CONSEJO GENERAL
DEL PODER JUDICIAL

STUDY ON THE IMPLEMENTATION OF THE COMPREHENSIVE LAW AGAINST GENDER VIOLENCE BY THE PROVINCIAL COURTS

GROUP OF EXPERTS IN DOMESTIC AND GENDER VIOLENCE OF THE GENERAL COUNCIL OF THE JUDICIARY (September 2.009)

This study has been carried out by the Group of Experts on Domestic and Gender Violence of the General Council of the Judiciary, integrated by the judges Pilar Alhambra Pérez, Vicente Magro Servet, Mª Jesús Millán de las Heras, María Tardón Olmos, María Isabel Tena Franco and Francisca Verdejo Torralba, as well as by the judges and lawyers of the General Council of the Judiciary, Joaquín Delgado Martín and Paloma Marín López. The latter has coordinated it.

It has been approved by the a.m. Group of Experts at their meeting on 10th September, 2.009.

I would like to express my thanks to the judges that integrate the Group of experts of the Observatory against the Domestic and Gender Violence. Thanks to their effort and dedication we can avail of a very useful study for a first approach to the interpretation and implementation of the Organic Law 1/2004, of 28th December, on Measures of Comprehensive Protection against Gender Violence.

Four years after the specialised judicial bodies came into operation, it is now necessary to know how our tribunals are implementing the new specific laws on gender violence within the scope of the couple –procedural and substantive, criminal and civil rules- with the aim to know the judicial response and make a diagnose that might be used on potential proposals for organization or legislation improvements.

The "Study on the implementation of the Comprehensive Law against Gender Violence by the Provincial Courts" is the result of a significant sample of sentences passed by the criminal Sections that specialize in Violence against Women, within the Provincial Courts. The indicators used in the a.m. study disclose important aspects of the judicial performance, as well as the legal controversies raised from the interpretation of some regulations.

All of which are matters of interest. Take as a sample the ones related to the judicial appreciation of the statement of the victim as the only prosecution evidence; or the different jurisprudential interpretations on the effectiveness of the victim's consent on the violation of the judicial prohibition on approximation or communication. Also, the repercussion and incidence in this matter of general prosecuting regulations, such as the exemption to declare of a relative witness- is considered, and the study is complemented with information about the number of acquittal or conviction rulings, offenses and penalties most commonly applied and the incidence of the amending circumstances of the criminal responsibility on this criminal phenomenon.

Finally, this work has the merit of presenting a first radiography of the judicial response since the Organic Law 1/2004 was passed. Not only does it undo imaginary issues or generalizations lacking on factual support like the one concerning the potential "false reports" issued by women but it also, and more importantly, offers objective elements to extract useful conclusions for the diagnosis and proposals of improvement. A compromise and an institutional duty that the article 9.2 of the Spanish Constitution imposes on all public authorities, binding us to remove all obstacles that may prevent or make difficult the real and effective equality and freedom for men and women.

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Member of the General Council of the Judiciary
President of the Commission for Equality and of the Observatory against the Domestic and Gender Vilolence

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I. INTRODUCTION

During the last few years, the Group of Experts in Domestic and Gender Violence within the Judiciary has taken up the study and analysis of the court rulings concerning the most serious manifestations of this violence, with the object of improving the knowledge of one of the facets –the judicial response- of the criminal phenomenon that was initially classified under a general heading of "domestic violence" and which, later, has been specifically visualized and typified as "gender violence"; in this case, within the scope of the partner or ex-partner relationship.

Up to now, this specific performance has been aimed at analysing the sentences passed by the Tribunals of the Spanish Jury, related to homicides or murders that have taken place among the members of the couple or ex-couple, materialising in three studies. The two first ones have been published along the year 2.008 and the third one, recently, during the month of July 2.009.

The first one was related to the totality of the sentences passed by the Tribunals of the Jury between 2.001 and 2.005. The second one, initiating annual periodicity studies in this matter, involved the study of the ones passed in 2.006. The third one assumed the analysis of the sentences passed on this field during 2.007 by both, the Tribunals of the Jury and the Provincial Courts. All of them have unquestionably concluded that violence resulting in death of the partner or ex-partner is, fundamentally, part of the gender violence: 94,49% of the perpetrators of the committed homicides and murders, judged and sentenced between 2.001 and 2.005, have been male. This percentage rises to 97% for the cases sentenced in 2.006, declining to 77% on the cases sentenced in 2.007 by the a.m. bodies.

While performing the first studies, the people integrating the Group of Experts agreed that, after a certain period implementing the last legal reform on this matter -the Organic Law 1/2.004, dated 28th December, on the Comprehensive Protection Measures against Gender Violence (from here forth, Comprehensive Law), which introduces important changes in the way this specific violence should be addressed-, studies should be carried on periodically on particular aspects of its implementation in order to get to find out the judicial response to this criminal phenomenon.

The study presented in this occasion concerns a first approximation to the judicial implementation of the Comprehensive Law, including the influence in the results of such implementation of legal norms that already existed, by considering a representative sample of resolutions.

Initially, we had to decide on two options: the selection of the sample object of study and the matters that would be incorporated to it.

Concerning the first option, we had the possibility to count on the invaluable collaboration of the Judicial Documentation Centre that gathers a magnificent database on judicial resolutions which were made available to us.

Concerning the specific object of study of the sentences concerning the selected sample, from the very first moment, we considered aiming exclusively at some of the aspects of its implementation, knowing that this study would not exhaust the different problems that have arisen in this work. Those may be taken up in further studies.

Nevertheless, the Judicial Documentation Centre database presented two limitations:

The first one, which could only offer resolutions from the collegiate bodies, in particular and as regards the present study, sentences from the Provincial Courts, passed both, on appeal (in this case, against either decisions on trials for infractions, or sentences issued by the Criminal Courts that had

prosecuted offenses), or issued on first instance, concerning offenses that involve a deprivation of liberty sentence, lasting over five years.

Through the ones passed on appeal, we may know about the implementation of the Comprehensive Law by the Courts of Violence against Women, as regards the trials for infractions, and by the Penal Courts in charge of the bulk of trials of offenses of gender violence; but only as long as the account of the proved facts, the legal argumentations and the full dispositive part of the passed sentence in firsthand are considered in the appeal ruling, which does not happen in all cases. This is relevant since the appeal rulings represent 95,48% of the studied sample object. However, it did allow to thoroughly know the implementation of the Comprehensive Law on the most serious cases of gender violence, which are to be tried, in first instance, by the Provincial Courts.

The second limitation is due to the fact that, even to this date, the Judicial Documentation Centre does not avail of 100% of the resolutions passed by the collegiate bodies.

Nevertheless and considering that the Judicial Documentation Centre database was able to provide with the maximum possible information obtainable on these resolutions, and discarding the possibility of carrying on a field job on the full scope or on a representative part of the jurisdictional bodies, the Judicial Documentation Centre was required to provide all the resolutions they held within their criminal database, that belonged to collegiate bodies (Provincial Courts) , on the matter of gender violence, concerning the period between 1st January 2.007 and 31st March 2.008. This way, we intended to know about the implementation of the Comprehensive Law, consolidated after a certain period of time from its coming into effect, preventing the incorporation of the initial interpretations that had not been maintained through time. Equally, and based in the fact that in more than just a few cases, the judicial response was produced, specially earlier, with undesirable delays, we intended to limit to the maximum the submittal of resolutions that, having been passed after Titles IV and V of the Comprehensive Law came into effect, referred to events that had taken place previously, which demanded the application of the law in force at the moment the events took place. The study, as previously stated, was meant to find out about the implementation of the Comprehensive Law and this could only be achieved based on resolutions that

prosecuted cases that had occurred after its coming into effect. Even though the chosen time criterion intended to prevent receiving resolutions that were not to be an object of study, due to the stated criteria, some of the ones received, nevertheless, have had to be excluded *a posteriori*, after confirming the fact that they did not concern cases susceptible of being included within the new regulation.

Once the total amount of criminal resolutions related to this subject and available within the Judicial Documentation Centre database was received within the stated period, we asked the Sociologic and Statistics Studies Section in the General Council of the Judiciary to fix the appropriate methodology to achieve a comprehensive study sample that might be considered reliable and representative of the work performed by the Criminal Sections Specialized in Women Violence in our Provincial Courts.

The technical record of the sample of sentences to be analysed, provided by the a.m. Section, evaluated the number of resolutions passed during the period under study (7.691, according to the information resulting from the statistics judicial bulletins at the moment the resolutions were received) and the number of sentences received (1.653). In order to determine the size of the sample, to achieve the highest degree of reliability from the selection to be performed, the Sociologic and Statistics Studies Section established that 580 sentences would provide a reliability level of 99% and a sampling error of 2% which is considered greatly representative.

Once the sample number was fixed, the provincial distribution of the total figure of the same was made following two parameters: the total number of criminal sentences passed in the whole of Spain connected with gender violence (in grade of appeal against gender violence infractions and offenses and in first instance by the Provincial Courts) and the number of sentences passed in each Provincial Court, referred to the stated period for both cases. In order to effect as close a calculation as possible to both parameters and so as to round them off, the final sample raised to 606 sentences. The provincial division of the sample was the result of dividing this figure between the weight each province has in resolutions and sentences.

The fact that the sentences submitted by the Judicial Documentation Centre were numbered in an orderly fashion from 1 to 1653 in a provincial arrangement, helped in the task of obtaining a random figure of the specific sentences to be analysed in each province.

The selected sentences are the result of calculating as many random numbers by sections as the sample assigned to the particular province.

The sample object of study was fixed as per the following table:

	Sample		Sample
ÁLAVA	3	LA RIOJA	2
ALBACETE	1	LAS PALMAS	19
ALICANTE	50	LEÓN	5
ALMERIA	10	LUGO	1
ASTURIAS	15	LLEIDA	4
ÁVILA	2	MADRID	151
BADAJOZ	3	MÁLAGA	3
BALEARS	0	MURCIA	14
BARCELONA	105	NAVARRA	4
BURGOS	6	OURENSE	0
CÁCERES	1	PALENCIA	0
CADIZ	21	PONTEVEDRA	10
CANTABRIA	7	SALAMANCA	0
CASTELLÓN	3	SANTA CRUZ DE TENERIFE	13
CIUDAD REAL	6	SEGOVIA	0
CORDOBA	1	SEVILLA	12
CORUÑA (A)	6	SORIA	0
CUENCA	2	TARRAGONA	2
GIRONA	19	TERUEL	0
GRANADA	18	TOLEDO	3
GUADALAJARA	0	VALENCIA	25
GUIPUZCOA	3	VALLADOLID	6
HUELVA	3	VIZCAYA	21
HUESCA	1	ZAMORA	1
JAEN	5	ZARAGOZA	19
		TOTAL	**606**

Therefore, the study was made on 606 sentences. 76 have been excluded along the same because either the sentence did not relate to the gender violence regulated by the Comprehensive Law, or the events took place before it came into effect. The intended knowledge, as previously stated, concerned the implementation of the Comprehensive Law, and not the judicial response to the gender violence before this last amendment. The latter had been taken up, some time back, by earlier studies entrusted to the Laboratory of Legal Sociology in the University of Zaragoza. Thus and finally, there have been 530 sentences analysed. According to the Sociologic and Statistics Studies Section, this figure maintains a reliability level of 99% and a sampling error of 2,145%. This circumstance allows for a great level of reliability when legally implementing the Comprehensive Law all over Spain, as regards the matters that are the object of study.

The object of the investigation was based on the following matters:

1. Penal types that are the object of a convicting or acquitting sentence, with the exclusive purpose of enabling the possibility of referring to them the different aspects that have been considered.

2. Reasons for acquittal.

3. Evaluation of the victim's statement when this is the only prosecution evidence presented in an oral proceeding.

4. Analysing which resolutions required or excluded a subjective element in the penal types, the discriminating intention, an element that the legislator had not included in the description of the different penal types and which was known to be required by some Tribunals as an element of the type, based in article 1 of the Comprehensive Law.

5. The specific circumstances that amend the criminal responsibility considered in the condemning sentence.

6. The effects of the victim's consent to the resumption of a life together, while existing a restraining order (sentence or measure), as regards the penalty or acquittal following the type in article 468 of the Penal Code.

7. The interpretation of the “similar affective relation” without existing a life together, to which some penal types refer, to include or exclude the implementation of the Comprehensive Law.

8. The penalties imposed in the convicting sentences other than the deprivation of liberty.

9. The possible reference to the existence of false accusations in the passed resolutions.

10. The existence of reasons for nullity in the sentences passed firsthand, when considered by the Provincial Court.

II. RESULTS OF THE STUDY

II.1. DISTRIBUTION OF THE RESOLUTIONS

Out of the 530 sentences conforming the total sampling group that has been an object of study, 34 (a 6,42%) concern appeals against sentences passed on trials for infractions; 472 (a 89,06%) concern appeals against sentences passed in cases of plea bargaining by Penal Courts and 24 (a 4,53%) are sentences passed in first instance by the Provincial Courts.

II.2. SENSE OF THE RULING

The result of the final judicial decision on the proceedings concerning the penal infractions related to gender violence, expressed in the Provincial Courts' resolutions, is a conviction, due to one or various infractions, in the 84,91% of the cases concerning 450 sentences. There is a 1,89% of cases (related to 10 sentences) that declare the nullity of the appealed sentence. The reminder -70 sentences, a 13,20% of the cases- relate to acquittal sentences.

31 of the studied sentences, a 5,85% of the total cases, contain both, a statement of conviction, as regards some infractions, and an acquittal, as regards others. Once this clarification has been introduced, the figures and percentages remain as follows:

II.3. ON THE PENAL TYPES OBJECT OF CONVICTION AND ACQUITTAL

The offense against which a charge has been raised most often and which, because of this, has been the object of the highest number of convictions or acquittals, is the one described in article 153 of the Penal Code, which typifies the psychic undermining or the injury that does not require medical or chirurgic treatment or the ill-treatment performed without causing injury. Concerning the penal types that have been the object of a conviction for the 450 resolutions of this kind, a 59,33% (267) of the convicting rulings are related to this offense, which may concur with some others. As regards the sentences of acquittal, a 65,35% of the total number of them are acquittals of this offense, notwithstanding a conviction or an acquittal ruling owed to other infractions.

