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Spanish Criminal Policy on Intimate partner violence: why "tough on crime" strategies are failing[1]

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Abstract

The aim of this paper is to describe how the "tough on crime" policies on intimate partner violence have not been effective at all in Spain. Even if prevention of violence against women involves necessarily more than educational strategies and targeting cultural practices or social structures that support or consolidate this violence, deterrence through holding perpetrators accountable in the criminal justice system is not a panacea. Not only has using high repression levels through inflexible and very intrusive penalties not solved the problem, but it has also created new dysfunctions. The lack of consistent guiding principles in the elaboration of the criminal strategy of violence against women and the introduction of diverse legislative amendments on the spur of the moment has resulted in an amount of inefficient provisions, which even re-victimize and criminalize the women that don't behave in the way the criminal justice system expects.

Key words: intimate partner violence, domestic violence, isolated violence, habitual violence, punitive turn, ultima ratio.

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1. Introduction

In the past decades, the perception of intimate partner violence has experienced an almost complete turnaround in Spain: from being an invisible phenomenon, violence against women has turned into a public issue since it began to be prominent in the media about 20 years ago (Maqueda Abreu, 2006). After a while, this sudden visibility gradually brought a mentality change in public opinion, which in turn set the issue on the agenda of the political parties and governments. From that point, the zero tolerance motto has prevailed and over the last few years, the number of offences connected with intimate partner violence has grown steadily, just like the severity of the foreseen sanctions (Ortubay Fuentes, 1998; Laurenzo Copello, 2007; Maqueda Abreu, 2007).

Even if prevention of violence against women necessarily involves more than educational strategies and targeting cultural practices or social structures that support or consolidate this violence, deterrence through holding violent *doers* accountable in the criminal justice system is not a panacea. The lack of consistent guiding principles in the elaboration of the criminal strategy of violence against women and the introduction of diverse legislative amendments on the spur of the moment has resulted in an amount of inefficient provisions in the Spanish legislation.

The aim of this paper is to describe how this “punitive turn” hasn’t been effective at all. Not only has using high repression levels through very intrusive penalties not solved the problem, but it has also created new dysfunctions.

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2. Evolution of intimate partner violence in the Spanish Criminal Law

It is not surprising that intimate partner violence was an invisible phenomenon in Spain if we put it into the context of a gender-based unequal juridical position of citizens. There are some details, which are quite significant and may be adequate to depict the women's juridical position and social role in Spain until recently: until 1963 if a man killed his wife after surprising her in adultery, he was only punished with the penalty of exile. Until 1989 the only women who could fall victims of a rape were the ones being "unequivocally honest and decent".

In this scenario, it's understandable that intimate gender violence has been historically conceived as a private problem between the members of a couple (a problem, which a selfless woman should tolerate). The dominant mentality used both to justify the behavior and relegate it to the private sphere (Larrauri Pijoan, 2007). No external interference was justifiable in those situations, among other reasons because the man had the unquestionable right to correct his wife. If any woman dared to report that she had been battered or mistreated, the distrust and the disapproval used to fall to her, since she was questioning her role as self-sacrificing wife and mother, and endangering the "family peace" (Maqueda Abreu, 2007).

Obviously violence against women wasn't perceived as a structural problem. At most, alternative explanations for this violence (I mean, explanations that didn't blame the women for it), used to emphasize the influence of precipitating factors like drugs, alcohol, money matters or individual aggressiveness of the offender. With this background, it can be stated that the insufficient and unsatisfactory protection the Criminal Code provided women wasn't connected with the *ultima ratio* principle, that is, with a conscious use of criminal law as a last resort. This indulgence came rather from the fact of not even perceiving the existence of a problem which deserved criminal intervention.

Gradually, other analysis perspectives started gaining ground and emphasized that violence against women is a manifestation of the historically unequal power relations between men and women (Asua Batarrita, 2004). It was stressed that these unequal power relations have led to domination over and discrimination against women by men and to the prevention of women's full advancement (Maqueda Abreu, 2009).

