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THE WOMAN OF LEGAL DISCOURSE: A CONTRIBUTION FROM THE CRITICAL LEGAL THEORY[1]

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Abstract
Recover the work of Carole Pateman The Woman of legal discourse allows repair in the three phases identified by her around the feminist critique of law. Connect these three periods-the Law is sexist, Law is male and the law is gender-priority within a framework of analysis such as gender violence in the context of couple, can detect not only urges reflection and evaluation legislative commitment adopted by the Spanish State, but also and especially, review and falsification of scientific-legal categories and seized learned from the Academy and applied automatically in judgments. This scientific anachronism, only adds more violence (secondary victimization) women finally decide to report. Finally, the shielding of the concept of gender violence, linking citizens and the State, stands as essential to the imminent threat of legal dissolution of the latter in the domestic or family violence that brings us back to the unfailing and dangerously vulnerable victim.

Keywords: Gender Violence – Citizenship - diligence State - juridical science

INTRODUCTION

Almost 25 years ago, on May 16, 1991, one of the most internationally recognized Feminists, Carole Pateman, presented a lecture on the occasion of the inauguration of the Chair of Belle van Zuylen, in the School of Women's Studies University of Utrecht. That conference, called The Woman of Legal discourse (The woman of legal discourse)[3]was subsequently published in Volume 1 (1992) of the prestigious journal Social and Legal Studies, establishing itself as one of the most significant contributions to the world of juridical reflection policy from the critical Theory. It identified the three periods in the feminist critique of law; namely: the Law is sexist, the Law is masculine, and finally, the Law has a gender.

Since then, Gender Violence in the context of family and victims charged annually come to occupy a central place in the social and media debate, and have driven as far as Spain is concerned, an avalanche of

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[3] Available at Spanish in Pateman, C., "The woman of legal discourse" in LARRAURI PIJOAN, E. (ed.), Women, Criminal Law and Criminology, Spain Siglo XXI Editors, 1994. Translation by Elisabeth Almeda.

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legislative reforms trying to eradicate this scourge of devastating personal and social consequences. In fact, ten years went by since the approval of the groundbreaking and controversial L.O.1/2004, of December 28 on Comprehensive Protection Measures against Gender Violence, undoubtedly one of the most serious and rigorous – I bet even on an international level – to eradicate this scourge. However, gaps and dissatisfaction about its implementation are putting it into the package of "laws requiring reforms".[4]

It cannot be otherwise, given the number of women killed by their partners or former partners in recent years. The data are certainly frightening. If ETA managed to establish itself in 42 years (between 1968 and 2010) in a remarkable place in the ranking of murdered citizens as political terrorism is concerned, a total of 829 victims, Gender Terrorism is not far behind with 757 women killed between 2003 and November 25, 2014. We are speaking of more than 700 murders over 10 years of "celebration" of the entry into force of the Law of Integral Protection Measures against Gender Violence 2004; which summarizes an annual average in Spain of 70 murders of women by their partner or former partner.

As part of this violence, new elements are added and complicate the problem. The percentage of young and teenage women who suffer gender violence has risen to significant levels[5]. Surely, the "mirage of equality" generated by recent legislative efforts towards effective equality and the eradication of the different forms of gender violence is, of course, especially for youth, a false oasis of emancipation of human beings and a "lowering of guard" as far as protection of liberty, equality and safety are concerned.

Thus, writing on the rights and vulnerable groups, reflecting on freedom, equality and security, or its emptiness, demands more than ever dwelling on the issue of Gender Violence and on the citizens– not victims, in the poorest and devalued sense of the word – that suffer daily from domestic terrorism. Social awareness on the subject exists, nevertheless, far from the empathy and anxiety that other forms of violence such as political terrorism generate in our citizenship. Today, the latest survey of CIS 2014 puts gender violence in the last of the list of concerns of the Spanish population below the "crisis of values".

[4] This law is being revised for reform, both in the Spanish Parliament, in autonomous communities such as the Andalusian (Law 13/2007 of 16 November, on Measures for the Prevention and Integral Protection against Gender Violence. BOJA No. 247 of December 18, 2007).

[5] ANAR, the Foundation for Assistance to Children and Adolescents at Risk, says the number of children suffer some type of gender violence in Spain has grown nearly 35% compared to 2014. So pronounced Leticia Mata, director of Hotline ANAR Foundation: "Unfortunately the ANAR phone calls for domestic violence towards children have grown steadily since 2009. That year we received 278 calls and during 2014 we had 1,920." The foundation also notes that abuse is not a question of social class, or creed or race. The surveys specified that 45% of young people who report living with both parents and are mostly of Spanish origin. Ages with which the attackers are identified ranging from 12 to 30 years. Another fact should join their gravity: nearly 50% of girls and adolescents who are victims of abuse do not record this phenomenon as violence per se. This may be due to the difficulty to identify and perceive that age insults, extortion and threats as a serious situation that should not happen. "Vine. BECH, Laura, "Teenagers do not perceive violence as such" in Blasting News, Society, May 19, 2015.

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However, in this text I do not pretend to approach all the weak points of the legal and political[6] treatment regarding the episodes of gender violence in the context of couples. In addition, the reasons lie not only in brevity but also in the incommensurability of the problem that concerns more than 52% of women worldwide. The World Health Organization raised to one-third (1/3) of the global population the ratio of women suffering from domestic violence. 38% of murders of women in the world have been caused by gender violence. 30% of women between 15 and 19 years are suffering domestic violence by her partner or former partner. Seven out of 10 women in Mexico has suffered this violence at least once in their lives, increasing the number of killings in the recent years. Undoubtedly, talking about international femicide[7]could not be described as exaggerated after these data, but quite the contrary. We speak of structural violence against women resulting in death, which requires immediate and urgent institutional responses.

Since the problem is introduced, I must focus on the same node. I do not think the problem resides strictly in the defective configuration of the law, although it certainly can be improved. The severity of this secondary victimization added to women and child victims of domestic violence, comes on the heels of the lack of coordination[8], ignorance in gender methodology[9] and the special features of violence against women[10], lack of financial and human resources, lack of political will, and of course, of a legal science that continues to use unreviewed standards in the frame of gender violence.

If I may, this is the goal of my work, and I want to focus on it, because I understand that more than a legislative amendment, it urges a review of its implementation by the judiciary, attached to dogmatic categories of legal scientific doctrine. A just law – if that is possible – has no use if its application and interpretation contradicts its spirit, hand in hand, furthermore, with a scientific doctrine taught and transmitted from our university classrooms.

[6] In this regard, can be found, among others, SCHNEIDER, E., "Battered women and the development of feminist law: definition, identification and development of strategies" in DI CORLETO, J., (ed.), Justice, gender and violence, Libraria, Buenos, Aires, 2010, pp. 23-42. Schmal N., CAMPS, P., "Rethinking the relationship between law and violence against women: an approach to the speeches of the / the agents of the judiciary in law relaicóna comprehensive gender violence in Spain" in Psicoperspective. Individual and Society, vol. 7, No. 1, 2008, pp. 33-58.

[7] It is worth reading Lagarde, M., "Synergy for our human rights. To violence against women in Spain, Guatemala and Mexico, "Lagarde, M. and VALCÁRCEL, A., (ed.), Feminism, gender and equality, Madrid, Spanish Agency of International Cooperation for Development Foundation Carolina , 2011, pp. 63-83.

[8] You can consult among other works, CARDENAS, M., Carcia, L. "Limits, Possibilities and informal co-ordination local circuits of violence against gender" II Communication to the Catalan Congress of Public Management, July 2006. Available online at the link: http://www20.gencat.cat/portal/site/EAPC/memuitem.ca54cfbb17b4abf5272a63a7b0c0e1a0.

[9] Just to approach, see FACIO, A., "Methodology for gender analysis of the legal phenomenon" in FACIO, A. Fries, L. (ed.), Gender and right, Santiago de Chile, LOM / La Cottage, 1999, pp. 99-136.

[10] Some of these aspects can be found in CUBELLS, J., Calsamiglia, A., Albertin, P., "The practice in addressing gender violence in the legal-criminal matters: a psychosocial analysis", in Annals Psychology, 2010, Vol. 26, No. 1, pp. 369-377.

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Since 1989, the first year in which the crime of routine ill-treatment in the old Spanish Penal Code is collected, until today, this social scourge has been "reformulated" legally speaking, on numerous occasions. The last legislative response has been controversial – despite its unanimous adoption by all the political forces – Organic Law on Integrated Protection Measures against Gender Violence of 28 December 2004. However, the visibility of violence in the context of family and its classification as a crime has been very recent (1989), confirming the lack of interest of Spanish legislators to address episodes of violence against human rights in family and couple contexts.

It is true that the old Spanish Criminal Code contemplated general injuries of active and passive subjects, in articles 147-156 in case of crime, and article 617 for offense. Determining one or another will depend on the outcome of harm, that is, if more than one first medical assistance is required for its cure.

However, the existence of a series of violent behavior towards women was an obvious fact. A look at the Criminal Code reveals that, although there is no general distinction of sex in any of the types compiled– except those that can be related to sex, as in the case of assumption of labor, abortion – there is a majority sociological presence of women as passive subject of certain crimes. Among them, worth mentioning those related to regular violence or sexual assault perpetrated by a spouse (or ex-spouse) or a person who is or has been stably linked to the woman by a similar relationship. On the contrary, we have not found any crime type that the victim is the man because of the role he occupies in society.

It was precisely the social alarm that arose because of the substantial episodes of aggression within home, which prompted an institutional response at an international[11], national, regional and local level. In fact, as far as international level is concerned, since the Convention on the Elimination of All Forms of Discrimination against Women of 1979 to the review that took place in New York in 2000 of the Beijing Platform of 1995, the UN has undertaken major awareness campaigns to eradicate domestic terrorism. World Conferences on Women in Mexico (1975), Copenhagen (1980), Nairobi (1985) and Beijing (1995), the Declaration of the General Assembly and the World Conference on Human Rights of 1993, the Resolution of the General Assembly of 1998 for the prevention of violence against women and the optional protocol to the 1979 Convention adopted by the General Assembly in 1999 are good examples of this effort.

In fact, in our country, it was not until 1984 when for the first time the figures of complaints of ill-treatment in police stations[12]made public. The dire situation provoked an institutional response not only at

[11] For more complete information, see FREIXES SANJUÁN, T., "The rules of prevention of domestic violence. Reflections on the European and international framework, "Article 14. A gender perspective, Andalusian Institute of Women, No. 6, 2001, pp. 4-20.
[12] In 1984, there were 16,070 complaints of abuse collected in police stations. According to the Interior Ministry itself, are presented each year in our country an average of 18,000 to 20,000 complaints of physical and psychological abuse of women. This figure

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national, but also at regional and local level. Within the Human Rights Commission of the Senate, a special presentation of the research devoted to the problem of ill-treatment in Spain had the aim "to progressively and definitely eradicate this social scourge of domestic violence, and thus alleviate its serious consequences, both at the individual, as at family and social level"[13]. The results of this Commission were fast. Organic Law 3/1989, of June 21, introduced Article 425 into force at the time of the Penal Code, which first defined the crime of discharges of abuse within the family unit. Subsequently, the Penal Code of 1995 will include it in the Article 153, although its contents will also be modified by an organic law in 1999 and 2003. Today, after numerous reforms[14], the new Penal Code as indicated in Article 173.

However, the Penal Code was further amended but not without a discursive battle fought during its passage through the Parliament. Organic Law 1/2004 of 28 December on comprehensive protection measures against gender violence changed, among other provisions, Article 153, Article 173 creating specific aggravated criminal offenses and especially focusing on the cases of injuries committed against whom is or has been the author's wife, or any woman who is or has been linked to him by a similar emotional relationship even without cohabitation.

