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The law and gender-based domestic violence in Spain – legal backgrounds, efficiency and problems

Introduction

The law of gender violence in Spain was created in 2004¹, with the purpose of solving the problems caused by aggressions and deaths mostly of women by their husbands or partners. The reason for its creation was to provide a legal solution to the increase in deaths of women and injuries that occurred at that time and by the existing social alarm. The aim was to eradicate all forms of violence against women and, in particular, to punish more severely the perpetrators of attacks on women. The legislation contained in the 1995² penal code was not thought to be sufficient.

The main idea of the law was to protect women exclusively from physical and psychological aggression, suffered by their husbands or partners by men towards their partners, only women this includes, wives, ex-wives and non-marital emotional relationships, such as boyfriends or couples who live or have lived together.

Therefore, men who suffered any type of physical or psychological violence by their wives or partners were not protected, nor could they be protected or benefited by this law. It was and is a law purely and exclusively for women, made as a tailor-made suit.

Nor were other cohabiting relatives or the elderly, such as grandparents, protected or benefited when the aggressor was the woman, since they were clearly excluded from the benefits of this law.

¹ Law Organic 1/2004, of 28 de december, on integral protection measures against gender – based violence (BOE núm. 313, of 29 de december de 2004, Reference: BOE-A-2004-21760).

² Law Organic 10/1995, of 23 november, of Criminal Code (BOE num. 281, of 24.11.1995, Entry into force: 24.05.1996, BOE-A-1995-25444).

All of the above, ignoring the articles and principles of the SC (Spanish Constitution) on equality of sexes, equality before the law and prohibition of discrimination on grounds of sex³.

This article raises research questions about whether the law is able of solving the problems of gender-based and domestic violence, whether it is enough and whether it protects the constitutional and procedural rights of victims and aggressors. To do this, a vision of what the problems and gaps are, analyzing the law and explaining the solutions provided by the law, exposing the failures and consequences of it, all from the scientific and practical point of view in the courts. It is given to provide a coherent and logical solution to the various hypotheses that are being discussed in this article.

Legal Backgrounds

Spain, traditionally at the international sphere, has always wanted to be at the forefront of countries by signing treaties and agreements for the development of world peace and the protection of human rights.

At the Fourth World Conference in 1995, the United Nations⁴ recognized that violence against women is an obstacle to achieving the goals of equality, development and peace and violates and undermines the enjoyment of human rights and fundamental freedoms. It also defined violence against women as a manifestation of historically unequal power relations between women and men and drafted a technical definition of battered women's syndrome, which consists of "aggressions suffered by women as a result of socio-cultural conditions that act on the male and female gender, placing them in a position of subordination to men and manifested in the three basic areas of the person's relationship: Abuse within relationships, sexual assault in social life and harassment in the workplace".

In addition, Spain has tried to follow the recommendations of international organizations in defense of women against violence⁵ and has stressed that

³ Art. 14 SC. Spaniards are equal before the law, without any discrimination on the basis of birth, race, sex, religion, opinion or any other personal or social condition or circumstance. Art. 24.1 1. All persons have the right to obtain effective protection from the courts and tribunals in the exercise of their rights and legitimate interests, and in no case may there be a lack of defence.

⁴ It took place in September 1995 in Beijing, China and marked a turning point in the protection of women worldwide. One of the most important objectives was to remove the obstacles to women's participation in society, calling for equality in economic, social, cultural and political decision-making.

⁵ E.g. the 1979 Convention on the Elimination of All Forms of Discrimination against Women; the United Nations Declaration on the Elimination of Violence against Women, proclaimed in December 1993 by the General Assembly; the resolutions of the last International Summit on Women held in Beijing in September 1995; World Health Assembly Resolution WHA 49.25

this problem of violence against women must be seen from a multidisciplinary point of view, in which society is educated in values of equality, non-violence and mutual respect between sexes.