Many feminist groups claimed that it was necessary to turn violence against women into a public issue. Some of them were in favor of resorting to criminal law as a primary strategy to fight gender violence, whereas others didn't consider criminalization as the issue to prioritize (Pitch, 2009). The former option has prevailed. Let's look at an overview of how the penal treatment on this issue has evolved in Spain:

The first relevant landmark in this process was the amendment of the penal code in 1989. For the first time, *regular physical violence within the domestic context* was introduced as a felony in article 425 of the Criminal Code. But this legislative approach had many weak spots, so numerous gaps and challenges remained:

a) Intimate partner violence was configured as a type of domestic violence, even if this categorization doesn't reflect reality. In fact, the causes behind intimate partner violence and domestic violence are different: domestic violence comes from the nonsymmetrical relationships within the family, which can have a factual basis (for example, the objective vulnerability of elderly or disabled members of the family) or a juridical one (the law acknowledges parents' capacity to decide about their minor children). Intimate partner violence in exchange is rooted in the structural discrimination against women that is a result of a patriarchal society (that's why its victims can only be women). Sometimes both kinds of violence overlap, but in any case, ignoring the differences between these phenomena makes it more difficult to develop specific arguments for the legitimacy and necessity of penal intervention on violence against women, and to

develop adequate strategies to prevent it (Laurenzo Copello, 2005a; Laurenzo Copello, 2005b; Maqueda Abreu, 2006; Laurenzo Copello, 2007).

b) Art. 425 was limited in scope and coverage, since it only addressed regular physical abuse, so, punishment of psychological violence was excluded.

c) The legislator only addressed violence among cohabitating family members. That meant that separation precipitated violence, which is quantitatively very relevant, couldn't be punished.

In 1995 the current Criminal Code came into force in Spain, but the legislator didn't take advantage of the moment to address an appropriate provision which included both physical and physiological regular violence and which would allow perpetrators who didn't cohabite with the victim any more to be punished. So, the regular violence felony remained almost unchanged in the title of the penal code related to bodily harm (new art. 153 of the Criminal Code).

Occasional violence, which didn't cause an injury that objectively required medical or surgical treatment for health purposes, was considered a misdemeanor (art. 617) as the current Criminal Code came into force. Classifying an offence as a misdemeanor instead of a felony had some important practical consequences:

a) No criminal records remained.

b) No freedom depriving precautionary measures could be allocated (like detention pending trial).

c) Violent incidents classified as misdemeanors could only be prosecuted by motion of the party.

d) There wasn't any preliminary investigation before the oral trial and the party had to show up in the trial with the evidence considered appropriate.

e) No imprisonment penalty was foreseen for misdemeanors, the sanction used to be a fine, which gave the impression of a very lenient answer.

In practice, most of the incidents were considered misdemeanors and in most cases the features of the misdemeanor procedure resulted in acquittals.

Even though it isn't a legislative amendment, from a chronological perspective an event in 1997 has to be mentioned, because to a certain degree it changed the course of things regarding this issue. A woman, called Ana Orantes, explained on a TV show that she had been a victim of regular violence and some days later she was burnt alive by her husband. From that point on, the media started taking an enormous interest in violence against women. The former invisibility was over (Laurenzo Copello, 2007).

In 1999 some steps in the right direction were taken. Art. 153 was amended and, finally regular psychological violence was likened to regular physical violence. Besides, the new provision didn't require the victim and the offender to cohabitate in order for the felony to be punished. Moreover, the prohibition to approach and to contact the victim was introduced in Spanish law with different juridical natures: as a precautionary measure, as a punishment, as a security measure and also as a condition to suspend the execution of the sentence. The court had to assess the gravity of the conduct and the danger of the offender when deciding the imposition of these prohibitions. What is relevant is that at that moment it was a facultative measure.

In 2003 amendments proliferated. The most important landmarks were the following two:

a) The Organic Act 11/2003 turned all misdemeanors among the domestic context into felonies.
b) The Organic Act 15/2003 made it compulsory to impose the prohibition to approach the victim in all cases of domestic violence. That shall prevent the convict from approaching

the victim, wherever she may be, as well as approaching her dwelling, her places of work, and any other places regularly visited by her, together with suspension of visitation, communication and overnight stay rights with regard to offspring that might have been recognized by a civil judgment, until total fulfillment of the sentence concerned. It's important to point out that this penalty shall be imposed in all cases for a time not exceeding ten years for a serious felony, or five if less serious.