The second offense, quantitatively speaking, which is the object of a conviction ruling in most cases is that of minor threats, a 21,78% (98 sentences), followed by that of violation of a sentence or provisional measures, issued for the protection of gender violence victims, a 10,22% (46 sentences).

Concerning the acquittal rulings, the a.m. two offenses are also the ones that have obtained this type of rulings in second and third place, although in an inverted order: the second offense -in terms of quantity- that has got more acquittal rulings is the one related to a violation of sentence or provisional measures issued for the protection of gender violence victims, a 25,74% (26 sentences), of the total acquittals, followed by that of minor threats, a 22,77% (23 sentences).

Other types of offenses have had a much smaller incidence. Thus, the offense related to regular violence is the object of a convicting ruling in 6,22% of the cases and of acquittal in 11,88% of the total number of cases of this kind.

Far behind, the accusation of physical injury – including the cases of major importance, with the result of deformity- amounts to a 4% of the total convictions and to a 0,99% -1 sentence- of the acquittals. Another 2,67% of the conviction rulings are, at least, due to crimes of minor intimidations, offences that reach a 5,94% of the total acquittals.

The convictions related to homicide reach 1,11% of the court rulings of this kind.

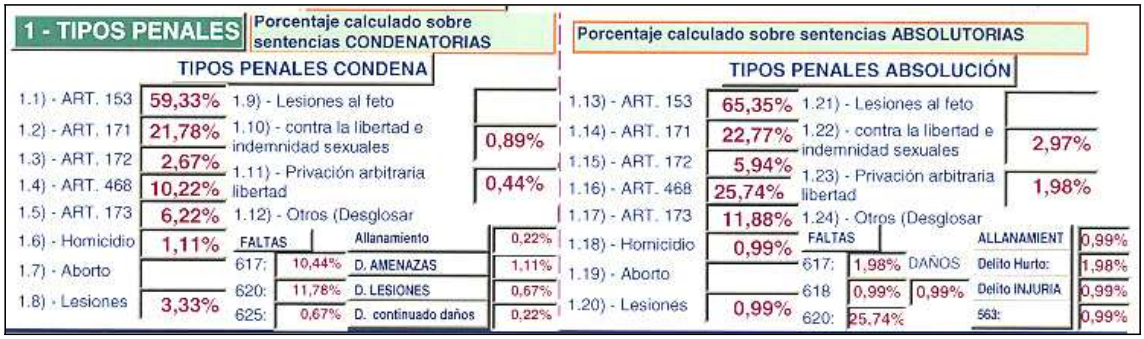
Under the 1% figure are included the sentences related to offenses against sexual freedom and indemnity (0,89% which, nevertheless, represent a 2,97% of the total acquittal rulings) and related to the arbitrary deprivation of liberty (0,44% which, in itself, represents a 1,98% of the total ones for the opposed sign).

The acquittals for homicide are also under the 1% threshold: one sentence only, amounting to 0,99% of the total acquittals.

Sometimes, due to the earlier mentioned limitation concerning the non-inclusion of the report of the proved facts within the sentences passed in appeal, and in the absence of this knowledge, we are prevented from knowing the facts that were the cause of their perpetrator's conviction or his acquittal; this seems to be reinforced by the diversification of the terminology used to name the offense types in the sentences (gender violence offence, offense of violence against women, domestic violence offence related to article 153.1 CP, offense of violence within the scope of the family, injuries within the scope of the family, aggravated offense of gender violence, ill-treatment offence, aggravated offence of standard psychic domestic violence, simple and aggravated domestic violence offense…), without an explicit reference to a penal type or a specific rule. This is extensive to the cases of conviction or acquittal related to an infraction as per article 468 of the Penal Code, where the lack of inclusion of the statement of proved evidence, if existing, prevents to ascertain if the ruling, whatever its contents, is referred to a violation of a sentence or to a violation of a provisional measure.

The following tables show the number of sentences, with their related percentages, that have been delivered in the analysed sample, to convict or acquit, on the gender violence offenses.

They also show the rulings on infractions, which in more than a few occasions discover the lesser gravity granted to the reported facts in the judicial venue and which, in other occasions, also form part of sentences passed on other offences.



Lastly, we must note that, in the a.m. table, no mention has been made to the penal infractions that could be the object of this study -when there are court rulings related to offenses of resistance or disobedience to authority, in the event that the information on the statement of the proved evidence is missing-, such as infractions related to the non-existence of damages, in which cases, it is reasonable to predict their exclusion from the field of direct protection of the Comprehensive Law.

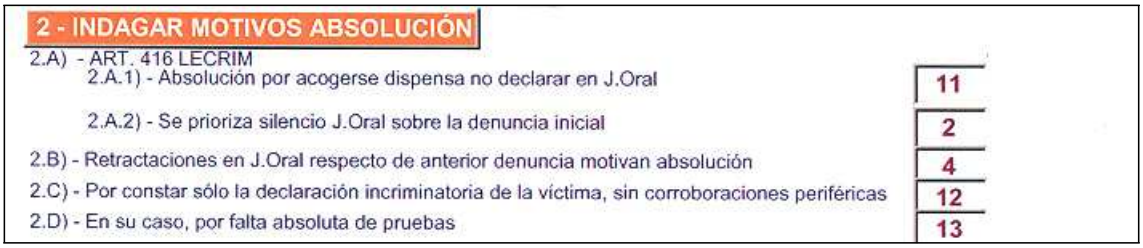
II.4. REASONS FOR ACQUITTAL

The knowledge of the reasons for the acquittal –of special quantitative incidence in the resolutions passed by the Penal Courts- was an important aim within the study in question. With this in mind and initially, various factors that could lead to such ruling were considered in the drawn up file. Specifically, the knowledge of the incidence that the use of the right of exemption to declare among some relations allowed by article 416 of the Criminal Procedure Act had and, which since the visualization of the gender violence, has acquired a specific significance that is not considered when the property protected by the legal system is of a different nature.

In order to get to the earlier described goal, the range of possibilities generated by the implementation of the a.m. rule was expanded to a maximum, including a section related to a complete lack of evidence, which included the rulings related to that concept, from the cases where the victim had refused to report the offender, initiating the proceedings based on the existence of other evidence, to those in which the Court evaluated the non-existence of evidence, in spite of the earlier displayed instruction and which had justified the opening of an oral proceeding.

The justification of the acquittal on other grounds, e.g.: on the implementation of the principle of *"in dubio pro reo"*, was not specifically considered as such in the file, notwithstanding its inclusion in the comments made on the analysed sentences.

The results obtained in this subject from the carried out studies are the following:



II.4.1. Introduction

It is really difficult to find at present a legal system that, as in the case of the Spanish one, has more reliably considered within its internal regulations, the principles and warrants of the different International Instruments and Treaties that during the past thirty years, approximately, have taken up the fight to achieve the eradication of the violence exerted on women, reducing and finally suppressing the impunity areas of any action that may result from gender violence and designing a more comprehensive protection system for women that are victim to this type of violence.

A thorough study of the facts that surround the offences and infractions that represent the expression of gender violence expose a specific reality that, even though no key has been found to eradicate it in the short term, does perfectly provide a knowledge of its most common features, at present. A social reality that tells us why the victims in these aggressions "collaborate" with their aggressors, facilitating their actions, covering them up, protecting them, and assuming unreasonable risks for an outside observer that is a stranger to the case; this reality has no similitude with any other sphere of human relations.

And thus, no other type of offences show the circumstance that the victim not only forgives her aggressor but, moreover, she blames herself of the aggression and, immersed in what has been called "the cycle of the violence", she continues in a permanent situation of aggression-report-repentance-aggression; which, very often, means that she will end up finding herself at a real

dead-end: she puts up a claim, withdraws it, she backs out, she makes use of the right of exemption to declare against her aggressor that is provided for the relatives of the prosecuted individuals within the prosecuting legislation… In the end, it is a mighty obstacle race for such an especially vulnerable victim of these offences that might make her wish to withdraw from the prosecution.

All of this has, of course, its direct reflection on the result of the lawsuits arisen from these facts that, obviously, have to abide by the inalienable principles on the subject and guarantee the full rights of those who might be accused of any such charges and, specifically, the right to the presumption of innocence granted by article 24.2 of the Spanish Constitution.

Moreover, the specific nature of these offences, which often take place in the privacy of aggressor and victim, mean that, in such occasions and in the best case, only a complex circumstantial evidence or the sole statements of the victim are available.

Both these attitudes and requirements are considered for most of the resulting acquittal sentences that have been examined here; most of these acquittal sentences have been issued by the Provincial Courts in the resolution of appeals. Only 6 of the acquittal sentences have been issued by them during the procedural phase.

II.4.2. Cases where the determination of the reasons for acquittal is not possible.

First of all, it should be noted that, in a considerable number of cases, it is not possible to determine the causes that have led to the total or partial acquittal of the charged individuals, concerning the sentences of the different Provincial Courts which resolve the appeals, due to either the succinct arguments that support it or, because the latter concern various other aspects under debate. This is the case in 23 of the analysed sentences.

Concerning 13 cases in this group, the reason why no cause can be determined to explain the acquittal is related to the fact that the dismissal of the

appeals has been supported, exclusively, on the constitutional doctrine originated from Sentence no. 167/2.002 of the Constitutional Court. From this point on, the restrictive criteria it introduces on the extension of the control over the appeal have been reaffirmed and reinforced in later resolutions from the same Court; e.g.: Sentences no. 41/2.003 from 27th February, 68/2.003 from 9th April, 118/2.003 from 16th June, 189/2.003 from 27th October; 192/2.004 from 2nd November, 65/2.005 from 14th March, 338/2.005 from 20th December or 11/2.007 from 15th January.

According to such a doctrine, and notwithstanding the wide revising possibility of the appeal Court, once an acquittal sentence in firsthand has been passed and a conviction sentence is requested for the defendant in the appeal, such conviction cannot be granted on the basis of the statements of witnesses, experts and defendants if the Court has not witnessed such evidence under the principles of publicity, vicinity and contradiction and the intended conviction must be supported on a new evaluation of those elements of evidence that lead to amend the proven facts. Therefore, the constitutional interpretation of the right to a trial with full guarantees should be adapted to the requirements imposed by article 6.1 of the European Agreement for the protection of the human rights and the public liberties, according to the interpretation given to it by the European Court of Human Rights. The latter states that, when the body of appeal needs to make a global statement over the defendant's guilt or innocence, the appeal cannot be solved without a direct and personal examination of the defendant that denies having committed the action.

That is why, our Constitutional Court, and in sentences similar to the one described above, among many others, has been aware of the violation of the right to a trial with full guarantees when, without any new evidence, a revocation has taken place on first appeal of an acquittal sentence and it has been replaced by a convicting one, after a new evaluation and consideration of the defendants and witnesses' testimony on which the amended statement of the proved facts was based. And this takes place on the grounds that the conviction requires a direct and personal verification of the new evaluation of the evidence by the defendants and the witnesses, in a public debate where the possibility of contradiction should be respected.

We cannot forget, either, considering, and this is even more relevant, that in most of this type of sentences, it is understood that the repetition of the evidence would not be legally possible, as per the restrictions imposed by article 790.3 of the Penal Prosecuting Law. In fact, this rule states that, during the appeal, the plaintiff may propose to effect the evidence proceedings, "*that he was prevented from proposing in the first trial, of the proposals that were unduly denied to him, so long as the necessary complaint was duly formulated at the time; and of those others which were admitted but were not effected due to causes that are not to be attributed to the defendant*".

Even the Court itself establishes, in its recent Sentence of the First Chamber, dated 21st May 2.009, in the appeal on the grounds of unconstitutionality 8.457/2.006, after reiterating the above mentioned doctrine, that the immediacy cannot be replaced by the emission at the appeal Court of the audiovisual recording of the oral proceedings celebrated during the first trial. And this is considered so because the immediacy in relation to the oral evidence, that is the statements, whichever the concept in which they are transmitted, means a direct contact with the source of the evidence, its personal and direct consideration; this implies the coincidence in time-space of the individual who makes the statement and the one before whom the statement is made.

Consequently, the only possibility of alteration of the proved facts, in these cases, cannot take place by replacing the legal body when evaluating the evidence means, the appreciation of which requires immediacy; it must rather consider the correction or coherence of the reasoning employed at the evaluation of the evidence. Thus, the duty of the appeal Court does not consist of examining the results obtained but rather of effecting the external control of the logic reasoning followed to get to them. That is to say, the examination of the personal evidence considered during the trial can only be left without effect if the conclusive argument reached by the judge *a quo* violates the right to an effective legal tutelage, or reaches an absurd conclusion, or the ruling is irrational or incongruent concerning the facts declared as proved, or if the judgement passed were arbitrary.

In 9 of the analysed sentences, the impossibility to determine the reasons for acquittal is due to the fact that, since only the convicted appealed, the reasons of the appeal sentence are focused on the examination of the reasons for the appeal, without evaluating the reasons that have led to the partial acquittal of the same as regards the rest of penal infractions he was accused of during the first trial, which nobody questions.

On the other hand, in another one of the analysed sentences, the reasons that led to the acquittal cannot be ascertained because, having considered only the legal infractions in the appeal, the appeal sentence will only be examined in such grounds, without considering the basis for the complaint.

II.4.3. Acquittal due to lack of sufficient evidence (with victim's statement)

Within this group of sentences of acquittal, 24 of the ones examined support the fact that, even when existing statements from the victim, they are not considered as prosecution evidence with the power to prove the tried facts. This conclusion is reached after considering that the statements do not hold the necessary conditions that would allow them to be considered suitable evidence to support, on themselves, a convicting sentence and without the backing of other suitable means of evidence.

In 3 of these sentences an allusion is made to the existence of a previous conflictive situation between the parts.

Also in this group, there are 2 sentences alluding to the already mentioned constitutional doctrine arisen from the STC 167/2.002, as an obstacle to consider an appeal against sentences of acquittal. Nevertheless, they examine the evaluation of the evidence effected in the Court sentence, confirming it.

In 8 cases, the understanding that the facts that are the object of the accusation have not been sufficiently proved relates to the evaluation of the sentence passed in appeal by the Provincial Court, revoking the convicting sentence issued by the Penal Court.