Structure

The LOMPVG (Law 1/2004 of 28 of December about Protection Measures for Victims of gender-based violence) consists of a total of 72 articles, divided into several sections. Thus, in the first place, the principles are established, the purpose and scope of the law are explained and then it is committed to the promotion of social education in values of equality and in the detection and prevention of gender violence. In addition, sexist, discriminatory advertising in which women are seen as mere objects are prohibited. Big importance is given for the media to defend the values of equality between men and women and avoid discrimination between them and also to help visualize the problem of gender violence objectively when reporting.

Secondly, a system of rights is organized only for women, victims, at various levels, such as in the economic field, in which victims will be helped financially and will also have help such as free legal assistance and complete legal information. Also in the workplace and social security, you can change of place of work, as the most important novelties.

An extensive network of social assistance has been set up, especially for housing for victims, so that they have preferential access to decent housing.

Thirdly, at the governmental level, a Delegation against gender violence is created, whose function is the protection and defense of gender victims. The State Observatory against Gender Violence is also created. The most remarkable thing in this section is that a framework of collaboration and information is created so that the police know how to act in cases of gender violence, so that they know how to act before and after an aggression has been committed against the victim⁶.

declaring violence a priority public health problem proclaimed in 1996 by WHO; the European Parliament's report of July 1997; the 1997 Resolution of the United Nations Commission on Human Rights; and the Declaration of 1999 as the European Year for Combating Gender-based Violence, among others; Decision No. 803/2004/EC of the European Parliament adopting a programme of Community action (2004–2008) to prevent and combat violence against children, young people and women and to protect victims and groups at risk (Daphne II programme) has set out the position and strategy of the representatives of the citizens of the Union in this regard.

⁶ Approved by the Technical Commission of the National Coordination Commission of the Judicial Police on June 28, 2005, after having adapted the previous Protocol to the modifications of LO 1/2004, on Comprehensive Protection Measures against Gender Violence.

Fourthly, the penal code is modified⁷, proceeding to aggravate the penalties for gender violence, in crimes, such as injuries, psychological abuse, minor humiliation and the victim is protected so that during the time that the sentence lasts, the aggressor, can not have any contact with the victim, under penalty of breach of sentence.

Fifthly and finally, several laws are reformed, creating special courts for gender violence and establishing the competences that these courts will have. Not only will they be able to judge and determine penalties in the criminal order, but also in the civil order. The most important thing is that the same judge may take civil measures, such as guardianship and custody of minors, alimony, attribution of the home to the victim and later they may also agree on definitive measures such as divorce decrees. This has given rise to much controversy, as the alleged victims have misused this law for other purposes, contributing to a widespread sense of injustice and distrust of the courts and justice in general. We have to be aware anyway, thus in fact the criminal process is affected by several laws regulating the law on gender-based violence⁸.

Efficiency

It is necessary to ask whether the LOMPVG is an effective law and solves the problems of gender and domestic violence, protecting the victim and preventing the recurrence of acts of violence against women. Unfortunately it is a law that since the beginning has been the subject of great controversy by judges, political parties and associations who think that this law was unconstitutional and that it affected fundamental rights enshrined in the Spanish constitution, such as the principles of equality of sexes and equality before the law. It has not been a law that solves problems, rather it has created them, because it is a law that was made in haste, given the social alarm in society, and since it is a multidisciplinary law, which covers not only the legal aspect but also the social one, it was done without consultation and without consensus of all the parties involved.

For some authors⁹ who have pointed out about efficiency, believing that it is appropriate to make several changes to the law. Other authors¹⁰ believes

⁷ Organic Law 15/2003, of 25 November, amending Organic Law 10/1995 of 23 November, on the Criminal Code. The purpose of this reform was to correct certain problems in the application and length of sentences. In addition, the penalty of community service was introduced.

⁸ J.L. Vázquez Sotelo, *Prologue to the work of Prof. Vallespín „The connection in the criminal process”*, Barcelona 2007, p. 15.