In 2004 the Organic Act on Integrated Protection Measures against Gender Violence was passed. The act describes gender violence as a structural problem, which comes from the discrimination and subordination of women in the context of a patriarchal society. It meant a multidisciplinary approach, so it didn't only focus on criminalization. In fact, the act included provisions on sensitization, prevention and detection, created special institutional mechanisms to address violence against women and introduced many non-penal measures aimed at reinforcing the autonomy of the victims. But the "fascination for criminal law" made the legislator succumb once more to the temptation of strengthening punitive means (Laurenzo Copello, 2007). As a result, specific aggravating circumstances came into force when the victim of injuries (art. 148), situational mistreatment (art. 153), threat (art. 171.4) or coercion (art. 172.2) was the woman of the partnership[3].

A further amendment came into force in 2010. According to this, in the event of the prisoner having been convicted of a gender- violence related offence, a sentence of imprisonment may only be substituted by that of community service or permanent traceability in a different

[3] If the man of the couple falls victim to the same felonies, the foreseen punishment is more lenient. Even though the act was introduced in a moment of increasing awareness regarding the reprehensibility of violence against women, the new regulations under criminal law caused mistrust and suspicion, because they were seen as a privilege for women and unequal treatment for men who were victims of such crimes. That's a direct consequence of addressing intimate partner violence as a type of domestic violence. As I've mentioned before, these phenomena stem from different reasons, but grouping everything together makes these differences hazy and, besides, puts the focus on men being discriminated against.

location, away from the victim's dwelling (so, the possibility of substituting a prison sentence for a fine isn't acknowledged in the law).

The last amendment came into force in 2015, which brought the possibility of imposing a measure of probation to the convicts of gender violence related offences after serving their sentence. Probation consists of the convict being subject to court control and having to fulfill any one or number of the following measures once the penalty is over: the obligation to always be traceable by means of electronic devices; the obligation to regularly appear at the place set by the Judge or Court of Law; that of immediately reporting, within the maximum term and by the means stated by the Judge for that purpose, each change of residence or place or post at work; prohibition to leave the place of residence or a specific area without leave from the Judge; prohibition to approach the victim or her relatives or other persons determined by the Judge; prohibition to communicate with the victim, or her relatives or other persons determined by the Judge; prohibition to visit specific areas, places or establishments; prohibition to reside in specific places.

3. Addressing the dysfunctions of the Spanish Criminal Policy on intimate partner violence through seven controversial points

The legislative evolution on intimate partner violence illustrates an uncontroversial "punitive turn". In fact, now all roads lead to the criminal justice system and this happens, as *Larrauri* pinpoints, due to the advantages that the political class sees in the so called "penal populism", that is, the electoral advantages provided by an attitude of inflexibility regarding social problems. In this age, the only way to show social condemnation seems to be by criminalizing behavior considered blameworthy. So, each political party who reaches power

introduces a legal reform on this matter, just to show that they take the problem more seriously than their predecessors. The obvious consequence is a remarkable inflation of criminal law, due to the creation of new offences or to the elevation of the sanctions (Larrauri Pijoan, 2007). Facing this new reality, it is appropriate to analyze under what circumstances criminal law can legitimately be considered an adequate tool to fight intimate partner violence.

The first thing that has to be taken into account is that there are many types of intimate partner violence, so that an appropriate criminal policy strategy depends on what type of violence we are talking about. Many misunderstandings and dysfunctions come from the failure to make such distinctions. Even if there are huge differences in the severity and in the intervals of violence, there's a tendency to oversimplify, probably because an isolated violent incident may look exactly like those involved in chronic violence. The differences I mean can't be generally found in the concrete nature of the assault (Caro, 2010). The difference has to do with general patterns of control and power. Situational violence is generally rooted in the events of a particular situation rather than a relationshipwide attempt to control (Johnson, 2008). The Spanish legislator obviously believes that the man, who crosses the boundaries and attacks his partner, is predestined to end up as a severe abuser, or, in other words, that each "mild" or isolated act of violence will turn into a severe violence scenario (Maqueda Abreu, 2007).

And even if each violent incident is unacceptable, criminal law must match or adapt the intensity and intrusiveness of its reactions to the gravity of the conduct. A mere presumption of danger (a prospective assessment) can't justify the use of too burdensome means.