II.4.4. Acquittal due to lack of evidence (without victim's statements)

These are cases where the plaintiff acts according to article 416 of the Rules of Criminal Procedure, without considering the rest of the evidence – which, in all cases, concerns the reference evidence given by the Police agents that took part in the action- as valid evidence to prove the facts. This happens in 10 of the analysed sentences.

In connection with this, we may remember that article 416.1 of the Rules of Criminal Procedure states that *"the following are exempted from making an statement: 1).- the defendant's relatives, up and down a straight line of succession, his/her spouse, his blood or uterine-brothers and sisters and the side blood relatives up to the second degree, as well as the natural relatives referred to in number 3 of article 261"* (ancestors and descendants).

Moreover, it has been considered, unanimously, that such an exemption must also be applied to the people close to the defendant with a similar affective or marital relationship, equality of status which has been specifically admitted in the most recent case law of the Second Tribunal of the High Court, among others, in sentence number 134/2.007, dated 22nd February.

The reason for the existence of such a rule is not related to the protection of the accused within the trial, as insinuated in an old sentence of the Tribunal, and which could have been relevant for other types of infractions. Within the penal proceedings, and abstaining to get into the opportunity of its reform in the cases of infractions related to gender violence, it is related to the protection of the relative-witness who is in a conflict between his/her duty to make a true statement and his/her possible *interest* in concealing from or silencing to the justice authorities the ill-treatment situation for *love* or other personal or family reasons of the witness. Within this context, it is considered that people that are so close to the defendant cannot be faced with the dilemma to either state the truth of what they know that could incriminate him, or find themselves in a situation where they could lie in order to protect him and thus incur in an offense of false testimony.

Therefore, it is a personal right of the witness in the trial, which exempts him/her from the general duty -of all those who live within the territory of Spain

to declare all they know on whatever they are asked about, and tell the truth, according to what is established in articles 410 and 433 of the Rules of Criminal Procedure.

Concerning the impact of the a.m. referred rule on the process of trial, it should also be noted that, following an already consolidated recent case law line, (Sentence number 129/2.009 dated 10th February, of the Second Tribunal of the High Court, which ratified the earlier statement issued by the same Tribunal on 27th January 2.009), if the witness who is also the victim of the facts opts for abstaining from declaring against the defendant, according to the above mentioned processing rule, it should not be possible to evaluate her summary statements, whichever the way they were made, and it should not be possible to incorporate them to the plenary stage by reading them in an oral process. It should neither be possible to evaluate them through the reference statements that got the knowledge about the development of the facts through the statements of the person that appears in court and enjoys that exemption, while the High Court understands that, in other case, their effect would be neutralized during the penal proceedings.

In 9 of the sentences analysed here, passed by various Provincial Courts (Alicante, Barcelona, Madrid, Murcia, Las Palmas, Tarragona and Sevilla), the acquittal has been granted after having considered the nullity of the statement of the victim, made during an oral trial, where her right to be silent as per articles 416.1 and 707 of the Rules of Criminal Procedure, was not respected, considering that the outstanding practiced evidence did not represent enough proof to support the convictions passed by the Penal Courts.

II.4.5. Acquittals on an offense of breach of a conviction sentence and provisional measures, in response to the victim's consent

In some cases, the acquittal sentences are due to various reasons related to the defendant's lack of knowledge of the resolution that sanctions a sentence or provisional measures of a restraining order to stop him from getting near or contacting the victim.

Also, in other cases, they are due to the fact that the execution stage has already started and thus also, the implementation of the conviction sentence where the beginning and finishing date of the conviction or the notification to the affected person of the consequences of the non-compliance, are stated. All of the reasons have been included in the sections related to the acquittal due to lack or evidence, with our without testimony from the victim, following the outcome of each case.

Moreover, there are 4 sentences – from the Provincial Courts of Tarragona, Santa Cruz de Tenerife and Madrid-, where the acquittal sentence is due to the fact that the renewal of a life together, in spite of existing a restraining order, takes place with the consent of the victim.

II.4.6. Acquittal based on the absence of the finality element

This section includes, at least, in a specific and determining way of the verdict, 5 sentences, 4 from the Provincial Court of Valencia and 1 from the Provincial Court of Barcelona. Within them, the acquittal from the offenses of ill-treatment of article 153.1 and threats of article 171.4, both of them within the Penal Code, are due to the acknowledgement of the lack of proof about the events having taken place within the context of a situation of dominance or as a consequence of a discriminatory spirit on the side of the defendant.

In four of these cases, three from the Provincial Court of Valencia and one from the Provincial Court of Barcelona, involve reciprocal aggressions. In the fifth, also from the Provincial Court of Valencia, and acquittal sentence is reached due to the lack of precision about the frame in which the events took place: the court sentence states, as a proved fact, that the defendant uttered

> "*expressions in a threatening tone like if I get hold of my gun, you and your mother will know all about it*"

And the appeal sentence states that:

> "*notwithstanding the ambiguous content of the uttered expression, which is susceptible of various interpretations, without availing of the precise frame in which it was uttered, and without discarding that it might have been uttered*

within the context of a discussion, in a vindicating spirit by the defendant, as a consequence of the opposition from the plaintiff to the petition made…".

II.4.7. Other reasons

There are 4 sentences that cannot be framed within any of the groups above mentioned.

The first one is Sentence number 112/2.007, dated 17th May, from Section 3 of the Provincial Court of Asturias. It revokes the sentence passed by the Penal Court that condemned the defendant as the author of an offense of ill-treatment related to article 153.1 of the Penal Code, acquitting him on the grounds that, during the trial, three months had elapsed between one of the sittings and the next, the injuries were minor and they did not appear to have been caused intentionally, and, moreover, they were not a sign of the discrimination of the defendant towards the victim, his ex-wife, whom, as he understood, provoked the discussion when she went to the defendant's house to pick up her belongings.

The second one is the Sentence number 83/2.007, dated 19th April, from Section 2 of the Provincial Court of Valladolid: it confirms the acquittal of the defendant accused of an offense of ill-treatment and his conviction as the author of an infraction for injuries because, according to it, the circumstances of the relationship that related him to the victim have not been sufficiently clarified. It concerns an underage of 17 who a year before the aggression had kept a sentimental relationship with the plaintiff, existing no registered data that would allow for its equation to a marital relation.

The third one of the sentences is number 283/2.008, dated 12th March, from Section 27 of the Provincial Court of Madrid, which also confirms the Penal Court's acquittal of the defender from the offense of threats he was charged with, stating that the uttered expressions cannot be part of such crime. Thus, it is considered proved that, during a phone discussion, the defendant said to the plaintiff:

" I will go for you, I will give you no quarter. I will take you to Court"

and, later, he sent her an SMS, telling her

"You have buried yourself"

The appeal sentence argues that an offense of threats cannot be considered since the essential requisite of this penal infraction is missing, that is,

> *"the warning of a future ill, unjust, possible, defined and dependant on the will of the person who utters it"*.

A last sentence, number171/2.007 dated 14th June, from Section 2 of the Provincial Court of Las Palmas, revokes the one issued by the Penal Court that convicted the defendant for an ill-treatment offense. The Court issues an acquittal sentence because she, who had adopted the right to be silent according to article 416 of the Rules of Criminal Procedure, during the oral proceedings, gives notice of appeal against the sentence of the trial. In this notice of appeal, she states that she has lied and what really happened is that they had an argument and she injured herself when she hit her chin against the door (according to the statement of proved facts, she was suffering from a traumatism at the left hand cervical level and her chin, together with an anxiety crisis) accidentally, due to her nervous state when he told her that he was leaving her. In the face of this, the Court agrees to celebrate a hearing where she ratifies her statement in writing and the Court passes sentence acquitting him, inferring a testimony against the plaintiff.

II.4.8. Sentences passed on a first instance trial by the Provincial Courts

As previously stated, the sentences examined in this section containing the reasons for the acquittals, are mainly those passed during the resolution of appeals against sentences passed by Penal Courts. But, there are also 6 sentences passed during the criminal procedure, 5 of them from Section 27 of the Provincial Court of Madrid and 1 from Section 20 of the Provincial Court of Barcelona. A brief individual reference to each of them would be appropriate.

1).- Sentence number 8/2.008, dated 26th March, from Section 27 of the Provincial Court of Madrid, condemning the defendant as the author of an

offense of ill-treatment within the scope of the family, according to articles 153.1 and 3 of the Penal Code, acquitting him of the offence of coactions he was also accused of by the Department of Public Prosecution, this being the sole accusation effected during the oral proceedings (there had been a private accusation which was withdrawn a few days before the trial took place, which accused him of unlawful imprisonment, which justified the knowledge in first instance of the Provincial Court). At the time of the oral proceedings, the victim who could not be traced because she had gone back to Rumania, her home country, does not show up at the oral proceedings. Only the first offence is considered proved, by the testimonies of the accused himself and those made by the agents of the National Police who show up at his address, after the events take place, and by the existence of injuries, ascertained by the report made by the medical service and by the forensic medical report. The offence of coactions is not considered proved since the accusation against him for having forced her to get into his car against her will was only made by a Municipal Authority Agent who stated that, at the same time, a group of people in the street came to them and told them about a person who wanted to kidnap the victim, taking her away in a car, and the people's reaction stopped him from doing so.

2).- Sentence number 5/2.008, dated 29th February, from Section 27 of the Provincial Court of Madrid which, on the one hand, acquits the defendant of an offense of ill-treatment within the family scope, according to article 153.1 of the Penal Code, convicting him as responsible for an offense of injuries, having been unable to prove that they had kept a stable couple relationship that might have been framed within such penal type, since the plaintiff herself affirmed that they were basically friends, and had occasional sexual relations, but, within an open relationship where each of them followed his/her own way. On the other hand, the defendant is acquitted of the offenses of coactions, unlawful imprisonment and the offense of threats, which he had also been charged with, for considering that these infractions had not been proved. The sentence admits that those charges were based on the victim's testimony who produced a letter from the defendant the handwriting of which was examined by experts who considered her to be its author, thus discrediting her; she even informed about some people who saw what happened but, she never presented them as witnesses.

3).- Sentence number 13/2.007, dated 30th May, from Section 27 of the Provincial Court of Madrid, that convicts the defendant as the author of an offense of aggravated injuries following article 148.1 and 4 of the Penal Code

acquitting him of the regular ill-treatment offense he had also been charged of by the private accusation only. The acquittal is based on the fact that the accusation was only supported on the expression

> *"and considering previous episodes of similar nature, some reported while others not, as reported by Rosa on 25th May 2002, which are kept in statement number 327/02 MT of the Local Police",*

without defining, therefore, the dates or the circumstances, nor the details on specific episodes, or without even mentioning the existence of a climate of domination, terror or violence in the accusation's writing. This means that an eventual conviction would violate the accusatory legal principle. It also states that apart from the particular facts that are the object of the conviction, nothing has been proved concerning the continued ill-treatment reported, considering that, in this case, the victim and her daughter's testimony cannot represent enough proof to weaken the presumption of innocence.

4).- Sentence number 4/2.008, dated 28th February, from Section 27 of the Provincial Court of Madrid, that convicts the defendant as the author of two offenses of ill-treatment as per articles 153.1 and 3 CP, acquitting him of a charge of unlawful imprisonment, of another one of threats and of an offense of slander and humiliation. The acquittal of the two last penal infractions is based on the fact that they are the same actions that are treated as one of the offenses of ill-treatment for which he is being convicted, since we face one only action integrated by the following sequence:

> *"Discussion in which the defendant insults the victim and tells her that he must kill her, and slaps her, pushing her to the floor".*

Concerning the offense of unlawful imprisonment, the acquittal is based in the fact that her testimony is considered rushed and confusing in many aspects and, at the same time, scarcely believable as regards the alleged imprisonment, over how it is done, and whether she has been stopped from going out or coming into the house at any moment, since, among other facts,

> *"she ends up admitting that, in order to get into the house, he has to ask her to open the door or to throw the key out the window to him".*

5).- Sentence number 1/2.008, dated 31st January, of the Provincial Court of Madrid which condemns the defendant for an offense of ill-treatment according to article 153.1 CP, acquitting him of charges of rape, unlawful imprisonment and threats, that were also attributed to him. The defendant and the victim have a relatively short record of a life together as a couple, when she gets pregnant, but they end up their relationship and he goes away to start a new relationship with another woman. When the defendant is in her eighth month of pregnancy, she rings the defendant, dating him at a nearby spot. They meet there and have sexual relations and, when he is in bed, naked, while she is having a shower, her new partner shows up and when she sees the situation, she leaves hastily, breaking up their relationship. The defendant, trying to justify himself before his new partner, asks the plaintiff to ring her in order to explain to her that he has met the plaintiff to talk about the child but, the plaintiff rings her to tell her that they have had sexual relations. He hits her and even bites her. The sentence concludes, due to the richness of the details given and the precision of the statement of the aggression, as well as the resulting injuries, that, indeed, there has been an aggression, convicting the defendant for the offense of mistreatment. But it considers that there are no proofs concerning the outstanding offenses because, regarding those charges that are based on the fact that the plaintiff affirms that he forced her into going into the apartment, seizing her by her hair and shouting at her that he would kill her if she did not do what he asked her to, and then he rapes her; the sentence notes that

> *"There are not enough guarantees of veracity in such statements because the account is full of contradictions and of incoherencies and it even lacks precision and detail regarding the way in which these events take place, concerning which not only there are no corroborations from any peripheral or objective elements but all the external signs and evidence derived from the different witnesses (the defendant's ex-partner who states that the plaintiff was even singing while having her shower; a neighbour that sees them walking normally in the street when they are heading towards the apartment, etc) provide a base to doubt about the account of the plaintiff".*

6).- Sentence number 461/2.007, dated 9th May, from Section 20 of the Provincial Court of Barcelona, that acquits the defendant of a charge of mistreatment as per article 153 CP, of sexual aggression, of regular mistreatment, of violation of a sentence as well as of the illegal possession of arms (he had an extensible truncheon in the car that is not considered an arm in the Arms Regulation). The acquittal is based in the lack of credibility towards the plaintiff, who is credited to be a cocaine-dependent person because she has admitted it herself, showing various contradictions between the account she makes at the summary stage and the information she gives at the oral proceedings; it also considers that the existence of false motivation within her reports and testimony cannot be discarded, since they hold a fierce fight for the custody of a common child and the right of the father to visit him, assessing that:

> *"this testimony seems more geared towards obtaining advantages in an eventual legal procedure between both parties as regards the custody of the common son, than to offer the court the reality of what has happened"*.