⁹ E. Aranda Álvarez, *Object and guiding principles of the integral law*, „Studies on the Integral Law Against Gender Violence” 2005.

¹⁰ J. Magariños Yañez, *The right against gender violence*, Madrid 2007.

that the law on domestic violence should be treated from a multidisciplinary point of view, since as it is currently drafted, it is not effective.

In any case, we can determine that the LOMPVG suffers from five major problems that make it ineffective and does not help to reduce the victims of violence and are the following:

Use of Precautionary Measures in a generic way and without being sufficiently substantiated

The first of the problems we find in the LOMPVG, is after the victim's report, the adoption by the courts of precautionary measures in a generalized way to protect the alleged victim. It is correct in all cases to try to prevent and adopt measures that prevent the alleged aggressor from re-influencing the violent act against the woman. However, in Spain, the courts abuse them and lots of them can be imposed automatically and standardized in such a way that it often happens that they do not fit or are not effective for the protection of the victim, restricting and limiting the rights of the alleged aggressor unnecessarily. This means that the alleged conflict between both sides is not settled, but rather aggravates them. This does not mean that in the event of a violent act, precautionary measures are not applied, but that their adoption must respond to the principles of motivation, proportionality, security and temporality¹¹ realizes that protection measures in practice, in the courts, are often applied in a generic and automatic way.

The solution is to take measures on a case-by-case basis and without unnecessarily burdening the man with measures that do not benefit either party and create conflicts.

Fraudulent use of the law for other purposes

The consequence of the above is the increasing misuse of the law for other purposes not provided for in the law. It is known that family proceedings, such as divorce or child custody, can last for years, in addition to the high economic and emotional costs involved¹².

In forensic practice, there is a dramatic increase in cases in which the alleged victim, a woman, proceeds to denounce acts without criminal relevan-

¹¹ M. Calvo García, *Evolution of the legal response to gender-based family violence. Analysis of Organic Law 1/2004, on Comprehensive Protection Measures against Gender Violence*, [in:] *The Law on Comprehensive Measures against Gender Violence*, Bilbao 2005.

¹² L. Entrena Vázquez, *Study on the Comprehensive Law against Gender Violence*, Madrid 2005.

ce, exaggerating so that civil measures are adopted, such as the use of the family home, child custody, visitation regime to avoid having to go to civil courts with the expenses involved.

The most common example of this fraudulent law is that in Spain, on average, a divorce in which the spouses do not agree on the terms of the divorce usually lasts on average two years and up to four or five if there are children. It is a long, expensive process where there is a lot of feelings involved. For this reason, many women, knowing the above and taking advantage of the LOMPVG, file a complaint against their husband for psychological violence (the facts not being true) and all the measures described in the previous section will automatically be adopted. So in one day, they have the husband out of their home and out of their lives immediately. Subsequently, the gender violence court will process the divorce in an express way, which can take only several months. This certainly represents an advantage for the woman, as it saves time, money, and years of litigation. That is why there are many cases of misuse of this law.

This is undoubtedly a fraud of law, since it takes advantage of the law for purposes for which the law was not created. That is why I believe that it is necessary that the civil precautionary measures that are adopted, as a result of gender violence, have a limited validity and in any case oblige both sides to file the corresponding lawsuit through civil proceedings, since the civil process has greater guarantees than in criminal proceedings, which for the alleged aggressor is considerably limited his possibilities of defense and his rights.

Insufficient regulation of gender violence among minors

As time progresses, relationships between minors increase and intensify, which are not exempt from controversy, nor from what can be considered as gender violence. Actions such as controlling his girlfriend's mobile phone at all times, asking where he is at all times and with whom, or demanding the sending of intimate photos, are in Spain, reprehensible behaviors subject to criminal offense and subject to the law gender violence.