Now the two main legal provisions for violence against women in the Spanish Criminal Code are articles 153 and 173.2, which are directed at addressing different phenomena of *domestic* violence. The first one is for occasional physical or psychological violence, that is, for

isolated incidents that do not cause injuries that require surgery or medical treatment. The second one refers to a felony against one's moral integrity (the habitual use of physical or mental violence).

Nobody questions the fact that habitual use of violence should be criminalized. This is the type of violence most people think of when they're asked about intimate partner violence. It involves systematic controlling abuse, that is, the offenders show a pattern of coactive control: they humiliate and scorn their partners and attack them through a variety of strategies and tactics, both violent and nonviolent, which allows them to "disempower" the victim, to the point of crushing their personality and will (Johnson, 2008).

Criminalizing those conducts is an unavoidable strategy not only as a tool to deter or discourage them but also as a way to delegitimize them, that is, to express severe social censure.

But most of the problems arise when we analyze how the Spanish legislator addresses occasional violence which doesn't cause serious injuries (conducts like a push or a slap, for example). The current article 153 of the Criminal Code considers to be a felony a type of conduct that would only be a misdemeanor if the victim were a stranger. So, the kinship between perpetrator and victim is the decisive point to punish that behavior more severely.

It's obvious that the Spanish legislator has decided that Criminal Law is the adequate tool for all disputes that may happen in the family context. And even though it's become evident that this tactic doesn't work, the legislator continues on this path as if it were unquestionable. Let's analyze in more depth some of the aspects that make the Spanish legislator's approach controversial and not especially respectful with the *ultima ratio* principle (Bodelón, 2013).

3.1. Criminal report as a requirement

In order to get any support or social aid, the Spanish Organic Act requires a criminal report. In intimate partner violence cases, most of the victims don't report the incidents (in Spain only between 10 and 30% of victims do). Among the reasons for not reporting, for many women the feeling that making the situation public involves a new humiliation which she has to deal with prevails, because she is reporting a person with whom she have had or still has affective boundaries (Larrauri Pijoan, 2005).

The lack of reporting these felonies worries the public powers and they constantly insist on the importance and the necessity of victims or witnesses reporting violence against women in the several sensitizing campaigns launched by the government. But reporting abuse isn't a magical solution, so resorting to the criminal justice system shouldn't be represented as a panacea that will solve all the victim's problems. Nevertheless, the government and the public authorities have continued emphasizing the good sides of reporting violence, and creating unrealistic expectations regarding the response that criminal law may provide. In fact, the criminal law system has big problems in managing the pressure of the few victims resorting to it, so it wouldn't be at all effective if all incidents were reported (Larrauri Pijoan, 2005).

Some victims report violence because they know that getting the "victim label" is an unavoidable requirement to have access to any kind of support that the organic act foresees. But when they report, some of them don't even know what all the implications of the criminal report are. They do not know that when criminal law intervenes in a conflict, it takes control

over the whole situation; it sets the tone and determines in an absolute way in which the situation is managed (Larrauri Pijoan, 2007; Ortubay Fuentes, 1998). Since most of the felonies relating to violence against woman are public offences, as soon as the report has been made, the victim loses control over the situation. The victim's forgiveness doesn't count (or at least it doesn't have juridical consequences), and the felony will be punished as foreseen if it is proven (Libano Beristain, 2011).

One of the practical problems that arise is that many victims don't want their partners or ex partners to be punished (they often say they only want the violence to disappear) and plenty of them don't even end the relationship with the offender. So, when these victims realize that not only is the criminal justice system unable to give them what they need, but it also creates more trouble, they start mistrusting the system. They aren't going to collaborate with it and even if the report is necessary to get all the support that the law foresees, they will often prefer to renounce the help because it demands too high a price (Larrauri Pijoan, 2007).

The consequence is a law which in theory offers the best protection, but which few victims resort to, because it doesn't offer them alternatives to a trial, that is, the non traumatic solution they might need and want.

So not foreseeing the possibility of diverting battered women to other institutions that might be able to inform them and help them get out of the violence scenario without going through a trial isn't precisely a sign of *ultima ratio*, especially if we consider that this possibility doesn't even exist for isolated and less serious incidents.

3.2. Transformation of mild, isolated violence acts into felonies

Another point which has been particularly controversial is the *transformation of mild, isolated violence acts from misdemeanors into felonies for all incidents among family members*. In practice, one of the consequences of this change is that those incidents can be punished with imprisonment, even if they don't occur in a latent climate of violence.