All this "run" by the Criminal Law[15] shows, from a few years (1989) ago, the eternal apathy and disinterest of the Spanish legislators to approach episodes of violence against human rights within the family (domestic violence) and especially to women as citizens (gender violence) . Just later on, as we know, the aforementioned and popularly known as Integral Law created specific aggravated types and considered the aggression that occurs from male to female in the context of couple as a crime (not only offense) and as gender violence, even without designating it in the Criminal Code.

However, the importance of this last legislative step was not its rougher penalties in the Criminal Code but a new legal concept with a special transformative potential. We refer to the concept of gender violence, having nothing to do with what so far had been qualified as domestic or family violence.

> Gender violence is not a problem that affects the private sphere. On the contrary, it manifests as the most brutal symbol of inequality in our society. It is a form of violence that is directed

represents less than 10% of all cases of abuse of women that occur annually in Spain. On this last point, a black figure of 200,000 is estimated silenced assault.

[13] See Report of the working party created within the Commission for Relations with the Ombudsman and human rights, commissioned study of the problem of battered women, based mainly on statistics provided by the Ministry of Interior.

[14] If originally the crime of "domestic violence" was located in Article 153 CP, albeit with reforms of its content by the Organic Law 14/1999 of 9 June (BOE No 13, of 10 June), four years later, again modified the Penal Code by Organic Law 11/2003 of 29 September on specific measures relating to public safety, domestic violence and social integration of foreigners, altering the content of Articles 153 and 173 later we will try. The newly adopted Law on Integral Protection Measures against Gender Violence, of December 28, 2004, has returned to amend the Criminal Code increasing sentences and activated new measures in areas that deal with violence gender such as prevention, protection, health, labor and social care, and of course, judicial coordination.

[15] One of the most recent contributions and suggestive review we find in BODELON, E., (ed.), Gender Violence and the responses of criminal justice systems, Ed. Didot, Buenos Aires, 2012. It must also be consulted DI CORLETO J., "The legal construction of violence against women" in DI CORLETO, J., (ed.), Justice, gender and violence, Library, Buenos Aires, 2010, pp. 9-22.

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> against women for the very fact of being a woman, for being considerate by their aggressors as deprived of the minimum rights of freedom, respect and decision-making capacity"[16].

It is "a manifestation of discrimination, the inequality and power relations of men on women"[17]. In short, this concept looks into the eyes of women as citizens not as a collective, and provokes the State in its duty of care[18], as a guarantor of order and social peace. This is the reason that "comprehensive protection measures aimed to prevent, punish and eradicate this violence and assist its victims" are set[19].

By contrast, domestic or family violence continues to deal with the attack on a particularly vulnerable person in a family setting (man or woman). We are not talking of structural discrimination affecting female citizens, but of aggression against an individual who is a vulnerable victim in his particular family relationship.

Therefore, the passage of the "simple legal protection of victims of domestic or family violence" to the need to combat and eradicate gender violence as a form of citizen structural discrimination means breaking-up with the idea of seeing women asvulnerable, weak beings, in need for protection, thereby dealing with it through paternalistic protection, and replacing it through the recognition of the citizenship of women, making visible – in the case of lack of protection – the state's inability to guarantee them the full exercise of fundamental rights to life, integrity, equality, freedom and security.

However, following the thread of our previous argument, and despite the undeniable legislative progress – even if it can have improvements[20] – related to achieving effective equality of citizenship and elimination of the various forms of gender violence, our law schools are still extrapolating an outdated model of legal science, typical of the nineteenth century, immune to any criticism, converted to a scientific dogma, a sort of legal theology, not reviewable nor falsifiable. The reluctance to recognize the aggravating circumstance of treachery, the worship of the presumption of innocence principle in front of the questioning of the special knowledge of the victim, the "regularity" of aggression as exponential mathematical requirement, and the invention of a subjective doctrinal animus of domination by the aggressor are, among others, examples of categories elevated to dogma status, symbol of how the Law, this new Law, crashes against the pseudo interpretive neutrality.

Despite various penal reforms, some of the typical requirements of these provisions continue to raise important questions that require a critical reflection, at least from the Philosophy of Law. If it is true that the primal

[16] Reason of LO1 / 2004 of 28 December on Comprehensive Protection Measures against Gender Violence.
[17] Art. 1 of the L.O. 1/2004 of 28 December on Comprehensive Protection Measures against Gender Violence.
[18] See editorial RUIZ GIL, JM (ed.) And the monograph No. 48 of the Annals of the Chair Francisco Suarez, dedicated to Institutional Gender Violence, Granada, 2013, pp. 9-158.
[19] Ibid
[20] In this regard, see Anon, MJ, "ma non troppo Equality? A critical reflection on the recent Spanish legislation on equality between women and men, "Sociology of Diritto, Franco Angeli Edizioni, vol. 34, Italy, 2008. In addition, anon, MJ should be consulted and i MESTRE MESTRE, R., "Violence against women: discrimination, subordination and law" in BOIX, J. and Martinez, E. (coord.), The new Law against Gender Violence, Madrid, Iustel, 2005 , pp. 31-63. CGPJ, Expert Group Report / as in gender and domestic violence CGPJ about the technical problems encountered in implementing the LO1 / 2004, CGPJ, Madrid, 2011; Heim, D., "Access to Justice and Gender Violence", Annals of the Chair Francisco Suarez, No. 48, Granada, 2014, pp. 107-130.

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claim to achieve equality has led to the reformulation and the enactment of laws expressed in gender-neutral way, yet this policy of requiring equal treatment causes doubts, as suggested by the Feminist Jurisprudence. To say that the woman is treated as a man evidently does not suppose she will be treated equally; the neutrality of the law overshadows the true masculine interpretation governing it.

Thus, the Law is seen as something constructed historically and concretely over experiences, opinions and interests of men. It is not masculine by structure or by vocation, but by historical development from man to man, which does not mean that women do not appear. Pitch reminds us "the law is conceived in two ways, according to a male model and a female one, the latter caused by male perceptions of what women are or how they should be"[21].

The Feminist Jurisprudence proposes two options to combat structural inequality that leads to the claim of difference, fighting the false idea of equality, and the subordination associated with the difference. However, let us return to MacKinnon:

> There are two options. The first I call the male standard. Women can be equal to men. In Law this is called neutrality. The other option I call the female standard: Women can be different from men. In Law this is called special protection. In both forms it is men who articulate the standard under which one is measured. One can be the same as a man, and then both will be the same, or one can be different from men, and then she will be a woman[22].

This reflection requires us to notice the three periods indicated by Carol Smart in The woman of legal discourse, about the feminist critique of Law. The first one of them lies in the statement that "the law is sexist"; the second with "the law is masculine", and finally, in a third stage it is argued "the Law has a gender". If the first one forced to review all provisions of criminal law under the scrutiny of the principle of equal treatment, giving rise not only to criminalization requirements, but also demands for decriminalization; the second – the Law is masculine – alluded to the realization that these neutrally formulated laws, however, are applied according to a male perspective and take as reference men as a measurement benchmark.

> For this reason, – goes on Smart – compared to the previous approach , "the Law is sexist", this analysis suggests that when a man and a woman are facing the Law, it is not the Law that fails to apply to the female subject objective criteria. As a matter of fact it applies objective criteria and they are masculine. Therefore, to insist on equality, neutrality and objectivity is, ironically, insist on being tried under masculine values[23].

However, we should not think that this actual partiality of Law – non-formal – is due to a misapplication of the law regarding the judge and interpreter; that is, the masculine spirit of this course. What we want to demonstrate goes even further: the objective application of the law tends to reproduce the dominant social

[21] Vid. PITCH, T., A Right for two. The legal construction of gender, sex and sexuality, Editorial Trotta, Madrid, 2003, p. 262.
[22] MacKinnon words cited by Eisenstein, A., The female body and the law, Berkeley, University of California Press, 1988.En this regard, see LAURENZO, P., "Gender violence in the Criminal Law: A punitive paternalism" in LAURENZO, P, MAQUEDA, ML, RUBIO, A. (ed), Gender, violence and law, Tirant lo Blanch, Valencia, 2008, pp. 329-362.
[23] SMART, C., "The woman of legal discourse", opus cit., P. 173.

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version; and this goes on, applying the Law to a man or a woman[24]. The dogmatic application of the law and the strict compliance with all the requirements supported by the Doctrine, can lead to legal and real vulnerability of certain groups, and all this – paradoxically – for the sake of the egalitarian principle.

Nevertheless, unlike these two stages in feminist critique of Law, contributions that review the idea that the "Law has no gender" has led us to wonder rather than how the law exceeds the genre, how the gender works within the Law and how the Law works to create gender.

> Moreover, the Law is redefined not as the system that can impose gender neutrality, but is defined as one of the systems (speech) that produce not only gender differences but specific polarized differences forms. The Law is seen as creating both subjects with gender and also (more controversial) subjectivities or identities to which the individual becomes attached or associated[25].

Perhaps all this threefold process, which can certainly be described as complex, can be seen more clearly in the scope of domesticity, invisible, private and intimate sphere, which has maintained its own despotic law, and extra-legal jurisdiction. We can easily find the first of the aforementioned steps, "the law is sexist", and the subsequent reaction of depenalization and criminalization of behaviors. The abolition of the crime of adultery and the incorporation of the crime of mistreatment gives a good account of it. Then we will detect the second of the aforementioned steps, "the right is male". The reluctance to observe the aggravating circumstance of treachery in the case of death of the victim, or the traditional conflict between the expertise of the victim and the presumption of innocence will show the partiality of a Law that presents itself as universal. Finally, the analysis of criteria such as "habitual" required by the criminal legislature, both in its Draft Law of Criminal Code of 1992, as in its current text, and the requirement of proven domination animus of the aggressor by an incipient line of jurisprudence allow us to discover the third phase, the "right has a gender", a genre that is perpetuated by dogmatic categories. Ditto is detected[26] by observing the tendency to apply mitigating and extenuating circumstances that somehow justify the violence, such as jealousy, drunkenness, temporary mental disorder or disaffection or conversely, the suspicion in recognizing the self-defense extenuating circumstance if the attacked woman defends herself or the tendency to apply, where appropriate, a mitigating circumstance of temporary mental disorder.

In this sense, our analysis will focus on these last two phases and will try to show the male spirit of legal science, and how gender operates within the Law, even generating it. Bidirectional reaction of legal science to the aggressor, on the one hand, and to the abused woman, – in the case she defends herself –, killing her abuser, is also

[24] In this regard, we note the controversial ruling of the Provincial Court of Barcelona, on January 31, 1997, with the report of the Court, the Ilma. Ms. Ingelmo Judge Ms. Ana Fernandez, and where it is estimated that rape within marriage practiced generates less anxiety, fear and psychological damage that sexual assault perpetrated by a stranger, not her husband. Note how the "conjugal" seems to follow ingrained into the collective unconscious.

[25] SMART, C., "The woman of legal discourse", opus cit., p. 177.

[26] In this regard, see RUIZ GIL, JM, The different faces of Gender Violence, Dykinson, Madrid, 2007. The development of this research will soon be published.

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a good proof– even when we cannot develop it[27] – that "Law has a gender", a Law which is perpetuated through dogmatic categories. Not surprisingly, we have only detected changes in the application of these categories, which are executed automatically, without review or falsification in contexts of violence against women, despite the existence of unanimously approved L.O.1/2004 of 28 December on Integrated Protection Measures against Gender Violence.