The current law on minors¹³ does not establish any measure or refer to cases of gender violence, except for the status of victim when their mothers are victims and whose modification came into force in 2015¹⁴.

¹³ Organic Law 1/1996 of 15 January on the Legal Protection of Minors, partially amending the Civil Code and the Civil Procedure Act. The law regulates the general principles of action in situations of lack of social protection, including the obligation of the public entity to investigate the facts it learns in order to correct the situation through the intervention of the Social Services or, where appropriate, by assuming the guardianship of the minor by operation of law.

¹⁴ Law 26/2015 of 28 July, amending the system for the protection of children and adolescents. The purpose of this law is to introduce the necessary changes in Spanish legislation on the

What happens is that in Spain, the LOMPVG does not regulate or even refer to minors and cases of violence between minors and therefore the law cannot be applied to them as they do not have the age of majority. Then you can quickly see the problem, what and how to apply to safeguard the victims, what measures can be adopted, what restrictions can be established on the alleged aggressor to avoid further violent episodes and all this without losing sight of the law of the minor. A good solution would be to extend the protection of the LOMPVG to minors, protecting the sexes equally.

False complaint

In line with what was said in the second section, regarding the fraudulent use of the law by victims, there can also be a considerable increase in false complaints, to either harm the partner or former partner for different reasons, subjective or to obtain judicial benefits with the adoption of measures in favor of the alleged victim.

The false denunciation consists of denouncing a person attributing facts or actions that he has not committed knowing their falsehood. This conduct of all points of view reprehensible and immoral apart from constituting a crime¹⁵ sets in motion the entire judicial mechanism using means in vain and uselessly and what is worse to make there an erroneous judicial decision.

What the LOMPVG does not deal with is compensation to the man who has been unjustly accused and against whom a judicial process has been followed and on whom criminal and civil measures have fallen, such as those of prohibition to reside in the family home or the submission to a regime of visits to see their children with loss of custody of the same, among others. It is clear that when false reporting is incurred, the results they produce must be compensated in some way, thus restoring the rights that have been deprived or restricted to the one who has been wrongfully accused.

Unfortunately, we find several cases of false report by the victim, which are only resolved after years of investigation by the court, producing for the man a damage that is difficult to repair, not only economic, but also social

protection of children and adolescents in order to continue guaranteeing minors uniform protection, in accordance with the proposals and observations made in recent years by the United Nations Committee on the Rights of the Child (General Comment No. 13 of 2011) on the right of the child not to be subjected to any form of violence. Likewise, an express mention is made of digital and media literacy, as an essential tool for minors to develop their critical thinking and take an active part in a participatory society and in a current world that cannot be understood apart from the new information and communication technologies.

¹⁵ Art. 456 of the Criminal Code shall be punishable by imprisonment from 6 months to 2 years and a fine from 12 to 24 months, if it is a felony. The penalty of a fine of 12 to 24 months, if it is a less serious crime. The penalty of a fine of 3 to 6 months, if it is a misdemeanor.

prestige by being falsely accused and most importantly with his children by having forbidden to relate to his children in a normal way and then resuming the relationship with them results in very difficult. About the restorative justice some authors¹⁶ pointed out that in family violence it is very difficult to give a satisfactory answer for everyone.

Induced or consented breach

Another problems with no apparent solution in the LOMPVG is the violation of a sentence or precautionary measure favored or with the acquiescence of the victim, that is, when the woman actively or passively consents to her aggressor failing to comply with the established in the sentence or precautionary measure.

These cases usually occur very frequently, by way of example and without going any further we have it when the man is convicted, by a final sentence, for beating his wife and the prohibition of communicating and residing together for a certain period of time for example a year and a half is established. Well, in many cases the woman decides to skip the sentence and resume living with her husband, forgiving him despite the sentence or when it is the man who takes the first step and begins to communicate with the wife or resume co-existence with the approval of the wife. In both cases there is induced or consented brokenness. In both cases, both women and men can act actively or passively to try to avoid punishment and in any case there is always a violation of a sentence or precautionary measure, which should be punished equally. This is an offence that is in art. 468 C.P and the penalty is from 6 months to 1 year or a fine from 12 to 24 months. In this case some part of the doctrine¹⁷ pointed out that the woman (at first victim) should be condemned for her responsibility as an inducer or necessary cooperator.

