which recommends a balanced presence of women and men in public authorities. In the same vein, Article 25 makes a recommendation on gender equality to universities.

3 Project forming part of the Programa Estatal de I+D+i Orientada a los Retos de la Sociedad—Ministerio de Ciencia e Innovación (2019–2021): https://proyectogender.wordpress.com/, accessed on 4 April 2023.

4 Other international treaties ratified by Spain recognise the right of access to justice: Art. 8 of the Universal Declaration of Human Rights; Art. 2.3 of the International Covenant on Civil and Political Rights or Art. 6 of the European Convention on Human Rights.

5 To these should be added, given their impact upon women's rights and their situation, Law 39/2006, of 14 December, on Promotion of Personal Autonomy and Attention to People in Situations of Dependence, Organic Law 2/2010, of 3 March, on Sexual and Reproductive Health and Voluntary Interruption of Pregnancy, and the more recent Organic Law 10/2022, of 6 September, on Integral Guarantee of Sexual Freedom. One should also take into account all the laws adopted in the different Autonomous Communities.

6 This shortcoming appears to have been addressed recently in Ruling 67/2022, of 2 June 2022. In the latter, and resulting from a writ of amparo as a consequence of discrimination on grounds of gender identity, the CC includes a delimitation of both concepts in 3rd legal basis.

7 Art. 44 bis of the Electoral Law, introduced by the LOIEMH, obliges electoral candidacies to include no more than 60% and no less than 40% of candidates of the same sex.

8 'Writ of amparo' is a special writ of appeal to the Constitutional Court.

9 Subsequently, Protocol n.º 12 was approved, which contains a general prohibition of discrimination not limited to the rights of the ECHR, but extensive to any other fundamental or legal right. Its Article 1 establishes: *"The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status"*.

10 Since IV World Conference on Women in Beijing in 1995, the term gender has been consolidated within the United Nations.

11 The first case studied by the ECHR was *Abdulaziz, Cabales and Balkandali v. UK*, 1985.

12 The first case of gender violence that was analysed *ex* Art. 14 ECHR was *Opuz v. Turkey*, 2009.

13 See *Napotnik v. Romania*, 2020, as a recent case in which the ECHR has timidly applied the principle of non-discrimination based on gender.

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