We finally understand, as has been pointed out by experts groups[28], the only thing that would change the Law's response to domestic violence, above legislative changes, is a real change of attitude of the legal operators, the – stepping back from the idea that it is a private problem and which the resolution rests solely with those affected, and considering it instead as a public problem of devastating social consequences – that requires, for its eradication, commitment, training and the subsequent incorporation of gender perspective[29] in judicial practice and in legal science in particular.

LAW IS MASCULINE AND SINGULAR

The aggravating circumstance of treachery in cases of gender violence

The aggravating circumstance of treachery is defined as the treacherous and coward attitude of the aggressor, who attacks the victim by using means, modes or ways to ensure the result to injure or kill, or removes a possible defense by the victim. In this respect, the doctrine has distinguished three modes of treachery: the treasonable[30], that includes treason; sudden or unexpected[31]; and finally, other consistent ways of use of a special situation of helplessness[32]. The criteria used by the courts to assess this aggravating circumstance are not uniform[33], but the really important concern lies in the tendency of the courts to not appreciate the treachery in

[27] However, full information can be found in the aforementioned book: RUIZ GIL, JM, The different faces of Gender Violence, opus cit.

[28] Within these leading voices within the Academy should be noted Maggy Barrère positions, Ana Rubio, María José Añón, Arantza Campos, Encarna Bodelón, or Juana María Gil. In the professional partnership framework, see as initial example, Association of Women Lawyers THEMIS, criminal response to family violence, Women's Council of the Community of Madrid, 1999, p. 96.

[29]The Amnesty International November 2012 emphasizes the lack of compliance with the duty of gender training of the judiciary, law-in particular, legal aid free of charge and the prosecution, adding their own willingness of Law operators with moral prejudices, suspicions related to instill false denunciation and even in cases of foreign women in an irregular situation, probable instrumentalization of the complaint for a residence permit.

[30] Judgment of the TS of December 22, 1992, RJ 1992/10465.

[31] See judgments of the TS of February 22, 1991, RJ 1991/1349; of 14 June 1991 RJ 1991/4718; of October 18, 1991, RJ 1991/7311; of April 20, 1992, RJ 1992/3165; of March 8, 1993, RJ 1993/1992; and of 9 March 1993 RJ 1993/2163, among others.

[32] See judgments of the TS of May 28, 1992, RJ 1992/4396; of June 4, 1992, RJ 1992/5444; of May 7, 1993, RJ 1993/3860; and on October 3, 1994, RJ 1994/7604, among others.

[33] STTS of October 9, 2000 is a good example where the jurisprudential aggravating circumstance of treachery is appreciated. It says its FJ 2nd "And those expressed instrumental arrangements, it is well evident the presence of the unexpected treachery and also corresponding to helplessness, because the fact of sticking the knife in the back, while the victim is unprepared, is unquestionably subject to such legal classification, in the case qualifies the acts of murder. " With respect to the lower case, we emphasize the

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case of existence of prior ill-treatment on the grounds that the abused woman may be helpless but not unaware. As Larrauri rightly points "bias regarding gender formulation can further be seen in the fact that the woman is perhaps considered as helpless but not as a result of being unaware (as has been the victim of sudden attacks), thereby her death cannot be described as Heimtücke"[34],a death with the aggravating circumstance of treachery.

An example of the above stated can be seen in the STTS of July 25, 2000 where the High Court partially supported the appeal by the accused and condemned him as author of a homicide – not murder – with aggravating circumstances of relationship and abuse of superiority, because of the understanding that there is insufficient information to assess the concurrence of the aggravating circumstance of treachery. The arguments are: procedural defects[35] and the evidence of not being "before a person absolutely unprepared and who could not realize or glimpse the aggressive intentions by the one that until then was her husband." Worth the transcription of the judgment:

> It is said, as background to the fatal outcome, that the accused had previously had several violent arguments with his wife, mistreating her even in the streets. It is true that in the day of the events he waited for his wife to sat alone in her parents' house, but it is also said that he got the door opened again initiating a prior brief discussion. This event must had warned the victim about the aggressive intentions of her irascible husband. Then we are told, in a disjointed way that he surprised the victim, to affirm later that he pushed her down the hall until the fall both, continuing to the bathroom where he kept stabbing her back, face and both limbs.
> The factual story is as already mentioned vague and even contradictory, so we find no basis to see a sudden and treacherous attack.
> 6. It is clear that we are not facing a person absolutely unprepared who could not realize or glimpse the aggressive intentions by the one that until then was her husband. There is a factual background that shows us that the violent behavior was almost constant in their recent meetings. If we stick to the classic schemes that configure the treachery by the concurrence of betrayal, assurance or cowardice, we must conclude that in the factual assumptions that are told in the sentence none of these component elements are not clearly outlined[36].

Judgment of the Criminal Court No. 1 of Algeciras (Cadiz), with reporter Mr Pérez Pérez, where the offender is convicted of an offense of aggravated injury with premeditation committed -aggression with a kitchen knife his back and understand: "In sum, given these criteria, it incardinable the defendant's action on the aggravating circumstance of treachery, in the second phase of the procedures analyzed by the STS.of 01/24/92, sudden or unexpected, the surprise attack have been made and in the back, thus avoiding any possible defense of the assaulted. This determines the application of the aggravating and therefore rule penological art. 66.3º Code ".

[34] LARRAURI, E., "Domestic violence and self-defense-a case of male implementing the law, in LARRAURI, E. and VARONA, D., domestic violence and self-defense, EUB, Barcelona, 1995, p. 17. However, do not understand why the offender was not convicted of an offense of attempted murder also other contributions of the author are noteworthy. "sound inequalities, silent and forgotten: Gender and criminal law", Yearbook of the Faculty of Law UAM, Madrid, 2009, or "Gender violence in Spain: Three years after the Law 1/2004 of 28 December on Comprehensive Protection Measures against Gender Violence" in BIRGIN, H. & GHERARDI, N., (eds.), Legal Reflections from a Gender Perspective, Editorial Fontamara, Mexico DF, 2011.

[35] TS, on this occasion, too formalistic arguments and procedurals -errors and inaccuracies in the jury is welcomed; no estimate of the investigating judge for the return of this act to the jury for correction ... - creating a huge state of helplessness, powerlessness and injustice around the figure of the victim (see STTS of July 25, 2000, 2nd FD. 1. 2. 3. and 4.). In this sense, and to know that there are contradictions between the facts found, the verdict and the reasoning of the judgment, the crime of murder to manslaughter is lowered.

[36] TS Judgment of July 25, 2000, being Magistrate, the Hon. Mr. Martin Pallin. Legal Basis No. 5 and 6.

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This way it is possible to see how a "resumé of attacks" or a history of mistreatment by the accused benefits him to the detriment of the victim. Thus, the argument of TS continues: "Nor is it possible to build it, based on the existence of a trust relationship between aggressor and victim in such a way that she could not have guessed an aggressive behavior of her husband, because, as has been said, sufficient circumstances concur to rule out this possibility being on record that lately the accused showed an aggressive attitude whenever he was with his wife"[37].

Ditto happens in the lower jurisprudence. The Provincial Court of Badajoz (Section 1) inSentenceNo.47/2011of21November (ARP 2011/1371) states that view – surprisingly –with what is defended by the Prosecutor Ministry:

> The Chamber finds serious difficulties in assessing the aggravating circumstance of murder in this case since the victim was already aware of a possible attack by her partner, since according to her own admission ,she saw the knife under the bed, the handle of it, being the blade hidden in a shirt, so the action of the passive subject was not entirely surprising, nor was completely eliminated the possibility of the victim's defense. In this regard the prosecution, whose thesis is shared by the Court positions. That is, the attack, despite being virulent, cannot be described as treacherous because the passive subject was not unaware of the danger, since finding the knife under the bed could reasonably anticipate a possible attack by her partner, whom previously seen as "uncanny", had given a "cold" kiss (as the victim expressed in the act of judgment). Therefore, the attack may be unexpected but not unforeseen. In parallel, the defendant did not make any act aimed at eliminating the defense of the victim or its assurance. He simply undertook a violent and disorderly way, but it does not characterize a treacherous attack.

As we can see, the jurisprudential tendency has not changed at all after the adoption and implementation of the Comprehensive Act of 2004, although it results from the modern Antidiscriminatory Law[38]. Not surprisingly, we found no differences in judicial pronouncements from thirty years ago. An example of this jurisprudential continuum is the judgment of the Provincial Court of Madrid on October 21, 1992 that does not apply the aggravating circumstance of treachery even though the perpetrator kills his wife hitting her in the back with a hammer as a surprise while watching television. Worth reading part of the convoluted reasoning of the Court that was even going against the accused first statement:

> (...) this circumstance does not concur because, although the absence of signs of defense in the body of the victim, and disorder in the room, together with the statement by the accused himself in his statement to the court, where says, "She was watching television and did not saw when he entered the room, could not defend herself...", they might suggest that the attack came suddenly from behind, a detailed study of the various data that exist bring at least doubt that the assault occurred in the manner described above, because the absence of signs of defense are not enough by themselves to justify this circumstance and the manifestation of the accused is a subjective and personal appreciation, that in no way can be accepted, corresponding exclusively to the courts this assessment in view of the circumstances of each case, and particularly in the present, because of the situation occupied by the victim when attacked, who was sitting on the edge of the angle formed by the sofa, composed of several

[37] Ibid, Legal Fundament nº 6.
[38] In this regard, see RUIZ GIL, JM, new legislative techniques in Spain, Tirant Lo Blanch, Valencia, 2012.

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> pieces and placed in an L shape, as is clear without any doubt by the place where they were bloodstains, and not on the end closest to the door through which her husband comes in, with her legs extended on the shorter section of the sofa,position where it was when their children left the home, and watching TV, that was located in the center of the piece of furniture located opposite the longest section of sofa, that is,she was looking ahead with a very slight tilt to the left, as is apparent from the pictures of the room (pages 31 and following), so that her viewing angle to the right, since the door position was quite extensive, being at best a very small dead zone,from which she hardly could be hit by the accused, who should have been almost lying on the couch to reach her or at least lean on it, what would have led to the displacement of the module, which was perfectly placed when A. found his mother, so it is more logical to think that either the attack came from the front, as the indicated at the trial, or at least from the right, not from behind, allowing the possibility of defense the victim, who was not hampered by the previous ingestion of alcoholic beverages, as is clear from the finding of 1.5 grams of alcohol per 1,000 cm3 of blood, analysis made by the National Institute of Toxicology (folio 97), as indicated the medical experts in the act of judgment, especially if we take into account the immediacy of aggression with the strong precedent verbal discussion, and that in previous cases had degeneratedintophysicalviolence.

In the same vein, with no hintofany change, pronounced judgment nº. 590/2005, of June 10, from the Provincial Court of Girona, ARP 2006/56, -after the Integral Law- where the Court makes a prognosis of what, as it understands, could have happened in the illicit event, leading it to interpret in a negative sense the forensic evidence brought to trial, even contradicting what was testified by the aggressor.