Concerning the offense of violation of a sentence, the acquittal is granted because it consists of a restraining order imposed in a sentence which has not been credited as being firm.

II.5. EVALUATION OF THE VICTIM'S STATEMENT AS THE ONLY PROSECUTION EVIDENCE

The numeric analysis of the resolutions this study refers to is shown in the following table (1):

II.5.1. Introduction

A basic problem that affects the offenses committed within the scope of a couple living together and, specifically, the gender violence is that, as already stated, they take place within the privacy of the home or that of the couple itself, without external witnesses that might corroborate the testimony offered by the victims.

[1] Within the resulting table we may observe the omission in the filling in of the files that have been used as a base for the present study, in two cases, concerning the breakdown of the 83 cases where the Penal Courts have passed a conviction sentence in these cases.

Moreover, there are many cases where the offenses do not leave any traces, as in the case of threats or mistreatment that leave no injuries; this means that no objective evidence, such as a medical report on injuries that may corroborate the statement offered by the injured part, can be provided.

If we add to this the fact that there is or has been an affective bond between the aggressor and the victim and that there may still be further bonds such as children, or dependence of other types, etc..., the circumstances that surround the testimony of the victim, if presented as the only acceptable prosecution evidence, make it difficult for the Court to pass a conviction sentence.

In particular occasions, we may notice in the analysed resolutions that what the Court considers is the immediacy that the judge has enjoyed *a quo* at the time of the evaluation of the testimony of the victim. In these cases when he considers that there have been no contradictions in such an evaluation and that the same has been carried out according to the rules of logic and of a healthy critic, he confirms the sentence of the first trial.

In addition, the doctrine of the Constitutional Court must be considered, according to the before mentioned Sentence 167/2.002, which entails the difficulty for a revocation of the acquittal sentences passed by the Penal Courts when based in the oral allegations of the parts and the witnesses involved, as usually happens in the cases of gender violence, thus meaning that the first trial becomes the only trial.

II.5.2. Overall analysis

For the overall analysed sentences, in 148 of them the victim's testimony is considered as prosecution evidence, although in 114 of them, there are also peripheral corroborations that support the contents of such testimony. In the outstanding 34, the allegations of the victim are the only evidence; of those, 14 lead to a conviction and 11 to an acquittal. The outstanding 9 other aspects of the sentence passed by the Court in a second trial are evaluated; some of these are the immediacy of the Judge *a quo* or the absence of the allegations of the victim in the oral proceedings, thus discarding both the prosecution evidence consisting of the victim's allegations and those other aspects.

II.5.3. Special reference to the contents of the sentences

Out of all the conviction sentences that hold the victim's allegations as the only prosecution evidence sufficient to weaken the presumption of innocence that protects the defendant, it should be noted that Sentence number 47/2.007, dated 31st January, from Section 2 of the Provincial Court of Las Palmas stated:

> *"In the cases where the victim and witness are the same person, the High Court has determined that the testimony of the person that holds such double condition represents evidence to alter the presumption of innocence as long as it complies with certain conditions: absence of lack of subjective credibility, verisimilitude, persistence in the allegation without ambiguities or contradictions (STS 2-16-1998, 3-12-1999 AND 10-2-1999). Following the same line the Constitutional Court -SS 201/89 160/90, 229/91 and 64/94, among others- has established that the allegations of the victim of a crime, made normally in an oral proceeding with the necessary legal guarantees, are considered as witness evidence and, as such, they may represent useful prosecution evidence, where the judge may support his convictions to ascertain the facts of the case, even though it will also be necessary to make sure that there is no lack of subjective credibility related to a confirmed false motive, such as resentment, revenge, etc..., that the allegations are plausible, that is, they should comply with the possibility of being extended in time, being plural and without ambiguities or contradictions; thus forcing the Courts to carry on a careful and deep examination and criticism on the reliability of her allegations.*
>
> *As regards the above, the examining Magistrate makes a deliberate reference to the motives that lead to evaluate the moving party's allegations: categorical statements, persistence in the account of the facts.*

In this regards, the appealing party alleges that the account made by the moving party during the trial does not coincide with her allegations at the time she made the formal complaint. Nevertheless, both coincide on the main facts, since in the initial complaint, a mention is made to the fact that the accused insulted and threatened constantly and that, among other utterances, he alleged that " she was good for nothing, she was not a good wife, a good mother or a good person".

On the other hand, the amendment of all the conclusions - rational and logic- would require a new evaluation of the evidence, a forbidden possibility in this appeal, as has been reasoned earlier, since the examining Magistrate has had the opportunity of seeing and listening to the moving party and evaluating this testimony in full awareness, which establishes the rejection of the motive as well as of the alleged violation of the principle of presumption of innocence (article 24 EC)since there is no prosecution evidence.

This sentence, passed in a civil lawsuit, maybe, expresses clearly the intrinsic and extrinsic requisitions of the victim's allegations as the sole prosecution evidence and as apt to weaken the presumption of innocence that protects the defendant. It also expresses the difficulties to perform a revision of that sentence at the second trial, since the victim's allegations have been evaluated by the Judge *a quo*, following the rules of the logic and of the healthy criticism and based in the immediacy he enjoys, thus, resulting very difficult that the account of the facts or the evaluation of the evidence might be amended at the second trial.

Nevertheless, this does not mean that the immediacy might be erected as a symbol of arbitrariness, but rather that the evaluation of the evidence must be logical and based on objective information like the categorical, persistent and credible argumentation of the statement of the facts directly following the account of the victim along the whole process.

Following this line, there are two outstanding convicting sentences among those which have been considered for the study. On the first one, number 56/2.007, dated 23rd January, from Section 1 of the Provincial Court of Alicante,

when prosecuting an offense of threats, the victim's allegations have been the only prosecuting evidence even against the allegations of the defendant's son-in-law who claimed that the telephone was off the hook and he was able to listen to the conversation. The second one, number 54/2.007, dated 19th February, from Section 3 of the Provincial Court of Almeria, states that the victim's allegations in an offense of threats and in an offense of slander are considered as sufficient prosecution evidence to weaken the presumption of innocence that protects the defendant, even against the latter's allegations and those of his partner's. All the above mentioned shows that, in some cases, the victim's allegations can be taken as a sole and sufficient prosecuting evidence to lead to a convicting sentence, even against the allegations of other witnesses for the defendant who do not offer enough credibility to the Judge for him/her to disregard the victim's allegations.

Last, and to finish with this matter, we might mention the Sentence 350/2.007, dated 14th November, from Section 1 of the Provincial Court of Valencia. The appeal was risen against the evaluation of the lawsuit sentence which stated that the prosecution witness had not told the truth, based on the fact that she had continued to live with the defendant after the alleged aggression. The Provincial Court states that the lawsuit sentence evaluates it as

> *" a further display of the subjugation and fear suffered by the victim, which is thus explained by her and which is proved by her later actions that show her clear determination to report what has happened. The mere delay in looking for the judicial help or the continuation of the family life in spite of the illicit act, is a common attitude in this type of situations, considering the personal and parental transcendence involved in the exposition of the familiar privacy and the resulting fear to the aggressor's reactions".*

Adding up:

> *"the witness has been clear and reiterative in her different allegations, and there is no reason to doubt about the meaning of the literality of her words due to an imaginary mendacious intention, which does not avail of any backing support nor does it follow any human logic behaviour.*

At the other end, there are sentences that consider that the victim's allegations, without peripheral corroborations, do not offer enough prosecuting evidence to support a convicting sentence and proceed to pass an acquittal sentence based on a lack of evidence. In this case, the Sentence 30/2.008, dated 26th January, of the Provincial Court of Vizcaya, revising an acquittal sentence passed by the Penal Court on an offense of gender violence and an infraction of threats, is outstanding. The Provincial Court confirms the sentence because

> *"considering the satisfaction of the right to the effective judicial tutelage, there is no evidence within the arguments alleged in the appealed sentence to show an error that would need to be the object of rectification in this appeal (…)"*

For the acquittal decision it also takes into account the circumstance whereby

> *"the victim placed the formal complaint six days after the events took place"*

II.5.4. Summarizing

As a result of the earlier study, we may differentiate the offences that, due to their own nature, leave traces, like the offences of injuries, where the medical report, as a prosecution evidence, plays an important role, together with the victim's allegations and the possible allegations of other witnesses. In this case, we are not facing a case where the victim's allegations are the only prosecution evidence, but rather a relevant evidence together with other evidence that corroborates it either directly or peripherally.

Compared to them, offenses such as threats, physical mistreatment without causing injury, sexual violence without leaving traces, etc... are normally supported on the victim's allegations as the sole prosecution evidence, since they take place within the privacy of the home and with no other witnesses that may confirm the reality of what has happened. In these cases the immediacy of the Judge *a quo* and a proper evaluation of the evidence, following the rules of logic and healthy criticism, can support a convicting sentence, even against other evidence from the defendant, such as other witnesses' statements.

Nevertheless, in these cases and since the actions take place within the privacy of the couple, it is helpful to provide some type of peripheral corroboration, together with the victim's allegation; even if it is only the statement of a reference witness such as a relative that might have heard some expression or to whom the victim might have told the facts at a later stage, or a neighbour or police agent that might have come to the premises just after the events took place and seen the estate of the premises, the victim or the aggressor. All of which would help sustain a convicting sentence, since the sole allegations of the victim have been sometimes considered as insufficient to pass a convicting sentence, within the studied sentences.

In the cases where such allegation has been evaluated as a sole evidence to weaken the presumption of innocence that protects the defendant, the appeal Court has confirmed the sentence usually based on the immediacy of the Judge *a quo*, as long, of course, as the sentence is well argued, has exhaustively evaluated the victim's statement and has not incurred in contradiction.

II.6. LINKING ARTICLE 1 OF THE ORGANIC LAW 1/2.004, DATED 28TH DECEMBER, CONCERNING THE COMPREHENSIVE PROTECTION MEASURES AGAINST GENDER VIOLENCE WITH THE PENAL TYPES

The majority of the resolutions from the Provincial Courts do not look at this question, which means that the question related to the integration or non-integration of the finalistic element in the offenses of gender violence has not been aroused by the parties, in these cases. When it has actually been an element of debate or when the Provincial Courts have examined this formal question, what has happened is that 17% of the resolutions that are part of the study sample, have concluded that article 1 of the Comprehensive Law defines a subjective element in the offenses of gender violence, in 66% of the cases.

II.6.1. Introduction

Article 33 and following of the Organic Law 1/2.004, dated 28th December, amend offense types related to gender violence: the offense of injuries –article 148, 4th and 5th of the Penal Code-; the offense of occasional mistreatment –article 153 of the Penal Code-; the offense of break of sentence and provisional measures –article 468 of the Penal Code, also referring in this case to domestic violence-; and the types concerning minor threats and coactions, -articles 171.4 and 172.2 of the Penal Code.

On the other hand, article 1.1 of the same Law defines as object of the new legal text “to act against the violence that, as a sign of the discrimination, the inequality situation and the power relations of men over women, is practised on the latter by those who are or have been their spouses or those who are or have been bound to them by similar affective relationships, even if they have not been living together”.

The descriptive element that is picked up by article 1.1 of the Comprehensive Law has not been incorporated to the writing of these penal types.

Nevertheless, the writing of the mentioned rule has brought forward a restrictive interpretation on the part of some Provincial Courts and Tribunals concerning the offense types related to gender violence, by demanding proof of concurrence of a subjective element or the author's wish "to demean, subdue or dominate" the victim. This interpretation is opposed to the one that was being made before the coming into effect of the Comprehensive Law.

The sentences that are objet of the present study reflect various interpretative positions: some consider that in order to deserve a penal disapproval it should be enough for the man to exercise the typical conduct towards his wife or a woman who is or has been bound to him by a similar affective relationship, even without the existence of a life in common; others, on the other hand, consider that it is necessary to prove a subjective element: the performer's wish "to demean, subdue or dominate" the victim; a third position holds an intermediate stance, establishing that this intention to demean and dominate is presumed when the man performs the offensive acts against the woman while maintaining a couple type relationship with her, but admitting the existence of this presumption of evidence against him.

II.6.2. Analysis of the different interpreting criteria

Sometimes, different interpretations coexist within the scope of the same Autonomous Regions, as in the case of Cataluña.

Sentence 471/2.007, dated 6th November, from Section 4 of the Provincial Court of Girona, makes reference to the contradictions that exist within the various Penal Sections of the Provincial Courts of Cataluña, where some Courts demand a proof showing the situation of dominance in which violence takes place.

The above mentioned interpretation is criticised in the analysed resolution because it considers that:

> *"that theory is based on an erroneous or partial reading of the Exposition of Arguments of the Law of Comprehensive Protecting Measures against Gender Violence as well as on an erroneous consideration of the factual precedent of the rule. In fact, all along, reference is made to the existence of an intolerable chauvinist violence for subordinating women to men which is meant to be fought with hardness; this is why a reference is made to gender violence that enables or legitimates, according to the legislator's judgement, proceeding to increase the minimum sentences that punish those behaviours; nevertheless, the sentences that refer to that type of argumentation forget that there is a further reprehensible violence which is the one that takes place between members of the family other than the marital couple or the like, without the necessary intervention of a subordinating relationship; this violence mostly represents an affront to the family peace and deserves a greater punishment than the one given to a simple offense related to two people that hold no binding ties. On the other hand, and even if it is true that within the usual violent behaviour punished in article 173.2 of the Penal Code, the situation of subordination, dominance and submission of the victim, intolerable in all cases, can benefit from the requirements of customary habits; article 153 of the Penal Code punishes specific and particular violent behaviours and therefore, the submission of the victim is, in no way, part of the type, because through its own definition, it does not exist in the specific aggressions".*

Section 20 of the Provincial Court of Barcelona holds the opposite point of view. According to Sentence number 145/2.007, dated 13th February, concerning article 153 of the Penal Code:

> *"no specific bad faith is required when acting against the wife or life partner "only because she is a woman"; the compliance with the action described by the type is sufficient when there is or there has been a relationship between the aggressor and the*

victim, as per the one described by the norm, and when an inference may be made from the entourage of the circumstances as to an, even specific, existence of a situation of dominance of the man over the woman, within an evident understanding of "the first time" that the earlier attacked his wife or partner, within the offense".