Was it necessary to turn occasional violence misdemeanors into a felony? Was it really the last resort to improve the effectiveness in addressing this issue? Punishing occasional violence which didn't require medical or surgical treatment only as a misdemeanor had brought a feeling of impunity and a lack of protection of the victims. In practice, many cases ended with the acquittal of the offender (because many of the victims didn't testify) or with the imposition of a fine, which meant that in many cases the women had to pay for the felony as well, at least if they were married to the perpetrator with a shared possessions regime (Calvo García, 2005).

Instead of analyzing the reasons for the dysfunctions, the Spanish legislator chose a more severe criminalization as a way of addressing this kind of violence. The symbolic effects of creating new offences and increasing sanctions was considered an appropriate way to show the worry and the censure that intimate partner violence deserves, and to make clear that the state wasn't going to tolerate it. But in terms of its efficiency, this strategy was an absolute failure. An isolated and non-serious incident being classified as a misdemeanor is acceptable and respects the proportionality principle (like pushing or slapping in the context of an argument). The real problem lay in faulty judicial practice, which assumed that the first report (of such an isolated incident) also indicated the first violent incident. Before the amendment

in 2003, three reports were necessary to consider violence regular and to apply the felony of art. 153. If a woman went to the police for the first time and referred to a whole life of abuse, it was still going to be the first report. The amendment in 2003 wanted to modify that inertia, but it didn't manage to. What's more, turning occasional violence into a felony had as a result, that almost all reports on violence against women are currently treated as isolated abuse. Since an isolated slap is much easier to prove than a climate of terror, the judicial application tends to apply the occasional violence felony (art. 153) instead of investigating if the incident which triggered the report was just the straw that broke the camel's back (Laurenzo Copello, 2007).

Even though turning all misdemeanors into felonies has been counter-productive, the Spanish Constitutional Court declared that it was a legitimate option, among other reasons, because of the inexistence of other alternative and less intrusive means, which could be as efficient as punishment for addressing domestic violence.

3.3. Higher penalty if the victim is a woman

Another controversial point that has to be analyzed is that since the amendment in 2003 art. 153 foresees a higher penalty for the perpetrator if the victim of occasional violence is or has been his wife or a woman with whom he has been bound by a similar emotional relationship (even when they aren't cohabitating), than if the victim is the male partner or some of the other persons of the domestic context who can be considered victims of this felony[4]. In the scientific literature some authors pointed out that this provision breached the equality principle, because men were more severely punished than women for the same

[4] Paradoxically, a higher protection for the female victims is only foreseen for occasional violence, not for habitual violence victims. It might have been an oversight of the legislator, because any other explanation would be difficult to understand.

conduct, and because the law gave a higher protection to the female victims than to the male ones.

But this argument based on the breach of the equality principle can be refuted through solid counter arguments: to start with, as *Johnson* pinpoints, it has to be stressed that men and women are not equally involved in occasional couple violence. Violence isn't gender-symmetric at all (in about 90% of the cases the perpetrator is a man). But even gender-symmetry would be meaningless in the face of the dramatic differences in the nature and consequences of men's and women's violence. Women are more likely to be seriously injured, to fear for their safety and to experience negative psychological consequences than men (Johnson, 2008; Larrauri Pijoan, 2009; Laurenzo Copello, 2007).

Moreover, a woman battering a man isn't the same as a man battering a woman. Not if we really believe that violence against woman is a structural problem stemming from women's ancestral subordination and inequality in the distribution of social roles. So a different punishment based on these differences could be legitimated, which has been stated by the Spanish Constitutional Court as well, since one of the dimensions of the equality principle involves treating different cases differently (Larrauri Pijoan, 2009; Lascurain, 2013).

3.4. Compulsory application of the prohibition to approach the victim

The aim of this prohibition[5] is obviously to guarantee the safety of the victim in all the stages of the process (and afterwards) and it goes without saying that it can be a very useful and necessary tool in some violence scenarios. But what has to be stressed is that the amendment

[5] This prohibition can be a precautionary measure, a penalty, a security measure, or a condition to fulfill during the suspension of the execution.

of 2003 made it compulsory to apply this prohibition as a *penalty* to whoever is condemned because of domestic abuse, regardless of the gravity of the conduct, of the victim's willingness, and the dangerousness of the offender. So, the prohibition to approach the victim has to be imposed in all cases for a time that shall not exceed ten years if the felony is serious, or five if less serious.