> The day 05/04/03, around 23 hours and 30 minutes, at home located in the street (...), the defendant Miguel Angel with intent to kill Eve, struck several stab wounds in various areas of his body with a knife, which effectively resulted in the death of her (...). To achieve his purpose the defendant Michelangelo deliberately took advantage of possessing a knife with him, thus weakening the chances of defending Eve. (...) Indeed, the main fact in issue in these proceedings, the death of a person at the hands of another, did not submit special evidentiary difficultiessince it has been the defendant himself who, with important nuances related to the specific circumstances of the incident, has recognized both the causation of the death of Eva as his involvement in the incident. On the one hand, the violent death etiology is evident.The deceased had numerous deep gashes in various parts of her body, being the main ones inflicted in the chest and abdomen, so that one of them came to pierce a lung sectorreaching the heart and another came in from the left breast area twice also reaching heart. (...)
> However, we cannot stop here since the most serious qualification of the allegations claimed that the incident was not constitutive of a simple homicide but understood that it was a crime of murder concurring the aggravating circumstance of treachery, a generic circumstance that in this particular case converts the crime of homicide into murder. The Jury Court has held that such treachery, substantiated by the parties through the existence of a sudden and unexpected attack, exercised with great violence, with the deceased lying in bed, has not been established. Indeed, the events have not been reviewed in its essential configuration but through the testimony of the accused, since on the one hand there were no eyewitnesses to the facts and, secondly, no relevant objective data that supported the accusing thesis. (....) So, in the present case, it is not at all established that the murderous attack occurred while the deceased was restingunsuspectingly on the bed, for that thesis comes from the fact that large bloodstains were found in the mattress that the accused tried to make disappear, because such signs do not indicate but thata significant loosening of blood happened in that place, but it could be after the start of the attack, that is, for example, because Eva, after the stabbing, fell fainting or already dead in that place. Similarly, it is also not possible to deduce the situation in bed because there are drops of blood on both sides of the bed, since such splashes could have occurred when taking with violence the knife that

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> had been introduced several times, staining and leaking. Another major finding is the presence in the hand and arm of the deceased for signs of defense, that is, she tried to bring those parts of her body in the way of the knife, which implies the existence of a certain prevention, which, fatally could not prevent her death. In short, as well as the Jury Court has held that the defendant's statement is not entirely accurate, since many of his claims and omissions do not obey but exculpatory desires, from that silence it is not possible to necessarily deduce the opposite thesis by the accusations.

The conclusion of these arguments, as we shall see, involves the victim's obligation to remain alert at all times to avoid any tragic outcome and also being considered responsible for its occurrence. The rest of the judicial argument is surprising:

> The two logical hypothesis –in the Court's view- possible and probable, but with opposing results as to the application of the aggravating circumstance of treachery". (...) In the former case, more likely than the second, because it is more logical that when the contusions occurred in her head and face, the defendant still had no knife, otherwise, he would have used it, stabbing the victim and not hitting her in the head, it appears clear that there was no modalities of treachery, because neither was treason, sudden and unexpected attack, helplessness of the victim, as the assaults that produced head injuries did not occur suddenly and unexpectedly, nor treason, but with confrontation between victim and aggressor, even though the physical superiority of the aggressor. And about the aggressive acts with the knife, since most likely little time had passed between the moment she was hit in the head, being in the hallway, and when the offender returns from the kitchen with the knife, the victim had a margin of time to take refuge in the bathroom or bedroom, or even to flee to the house door, but also getting some object to defend herself in case the aggressor came back (...)".

The latest decision of the Court of the second option requires no further comment. It is enough to read it to understand the legal science, without review or contrast with gender perspective, produces a plus of violence in the assaulted women, demanding an unprecedented heroic behavior from them. The Court concludes:

> In short, with this hypothesis, the one we consider the most likely according to the forensic doctors, the defense of the victim was not completely eliminated, nor any advantage was took from the situation of helplessness, because she had the possibility to defend herself by taking refuge behind the door of one of the rooms, or to escape through the exit door of the house, and also when she could not escape, she fought the accused with her hands trying to pull the knife when he stabbed her, even coming to grip the blade. (Zamora Provincial Court (Section 1) nº. 1/2010 of 15 April.ARP. 2010/636).

The alarm of this procedural violence inflicted through the automatic application- without genre review – of the category treachery, in the process of gender violence in the couple context, has forced the recommendation of its falsification – as that scientific category that is not dogma – even by the body of prosecutors in its spirit of improving the procedural from this social scourge. Thus, in the Conclusions of the Eighth Workshop on Fiscal Delegates in Violence on Women held in Madrid during the month of October 2012, it is literally determined in the number 7:

> In crimes against life among the partners or relatives, a prior discussion between the aggressor and the victim does not prevent the assessment of the aggravating circumstance of treachery as, precisely, coexistence, generating a certain sense of confidence and security, causes the victim not to expect or imagine a fit of such gravity and nature, which means that the victim cannot implement any defense mechanism, or assume danger from the aggressor.

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This perception is what is causing a more than timid specific jurisprudential response (STS 16/12ofJanuary 20; 467/12of May 11; 527/12of June 20) about treachery, when the fact is committed against the partner (even relative) having existed a prior discussion between the aggressor and the attacked. This has been setting the so-called "coexistence or domestic treachery" defined by the STS16/12 of January 20 and which is based "on the trust relationship that comes from coexistence, generating for the victim a total unconcern about a possible attack that could have originated from the defendant's actions (SSTS 1284/2009, December 10and86/1998, April 15). It would, therefore, be the case of a domestic treachery, resulting from the relaxation of defensive actions due to the unpredictability of an attack carried out by the person with whom the victim lives day by day".

In the same vein, though with many contrasts, we noticed in the last year a shy jurisprudential change, admitting the possibility that the element of unpreparedness can be seen in a "second temp" or second phase of the execution of the criminal act, every time it does not come from a treacherous behavior. This is the case with the sentence of the TS nº474/2011 of May 23 (RJ 2011/5736) of the Criminal Division, Section 1, that determines:

> In the treachery conducted by surprise, in a sudden, unexpected and unforeseen way, the jurisprudence of the Chamber distinguishes the cases where one attacks unannounced from those that are also considered treacherous but where the treachery only appears in a second phase of the implementation of crime. The latter mode occurs when a qualitative change in aprevious situation of confrontation without treacherous initial circumstances takes place, so that thislast phase of aggression, with its own characteristics, could not be expected by the own victim in any way, depending on the specific circumstances of fact, especially when there is a substantial alteration in the aggressive power regarding the instrument used, the anatomical place of the attack and the force used[39].

In this sense, the TS, and almost exceptionally with the rest of its pronouncements, supports the aggravating circumstance of treachery in the following issue since it understands the prerequisites of helplessness and unpreparedness of the victim are met. Worth the transcript of part of the judgment:

> Limiting ourselves to the particular case, the court judgment declares proven with respect to matters that now there is an interest in settling that the accused "parked the vehicle in the C/... among the numbers..., in a place he knew was an obliged way for Emilia towards her school waiting for her a long time inside sitting in the passenger seat, looking straight at the sidewalk, with the knife in his belt at his back. When he saw her coming he waited until she arrived near the vehicle, coming out by surprise, approaching her before she could react, which led her to scream for help, he grabbed her tightly by the hair and dragged her to the door through he went out of the car with the intention of forcing her to enter the same, to which Emilia showed her opposition as she kept asking for help, and not surprisingly got hit by a strong blow that brought her to her knees with her head on the passenger seat, blocking all escape options with her own body that covered the gap left between the open vehicle door and an existing tree. Without interruption and with the intent to take her life away, he took the knife from his waist and stabbed her 19 times, in different parts of her body, some stabs being necessarily fatal, stopping only when the knife blade, given the virulence with

[39]In the same vein, see among others: STTS 178/2001 of 13 February, STTS 1214/2003 of 24 September; STTS 949/2008 of 27 November; STTS 965/2008 of 26 December; STTS 25/2009 of 22 January; STTS 93/2009 of 29 January; STTS 282/2009 of 10 February; STTS 854/2009 of 9 July; STTS 1180/2010 of 22 December.

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> which it was introduced into the body of the victim piercing in some cases her own clothing and crashing into bone material, broke and although since the first stab Emilia stopped resisting and therefore ceased her cries because of the lost of her consciousness". Therefore in the proven fact that must remain unchanged under the content of the appeal and the procedural route used, it is stated that the accused approached the victim by surprise before she could react and dragged her by force to the vehicle, which he had parked there. It is therefore given the assumption of a generic surprise treachery, because the attack against the minor occurred in a sudden way, without giving her any time to react. To this must be added that when he managed to situate the victim by the vehicle and she was kneeling beside the passenger seat and resisting when the defendant introduced her into the car, the aggressor, without interruption and with intent to take her life, took the knife from his waist and gave her numerous stab wounds, to a total of nineteen. No doubt, then, that the appellant managed to surprise his victim both in the way he approach her, at first, and immediately afterwards in the mode of assaulting her with a knife that until then had not been seen by her. This way, through a surprise attack, the defendant managed to exclude any possibility of defense by the complainant and ensure the implementation of the murderous action, despite the performed surgery avoided a fatal outcome. Therefore concur undoubtedly the subjective and objective requirements of the surprise treachery, so the defense is not viable".

Unfortunately, the dynamics detected in our courts in recent years, despite the legislative progress in this regard, remains what is reported in this paper, which forces us to question the efficiency of rules concocted in order to eradicate gender violence as the social scourge it is and the (ir)responsibility of a legal science that insists – without too much control by the Philosophy of Law[40] – in applying mathematical theorems to the Law. In this sense, chronologically in crescendo one should see ST Audiencia Provincial de Madrid of October 21, 1992; STTS of July 25, 2000; ST of the Provincial Court of Madrid (Section 1) Nº 458/2005, of October 17, JUR 2005/257752, ST of the Provincial Court of Girona (Section 3) Nº 590/2005, of June 10, ARP 2006/56; ST of the Audiencia Provincial de Zamora (Section 1), Nº 10/2010 of April 15, ARP 2010/636; ST of the Provincial Court of Badajoz (Section 1), Nº 47/2011, of November 21, (ARP 2011/1371) and Judgment Nº 474/2011 of 23 May, RJ 2011/5736.

The special knowledge of the victim versus the presumption of innocence of the perpetrator.

Another noteworthy aspect is the conflict that traditionally occurs between the alleged violation of the presumption of innocence[41] -principle traditionally claimed by the aggressor defense, the one complaint spelled

[40]Except for a few voices, minority, philosophy of law mentioned in a previous note, the fact is that neither the legal Science repair them seriously, neither this mission has been embraced as urgent by the Philosophy of Right . To this we must add the worrying residual role is gradually acquiring discipline in legal studies, problem that certainly should be treated urgently and reviewed by the Academy.

[41] However, striking the allegation of breach of the presumption of innocence in cases such as those occurring in the day in question the STTS of October 9, 2000, in which the defense argues, "there is no certainty that the defendant could have acted with premeditation, besides securing the coup and recounted the above contradictions could not be corroborated". In this regard, the prosecution states that "the facts are accredited by the admission of the accused, who said he stabbed his wife in the back, even though in the plenary rectified and aggression manifested not remember; we also have the testimony of their children and medical

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out by the aggrieved about the situation of physical and psychological violence to which is subdued and criminological data of medical experts that corroborates that the perpetrator directs the blows to the head (ruptured eardrum), back and chest[42], so that the hair and clothes cover the injury occurred in these zones. The psychological consequences are even more difficult to perceive. Deficiencies in the official investigation, according to the latest report from International Amnesty from November 2012, increase when violence is not physical, neither recent nor documented as an injury report (violence unmarked), which remains absolute unpunished despite the huge impact on the psychological integrity of women. If we add the fact that battered women - avoiding going to medical health professional and making file complaints for fear, shame or resignation - whenever they do come to it progressively in more serious violence, we must consider critically whether the legal response prevents and protects victims of future attacks or whether on the contrary, excessive formalism and casuistry-mathematical requirements abandon women and children to the fate of aggressor.