In Sentence number 314/2.007, dated 13th March, from the same Section of the Provincial Court of Barcelona, it is also required that "the accreditation of an attitude" that tends to transform the familiar scope into a microcosms ruled by the domination of the man over the woman is to be proved. And Sentence number 363/2.007, dated 28th March, from the same Court and Section, required that the events must take place within the context of abuse of authority and control of the woman by the man, the exteriorization of the discrimination of the woman and the power exerted by the man towards the woman. Finally, Sentence number 243/2.007, dated 6th March, from the same Section of the Provincial Court of Barcelona, concerning the offense related to article 153, states:

"As stated by this Court in other occasions, what the legislator has intended in the present drafting of article 153 of the Penal Code is the eradication of the violence from the familiar scope, understood as the core of a life together experience, protecting the familiar scope from the control or subjugation of one of the members in it"; The exasperation of the punishment is thus justified in attention to the protected legal benefit that consists of the preservation of the family scope, thus penalising those actions that exteriorize an attitude that tends to transform that scope into a microcosm ruled by fear and domination, because, in fact, nothing defines better the familiar mistreatment than the situation of domination and control of a person over his partner and the underage living with them (STS no.927/2000 dated 24th June). In the records of the case and as stated in the proved evidence of the appealed resolution that remains unaltered: "during a discussion motivated by the late arrival home of the accused, his wife Mariana hit him with a belt; the accused answered this aggression throwing her a feeding bottle and kicking her on her chin...". This is so acknowledged by the plaintiff when, during the oral hearing, she states:

> *"... her husband arrived drunk, she was crossed and hit him with a belt and he hit her on her face with a feeding bottle..." Thus, resulting that there was a mutual aggression and there is not one "victim" as such since it is a case of a quarrel accepted by the two parties, where the intervening parties are aggressors and assaulted, at the same time. In the records of the case and since there is no situation of domination on the side of one of the parties over the other, within a teleological interpretation, the appellant should be convicted as the perpetrator of an offense of injuries, according to article 617, 1st of the Penal Code".*

There are also different interpretative criteria within the Region of Valencia.

Sentence number 78/2.008, dated 4th February, from Section 1 of the Provincial Court of Alicante, summarizes the position of the Section on this question:

> *"... the appealing representative argues the concurrence of circumstances to apply article 153.1 of the Penal Code, since the intentionality of threatening the female condition of the victim has not been proved, considering more appropriate to include the actions within the lesser category of infraction mentioned in article 617 of the same legal text. Summarizing, the appeal points out that, in this case, there is no situation of domination or superiority of one of the parties over the other party integrating the couple or over the members among which the punishable facts take place; that it does not belong to the type of offense considered and penalized by article 153 of the present Penal Code where certain actions have been typified, when earlier the same had been classified as mere infractions in attention to the kinship between the aggressor and the victim, not requiring for them to live together, in many cases; following this line the Statement of Motifs of the Organic Law 11/2003 argues that the offenses related to domestic violence have been the object of a preferential attention within this reform, so that*

the offense type should reach all its manifestations and that its regulation achieves its objectives as regards the preventive and repressive aspects. This does not prevent the fact that, in very precise and exceptional cases, an absence of that motivation is acknowledged to exclude them from the aggravated typology displacing them to the inferior modality of infraction, as has been stated by this Court when the change of key of a commercial establishment had no other motif but to regularize the economic disagreements between the parties in a marital partnership following community property annulment procedures; or when one of the parties slapped his partner in order to reduce the anxiety and nervousness caused by the lack of narcotic substances on his partner. Outside these isolated and particular situations, as is said nowadays, the final object of the law must stand out, and must come as a response to situations that threaten the female dignity, due to her sexual condition, trying to solve violent, physical or psychical actions performed on them by men with whom they have or have had an affective or private relationship, similar to the marital one where attitudes of discrimination, inequality, and superiority of the male over the female have arisen within these situations (article 1 of the Organic Law 1/2004, dated 28th December, concerning the comprehensive protection against gender violence); the law must set some aggravated offense categories, with the purpose of eradicating the reprehensible and inadmissible disdainful behaviours towards the female sex. And the aggressions from men to women within that couple relationship are generally related to the superiority of the male and the submission of the woman, which should be noted more so in this case , due to the proliferation of similar actions that have taken place between the contestants, earlier; in account of which the appeal party has been convicted recently; and which denote an absolute lack of respect to the condition of his wife and a constant threat to her female dignity which he intends to keep under his control; resulting totally justified to implement the special penal type discussed in the appeal".

On the other hand, and following Sentence 33/2.008, dated 24th January, from Section 2 of the Provincial Court of Castellón, article 1 of the Organic Law 1/2.004 must include the penal types and, therefore:

> *"article 153 cannot be implemented; only the mere infraction considered in article 617 of the Penal Code, can be used in the cases of a mutually accepted argument, in which both members of the couple or of the family relationship show violence as a result of dissent and quarrels between equals and having, in general, nothing in common with the situations of gender abuse of authority, submission or subjugation of the weakest by the strongest that are common within the domestic and gender violence".*

Also the concurrence of the dispositions in article 1 of the Comprehensive Law from Section 1 of the Provincial Court of Valencia should be proved. In Sentence number 184/2.007, dated 15th June, it seems to opt for the eclectic interpretative position, when it states:

> "*The truth is that even though it is not necessary to prove the aggression cause, it is up to the defendant to prove its origin if he alleges that the violent action does not have that root. This is so because the type of aggression carried out makes evident, in itself, the action of dominance over the woman and that it exteriorizes the contempt and the superiority exerted by the aggressor, without any restraint to inflict physical and moral violence to the plaintiff in public. If the motive alluded by the defendant does not appear in the proceedings, it is understood that it is due to the fact that his behaviour does not show any coincidence other than its own discriminatory spirit toward the woman, whom he does not respect as such or as a person, for whatever reason".*

On the other hand, in the sentences analysed at a later date, a proof of the a.m. dispositions is required. According to Sentence number 221/2.007, dated 10th July from that Court and Section, violence actions always entail a discriminating spirit:

> *"it opposes the new article 87 ter of the Organic Law of the Judiciary which states that "When the Judge notices that the actions he is been informed of, are, notoriously, not related to gender violence, he can send back the claim to the competent Judiciary body"; this entails the difficulty to know which actions are those that "are, notoriously, not related to gender violence". And that "to appreciate the concurrence of the offense analysed today, a mere material aggression is not enough but, it additionally requires being a dominating situation; a situation of abuse of power from one of the parties in the couple, must be present; in fact, it should represent a situation of discrimination"*

At a later stage and in Sentence number 130/2.008, dated 22nd April, from the same Section of the Provincial Court of Valencia, a consideration is made on whether, in cases of absence of discrimination, the defendant should be convicted following paragraph 2 of article 153 (in reference to domestic violence), instead of immediately demeaning the cause to the infraction category, as a legal grading of the facts, stating that:

> *"in order to apply that rule, it would, also, be necessary, in any case, for it to confirm, once the discrimination towards women is excluded (153.1), that the rejected behaviour came into the domestic scope of special tutelage materialized in the typical behaviour on the side of the party which, being a member of the family group or assimilated, places the other in a position of week member within their mutual relationship. If this situation is not proved, the implementation of the infraction becomes ruthless".*

The provincial Court of Las Palmas, as regards the sentences analysed, clearly, follows the line of the Courts that do demand the integration of article 1 within the penal types. It requires that, for each specific case, there should be proof of the prevalence or the inequality situation between man and woman, which the earlier shows because of the fact of the latter being a woman inflicting

on her a relation of authority based in his belief in her not having the minimum rights of liberty, respect and ability to decide. According to Sentence 76/2.007, dated 9th February, from Section 1 of the above mentioned Court, also concerning article 153, paragraph 1 of the Penal Code, an automatic enforcement of such punitive aggravation should be avoided when the only concurrent objective element is concerned with the aggressor and the victim's sex, in the understanding that, if effected, there would be a double violation of the constitutional principles: the presumption of innocence and the principle of equality of articles 24 and 14 of the EC, respectively. And, thus, it states:

> *"Starting with the basic right to the presumption of innocence, the same unfolds every one and all of its effects along the penal process, being consubstantial to the same that whoever puts up the claim should credit the concurrence of every one and all of the penal type elements, in such a way that, if the punitive aggravation considered in chapter 1 of article 153 of the Penal Code is supported, as before mentioned, on a situation of prevalence of the man over the woman, this particular situation of prevalence, not only might but, also should be proved or, else, the legislator will be establishing a presumption iure et de iure against the accused which would be totally contrary to the above mentioned basic right to the presumption of innocence. That situation of prevalence cannot even be considered as a iuris tantum, because it would equally violate that basic right, since an essential part to it consists of the presumption, save proof to the contrary, that the defendant has not acted according to the conduct he is being accused of or that the way he has conducted himself does not have any correspondence with the penal type; thus, whoever thinks differently should prove it and not the other way round".*

Adding up that

> *"The other constitutional principle that this Court considers violated if an automatic implementation of the punitive aggravation considered in chapter 1 of article 153 of the Penal Code is made, is the one referred to equality, as acknowledged in article 14 of the EC, which would be considered as violated in a double sense:*

on the one hand men would be discriminated for the only reason of being men, and on the other hand, women would be discriminated when the legislator presumes, with a total lack of proofs as to the contrary, that they are creatures subjugated and dominated by men, for all and every one of the cases where there is an aggression of the first against the second".

Also, Section 3 of the Provincial Court of Leon, in Sentence number 8/2.007, dated 26th February, in order to appreciate the offense of threats of article 171.4 and 6 of the Penal Code, demands:

"the concurrence of a spirit that is a manifestation of the discrimination, of the inequality situation and the power relations of men over women, since otherwise, only the implementation of the infraction for minor threats would apply".

On the same line, the Provincial Court of Zaragoza, follows the position of the Courts that demand to prove that situation of domination of man over woman. Sentence number 447/2.007, dated 19th December, from Section 1, states that it is necessary to prove:

"a situation of prevalence of man over woman to impose his will on her within the relation they already maintained as a divorced couple, which is the situation that sanctions gender violence".

On the other hand, the only Sentence –number 224/2.007, dated 28th December)- passed by Section 1 of the Provincial Court of Huesca, that relates to the subject that is the object of this study, does not demand the proof of that finalistic element when it states:

"As regards the second of the events the defendant is convicted of, it is considered that due to the scarce seriousness observed in such conduct, it could have been considered as an infraction of threats and not as a equivalent offense; but it should be objected that, after the amendment of article 171 of the Penal Code implemented by the Organic Law 1/2004, dated 28th December, on comprehensive protective measures against gender violence, both serious and minor threats are considered an offense if the active subject is or has been a spouse or life

partner of the victim, since it would be impossible to describe the threats as a simple infraction, within the family scope. Therefore and since the Court has considered that in this case, also, the conviction of the witness has been thoroughly argued by the examining magistrate, the appealed Sentence must be confirmed by its own correct argumentation".

Section 27 of the Provincial Court of Madrid also excludes, without any complications, the requirement of a finalistic or ruling element as a proof within the analysed penal types. A summary of its doctrine is shown in the following quote from Sentence number 374/2.007, dated 30th April. The defendant alleged that the offense of mistreatment he had been convicted of could not have taken place because of the inexistence of the situation of prevalence between aggressor and victim which, according to his arguments, is required by the penal type. The Provincial Court refuses the argument:

"This Court must refuse such proposal. The finalistic purpose that is called on does not represent any of the elements of the penal type applied –mistreatment on the scope of gender violence, of article 153.1- and, as a consequence, the latter does not require to know the ultimate reasons for the defendant's actions, which are unconnected to the penal process, as in the reminder of the penal infractions –e.g.: the criminal law is not interested in the end that the perpetrator of a burglary is planning for the loot he has obtained with his predatory action- ; it will consider that he has objectively, intentionally and voluntarily perpetrated the action that the legislator considers to be a penal infraction and has, thus, brought a specific punishment onto the defendant. Therefore, it is the legislator who has the obligation to act against the gender violence that according to the already extensive legal experience and the different International Agreements subscribed by our country, represents an expression, the most cruel, of the manifestation of the concept of the woman as subordinated to man and condemned to his obedience and submission, within the couple relation, where, precisely, in order to maintain it, he exerts a violence that, because of it, requires a specific penal response, more serious and specialized as regards the instruments that have to be assigned to a more efficient protection of the victims.

As a consequence, that finalistic element is not considered a proof requiring factual requisite, for the configuration of the penal type; only the accreditation of the violence expressive action and of the couple relationship, whether present or past, between aggressor and victim, -all elements which have been properly proved-, is required to consider the admissibility of the offense the accused has been convicted of".

Sentence 477/2.007, dated 18th June, from the same Section of the Provincial Court of Madrid, insists on this argumentation, stating that article 153 of the Penal Code:

"from the point of view of the objective type, it requires that there should be an action meant to causing psychic or physical damage that would be considered an infringement by any means, or mistreatment without injuries; and in the second place, the victim should be one of the persons mentioned in article 153 concerning article 173.2 of the Penal Code. From a personal point of view, the type only requires the existence of wilful misconduct in the sense of a general intention of damaging or threatening the personal integrity or physical or mental health of the victim, both, in the case it is directly wished by the agent, or if he has represented the possibility of the result (eventual wilful misconduct). The type does not require any other special or different intention concerning the evidence of the final reasons of the subject's behaviour, which are excluded from the penal process, as happens in all the other penal infractions; but it should only prove the fact that, objectively and in an intentioned and voluntary way, he has perpetrated the action that the legislator has considered illegal and has thus punished with a particular sentence".

The Provincial Court of Valencia, in an identical position as the one from Madrid, equally excludes that the expression of article 1 of the Comprehensive Law should require the type that is object of evidence.