Far away from obtaining a clear and effective response from the courts on this problem, the truth is that there is no unity of criteria, even the supreme court¹⁸ trying to give reasons why the breach consented to in these cases should be decriminalized, invoking the right of the human being to regulate his private and intimate life based on the principle of freedom and to decide at any time with whom he wants to be united to the private sphere. This court ends up arguing that in these cases the *ius puniendi* of the state should not be applied because it would damage a superior legal good which is the right

¹⁶ J. Braithwaite, H. Strang, *Restorative justice and family violence*, Cambridge 2002.

¹⁷ C. Cueto Moreno, *The crime of breach in the field of gender violence*, Madrid 2017, pp. 231–232.

¹⁸ Judgement Supreme Court, Criminal Chamber, Section 1, Decision No. 1156/2005 of 26 of September.

to liberty and private life and that is why if the woman decides to resume cohabitation a sentence that would restrict basic constitutional rights cannot be applied. About it, in the doctrine¹⁹ criticises the Supreme Court's sentence, thinking that its reasons are wrong and that they cause confusion and legal uncertainty.

Of course the LVG does not regulate anything about this case and only refers to the penal code and in this the articles dealing with the breach of sentence or measure will be applied to the previous example.

Regarding to the ordinary courts or in the second instance, the previous assumption would also be judged as a violation, despite the innumerable criticisms of various social sectors such as the feminist collective, family and even by the judges who see the punishment as unjust.

It is evident that there is no unity of opinion when deciding on the consensual breach by the Spanish courts, thus giving a poor image inside and outside the country. It is also important to note that the police ex officio or any person who knows that there is a conviction and who witnesses its violation, can bring it to the attention of the courts and proceed to the imputation of both men and women, despite their willingness to be together.

In the doctrine there have also been exciting discussions with arguments for and against one way or another, some claiming that criminal law is not a right to the letter that can be used by the citizen at his will and convenience and that in any case the judicial resolutions are mandatory in all cases and without exception since otherwise it would lead to a system insecure and anarchic²⁰ who describes this problem perfectly.

Another sector of the doctrine maintains that it is an aberration that the right of the person to his private life and to be with whomever he wishes at any time is limited by a right that has been placed by men for the regulation of their lives and that in no case in summary can be subject to criminal law.

Conclusions

This article explains the origins of the law on gender violence, the reasons and its purpose. In addition, the legal precedents that have influenced this law are analyzed, such as the IV World Conference of Beijing of 1995 of the UN, and the structure of the law, its organization, its scope, its objectives, its means of protection and the legislative changes by its entry into force are analyzed, specifically which laws have been modified.

¹⁹ P. Lanzarote Martínez, *The breach of the sentence or restraining order with the consent of the victim of a crime of gender violence. Regarding the Judgment of the Supreme Court of September 26, 2005*, Sepin 2005, pp. 1–4.

²⁰ M. Alvarez Jiménez, *The crime of breaking a sentence of the art. 468.2 CP. The consent of the victim of gender violence*, Madrid 2020.

One of the goal of this article exposing and explaining whether the law is effective and correctly resolves the problems of violence against women. Unfortunately, we must say that this law has many dark points and gaps, which translate into uncertainty, insecurity and finally in the non-effectiveness of the law. In addition, another goal is, by pointing out the problems, it is possible for the authorities to take into consideration to make a radical change in this law, taking into account that domestic and gender-based violence must be treated from a multidisciplinary point of view.