In this regard, we agree with the STTS of June 24, 2000[43] in his 2º FJ when he reminds us that "There is an established doctrine about this -SSTS Room May 26, 1993, June 1, 1994, July 14, 1995 17 April, 13 May 1996 No. 111/99 of January 30, No. 486/99 of March 26 and No. 711/99 of July 9, according to which among others, the statement of the victim is, by itself, capable of causing the decay of the presumption of innocence as always as such statement does not appear suspicions of bias or interests other than the mere expression of the truth of what happened, and in that sense as no requirements-which aspects to consider for the veracity of such a declaration this Court has referred to the absence of absolute disbelief, to the credibility of the story and the persistence of imputation. As I recall the judgment of this Court of November 24, 1987, no one has to suffer the damage that the event that motivates the criminal proceedings are conducted in private between the victim and the accused.

expert reports, together with the minutes of visual inspection. " The proven facts in the judgment require no further comment, "the accused, following an episode of discussions with his wife, who determined to abandon his matrimonial home, she returned to him on the afternoon of November 15, 1997, staying in the house, once your son left. Shortly later, he comes his daughter Rachel, and after arguing with her, beats her in the face, so he takes refuge in the room; in these circumstances, Rachel listened as his father rummaged something in a toolbox and then in the kitchen, more specifically in the cutlery drawer where they were. Soon after, he entered the home before said his wife, Ana Maria, who temporarily lived in a shelter for battered women, although frequented the floor to provide care for her two children, and after discussing with the defendant, it called for who turned towards the master bedroom, which was occupied opposite Rachel, it moments after listening to the voice of his mother that said "Raquel kills me," leaving his room just at the time when his father left marital bedroom, then her mother with a knife twenty three centimeters sheet nailed it back voluntarily with the intention of causing death, the mother saying "take it off .....take it off ..." which he did, collapsing on the floor Mother and daughter out to the landing on the request for help.

[42]Muellerman study in 1996 on nine thousand women who went to the emergency room of ten hospitals showed that abused women often have lesions in the head and trunk, compared with women who came to the emergency room without having undergone aggression from their partners, whose injuries were focused in the spine and lower extremities. Also, according to a study STARK, E., Flitcraft, A. And FRAZIER, W, Medicine and patriarchal violence: The social construction of a "private" event, International Journal of HealthService, 1979, 9, pp. 461-493, abused women were 13 times more likely to have lesions in breasts, chest or abdomen that victims of other accidents.

[43] In this regard, worth mentioning some pronouncements of the "minor case", namely: Judgment of the Provincial Court of Seville January 10, 2003; Madrid from February 28, 2003; Valladolid on March 11, 2003 and the Provincial Court of Alicante of March 20, 2003.

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Otherwise, it would cause the most absolute impunity. "In this line also pronounced the Criminal Court No. 1 of Cartagena in Judgment 26/2013 of 18 February, remembering that the requirement of likelihood

> Must be weighed properly in crimes that leave no footprints or material traces of their commission (Article 330 LEC).; since the fact that sometimes the corroborating data cannot be contrasted not detract from the testimony if the impossibility of verification is justified under the circumstances of the fact.

The problem arises when women are especially made visible, they have to test and verify their testimony (judgment of the Provincial Court of Cordoba (Section 1), in its judgment of November 5, 2007) and are forced to move the process from evidence (whereas have no other corroborating evidence) promoting actions, in order to advance investigations and proceedings that would be dismissed for lack of evidence. If we add[44] the lack of diligence in investigating office, insufficient and sometimes inefficient work of the prosecution and the judges rejecting for insufficient evidence matters, the result cannot be less flattering for women that in the end dare to denounce. The Report of November 2012 of the International Amnesty also points to the predisposition of the legal operators in general, charged with gender prejudices, to the unfounded suspicions regarding the falsity of the claim and even, in cases of foreign women in an irregular situation, the tendency to value as more than possible the manipulation of the complaint to obtain residence permits and other economic and social benefits.

When presenting the case in this way, the three parameters or lines of action taken by the courts can only be understood in order to admit the evidence, needing a second "filter" in which the quality of this declaration will be assessed with other evidences that will contribute to the process. As shown in STTS 230/2010 of 19 March (RJ 2010, 1474) the contents of a witness that exceeds the triple filter indicated (credibility, credibility and persistence) should not be taken as a valid indictment. This it is the line taken by the judgment of the Provincial Court of Madrid (Section 2) No 113/2012 of 9 February, ARP 2012/444 which states that "(a)cquireequall importance to explain what is believed to witness account as to why the witness who says contrary facts" or the ST of the Provincial Court of Cordoba (Section 1) No 860/2010 of 16 November (ARP 2011/1094, among others also based believe in previous judgment of the TS of December 19, 2003 (RJ 2003, 9316) provides a point, in my opinion dangerous prejudiced, sexist, namely:

> No one escapes, says STS 19.12.2003 (RJ 2003, 9316), that when a crime in which feuding author and victim appear committed in these offenses usually committed in secrecy, it may be that the manifestations of the latter (the victim) have to be credible by the specific circumstances of the case. That is, the occurrence of any circumstance of resentment, revenge, enmity or any other ethical reason and morally unacceptable is only a warning for a large number of filters to be made of his statements and cannot be ruled out those that, even with these characteristics have strength , firmness and objective truth. What matters is the reasonableness of the conviction on which the Court has expressly argued in the sentence. The examination of these three elements is only a working method that this room is showing

[44] See Amnesty International Report of November 2012.

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> as a possibility rooted by difficulties that, very often, the courts found in these cases. STS 01.12.2004 (RJ 2005, 466)[45].

Regarding the contradictory or insufficient versions of the victim, - post traumatic typical lock - , and the need for expert medical-psychological monitoring, in order to disregard them or even to determine the existence of evidence of a crime or misdemeanor for the purposes of art- LECrim 54, pronounced by the Provincial Court of Madrid in Auto 5/2005 of January 19, 2005/246848 marginal RJA:

> The appellant stated in her application at the police headquarters that has received death threats from her husband, with whom she is in the process of separation, however, in her statement to the magistrate she is not able to realize any of these threats, or describe any acts which may constitute a crime against life, physical or moral integrity, sexual freedom or freedom and security.Only it refers to two years earlier (about threats with a weapon) in a vague situation. By not appear signs of any of these crimes, it is not even possible to appreciate the existence of an objective situation of risk for the victim.

We find it fundamental to admit the essential knowledge of the victim and we advocate to understand the threat as aggression itself. Otherwise, we could get to legal defenselessness or comic situations - lamentably -as the judgment of the Court of Instruction nº. 3 of Roquetas de Mar, on September 26, 2000 in which the accused of a lack of threats was acquitted "for the versions offered by those involved are opposite "and because" the complaint was instrumental in getting the assistance of the Andalusian Institute of Women[46]", or the judgment of April 13, 2000, the Court of 1st Instance and Instruction of Loja[47], would acquit excluding the victim's statement for "lack of attendance to the act of judgment the only witness of the facts" and "a superficial analysis" of previous relationships between the accused and victim.

This whole situation is further aggravated by contrasting it with some sociological data: the victim does not always go to trial (43%), or when it does, do not confirms its complaint (45%), 11% attend and forgive the aggressor and 1% remaining recognizes mutual aggression[48]. Some recent data[49] is of particular concern: in relation to 2007, the number of resignations has increased by 29%, especially from 2009[50]; and it has dropped the number of complaints in recent years about the dynamics achieved since the adoption of the "La Ley Integral". In 2011 were filed more than 45% of complaints of violence, at national and regional level, and the trend is to

[45] ST of the Provincial Court of Cordoba (Section 1) No 860/2010 of 16 November (ARP 2011/1094.

[46]It reads the judgment of the Court of Instruction No. 3 of Roquetas de Mar, on September 26, 2000, with Judge MrFernándezAyuso: "There has been established the commission of the offense of threats attributed to the defendant, because the versions offered by those involved are opposite, joined the witness practiced at the request of the complainant does not clarify the potential liability of the accused, but comes to clear it thus appears that he went to talk to the lawyer of the Institute for Women giving advices was accurate reporting of the facts in order to provide care and support, a fact which, combined with the close relationship between the witness and the complainant shows that the complaint was an instrument for this assistance. "

[47] Judgment of April 13, 2000, the Court of 1st Instance and Instruction of Loja, being the Judge Ms. Moreno Verdejo.

[48] Association of Women Lawyers THEMIS, criminal response to family violence, opus cit., Pp. 30-31.

[49] See Amnesty International Report November 2012.Asimismo see CGPJ Facts complaints registered criminal and civil proceedings, orders of protection sought in the courts of violence against women (JVM) and judgments of the courts in that matter in 2011, CGPJ, Madrid, 2011.

[50] In 2008, a total of 142,125 complaints, 16,100 women quit the process. In 2009, a total of 135,540 complaints, 16,762 women quit the process. For more information, see http://www.juntadeandalucia.es/export/drupaljda/Violencia_Genero_Ficheros_DENUNCIAS And RENUNCIAS.pdf

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increasing. Thus, if in 2011 18.349 protection orders were granted, in 2014[51] have fallen to 15,438. There are, as we see, nearly three thousand less. The protection of victims of domestic violence has been decreasing year after year[52]. Not surprisingly, in the last three years, we have seen a budget cut of 22%. Also (or consequence) has boosted the number of judicial dismissals and has significantly decreased the granting of protection orders. Most of sentences are delivered acquittal for lack of evidence. However, hidden violence, this is unreported but detected through statistical studies, representing 73% of the abuses. Data denounce: in 2013, 53 women were murdered in Spain. 93% did not have any protection in place even though 31% had previously reported abuse. Extreme risk valuations are down 38% in recent years and 28% the ones of high risk. They are also tracking 710 devices implanted only to control the perpetrators of the 3,000 available.

The conclusion is usually that the incriminating testimony of the victim, whether or not accompanied by other tests, only involves the conviction of the perpetrator in just under half the time; whereby the "one word against another" or counterclaim[53] involves the acquittal of the aggressor in this percentage[54] in the first case, or negotiation between parties, in the second; and beaten body area (the attacker hit where non-marking), or the evidentiary difficulty of moral and psychological damage also involves single conviction or acquittal of the accused, with the previous regulation[55] - not for lack of a crime; or derogating from 173.2 as usual violence, be compelled to adhere to the most specific event. This same line of cases remains at present, requiring to be the victim who test the veracity of her account (judgment of the Provincial Court of Cordoba (Section 1), in its judgment of November 5, 2007).

Faced with this, fortunately the judgment of the Audiencia Provincial de Jaen, Section Two, of January 18, 2002, pronounced on the line for us defended, the accused is condemned as responsible for a crime of common mental ill-treatment, other threats and three minor lack of insults "primarily by the witness of the victim itself", former wife of the accused, "which brings the jurisprudence conditions required to grant credibility and validity in order to constitute evidence of sufficient charge to rebut the presumption of innocence. " The proffered

[51] Data collected by LOURIDO, M., in http://cadenaser.com/ser (2015 02/16 / society)

[52] However, the Andalusian Women's Institute hosted 250 women from violence in danger of death in 2014: 115 women and 135 children in their care through comprehensive service and reception, according to the IAM own. Vine. Córdoba Journal of February 9, 2015, available on http://www.diariocordoba.com/noticias

[53] Evidentiary difficulties of aggression that happens in the privacy of home, we must add the growing tendency for the aggressor to file counterclaim as procedural strategy to try to reach a deal that favors the non-appearance of women in the trial. We speak of a re-victimization of women as not only be reported but also assaulted by their partner or former partner. According to the report on casualties of gender violence and domestic violence in the area of the CGPJ partner or former partner in 2011, three of the women murdered in 2010 they had been denounced by his murderers.