Section 6 of the Court in its Sentence number 299/2.007, dated 26th April, points out that,

> *"The penal ruling does not requiret that such subjective elements be object of evidence within the plenary action, but it does respond to article 1.1. of the Organic Law 1/2004, dated 28th December, concerning the Comprehensive Protection Measures against gender violence, that establishes as proof of the presence of such elements, all acts of violence of a man over a woman with whom he has kept or keeps an intimate relationship; thus inferring that these personal elements are part of a presumption iuris et de iure, requiring no evidence during the oral proceedings, but presuming them, due to the fact that a man injures, hurts psychically, hits or mistreats even without causing injury, a woman with whom he has maintained a marital or similar affective relationship, even when they have not enjoyed a life in common; this behaviour, in itself, implies that position of power or superiority of him over her".*

The above shows that our Courts held different interpretative criteria on this matter during the examined period, before the Constitutional Court came upon the subject. This has meant that there has been different responses to the same problems, and thus, the principle of legal security might have been affected.

II.7. CIRCUNSTANCES MODIFYING THE CRIMINAL RESPONSIBILITY THAT ARE CONSIDERED IN THE PROVINCIAL COURTS' DECISIONS

The analysed sentences reveal the scarce incidence of the various criminal responsibility modifying circumstances on the conviction sentences related to offences of gender violence. The outcome of their study is the following:

II.7.1. EXTENUATING CIRCUNSTANCES

The number of sentences that admit a concurrence of extenuating circumstances is small: 17 due to addiction to drug substances (3,78%,), 15 due to analogical extenuating circumstances (3,33%), 4 due to amends (0,89%), 1 due to confession (0,22%) and 1, also, for rapture (0,22%). The following are outstanding.

II.7.1.1. Addiction to substances

A) General

The addiction of a person to alcoholic drinks, toxic drugs, narcotics, psychotropic substances or others that produce similar effects might display different consequences on his penal responsibility: it may determine the concurrence of full extenuating circumstances, when the author is credited to suffer a psychic anomaly or alteration due to the prolonged and intense consumption of substances, so that he is not able to understand the illegality of his behaviour or to behave according to that understanding (article 20.1st of the Penal Code), or when he is suffering from full intoxication or withdrawal symptoms that prevent his understanding the illegality of the fact or to act according to that understanding (article 2.0.2nd of the Penal Code). It may also act as an extenuating circumstance in the cases of half-intoxication or not fully incapacitating withdrawal symptoms (article 21.1st of the Penal Code) or, in its case, as an extenuating circumstance when the culprit acts moved by his serious addiction to those substances, that is, in the cases where he has suffered an intense addiction prolonged in time, to substances that cause great harm to his health.

Within the studied sentences, the extenuating circumstances consisting of the addiction to substances is applied in 17 cases, that is, in 3,38% of the resolutions. It should be noted that they are considered in a smaller number of occasions than when considering sentences passed by the Jury Court or by the Provincial Courts in cases of homicide and/or murder within the scope of the partner or ex-partner: concerning the ones in 2007, it affected 14% of the resolutions (5 cases). In any case, its incidence in the offenses of gender violence is scarce.

The cases where the addiction to drinking or taking substances establishes extenuating circumstances, complete or incomplete, will be examined later.

B) Drunkenness

Within the scope object of study, the defence often alleges the concurrence of this extenuating circumstance in relation to drunkenness. Nevertheless, it is usually rejected because there is no concurrence of evidence of its factual base: a previous alcoholic intake is not proved, or else, there is no proof about such intake having affected the capacity of the accused to wish and to understand. Sentence number 13/2.007, dated 30th May, from Section 27 of the Provincial Court of Madrid, faced with the allegation from the defence on the matter of concurrence of an analogical extenuating circumstance of drunkenness, which is refused, states that

> *" concerning the drunkenness, only the defendant's allegations during the Oral Proceeding are available; within them, he states that before the events, he went out with Mrs..... and they were in some bars having about sixteen or eighteen drinks (beer) and he was not feeling well because drinking does not suit him". Nevertheless, Mrs. ... alleges that in fact, they went out, but they only had four beers in total and that the defendant was not drunk. The daughter, Maria Milagros, is categorical when she affirms that her father was not drunk. The Local Police number ... and ... deny that the accused was drunk..."*

II.7.1.2. Amends

A)General

Article 21.5 of the Penal Code considers the extenuating circumstance that consists of the fact that "the accused has proceeded to make amends for the damage caused to the victim, or diminish its effects, at any moment during the proceedings and before the oral hearing takes place". As may be noticed, it does not refer to remorse or any other motivations, but it demands an effort from the accused to make amends for the damage caused by the offense or to diminish its effects.

The basis for this extenuating circumstance lies in criminal policy motivations, to encourage the satisfaction of the victim's needs. Following the Sentence from Section 27 of the Provincial Court of Madrid, dated 30th May 2.007,

> *"it is mainly criminal policy reasons oriented to protecting the victims from all kinds of offenses that support the legislator's decision to provide an extenuating sentence, in attention to the actions effected by the perpetrator of the offense; actions that have been effected at a later date than that of the offense and which consist of making amends, total or partially, although always significantly, for the damage caused by the criminal behaviour".*

This circumstance has been considered in 4 sentences, which means 0,89% of the total studied resolutions. Specifically, the already mentioned Sentence, dated 30th May 2.007, from Section 27 of the Provincial Court of Madrid, in the proceedings for an offense of injuries, considers this circumstance because the accused, once he has pricked the victim on her side, proceeds to actively help her, calling the emergency number 112, waiting for the Police and assisting her up to the time the medical help arrives, in spite of the victim's refusal, considering, additionally, the extenuating circumstances due to his confession.

B) Well qualified circumstances

This circumstance can be considered as very qualified in the cases where the individual displays a behaviour that may be considered as superior to the normal behaviour that any person would have produced to make amends for the damages caused or to lessen the effects of the offense.

In this sense, Sentence number 152/2.007, dated 9th March, from Section 2 of the Provincial Court of Granada, after knowing about an appeal in a trial for an offense of coactions, considers partially the appeal and notices the concurrence of the well qualified extenuating circumstances of making amends for the damage because the accused, just after committing his coactive action, tried to end the same by climbing down to the common courtyard of the building to try and open the door from the outside.

This action, in the Court's opinion

> *"not only would allow to diminish the necessary penal recrimination, in the terms established by the last paragraph of article 172 of the Penal Code, but it also incorporates, in a qualified fashion, the extenuating circumstance of making amends for the damage, as considered in article 21.5th of the same Code; all of this would bring the consequence of reducing in two degrees the sentence of deprivation of liberty that is objectively prescribed for the offense..."*.

II.7.1.3. Confession

This circumstance, regulated with an eminently objective nature within the present Penal Code, concurs when the culprit has proceeded, before knowing that there was a process opened against him, to confess his infraction to the authorities (article 21.4 of the Penal Code). Its aim is to grant a more favourable treatment for the authors of the offense thus facilitating its investigation.

Within the sentences object of this study, it is only to be found in one occasion, that is, in 0,22% of the analysed resolutions. This percentage shows the important quantitative difference when compared with the sentences passed by the Jury Courts in cases of Homicide/murder within the scope of the couple or ex-partner: in those of 2006, it was considered in 36% of the cases, while in 2007 (the study of which also covered the ones passed by the Provincial Courts) it was considered in 26% of the cases. This difference is directly related to the seriousness of the committed offense itself.

The before mentioned Sentence from Section 27 of the Provincial Court of Madrid, dated 30th May 2007, considers, as already advanced, that the concurrence of this extenuating circumstance within a trial for an offense of injuries, is due to the fact that

> *"it has been proved by the testimony of the local Police agents that answered the defendant's call, that the latter met them and told them what happened, acknowledging the facts, taking them*

to the room where his wife remained and handing them his knife; behaviour that satisfies the extenuating confession, which, the same as the making of amends for the damage, is predominantly objective (High Court Sentence number 1737/2002, dated 20th December and 700/2002, dated 18 April)".

II.7.2. AGRAVATING CIRCUNSTANCES

The aggravating circumstance most often applied on the convicting sentences that are the object of this study is the one referring to the criminal recidivism (21 sentences, that is, 4,6%), followed by that of kinship (13 sentences, 2,89% of them). In addition to the earlier ones, only the circumstance of abuse of superiority (1 sentence) and that of abuse of confidence (also 1 sentence) have been applied. It can be noticed, that the number of sentences that consider the concurrence of aggravating circumstances is also small. Specifically, the aggravating circumstance of kinship, as regards its implementation by the analysed sentences, arouses a few interesting questions.

II.7.2.1. Circumstance of kinship

The concurrence of a relation of kinship between the defendant and the victim displays different effects within the Criminal Law, depending on the nature of the legal rights protected by each criminal type: sometimes it produces an aggravation of the sentence (offenses with contents of a personal nature), some other times its effects are extenuating (offenses that do not protect individual legal rights. It may even determine the exclusion of responsibility (acquittal excuse of article 268.1 of the Penal Code).

When it concurs within the scope of gender violence, as defined by the Organic Law 1/2.004, kinship will always be taken as an aggravating condition because we face offenses with an eminently personal content.

Nevertheless, this aggravation may concur in two different ways: either as an element considered by the penal type itself to define the penal type or to aggravate the sentence; or as a circumstance amending the responsibility that displays aggravating effects.

A)Circumstance inherent to penal type

Examining the first possibility, when the penal type of the Special Part of the Code considers kinship in the typical description of the infraction, the circumstance mentioned in article 23 will not be considered as an aggravating circumstance. As an example, we may consider the offense of regular mistreatment within the scope of domestic violence or gender violence (article 173.2 of the Penal Code) or some articles concerning offenses against sexual freedom (articles 180.1.4th.192.1... of the Penal Code). The principle *ne bis in idem* prevents sanctioning the same behaviour twice, as well as extracting a double punitive measure from the one fact.

Following this line, the earlier mentioned Sentence, dated 30th May, from Section 27 of the Provincial Court of Madrid does not consider that there is a concurrence of the kinship circumstance in the case of a conviction based on article 148.1 and 4 of the Penal Code, since it is of the same nature as what is described in article 4. It should be remembered that article 148.4 of the Penal Code establishes that: *"the injuries referred to in chapter 1 of the earlier article may be punished with a prison sentence amounting to two to five years, depending on the result caused or the risk produced: ... 4.- If the victim is or has been his wife, or a woman that is or has been bound to the accused by a similar affective relation, even if they do not live together"*.

B)Amending circumstance

In other cases, the mixed circumstance of article 23 of the Penal Code may be applied; this circumstance, as mentioned earlier, always aggravates the responsibility of the penal types in gender violence. Within the sentences object of the present study, we may appreciate it as an aggravating circumstance in 13 occasions and in no case as an extenuating circumstance.

The mentioned article 23 of the Penal Code states that *"a circumstance that may extenuate or aggravate the responsibility, depending on the nature, the motivations and the effects of the offense, is being or having been the offended spouse or person that is or has been bound in a stable way by a similar affective relation to the accused, or to be an older or younger first line relative, or a brother or sister by nature or adoption of the offender or of his spouse or of the woman that lives with him.*

Sentence number 114/2.007, dated 27th December, from Section 6 of the Provincial Court of Vizcaya, among other things, convicts the accused as the author of an offense of injuries according to article 150 of the Penal Code, with the concurrence of the aggravating circumstance of kinship. As argued by the sentence itself,

> *"the individual that has carried out the offense, abusing the confidence and community of feelings generated by the couple relationship, with absolute contempt of a previous life in common and of a daughter born by their union, physically attacked his partner".*

C) Its incidence in cases of lack of affection

Different sentences that have been analysed apply the aggravating circumstance of kinship in situations of lack of an affective behaviour. Before the amendment of the 2.003 Penal Code, the case law understood that such circumstance remained excluded from being used as an aggravating factor in cases where the couple relationship was so deteriorated that it could not provide a sufficient base to justify reprehending the author in a bigger way (non jurisdictional Plenary of the Second Chamber of the High Court, dated 18th February 1.994, which was taken up in many sentences) even though the case law clarified its position in the understanding that not all deterioration on the love relationship quenched on itself the possibility for its application.

The reform of article 23 of the Penal Code effected by the Organic Law 11/2.003, dated 23rd September, referred to specific measures on public safety, domestic violence and social integration of foreigners, meant that the circumstance of mixed kinship was *objectified*.

Due to an express legal determination, this circumstance will concur even if the marriage or similar affective relationship has disappeared, as long as the facts are related to that life in common, in a direct or indirect way (Sentence from the High Court, dated 14th October 2.005).

In this respect, Sentence number 114/2.007, dated 27th December, from the Provincial Court of Vizcaya, argues that

> *"an intensification of the penal response to situations that lead to very serious attacks within the familiar circle (gender violence) is intended. The legislator objectified the circumstance and minimized, to the point of annulling it, the need that the marriage bond or assimilated persisted; and all this was due to a criminal policy that, acknowledging the society's general feeling, considered that it was necessary to put a stop to the violent and aggressive manifestations among couples that live or have lived together, looking for a dissuading effect on the author of the deed"*.

Following the same line, Sentence number 35/2.008, dated 3rd March, from Section 2 of the Provincial Court of Valladolid condemns the defendant as the author of an offense of homicide while concurring, among other circumstances, the aggravating factor of the accused having been the spouse of the victim, since the divorce sentence was dated 3rd February 2.006 and the events took place on 1st March of the same year.

II.7.2.2. Criminal recidivism

According to article 22.8.2nd of the Penal Code, *"there is criminal recidivism when while committing a criminal offense, the culprit has been convicted with an enforcing sentence for an offense considered within the same Title of this Code, as long as its nature is the same"*.

The present Penal Code considers the so called specific criminal recidivism, which concurs with the presence of three conditions: the culprit must have committed a new crime; at that time, the individual should already have been convicted with a charge; and that the convicting sentence had been passed for an offense accounted for within the same Title, and it must be of the same nature, that is, the offenses must be the same or similar (there must be concurrence of the same attack on the same protected legal rights).

It should be noted that this circumstance is the one that enjoys the widest application in the sentences that are the object of the current study, having been applied on 21 resolutions, that is, on 4,67% of the convicting ones, which in principle proves that there is a moderate degree of criminal recidivism on the part of the culprits of offences tried within the gender violence range.