It doesn't seem very logical that a push (for example) in the context of an argument that has escalated automatically implies the prohibition to approach the victim for up to 5 years. It cannot be rationally argued that an adequate protection of the interests at stake can't be achieved by less intrusive means. Besides, and once again, the interests and the opinions of the concrete victim aren't taken into account when imposing this penalty automatically (Asua Batarrita, 2010; Maqueda Abreu, 2007).

In the case of intimate partner violence victims, the legislator just assumes a stereotyped image of abused women: the image of a vulnerable and defenseless woman, who might not be able to make the only possible coherent choice (that is, ending the relationship) and who needs the State to decide on her behalf. This approach confirms and consolidates the worst clichés of women being weak and incoherent (Antón/Larrauri Pijoan, 2009).

Despite the critics, according to the Constitutional Court, the compulsory non-approaching penalty is necessary to protect the legal interests at stake, because the obligatory nature of the penalty is precisely what makes it effective.

But it has to be stressed that the automatic nature of this prohibition doesn't only affect intimate partner violence cases: it has an impact on domestic violence cases as well. Imagine that a mother smacks her child when correcting him. Even if the use of force can't be

justified, the prohibition to approach the victim in such a case would involve keeping the child apart from his mother for a time up to 5 years. Examples like this one depict how the "punitive turn" in approaching violence against women has operated as a bench test to increase punitiveness in other fields as well.

3.5. Breach of the prohibition to approach the victim

With this background, it isn't surprising that the prohibition to approach the victim is constantly breached, and this breach is in turn a felony that has to be punished in all cases with a sentence of imprisonment of six months to one year (art. 468 Criminal Code).

If this breach happens against the will of the victim, it's logical to admit the imposition of a sanction for the offender (like prison or revocation of parole). But the perversity of the system gets to the point of protecting the victim under coercion: if a woman allows the offender to breach the prohibition to approach penalty, she can be condemned as an inductor or a necessary cooperator of a breach of sentence felony (Laurenzo Copello, 2007; Maqueda Abreu, 2007).

Many victims don't really realize that they have no choice in this matter before they are informed about the sentence and it's quite usual for victims to go to the enforcement officer and just express their will to withdraw that penalty. The problem is that a penalty (unlike a security measure) cannot be withdrawn or changed after a final judgment. And, as I've mentioned, judges are obliged to impose the prohibition to approach penalty "in all cases". Some case law pointed out that the offender shouldn't be punished because of this breach, if the victim agreed with this approach, but this interpretation isn't really in accordance with the law (Mayordomo Rodrigo, 2009). In fact, the only solution left if the couple is caught

cohabitating again or keeping in touch in any other way is to ask the government for pardon (Manjón-Cabeza Olmeda, 2011).

3.6. Exception to the obligation to testify as a witness when family members are involved in a crime

The victims of the aforementioned punitiveness are not only the male perpetrators but the women themselves. There is more evidence that confirms this: everyone who has witnessed a crime has the obligation to testify during the oral trial. Art. 416 of the Code of Criminal Procedure foresees some exceptions to this general obligation: this provision exempts family members to a certain degree from the obligation to testify against other family members. Spouses are included in the list of people who are exempt. This provision implies, among other things, that if the police or the investigating judge wants to interrogate someone because of a felony committed by a relative, they have to inform them about their right not to declare.

This issue is relevant because of the numerous acquittals in intimate partner violence cases resulting from the refusal of many women to confirm during the oral trial what they declared to the police or to the investigating judge (that happens in more than 60% of cases). Victims acting in such a way are considered irrational and lose the empathy and the affection they might have had at the beginning of the process, especially if they don't break up with the perpetrator (Larrauri Pijoan, 2003; Larrauri Pijoan, 2007). The judges, the prosecutors and the women protection services often declare that they feel frustrated because they make a big effort and invest a lot of time in these cases, and all this engagement often results in a waste of time because many of the women decide to give the perpetrator one more chance.