[54] Statements like that of the Provincial Court of Girona of 31 January 2003, or that of the Provincial Court of La Coruña of March 25, 2003, are good examples of rejection of credibility of the statements of the victim and lacking corroboration necessary.

[55] One example is the judgment on July 17, 2000, the Criminal Court No. 8 Malaga, even admitting that the special knowledge of the victim, condemned for lack that "there to have caused injury to health which has only been first medical aid precise with harmful intent that the body area affected by the events (head, neck, hands) show. " Judgment of July 17, 2000, the Criminal Court No. 8 Malaga, being Judge, Mr. Macho Macho.

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by the accused to his wife on several occasions such as "bitch, bitch," "I have to spray you with gasoline," "I have to take your life" as well as the various systematic episodes of physical and psychological violence phrases during marriage and after separation -some episodes, denounced and convicted, created "an unbreathable atmosphere and climate of systematic abuse." In addition, according to experts' reports, the victim "suffers the battered woman syndrome consisting of feeling of anxiety, fear, sleep disorders, among others, pointing as the only source of such bad physical and mental abuse caused by husband "[56].

The importance of a good medical expert report notes dissipate and help understand the last operator of the law any doubt about the ways in which it manifests and lives gender violence (with locks and apparent contradictions that affect the credibility of witness), as well as helping the victim to unravel the nuances of violence normalized by it, strengthening their resilience capacity and hence their confidence in the judicial process. This is the case of the recent judgment of the Criminal Court No. 1 of Cartagena, No. 26/2013 of February 18[57], or the judgment of TS No. 1139/2009, of October 30, RJ 2010/991, Chamber Criminal (Section 1):

> In the case of the contested judgment, condemning the accused as the perpetrator of injury by gross negligence, the room not only had the testimony of the victim but the medical expert reports on the serious injury suffered by the victim in the eye, objectively corroborating his testimony, which in turn contains contradictions or evidence or spurious motivations. Indeed once expressed the belief that her husband in the struggle itself intended to hurt her, and say other than within the fight the injury was an accident is not a contradiction of testimony but a change in his personal opinion or belief about the purpose of the defendant, which may result from reflection and reconsideration of their intention, which is not contradictory with respect to material materially account of what happened. Nor is it a contradiction that affects the witness on the substance of the fact that after the incident referred her husband threatened or bothered but also recognize that she is afraid that after two weeks he came home drunk asking for clothes. Still less that such expressions or statements shown any animosity or resulting spurious motivation derived from the above circumstances do act reported dubious veracity of his statement.

Also, if the medical reports that may accompany, assist and/or corroborate the testimony of the victim are really important- or even meet with their testimony, the legal exemption from the victim not to testify against her partner or former partner granted by Article 416 of the LECrim - are no less critical the reports provided by the Corps and State Security Forces or other peripheral testimonies entity that could provide the course pursued. In this line we find the ST of the Provincial Court of Madrid (Section 27A) nº. 1011/2011, of November 30, JUR 2012/22712, highlighted precisely the opposite.

> In the present case has not been practiced in this plenary an evidence of the presumption of innocence of the accused, whereby a conviction could be supported. Thus, the complainant and alleged victim filed in plenary to the power not to testify against his partner the art. 416 of the Criminal Procedure Act (LEG 182, 16), the accused on the other hand, said not remember what he said to be drunk and the Civil Guard No. J-35913-F not remember the expressions uttered the defendant saying he was drunk, and uttered a threatening and only

[56] Judgment of January 18, 2002, the Hon. Jaén Provincial Court, Section 2, being the Speaker Hon. José Requena Paredes.
[57] We speak of two medical reports that assess injuries incompatible victim with a slowdown in car-such as the alleged aggressor, in the absence whiplash; and highlights a bruise on his right calf, to try the victim out of the car where the attacker struck.

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> questions of the prosecution who asked if these phrases could be attempts against his life sentence, he replied that he believed himself and that he said in a state of exaltation and the national court whether it entered in the crowded's what he heard, he said yes. Just this statement of the Civil Guard, he did not remember exactly what was said by the accused, and that alone is incriminating, for the question directly made by the judge a quo, whether he could not say what kind of threats made, and if the referring expression in the crowded which was heard but not now remembered, was answered by the Civil Guard, "yes, yes indeed," it is insufficient for this Court to endorse the incriminating thesis maintained by the prosecution. It must therefore acquit the accused of the crime of threats which was being accused and was under indictment.

Ditto happens in judgment of the Provincial Court of Madrid (Section 27A) nº. 832/2012 of 26 July JUR 2012/332223, which clearly the terror of the victim perceives to two different assaults while certainly affect "contradictions" of his statement, and his mixed reaction around first and immediate complaint and the delay of this aggression in the second. Only a correct knowledge of the characteristics and manifestations of violence against women in the context of couple would make visible the normal reactions of dread and fear, own the psychiatric syndrome of the battered woman, and not classify them as crippling contradictions of the credibility of his testimony. In this case, moreover, even if the attacks were carried out in a public place, - and not in the privacy of home-peripheral testimony unfortunately absent, which leaves women to fend for themselves and not allowing their statements to be attributed to the probative value of that charge that would be granted in the instance judgment. And, "even if it was accompanied claims, or went to the hospital because her friends convinced, no data of their friends is provided, no statement has been received from any of them, so that no other incriminating evidence but their own statements".

> But in this case we are not faced with persistent statements, nor can we estimate them sufficiently corroborated from an objective point of view.
> As claimed by the appellant in his written complaint, when María Cristina for the first time denounce the events within the Antiquarium Bar - indeed, immediately after occurred - in Alcobendas Police Station, it refers that has entered that establishment and has seen him as the accused, with some friends, and although he had a ban on approaching it, data known by the bar owner, who ignored this fact, and within minutes, he came her and he told her she was a feeble, and she would better watch him, and if she wanted, they fixed on the street. However, when only five days after appearing before the magistrate, changed his version of events, to say that it is she who, seeing that Patrick was inside the bar, went to him to tell him to leave or call the police, when he began to insult and threaten with the stick was going back to, justifying his change of version she's scared to death, and "sometimes does not remember". And he says that he is going when she made the gesture to call the police. And in the act of oral judgment, again change his version of events, then he declares that she entered the pub with a group of friends, and when he saw her, he began to insult and threaten her, and the Bar just ignored. Concerning the second fact, she did not report until the 23.21 hours, that is, nearly 45 hours after its occurrence, when she went to the police station, again, it comes that she was going to sleep in the house of a friend, and when she was in the CALLE000, where she lived, he approached from behind and punched her twice in the face. And in the Court of Violence against Women, also with regard to this aggression changed his story to ensure he given her a single punch, which damages the cheek and lip, and reiterated "all made with the same blow." And at trial, he maintains that gave a single punch, but ensures that where he was going was not a friend's home, but his home. And when the

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> defense counsel puts such apparent contradiction, without altering in any way, it states that there is no contradiction, since she was then living in a friend's house, which returns to incur a contradiction moreover, since, as in the Magistrate's Court is asked for the delay in going to medical care and, further, to report, it justifies that, after the attack she went home. In the act of oral judgment states that it takes that long to go to medical care - 'At 22.17 hours on day 6, and more than 19 hours after the moment she said that happened the facts - and go to the Police Station - to report 'At 23.21 am on 7 February-because she was terrified and did not dare to leave home. But it is difficult to accept as plausible explanation such as the one made less severe, occurred even two hours before when matched him in a bar, and, according to her account, he has approached her, calling her and telling her that she was feeble and to be careful with him before he left the bar, as she warns him that called the police, go immediately to lodge the complaint. On the other hand, the objective corroboration, a peripheral character that could involve injury, which of course may be incompatible with the dynamics of causation which she refers, - one or two punch- is markedly diminished by the fact that the important time period elapses between the time of his alleged occurrence, and one in which its finding takes place at the Infanta Sofía Hospital.

However the a priori distrust of the testimony of the victim, it is observed even in sentences where understood cause of contradiction, ridiculous reasons for its irrelevance. This is the case with the judgment of the Provincial Court of Madrid (Section 27A) No 63/2012 of June 28, ARP 2012/760, where an alleged contradiction between the testimony of the victim and her sister, disable both testimonies. In this sense, the victim states that the accused said "I'll kill you", while his sister says he uttered "I'm going to kill them all." We understand that it has taken a very strict and narrow way, the necessary coincidence that must have both statements, given that saying "I'm going to kill all" also includes the victim, not having a substantial difference, in addition to absolute coincidence in the account of other attacks contained in the complaint regarding factual story ("she was going to sink, that would leave her with nothing, and that would leave even without the dog").

> In the present case, the incriminating statement of the complainant, while there has been persistent throughout the procedure, it has lacked, contrary to the statement made by the judge "a quo" peripheral corroboration of the testimony of her sister Reyes. As that is not coincident with that of the injured regarding the determination of sentences intimidation attributed to the accused and would constitute the crime for which he is convicted in the contested decision. Thus: both the accused and the victim agreed that the complainant had changed the lock thereby preventing the common domicile entrance to the house of the accused. Reyes in referring a dispute between them that was not subject to prosecution in which they have mutual insults uttered. However, although Reyes argues that the accused said "I will kill them all," these statements do not match the intimidating phrases that the victim reported having been object, to refer that from outside the house the defendant addressed her saying "I will kill you." These statements do not match what Reyes referred by saying the witness (coinciding precisely with the accused) that it could not be seen from outside the house your partner because "there are friar and cannot see." Faced with such threats, not even agreeing the victim and her sister if the death threats attributed to the defendant directed to all or only to Esther, it cannot be estimated credited that the appellant would pronounce it. If agreed to tell the sisters that the He accused told Esther that would sink, that would leave with nothing, and that would leave even without the dog, but these expressions (not included, on the other hand, in the account of the facts proved) would not constitute the crime of Article 171.4 of the Criminal Code (RCL 195, 3170 and RCL 1996, 777) by which the appellant (...) is condemned.

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Habitualness: concept and evolution of jurisprudence

The requirement of habitualness remains an example of how law has gender, both in the reflections that legal science has made around it, as the application that has been made of this typical requirement 173.2 (ex art. 153.2) CP. The first issue that we face is to determine what is meant by habitualness. The criminal legislature, - who in the previous Criminal Code of 1989 referred to it but without defining it -, specified in paragraph 3 of art. 173 - insisting on the provisions of the former paragraph 2 of art. 153 - that: "To appreciate the habitualness to which refers the preceding paragraph, account shall be taken of the number of acts of violence that are accredited, as well as the temporal proximity of the same, regardless of whether such violence has been exercised on the same or different victims covered in this article, and that violent acts have not been subject to prosecution or in previous processes." Interestingly, despite being one of the aspects we most criticized and which demands an urgent penal reform - if not it's elimination, something that should have been addressed in the latest reform of the Penal Code of September 29, 2003 - the legislator keep up in his attempt to keep it as a constitutive requirement of type.

The habitualness that appears on the type as constituting punishable action has historically generated a diversity of opinions regarding its interpretation. However, it did attempt to realize its content and in exhaustively way in Art. Project 161 C.P L.O of 1992 ". For the purposes of this article, it is habitual when the offender has been convicted of three or more crimes or offenses against persons to which is referred in the previous paragraph, in the five years preceding the commission of the new criminal offense "[58].

That is, to be punished with imprisonment of six months to three years, without prejudice to the penalties that might correspond to the result that in each case shall cause, it has required the exerted violence and had been convicted not by one, but by three or more crimes or misdemeanors of injuries, and the prescriptive period of five years immediately preceding the time of the commission of the criminal act.