II.7.2.3. Breach of confidence

Article 22.6th of the Penal Code considers the circumstance of "acting with abuse of confidence", consisting of the fact that the culprit abuses the confidence or familiarity in the relationship, thus disregarding his duty to loyalty and fidelity. The abuse of this relationship is already accounted for in the circumstance of kinship, which establishes a difficulty in the application of this aggravating circumstance in the matter of gender violence.

In spite of it, it should be noted that this circumstance is noticed within the offenses against women in some case. In this respect, Sentence 35/2.008, dated 3rd March, from Section 2 of the Provincial Court of Valladolid, considers the concurrence of this aggravating feature because

> *"even if it is true that H. and C. were divorced, notwithstanding, it is also true that they lived together in the same house and their own children and friends' allegations confirm that there was a relationship of trust between them, she kept preparing the meals for him, they went out for a walk together and Cristina used to help him to the doctor".*

Adding later that

"there is a concurrence of all the requisites that represent that aggravating circumstance. They lived with each other in the same address, even though they had different bedrooms; they trusted each other, as proved by the Court, and H. took advantage of it to have an easier access when he committed his offense, reducing her chances for defending herself, since, precisely, due to this trustworthy situation among them, she did not expect to get such an attack".

II.7.2.4. Abuse of authority

This aggravating circumstance, mentioned in article 22.2 of the Penal Code, cannot be considered in those cases where the unbalanced forces are essential to commit the crime, either because it is a type element or because the specific circumstances of the offense imply that it has to necessarily take place in this way. To this effect, we must consider that article 67 of the Penal Code establishes that *"the rulings of the earlier article will not be applied to the aggravating or extenuating circumstances that the law has considered when describing or sanctioning an infraction or the circumstances that are in such a way inherent to the crime that the later could not have been committed without their concurrence".*

Sentence number 60/2.007, dated 14th March, from Section 3 of the Provincial Court of Jaen does not consider that this circumstance could be applied to an offense of regular mistreatment as per article 173.1 of the Penal Code, when there is no evidence of the concurrence of the referenced aggravating circumstance within the tried case, since the elements that make it up are not mentioned, and adds up

"notwithstanding, it could be stated that committing the offense of regular mistreatment could mean that the aggressor has taken advantage of his dominating position as regards the victim who enjoys a poor self-esteem and a lack of decisive response to his attacks, even though in some particular cases, she would defend herself against them or report them. It is significant that F. should not have appeared in Court during the civil lawsuit concerning the offense of threats, or that as was alleged, she went back to live with her husband after the conviction sentence from the Penal Court and this Courtroom".

Sentence 35/2.008, dated 3rd March, from Section 2 of the Provincial Court of Valladolid is also remarkable since it considers, within an offense of homicide, the concurrence of abuse of superiority arisen from the use of a knife by the aggressor, which reduces the possibilities for a defence on the victim's side. According to this sentence,

> *"this aggravating circumstance may be risen due to, either, the number of offenders that attack the victim thus weakening her chances for defending herself, or to the means used which reduce her chances for a defence. While premeditation annuls all chances for a defence because it takes the form of a treacherous attack or a face to face attack, but a quick and unexpected one; the abuse of superiority reduces the chances for a defence (it does not annul it). The Court has considered the concurrence of the aggravating circumstance of abuse of superiority due to the means used by H. during the aggression, a knife, which the Court considered as an important disproportion between the means used by the aggressor and the ones that the victim could avail of to defend herself. As reasoned and proved by the Court, H. was in a situation of advantageous force, due to the means used in the aggression, a knife, thus weakening (not annulling) the victim's means for defending herself. It is, thus, evident that the use of a knife by the defendant, multiplied many times the attacking capacity of the attacker originating a disproportion of forces between the aggressor and the victim".*

II.7.3. CIRCUSTANCES FOR EXEMPTION

None of the sentences analysed considers the concurrence of a complete extenuating circumstance. That is, within the sample that is the object of study, there is no case of psychic alteration or addiction to alcohol or to other substances that could have determined the impossibility to attribute the offense to its author.

On the other hand, the incomplete grounds for exemption are considered in a small number of cases: that or psychic alteration in 4 cases (0,89% of the convicting sentences), and that of intoxication in 4 further resolutions (0,89% of the same sentences).

II.7.3.1. Psychic alteration

We have just mentioned that this circumstance is only detected in 4 cases as incomplete grounds for exemption. This shows, within the representative sample of the object of study, the scarce incidence of mental illness when charging the author of the offenses of gender violence.

This result coincides with the conclusions of the earlier studies on the Sentences passed by the Jury Tribunals in cases of murder or homicide within the scope of the couple or ex-partner: in those passed in 2.006, it was considered as complete grounds for exemption in 3% of the cases, and as incomplete grounds for exemption in a further 3% of the cases; in the sentences passed in 2.007 (this year the resolutions passed in this area by the Provincial Courts were also incorporated to the study) it was not considered as complete grounds for exemption in any case, and as incomplete grounds for exemption in 5 cases (14%).

II.7.3.2. Intoxication

The full intoxication due to addiction to alcoholic drinks, toxic drugs, narcotics, psychotropic substances or other that produce similar effects has not been considered as grounds for exemption in any case within the sentences analysed, establishing it as incomplete grounds for exemption in 4 resolutions, which means 0,89% of the total convicting sentences.

Again, it reveals a scarce incidence of addiction to alcohol and drugs on the possibilities of charging the author of the gender violence, both at the level of the grounds for exemption and that of extenuating circumstances. This statement also coincides with the conclusions reached from analysing sentences passed by the Jury Tribunals and by the Provincial Courts (those of the latter concern the sentences passed in 2.007) that were mentioned earlier and in which the extenuating circumstance was considered only in 9% of the sentences passed in 2.006 and in 14% of the ones passed in 2.007.

II.8. IMPLEMENTATION OF ARTICLE 468 CP: EFFECTS OF VICTIM'S CONSENT TO REINICIATE A LIFE TOGETHER WHILE EXISTING A RESTRAINING ORDER (SENTENCE OR MEASURE)

Out of the 72 sentences issued on article 468 of the Penal Code, more than half of them have taken up the matter on the effects of the consent of the victim as to renewing a life together, while a restraining order is in effect, either as a sentence, or as provisional measures.

II.8.1. Introduction

The ban imposed on the aggressor concerning his getting near the victim may be set:

1st. As a provisional measure.

2nd. As a sentence applied according to article 48 of the Penal Code concerning offenses related to gender violence, as well as those related to domestic violence.

This differentiation is transferred to the Penal Code in which article 468.2, that is systematically placed within Chapter VIII Title XX, Book II of the Penal Code, punishes the infringement of the offense or precautionary measure. The present drafting of the typical behaviour is introduced by the Organic Law 1/2.004 dated 28th December, concerning Comprehensive Protection Measures against Gender Violence. This penal type applies a punishment of 6 months to one year prison sentence to those who would infringe a sentence of those considered in article 48 of the Penal Code or a security measure of the same nature imposed in trials where the plaintiff is one of the persons article 173.2 of the same Code refers to.

Up to the time article 468.2 of the Penal Code came into effect, in its present drafting, no legal debate had been established on whether the consent on the part of the plaintiff could affect in any way the consummation of the typical behaviour. This debate was introduced after Judgement 1.156/2.005, dated 26th September, was passed; this judgement expressed some original considerations. The judgement related to the consequences of the decision of the person that benefited from the precautionary restraining order as to maintaining a relationship or continuing to live with the individual this order was passed against, on the effectiveness of the same, with the conclusion that the Judgement denied any penal relevance to the cases where the infringement took place with the consent of the beneficiary of the precautionary measure or to the cases where there was a doubt about the will to keep the above mentioned measure. The High Court stated that, in these cases, the precautionary measure falls *de tacto* and that, the behaviour is atypical in them.

This position was amended in later judgements of the High Court (Judgements number 69/2.006, dated 20th January, and 10/2.007, dated 19th January. The latter states:

> *"The access to the house on 29th October took place with the agreement of the wife, the argument of which is not taken up by the defendant, since he is aware that the consent of the plaintiff in this case could not eliminate the illegality of the fact. First, because the consent was conditioned or marred by "family pressures" as confirmed by the proved events; and, second, because the validity of the protected legal right is not weakened or blemished by the consent of the wife, since it is the principle of authority that is wronged by the offense of the infringement of the measure. It is true that this measure is granted for safety reasons to benefit the wife, to protect her life and body integrity –which are not legal rights she can dispose of, either- but, in any case, she is not the legal right directly protected by the rule".*

The High Court doctrine has continued to be clarified up to the time where the Second Division has adopted the Agreement, within the General Division celebrated on 25th November 2.008, concerning the interpretation of article 468 of the Penal Code in the cases where there have been provisional restraining orders where the victim's consent has been proved. It emphatically concludes:

> *"The consent of the wife does not exclude the possibility of a punishment, as per article 468 of the Penal Code".*

This non-jurisdictional agreement was applied to the Judgement of the Second Division of the High Court, dated 29th January 2.009, which states:

> *"On the other hand, concerning the bottom of the matter, that is, concerning the relevance the consent of the wife could have on the exclusion of this offense from article 468 of the Penal Code in the cases of preliminary (or penal) measures against the husband consisting of a restraining order, the matter was addressed in a non-jurisdictional plenary meeting celebrated last 25th November in which, with a majority of 14 votes against 4, it was agreed that the consent of the wife does not exclude the possibility of applying a punishment, as per article 468 of the Penal Code"; all of it, based on the key idea of the irrelevance, within the penal law, of the forgiveness obtained from the person offended by the criminal infraction, principle that is only considered as an exception within the so called private offenses, which is when the penal law considers it so, expressly".*

II.8.2. Analysis of the different interpreting criteria

The relevance of the victim's consent in the renewal of a life together, when existing a restraining order (sentence or measure), has been considered in different ways by the Provincial Courts, granting or denying extinctive effectiveness in the consummation of the typical action in the offense of infringement of the sentence and/or precautionary measure.

A group of the analysed sentences states that the consent has no extinctive relevance within the typical action. Among them, the following can be found:

1st. Judgement number 66/2.008, dated 14th January, from Section 20 of the Provincial Court of Barcelona. It states that the victim's consent does not grant extinctive effectiveness to the precautionary measure. It considers that the position of the High Court, held for the first mentioned ruling, cannot be transferred to the cases where the restrictive measure has the nature of a sentence: within the executing phase its time is determined in a firm ruling and must be exhausted up to its extinction. Thus, the will of the protected person cannot have any effect either on the duration or the extinction of the sentence, being the latter, like the reminder of the judgements, of compulsory compliance.

This judgement offers what is known as a *"legal channel to ease the conflict"* which can stem from the pronouncement of a judgement that imposes a restrictive order, when a partial pardon is requested, together with the simultaneous request for a suspension of the execution of the mentioned judgement. This is a consideration of article 4.4 of the Penal Code, as long as the Government makes a statement over it, which, in these cases, can prevent the compulsory separation of the couple when it is against their shared wish.

2nd. Judgement number 533/2.007, dated 12th October, from Section 4 of the Provincial court of Girona. It states that the consent does not have any relevance as regards to going back to living together, when there is a restrictive order, because that is precisely the behaviour that is punished by article 468.2 of the Penal Code.

3rd. Judgement number 497/2.007, dated 5th July, from Section 20 of the Provincial Court of Barcelona. It states that the consent is not relevant to the exculpation ends when it concerns a non-compliance of the restrictive order passed as a sentence.

4th. Judgement 132/2.008, dated 24th April, from Section 1 of the Provincial Court of Valencia. It considers that the consent of the plaintiff is irrelevant to consider the infringement of the preliminary measure consummated, nevertheless and in this case, the statement is not considered as the ultimate reason for the resolution but the Court mentions it *obiter dictum*.

5th. Judgement number 152/2.007, dated 27th February, from Section 6 of the Provincial Court of Vizcaya, considers that:

> *"The implementation of article 468 of the Penal Code to cases of the defendant's nature, tries to preserve both the protection of the victim and the effectiveness and respect that are deserved by the legal resolution the observance of which should in no way be subjected to the defendant's wish, not existing any consideration in it concerning the possibility that the victim's consent excludes the commission of the type, since it consists of an offense with a well cut up result"..."and there is no room for argumentations concerning issues such as the existence of a pardon or specific authorisations from the victim that would allow the defendant to violate the measure and see the victim".*

> *"To acknowledge that the consent of the offended could mean the impunity of the behaviour would amount to exposing her to possible coactions or pressure in order to leave without effect what had legally been agreed, leaving her free to determine its validity, coactions or pressures which the legislator has rightly intended to banish by establishing prohibitions like the one that has been infringed".*

On the other hand, the following ones grant a relevance to the victim's consent:

1st. Judgement number 397/2.007, dated 24th April, from Section 20 of the Provincial Court of Barcelona. In this case, the Court argues as reasons for acquittal, the following:

a. The doctrine of the High Court that considers atypical the infracting behaviour of a provisional measure of a restraining order when the person obliged by the provisional measure and the person protected by the same have voluntarily gone back to living together.

b. The provisional measure had been established for the period of time that the instruction of the proceedings would last and, at the time they went back to living together, there was no proof as to its validity since there was no

testimony or certification from the Secretary of the Court as to the possibility that the instruction had already finished by that date.

2nd. Judgement number 180/2.007, dated 14th May, from Section 4 of the Provincial Court of Tarragona, which repeats part of the legal argumentations of the same Section, established in the Judgement from 6th April 2.006, specifically mentioning them. It states the following:

> *"As stated in that resolution (6th April 2.006), even though we cannot assume a general clause of non-typical statement when considering the consent of the protected person or her lack of interest on the effectiveness of the protection measures ordered, this does not mean that the different evaluation deserved by the behaviour of the person who willingly violates a restrictive order should be ignored or that the actions of the person who acts with the free and specific authorisation of the victim not to respect her should not be considered, even when the measure would not have been legally modified.*
>
> *Within such exceptional cases, the specific bad faith that must concur in the author of the facts cannot be identified, as agreed in the Conclusions reached at the meeting held in Madrid, in December 2005 by the Judges of the Provincial Courts who are provided with exclusive competences within the gender violence scope and who consider that those cases must go unpunished.*
>
> *Naturally, this decision is a controversial one but, it is in tune with the doctrine established within the sentence from the High Court dated 26th September 2005 which, in fact, as stated by the appealing party, does not make any difference concerning its reach regarding the provisional or punitive nature of the imposed measure.*
>
> *Within that judgement, the case of infraction is evaluated paying attention to the specificity of the considered measure, in relation to the scene where its efficiency is developed, deserving the special constitutional protection, and even if it argues that the validity or annulment of the measure or the sentence cannot*

depend on the will of the person for whose protection it is awarded, it concludes that the most cautious decision would be to make its public nature compatible with the respect for the inviolable frame of the decision of the same, freely determined by itself".