It is noteworthy that the law protects only women, who are victims and men are always aggressors. Therefore, for a case of violence, this law can only be applied when the complainant is the woman, not vice versa, since other laws will be applied together with other accessory measures.

These problems of the LOMPVG, can be grouped mainly into five sections, which are the use of precautionary measures in a generic way and without being sufficiently substantiated, the fraudulent use of the law for other purposes, the insufficient regulation of gender violence among minors, false reporting and induced or consented breach.

These problems have created a feeling of insecurity and fear with everything related to violence against women, due to the configuration and purpose of the law and its poor drafting. Despite being in force for almost twenty years, the number of victims of violence against women has not decreased, but has increased and every year the number of victims, women, of violence, also extending to minors and other family members. For this reason, after twenty years, applying this law, it is evident that it helps very little to solve the problem of gender violence or domestic violence, often producing horrible outcomes, such as the increase in deaths of women of minors and subsequent suicide of the aggressor, which each time, unfortunately is increasing. There are also many cases of women assaulting and killing men and children and then committing suicide. On the part of the legislator, there is also no spirit of self-criticism, to undertake a reform that helps solve the problems more effectively and avoid unnecessary deaths.

Finally and as last goal, explaining to the readers of the international community, how the origin, birth and operation of this law has been, being able to compare it with other laws of other countries, especially at the European level, so that in the near future a regulation on domestic violence will be achieved, which is the objective of the European Union, embodied through various recommendations and the Daphne programmes.

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Summary

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Keywords: law, domestic violence, history, structure, functionality and efficiency, Law 1/2004 of 28 of December on integral protection measures against gender-based violence.

This article shows the history, structure, functionality and efficiency of Law 1/2004 of December 28 on protection measures against gender violence. First, it explains the legal background from which this law has been influenced and then its objectives, purpose and novelties are exposed. Secondly, it is analyzed objectively whether the law fulfils its purpose of combating violence, whether it helps to solve problems and whether the number of victims of violence has been reduced since its adoption. Thirdly and finally, the mistakes, lapses and inconsistencies of the law are analyzed and briefly explained. The purpose of the article is to show that Law 1/2004 of December 28 is ineffective and does not solve the problems of gender violence, neither domestic nor family. We also show that it is a sexist law, as it only protects women, excluding men. The most important conclusion is that the Law 1/2004 should be changed to a more efficient law that protects all victims, regardless of their sex. Also, it must change, the fraudulent use of the law to obtain judicial advantages, and the consensual or induced breach of a sentence must also be avoided. It is necessary for a new wording of the law to address from a multidisciplinary point of view.

Streszczenie

Problematyka przemocy domowej ze względu na płeć w Hiszpanii – podstawy prawne, skuteczność i problemy

Słowa kluczowe: prawo, przemoc domowa, historia, struktura, funkcjonalność i efektywność, ustawa nr 1/2004 z dnia 28 grudnia 2004 r. o integralnych środkach ochrony przed przemocą ze względu na płeć.

W artykule przedstawiono historię, strukturę, funkcjonalność i skuteczność ustawy 1/2004 z dnia 28 grudnia 2004 r. o środkach ochrony przed przemocą ze względu na płeć. Przedstawiono kontekst prawny, jak również zanalizowano następujące aspekty: czy ustawa spełnia swój cel, jakim jest zwalczanie przemocy, czy pomaga rozwiązywać problemy i czy liczba ofiar przemocy zmniejszyła się od czasu jej uchwalenia. Celem artykułu jest wykazanie, że ustawa 1/2004 z dnia 28 grudnia jest nieskuteczna i nie rozwiązuje problemów przemocy ze względu na płeć ani domowej, ani rodzinnej. Ponadto jest to prawo dyskryminujące, ponieważ chroni tylko kobiety, wykluczając mężczyzn. Zdaniem autora ustawa 1/2004 powinna chronić wszystkie ofiary, niezależnie od ich płci.