In other words, we should wait for the aggressor spouse to make several beatings over the other, or over children under guardianship or custody; and that these beatings have been reported, prosecuted and sentenced by the judge in question, a number equal to or greater than three and a period of less than five years. This demand shows once again - and connecting to the crimes referred to at the beginning of our exhibition - how domestic violence is still playing within the family space as a normal parameter[59]. Male violence towards women, who

[58] Art. 161, paragraph 21 of the draft Organic Law of the CP. 1992.

[59] Thus the judgment of the Court of Instruction No. 16 Barcelona, from February 5, 1991 states: "(...) was found inside the home, he showed up the husband, who upon learning the intent of the wife opposed it, thereby giving rise an argument between them, during which he grabbed his wife by the arms and shook her (...). In those circumstances, the action is considered husband what you might call the usual behavior of an average citizen, and therefore exempt from criminal responsibility and absolve proceeds of offenses that accused the prosecution and the prosecution. "

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should control a rebellious and weak one, and their children, who occasionally cry in silence "a touch" of physical and mental strength. Only this reasoning would justify the harsh demands of violence demanded by the legislator. Moreover, if not, why the conviction of three or more crimes or misdemeanors of injuries in the prescriptive period of five years are required? How many beatings must the aggressor MAKE against the attacked - in this case, women; in other cases, children[60] - for some that are reported, of course, not all, are prosecuted and prosper, culminating in convictions? Does the legislature did not know the famous slow pace of justice? Should we wait for the mate in one of his many beatings; or maim or incapacitate forever?

Fortunately, the drafting of the Project of L.O of C.P. of 1992 was unsuccessful and must now be the judge who determines whether there is habitualness in the case in question. TS jurisprudence, in some of its judgments, has defined habitualness as the "condition of the accused resulting from the persistence or repetition of events of the same nature or the same criminal purpose[61]". Some claim that "must be habitual what is interpreted as abuse in more than three times[62]"; and certainly it does not serve the concept of art. 94[63]. Others, however, introduce slight differences in its argument, which leads to some suspicion:

> The second element of the type is the habitualness, which figures here as evaluative concept unaffected by the regulatory definition contained in Article 94 which effects are limited to the provisions on the suspension and replacement of imprisonment, although its content corresponds to the prevailing jurisprudential criteria about the crimes "of habit." That is why, although not the provisions of art. 94 directly applicable, by express legal indication, to this type of crime, represents the best possible criteria to ensure an application of it according to the guarantee of legal security[64].

It is true that all these precautions to ensure the principle of legal certainty in determining the criteria of habitualness, we are somehow surprising by them, given that women who decides to denounce their abusive partners for crimes of abuse, suffering violence carried over a period of 10 years. The medical forensic of the Court of Zaragoza, Juan Antonio Cobo Plana, in his famous report[65], collected data that could qualify as chilling. About 250 cases of ill-treatment he has known in his tenure, the most common feature in women who have suffered

[60] A classic study on abuse and child abuse is CANTON DUARTE, J. CORTES GROVE, MR, abuse and child sexual abuse, Spain Siglo XXI Editores, Psychology Collection, Madrid, 1997.
[61] See, inter alia, the judgments of the TS 07/02/61 and 24/03/77.
[62] GONZALEZ RUS, JJ, "Injuries" COBO DEL ROSAL, M. (ed.), Course of Spanish Criminal Law, Special Part, Volume I, Marcial Pons, Madrid, 1996, lesson 4, p. 170.
[63] Article 94 of the CP, "For the purposes specified in Sections 10 and 20 of this Chapter are considered common criminals who have committed three or more crimes than those falling under the same Chapter, a term exceeding five years, and they have been convicted of them. "
[64] TAMARIT Sumalla, JM, "Injuries" in QUINTERO OLIVARES, G. (ed.), MUÑIZ VALLEY, JM (Ed.), Comments on the New Criminal Code, Editorial Aranzadi, Pamplona, 1996, p. 725. The emphasis is mine. See also TAMARIT Sumalla, JM, "Article 153" in QUINTERO OLIVARES, G. (ed.), MORALES PRATS, F. (ed.), Comments on the New Criminal Code, 2nd ed., Editorial Aranzadi, Pamplona, 2001. However, it is often the case law requires at least three close accreditation assault each other. See inter alia judgment of the Provincial Court of Alicante of 3 February 2000, the judgment of the Provincial Court of Guadalajara of March 20, 2002 and the judgment of the Provincial Court of Seville July 30, 2003.
[65] COBO FLAT, JA, coroner study on violence against women. PhD thesis. Faculty of Medicine, University of Zaragoza, 1990. Also, see CASTILIAN ARROYO, M., COBO FLAT, JA, Sanchez BLANQUE, A., "Le profil traits of personnalité des femmes victimes des violences" Portraits of Actes Xª méditerranéennesJournées de MédecineLégale, 1992, Montpellier, 1992, pp. 331-335.

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regular attacks is its enormous tolerance for abuse. Therefore, since the average years of suffering domestic violence ranged usual, and then, from 10 years to 20 years.

Insisting on dogmatic application of the criterion of habitualness means ignoring the specificity of this offense in which the victim is forced to live with the perpetrator and where the threatened legal interests and effectively injured, overcome physical integrity. We are referring to freedom or security. In the words of the US Supreme Court, this would condemn women battered to death by installments[66]. In addition, this is confirmed to run into sentences like March 28, 2000 of the Provincial Court of Huelva whose interpretation of the criterion of habitualness of ancient art. CP 153 in its pre-June 1999 regulation motivates the acquittal of the accused as guilty of the crime of routine ill-treatment[67]. Quote: "The term 'habitualness' is misleading. This has been discussed for if this habitualness served the previous conviction of the doctrine[68] and refuses to avoid double jeopardy, is attack on the principle of "double jeopardy" ("non bis in idem").

Indeed, if it solved past mistakes, it could be said that it weakens the principle that prohibits repetition of condemn by the same fact, therefore may act only physical violence unreported, which repeated, may lead to a crime "if had not prescribed in the case on trial[69]."

Fortunately, in 2000, two judgments of the TS, help to clear any doubts and betting on a criterion of habitualness, not centered properly in the number of acts of violence and temporal proximity, thereof as climate of contrasted violence suffered by the attacked and therefore vulnerable on its responsibility. We refer to the judgments of the TS of June 24, 2000[70] and from July 7, 2000, where the High Court emphasizes the attitude of the offender and the violent atmosphere in which family members live, so that acts of aggression are nothing but an expression of this violence. "In this case, - and following the text of the STTS of 7 July 2000[71] - , the single reading of the historical account of the judgment shows that we are not facing twin acts of aggression or physical violence arising isolation along time, but before two assaults that occur singled out as the externalization of a permanent state of violence exercised by the accused over his partner, allowing consideration as 'habitual' ".

[66]BOYLE, C., "The Battered wife syndrome and selfdefence. Lavalleev.R" on Women, Law and Social Change, Ed T. Brettel, 1993, p. 102.
[67] In this same vein pronounced the judgment of the Provincial Court of Girona, of June 5, 1998.
[68] In this regard DOLZ LAKE understands that art. 153 "is a patent violation of the non bis in idem, admitting to be taken into account in the assessment of facts and prosecuted habitual, even, perhaps, with acquittal, facts and prescribed, or mere suspicion". Vine. DOLZ LAKE, MJ, "habitual Domestic Violence: Myths and Realities", LL, 2000-3, pp. 1785. In this regard, Marin ESPINOSA CEBALLOS proposes to amend Art. 153 and explain that violent acts which have already been condemned to appreciate the regularity previously not taken into account. Vine. Marin ESPINOSA CEBALLOS, EB, Hamdorf, K., "The habitual element in the crime of abuse of the Swedish Criminal Code," CPC, No. 71, 2000, p. 430.
[69] Vid. Judgment of the Provincial Court of Huelva of 28 March 2000. We have to indicate that, despite acquit him as a perpetrator of routine ill-treatment, the accused was sentenced to three years in prison as a perpetrator of injuries art .150 CP., Four weekends of arrest as responsible for a lack of abuse of Art. 617.2 CP, the punishment of a fine of twenty days with a daily fee of 200 pts. as the author of a lack of threats of art. 602.2 CP approach ban for five years, and in compensation for damages the payment to Ms. M. 500,000 pts., Pay the costs including those of the prosecution. This judgment has been appealed to the Supreme Court.
[70] TS Judgment of June 24, 2000.
[71] TS Judgment of July 7, 2000.

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According to this argument, two acts of physical abuse may be enough to appreciate "habitualness" in domestic violence, as

> The most modern line of interpretation irrespective of the above numerical automation, more wisely it understood that what is important to appreciate the habitualness more than the plurality itself is repetition or frequency involving a stay in the violent treatment, the important thing being that the Court comes to the conclusion that the victim lives in a state of permanent aggression.In this lies the greatest disvalue permanence that would result from the mere aggregation of each individual action devaluations.

Later, the jurisprudential line followed confirms this important step as far as the interpretation of the habitualness is concerned, reviewing a discriminatory dogmatic criterion or category at all lights. This is the case of the STS of 13 April 2006[72] (No. 409/2006) or of 23 May 2006[73]. Recently, as the High Court manifested in STTS of July 18, 2011:

> The habitualness should not be interpreted in a legal sense of recidivism of aggressions - what might constitute a problem of" double jeopardy"- seems wiser to opt for a naturalistic approach understanding habitualness as repetition of acts of identical content but not strictly plurality which makes the act a crime, but the relationship between perpetrator and victim often as it happens, this is the permanence of violent treatment, so the need to consider it follows as a separate offense.

We cannot forget that the violence suffered by women not only affected them, but the members who make up the family:

> In this regard we must consider what the criminal law says at the end of its second paragraph, which is intended to give the maximum amplitude of this third element of the criminal type, when told that such habitualness can be expressed 'irrespective that such violence has been exercised on the same or different victims included in this article (...) .

Jurisprudence described as "minor", has also made interesting contributions as far as the criterion of habitualness is concerned. We emphasize an important judgment, by pioneering - Judgment of 26 November 1999 the Criminal Court nº. 1 of Seville where not only a thorough analysis of violence against women and its causes is done, but provides a clear ant formalist positioning on the concept of regularity of ancient art. 153 CP[74] (also valid for the current art. 173.2 CP). It reads:

> The legally protected interest is the dignity of the human person within the family and in particular his right to not be subjected to any inhuman or degrading treatment. The concept of habitualness referred to by precept has not understood in a formal legal sense ... but in a naturalistic sense, as a factual matter, fasting formal requirements, or at least from a social-criminological perspective ... not strictly to the plurality which makes act in crime but the relationship between the perpetrator and the victim more often you do then this is the

[72] "(n) and is therefore a lack of high injury offense by repetition, because it cannot speculate as to whether there are three or more than three occasions in which violence has occurred . Habitual be understood as criminological-social concept, not as a formal legal concept so it will be a normal behavior of the acting repeatedly in the same direction with or without prior convictions as they act as proof of the regularity ".

[73]"(l) to conduct repeated physical and mental abuse by a family member, joined by the bonds which are described in the precept (...) come to create, by repetition, an atmosphere of violation of the special duties of respect among people united by such links and the adverse effects on the development of children who are forming and growing in that familiar environment. " Judgment argument also reflected in the Provincial Court of Almería of October 7, 2005.

[74] In the same sense, and more recently, it has pronounced the judgment of the Provincial Court of Madrid of January 15, 2001.

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> permanence in the violent treatment... What is important is that the judge reaches the conviction that the victim lives in a state of permanent aggression[75] ".