That's why the General Council of the Judiciary proposed to modify the interpretation of article 416 of the Code of Criminal Procedure in cases of violence against women, confirming the point of view of some judges: according to this interpretation, if a woman reports a violent incident which has been committed by her partner, the exemption of art. 416 could not be invoked by the woman during the oral trial. In other words, art. 416 foresees an exemption only for the family members who have been witnesses of a crime committed by their relative, but not for those cases where they themselves were victims and have reported the crime to the police spontaneously (Castillejo Manzanares, 2011; Laurenzo Copello, 2011).

So, what would happen to a woman if she if she refused to testify even if the exemption isn't applicable? Then she would be prosecuted for a disobedience felony (art. 556), or for obstruction (art. 463). And if she testifies changing the description of facts given in the initial report, she could be condemned for perjury (art. 458) if the evidence shows that she lies, which isn't a very reasonable solution. Even if the frustration of the prosecutors and other institutions is understandable, and the logic of the juridical arguments is difficult to refute, things aren't that easy in real life. Some of the problems stem from the fact that calling the police is considered a report. Many people call the police when they fear for their safety, but that doesn't necessarily mean that they want to get involved in a criminal process. The reasonable solution would be to check if women who don't want to testify after having reported an incident act spontaneously and freely and empower them helping them and supporting them so that they don't decide not to testify because they are scared. The criminal justice system should give them the possibility to decide the role they want to play in the penal procedure against their partners. But it should definitely not allow them to be punished if they don't act in the way the system expects (Laurenzo Copello, 2008; Castillejo Manzanares, 2011).

3.7. Prohibition of mediation in gender violence cases

The 2001/220/JAI Framework Decision on the standing of victims in criminal proceedings, foresees that each Member State shall seek to promote mediation in criminal cases for offences which it considers appropriate for this sort of measure (art. 10).

The Recommendation 99/19, adopted by the Committee of Ministers of the Council of Europe, points out that mediation in penal matters is a flexible, comprehensive, problem-solving, participatory option complementary or alternative to traditional criminal proceedings. The recommendation emphasizes different aspects:

a) the need to enhance active personal participation in criminal proceedings of the victim and the offender;
b) the legitimate interest of victims to have a stronger voice in dealing with the consequences of their victimization, to communicate with the offender and to obtain apology and reparation;
c) The importance of encouraging the offenders' sense of responsibility and offering them practical opportunities to make amends, which may further their reintegration and rehabilitation;

Mediation may increase awareness of the important role of the individual and the community in preventing and handling crime and resolving its associated conflicts, thus encouraging more constructive and less repressive criminal justice outcomes. However, despite the advantages and the general background of promotion of mediation, Spain prohibits mediation explicitly in all cases of violence against women (the Organic act on Integrated Protection Measures against Gender Violence, 2004). The main argument, which is put forward, is that both parties do not have an equal bargaining power.

Even though it is true that in some cases the imbalance between the parties may be so considerable and the fear of the victim so patent, that even with preparation therapy the victim wouldn't be able to face the mediation process, this invalidating disadvantage cannot be taken for granted in all cases (Guardiola Lago, 2009; Esquinas Valverde, 2010). In the concrete field of intimate partner violence, mediation can be a good tool to avoid re-victimization on some occasions, because women have the opportunity to tell their story, to explain how they feel, what they need, what is crucial for them, whereas the criminal procedure doesn't allow this flexible approach to the conflict (Esquinas Valverde, 2008). However, there is the belief that all women who have been victimized have the same needs and all cases of violence against women have the same gravity, without distinguishing between isolated incidents and cases of regular abuse.

4. Concluding remarks

From the aspects analyzed it can be inferred that Spanish legislation on intimate partner violence constitutes a permanent breach of the *ultima ratio* principle in the cases of occasional violence. Criminal law intervenes in situations that can't be considered blameworthy enough to deserve a punishment and even then when punishment might be required, the disproportionate severity of the foreseen sanctions for isolated incidents is beyond all doubt. Nevertheless, the possibilities to extend control over the convicted continue increasing.

But one of the most obvious things that must be emphasized is that this punitiveness hasn't been at all effective in obtaining the goal of reducing violence against women. The legislator resorts to very intrusive means which instead of solving problems, create new ones or make the existing ones deeper, even re-victimizing and criminalizing the women that don't behave

in the expected way. The less unsustainable the current strategy is, the more the public powers opt for its continuity.

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