Similarly, the Judgment of 1 July 2002 of the Criminal Court nº. 3 of Granada understand - trusting the judgments of the TS of June 24, 2000 and July 7, 2000 there was habitualness in the facts of the case "revealing facts, without any kind of doubt, a lengthy rarefied atmosphere of coexistence, climate generated by continuing episodes of violence over the years by the accused and that it has decided to maintain after termination of conjugal cohabitation[76] ".

In this sense, the report of the CGPJ, of February 7, 2001 proposed to dispense with the requirement of habitualness and punish those attacks occurred in the home that "reach sufficient entity to cause injury or serious risk to the legally protected rights in such offense".

Probably the joint assessment of the attitude of the aggressor, and the atmosphere of violence experienced by different members of the family - who individually suffer physical and psychic violence -, "leads us to consider the existence of an infringement which feeds Atypical offenses but not a fault and therefore is really a special need to figure amounts to be continued by the condition of crime.[77]" - As Antonio del Moral says - words collected by judgment nº 144/01 of Criminal Court nº. 11 Sevilla, 3 April 2001 states:

> The repetition of violent activities, to create an unbreathable atmosphere or climate of systematic abuse, is punished not for what acts of aggression against the physical safety, but it has special duties in violation of respect for the spouse and children and family; it is supposed as affectation of the sense of security; by the adverse effects on the development of children who are forming and growing in that familiar environment: It is about the constitutional valuesthat revolve around the need to protect the family.[78]

However, some matters of great media projection revolve around this issue. We refer to the recent ruling of the TS of May 4, 2015 which returns the rationale exposion of the Court of Violence against Woman nº 2 of Las Palmas and remember, around the investigation of former Minister López Aguilar on gender violence to his ex-spouse, that "for the moment" is no need to open criminal proceedings MEP, while the proceedings (initiated

[75] Vid. Judgment of the Criminal Court No. 1 of Sevilla, 26 November 1999. In this sense, it is worth noting the position of ruling of the Provincial Court of Seville of 31 July 2003 who "to appreciate the regularity, more than the plurality itself (understood) is the repetition frequency or involving a stay in the violent treatment, the important thing being that the Court comes to the conclusion that the victim live in a state of permanent aggression ".

[76] Vid. Judgment of the Criminal Court No. 3 of Granada, on July 1, 2002. Subsequently, the sentence for a crime of injuries usual family violence was reversed, confirming only the conviction for lack of injuries, according to Judgment No 643/2002, of the Provincial Court of Granada, Section 2, of 11 November 2002. No mention is made to the habitual. The reasons for this partial estimate of the sentence: changing testimony of the daughter probably by psychological pressures parent-aggressor, and no statement attacked in this new process.

[77] It reads the judgment of September 30, 1999 of Criminal Court No. 7 Sevilla subsequently upheld on appeal, Section 3 of the Provincial Court of Seville on April 6, 2000: "This provision (art. CP 153) is due, like the previous 425 CP., to poor protection of physically weaker household members consistently aggressive behavior against other members of the same criminalizing ill-treatment of Spouse or partner when, despite not considered individually integrate more than a succession of faults occurring usual Faced with an offense that feeds but not atypical offenses as missing, and so is actually a special need to figure amounts to be continued by the condition of crime. "

[78] Nº. 144/01 Judgment of the Criminal Court No. 11 Sevilla, 3 April 2001. In this same vein pronounced the STTS of September 7, 2000.

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by his stepson, Mr. Gorka de la Nuez, the January 10, 2015, which were neither contested by the prosecutor or by the injured) were permanently archived. That gives the strength, according to the TS, the value of res judicata and is equivalent to an acquittal. Although later there was a second procedure opened by the police to clarify two fires on ex-wife house, with statement of the attacked, the problem seen by the Supreme is that "reading the borrowed judicial declaration by Mrs. Natalia to the Judge of Violence against Women "reveals that "there is no orderly succession of criminal acts attributed to volumetric". Sometimes the reference is to events that occurred the previous day and in some cases, years before or at undetermined dates. That is, that part of the statement could not be used to affect periods prior to the first complaint filed. TS finally concludes, making clear the problem we posed that

> It is inescapable that the investigating judge to state in his rationale which facts could lead, if deemed accredited to the imputation of volumetric and excluding those on which other free projected dismissal resolution agreed after the initial complaint of Mr. Gorka de la Nuez.

The legal requirement of subjective mood of domination.

Lately it has been discussed by the judicial doctrine the need for a subjective animus or mood of domination[79] found to apply the art. 153.1 CP. The reading of it, in any case alludes to this dominant intention, but there is already jurisprudence that requires it as the case in the Provincial Court of Murcia (Section 3). This invented requirement - not legal - obligates to shield the judgments of lower courts in order to not be challenged by this particular before the Provincial Court, which amounts to nearly - so covert - extrapolate the difficulties already identified in the analysis of the criterion of "habitualness" required by art. 173.2. CP.

An example of this can be found in the judgment of the Criminal Court nº. 1 of Cartagena, No. 26/2013 of February 18, which aware of this extralegem requirement, pronounced as follows:

> Finally we have discussed the existence of a subjective mood of domination. This judge in many judgments has argued that the occurrence of such subjective mood of domination is not necessary, but it is true that there is case law that so requires, among others the Section 3 of the Provincial Court of Murcia. Well, in this case the judge understands that concurs this judgmental mood since the conduct of the accused on the night of 6/29/12 answers a manifestation of domination and subjugation and is not disputed that the defendant went to the bar "Q caña" because he knew that there was the guy who had started dating the complainant, so that the defendant wanted her out of the car to see his reaction who refused to come down, which corroborated the accused was true that complainant had something with that guy, why not accept this relationship, he hit her in the face and then by various body parts. It is clear that the defendant's attitude responds to a clear manifestation of submission, domination and inequality derived from the not acceptance of the fact that Carlota had begun another relationship. But also both the complainant and several witnesses testify that the accused controlled Charlotte. For example, the complainant stated that the accused had

[79]While Article 1.1 of the LO1 / 2004 of 28 December on Comprehensive Protection Measures against Gender Violence particular that the purpose of the Act is "to act against violence as a manifestation of discrimination The situation of inequality and power relations of men on women, exerted on them by those who are or have been their spouses or those who are or have conditions attached to them by similar relationships of affection, even without cohabitation ".

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> controlled her, and she was ashamed of her because she had no education and because they had a son; the manager of the store where Charlotte worked states that he "super had control and was very possessive" telling her "do yourself a ponytail, look at your hair, and she changed clothes for him. And her sisters claim that he was very controlling. However, those statements are corroborated by several emails which are contained in the pages 331 and 349. On folio 331, the accused tells Carlota "in my house at 14:15 but with long skirt", another says " drunk and in a miniskirt "in other emails she says" I'm pretty worried because I do not know if i am too tacky or you'll like my styling "and at page 349 says" I have already left the pins, you cut your hair.

There are other difficulties encountered in the judicial treatment of routine ill-treatment, which cannot be addressed at this time[80], but that it should be the least mentioned. We refer to the worrying tendency to apply defenses and extenuating circumstances of the criminal responsibility of the perpetrator as the consumption of alcohol, jealousy, indifference and even a confession to authorities. Social justifications chasing women control in response to fragilitas sexus, but also show the true weakness and dependence of the person exercising such control. "That's why they are a good excuse for a man, a sufficient explanation for women, adequate justification for society and a mitigating or lawful defense for Justice[81]". However, rejection of the plea of self-defense for women episodes of self-protection, and the tendency to apply the "temporary insanity" as the only escape from the "battered women who fight back" from the clutches of criminal law perpetrated other violence law. Women have to accept their condition and admit their individual pathology. Surely, the law and legal science are male gender and awarded.

CONCLUDING

Serve this theoretical and practical analysis to reflect if indeed constitutional rights such as life, integrity, liberty, security and dignity of women as citizens are actually protected by our legal system and guaranteed by the Public Powers; or, on the contrary, are abandoned or rather, gauged to another jurisdiction, the extra-legal domestic, represented by male heads of households who ensures that their autonomous legislation is observed. Breaking the silence, appeal to government intervention, claim a greater sensitivity of Justice, modify the already outdated scientific-legal categories and shout that domestic terrorism is only one end of the structural violence, serve to avoid the privatization of violence returns to glide over citizenship. We must not forget that gender violence explicitly rejected and implicitly tolerated remains a valid mechanism to keep women in a subordinate position, erecting the difference between men and women in eternal inequality.

Only one aspect that deserves our attention as jurists before concluding this chapter: the danger of dissolution of Gender Violence again in domestic or family violence in the imminent reform of the Penal Code. The severity of this proposal pointed by some political voices would: Disabling the structuring component of modern anti-discrimination law, giant step back in the fight for the eradication of structural citizen discrimination,

[80] In this regard, see RUZ GIL, JM, The different faces of Gender Violence, Dykinson, Madrid, 2007.
[81] Lorente Acosta, M., my husband beats me normal. Assault on Women: realities and myths, opus cit, p. 73.

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and certainly a breach of European and international law[82] ratified by Spain[83] before which we will, I fear, something more than explanations[84].

LA MUJER DEL DISCURSO JURÍDICO: UNA APORTACIÓN DESDE LA TEORÍA CRÍTICA DEL DERECHO

Resumen
Recuperar la obra de Carole Pateman La mujer del discurso jurídico permite reparar en las tres fases señaladas por ella en torno a la crítica feminista del Derecho. Conectar estos tres períodos –el Derecho es sexista, el Derecho es masculino y el Derecho tiene género- en un marco de análisis prioritario como es la violencia de género en el contexto de pareja, permite detectar que no sólo urge una reflexión y evaluación de la apuesta legislativa adoptada por el Estado español, sino también y muy especialmente, la revisión y falsación de categorías científico-jurídicas aprendidas y aprehendidas desde la Academia y aplicadas de manera automática en las resoluciones judiciales. Este anacronismo científico, sólo añade más violencia (victimización secundaria) a las mujeres que finalmente deciden denunciar. Finalmente, el blindaje del concepto de violencia de género, que vincula ciudadanas y Estado, se erige como fundamental ante el peligro inminente de disolución jurídica de éste en la violencia doméstica o familiar que nos regresa indefectible y peligrosamente a la víctima vulnerable.

Palabras chave: Violencia de género – Ciudadanía - diligencia de Estado - ciencia jurídica.

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[82] Not making a list of conventions and treaties signed by Spain on the matter. In any case they cannot be ignored its obligations internationally in the CEDAW (1989) and ratified in 1994, Beijing (1995) or European (Treaty of Amsterdam and the Treaty of Lisbon), among others.

[83] At European level recently the March 18, 2014, Spain has ratified the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention), opened for signature in Istanbul the May 11, 2011 and entered into force on 1 August 2014. This is the first European legally binding instrument, which urges States to respond effectively against gender violence and responsible for the dejaciones or defaults their commitments. In this regard, see RUIZ GIL, JM, "Spain to the Istanbul Convention and the Crisis of the Welfare State: a question of principle (s) and institutional responsibility," Revue de droit de L` Homme, Paris Ouest-Nanterre, 2015 (in press).

[84] The ratification of the Convention on the Elimination of All Forms of Discrimination against Women, adopted in 1979 and ratified by 187 countries, including Spain in 1984, committed to our country to create and develop policies to eliminate any trace of discrimination against women taking necessary at all levels of the State. Among the state's obligations include reporting on the implementation of the articles of the Convention through a four-year report must be submitted to the CEDAW Committee, the same body, remember, issued in July 2014, the historical condemned Spain for failing to protect a victim of domestic violence, or his daughter, in a case that ended with the murder of the child.

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