II.9. IMPLEMENTATION OF THE "SIMILAR AFFECTIVE RELATION" WHILE NOT EXISTING A LIFE IN COMMON TO INCLUDE OR EXCLUDE THE IMPLEMENTATION OF THE COMPREHENSIVE LAW

The majority of the resolutions analysed that take up this point opt for the implementation of the Comprehensive Law to the cases of engagement relationships or to the new love relationships that arise within our society. Nevertheless, the doctrine of the different Provincial Courts offers varied solutions when subsuming or excluding the violence arising within this sphere within the specific protection radius that is introduced by the Comprehensive Law.

II.9.1. Introduction

The Organic Law 1/2.004, of Comprehensive Protection Measures against Gender Violence, maintained, in the drafting of articles 153, 171, 172 and 173.2 of the Penal Code, the equality of status between the marital relationship and the "similar affective relation" that its legal precedents had already established regarding the relation that must exist between the active and passive subject of the offense. The above mentioned Law also considered two important novelties introduced within the reform operated by the Organic Law 11/2.003: on the one hand, it maintained, the suppression of the specific demand of stability within the relationship and, on the other hand, it maintained the inclusion of the expression "even when they do not live together".

II.9.2. Interpretation of the expression "similar affective relation, even when not existing a life in common"

As derived from the legal text itself, within the mentioned penal types, both the spouses and the "*mores uxorio*" partners which are usually referred to as *de facto* partners are considered as active and passive subjects. There is no doubt about this. But, does it include only those cases?

The study of the judgement passed by the Provincial Courts derives that one of the points that has originated most interpreting discrepancies in the implementation of the Comprehensive Law has been the legal expression "even when not living together", added to the "similar affective relationship". With these expressions it has clearly intended to include other *de facto* cases where there is a special connection or union beyond the simple friendship but which were not immersed into the *de facto* union due to the lack of the element of a life together. With the new terminology introduced, the inclusion of those more and more frequent factual situations, in which the special connection of the couple, of fidelity, of unity, of future vocation that did not enjoy the same treatment because they did not refer to a life together under the same roof and that are equally situations requiring tutelage because of the existence of that special relationship which transcends the personal sphere, going through the familiar one and reaching the social sphere; have been meant to be included.

Some of the studied judgement underline that the degree of assimilation to the marital relationship must not be measured so much on the basis of the existence or non-existence of a project of life in common but by the reassurance that it shares with it the emotional nature where the legal drafting puts its stress: that is, the personal and private relationship itself that clearly goes beyond the limits of a simple friendship, no matter how intense it is. Judgement number 31/2.007, dated 22nd January, from Section 6 of the Provincial Court of Vizcaya, follows this line also referring to Judgement number 202/2.005, dated 20th December, from Section 2 of the Provincial Court of Avila, adding up that it should not matter the fact that there were no "plans for the future" within the relationship, since, the case being so, it could be due to multiple reasons that might even be unconnected with the wishes of the interested parties, as the social reality makes evident, while this point does not imply an erosion on the intensity of the relationship or on the affective factor that goes with it.

Judgement number 466/2.007, dated 11th June, from Section 27 of the Provincial Court of Madrid, among others, states that establishing in which cases the relationship may obtain that calcification, due to the existence of factual circumstances that might allow to perceive that plus which credits the seriousness, stability and vocation of permanence of the relationship, is a *de facto* question that is subjected to the necessary accreditation within the penal process.

Moreover, some of the studied judgements reflect that the different Seminars of the Courts of Violence against Women and those of the Judges assigned to Sections of the Provincial Courts that are specialized in violence against women, have adopted some uniform criteria, according to which, the engaged couple would be included within the referred laws, so long as there is an evident vocation of stability within the relationship and not considering the mere friendship or the specific and sporadic relationships as sufficient to comply with the requisitions of the same.

II.9.3. Analysis of the different interpreting criteria

A) Some of the sentences examined in this study, do not apply the Organic Law 1/2.004, because they consider that the similar sentimental relationship does not concur, in the following factual cases:

- A 15 day long relationship where the victim and the accused used to sleep at an ATM machine (Judgement number 101/2.007, dated 2nd February, form Section 1 of the Provincial Court of Alicante)

- A couple relationship which is starting (Judgement number 99/2.007, dated 2nd February from Section 1 of the Provincial Court of Alicante).

- An engagement type relationship where there is no proof of the existence of a compromise between the individuals which might allow to assimilate it to the “community of a life in interests” characterizing a marriage or a *more uxorio* de facto couple (Judgement number 108/2.007, dated 15th May, from Section 3 of the Provincial Court of Asturias).

- An emotional relationship lasting 3 months, along which the accused went to see the victim to her house often and kept sporadic sexual relations (Judgement number 37/2.007, dated 9th January) from Section 20 of the Provincial Court of Barcelona.

- A sentimental relationship regarding which no accreditation has been produced as to its intensity and degree of intimacy, confidence and compromise (Judgement number 83/2.007, dated 19th April from Section 2 of the provincial Court of Valladolid).

- A sentimental relationship regarding which no proof has been established as to the frequency the accused and the victim saw each other, the intensity of the relationship or the existence or non-existence of a project in common (Judgement number 824/2.007, dated 11th October, from Section 27 of the Provincial Court of Madrid).

B) Some of the sentences examined in this study apply the Organic Law 1/2.004, because they consider that the similar sentimental relationship does concur, in the following factual cases:

- An engagement type relationship, with its related sentimental connections between the two parties, lasting over two years and a half, acknowledged by the accused and the victim, regardless of whether they have been living together and of whether they have enjoyed a sexual relationship (Judgement from Section 20 of the Provincial Court of Barcelona, no number, appeal roll 625/2.006, dated 10th January 2.007)

- An engagement type relationship, even without the intention to share a future life in common. On the other hand, the mere friendship with a sporadic fling or a sporadic sexual relation without further emotional implications is considered excluded (Judgement number 175/2.007, dated 9th March, from Section 2 of the Provincial Court of Granada).

- An engagement type relationship lasting more than 1 year and considered as serious and stable and in which they referred to their partner as boyfriend or girlfriend before other people (Judgement number 432/2.007, dated 31st May, from Section 27 of the Provincial Court of Madrid).

- A sentimental relationship lasting a month and a half and which is admitted by the accused. The latter had the keys of the victim's house and he used to spend the night there sometimes. The victim's family understood that the relationship between her and the accused was that of an engagement (Judgement number 466/2.007, dated 11th June, from Section 27 of the Provincial Court of Madrid).

- A stable engagement type relationship lasting 1 year and a half (Judgement number 136/2.007, dated 29th May, from Section 1 of the Provincial Court of Valencia).

- A sentimental relationship lasting 1 month and a half, as acknowledged by the accused, and which consisted of living together and sharing a home even with the victim's younger daughter (Judgement number 35/2.008, dated 12th February 2.008 from Section 1 for the Provincial Court of Valencia).

- A sentimental relationship, related to a couple living together, where the assimilation degree to the marital relationship was not measured on the grounds of the existence or non-existence of a project of life in common but by the fact that it coincides with it in the nature of the sentimental relationship which is what the legal drafting stresses: that is, the fact concerned with a personal and private relationship which clearly gets further than the limits of a simple friendship, no matter how intense it may be (Judgement number 31/2.007, dated 22nd January, from Section 6 of the Provincial Court of Vizcaya).

- A sentimental relationship, related to a couple living together only during the weekends, in parallel with a different marital relationship (Judgement number 493/2.007, dated 14th June, from Section 6 of the provincial Court of Vizcaya).

- A sentimental relationship lasting 1 year as reckoned by the accused, without existing a life together but with temporal persistence on the personal encounters and with trips made together (Judgement number 907/2.007, dated 8th November from Section 27 of the Provincial Court of Madrid).

II.10. SENTENCES IMPOSED OTHER THAN THOSE INVOLVING PRISON

The analysis of the judgements that are object of study shows the following results concerning this matter:

8 - PENAS IMPUESTAS DIFERENTES DE LA DE PRISIÓN			
8.1) - TBC	28	8.9) - Privación derecho conducir	
8.2) - MULTA	23	8.10) - Privación derecho de armas	333
8.3) - Privación derecho a residir o acudir	10	8.11) - Inhabilitación absoluta	7
8.4) - Prohibición volver aprox. Víctimas o perjudicad	356	8.12) - Suspensión empleo o cargo	1
8.5) - Prohibición aprox. Fam/otros	16	8.13) - Inhabilitación especial	
8.6) - Suspensión régimen visitas		- Inab.patria potestad	
8.7) - Prohibición comunicación Víctima	285	- Inhab.sufragio	
8.8) - Prohibición comunicación Fam/otros	10	- Inhab.profesión, empleo o cargo	
		8.14) - Pérdida condición beneficiario pensión de viudedad	
		8.15) - Control medidas por medios electrónicos	1

8 - PENAS IMPUESTAS DIFERENTES DE LA DE PRISIÓN			
8.1) - TBC	6,22%	8.9) - Privación derecho conducir	
8.2) - MULTA	5,11%	8.10) - Privación derecho de armas	74,00%
8.3) - Privación derecho a residir o acudir	2,22%	8.11) - Inhabilitación absoluta	1,56%
8.4) - Prohibición volver aprox. Víctimas o perjudicad	79,11%	8.12) - Suspensión empleo o cargo	0,22%
8.5) - Prohibición aprox. Fam/otros	3,56%	8.13) - Inhabilitación especial	
8.6) - Suspensión régimen visitas		- Inab.patria potestad	
8.7) - Prohibición comunicación Víctima	63,33%	- Inhab.sufragio	
8.8) - Prohibición comunicación Fam/otros	2,22%	- Inhab.profesión, empleo o cargo	
		8.14) - Pérdida condición beneficiario pensión de viudedad	
Porcentaje calculado sobre sentencias CONDENATORIAS		8.15) - Control medidas por medios electrónicos	0,22%

II.10.1. Introduction

The sentence imposed by the judge or the penal court to the accused of gender violence is the result derived from the initial report and the maintenance of the statement of the victim from the time the proceedings started to the time the oral proceedings take place, when evaluated as a whole, together with the

reminder of the evidence practiced within the oral proceedings, when they are considered as a charge. Nevertheless the expression of the penal result of the study on the judgement from the Provincial Courts on gender violence offers some shades of interest that will be taken up below.

II.10.2. Sentences written in the legal document that are to be imposed on the criminal law provisions of major implementation concerning gender violence

When checking the result of the judgement studied, it is necessary to analyse the sentences that are passed within the Penal Code, concerning the offences that are most common within the gender violence, and which are mentioned below, in order to examine later the statistics they produce:

a) Offenses of specific maltreatment, minor threats and minor coactions: articles 153.1, 171.4 and 172.2 of the Penal Code.

Six months to one year prison sentence or works for the benefit of the community lasting from thirty-one to eighty days and, in all cases, the deprivation of the right to have and carry arms during a period of time raising from one year and one day to three years; also and when the Judge or the Tribunal deems it appropriate for the interest of the underage or disabled, deprivation of parental guardianship, tutelage, curatorship, guard or the right to take care of the underage or disabled, up to five years.

b) Within the regular mistreatment: article 173.2 of the Penal Code:

Six months to three years prison sentence, deprivation of the right to have and carry arms during a period of two to five years and, in its case, when the judge or tribunal deems it appropriate to the interest of the underage or disabled, special deprivation of parental guardianship, tutelage, curatorship, guard or the right to take care of the underage or disabled for a period of time rising from one to five years, without prejudice of the sentences derived from the offenses or infractions related to the physical or psychical violence acts that have taken place.

c) Offense of violation of a sentence as considered in article 48 of the Penal Code or of the precautionary or safety measure of a similar nature, granted within criminal procedures where the damaged party is one of the persons that article 173.2: article 468 of the Penal Code refers to.

Although technically, it is not an offense related to gender violence, it is included in the study, resulting, as previously stated, in the one of the penal types more commonly applied on the cases of the violence suffered by women at the hands of their husbands, partners or boyfriends, present or past, due to the fact that they are women.

A prison sentence of six months to one year is applied.

II.10.3. Minimum measures

Since the above mentioned are the penal types of major application within this sphere, the study will concern the logical implementation of the sentences related to the proved facts that are the object of a later convicting sentence, on those penal types.

a) Concerning the offenses defined by articles 153, 171 and 172 of the Penal Code, there are a total of 377 Judgement against 95 acquittals concerning the same penal types.

b) Whenever a sentence is passed on one of these offenses, the compulsory sentences that must be applied are the following:

1.- Prison or Works for the Benefit or the Community as the main sentence.

A total of 388 prison sentences have been passed on the sample that is the object of study. As for the other alternative main sentence, the one referred to Works to the Benefit of the Community, it has been passed in 28 cases, which means 6,22% of the total conviction sentences. This shows that the prison sentence is the main option.

In any case, the implementation of this sentence requires the consent of the convicted person (article 49 of the Penal Code), therefore, there are two possibilities: either the convicted person’s consent is obtained during the trial on the case that the prison option is passed in the sentence, or the prison sentence is appealed, specifically requesting a sentence of works for the benefit of the community.

2.- Restrictive measures (ban on getting near the victim), compulsory as per article 57.2 of the Penal Code (it is also compulsory for offenses of domestic violence), which states that, in any case, the implementation of the sentence mentioned in section 2 of article 48 will be effected, for a period of time that will not exceed ten years when a serious offense is considered, and five years if a less serious offense is considered, notwithstanding what is mentioned in paragraph two of the earlier section, which states that this sentence should exceed at least in one year the one related to the deprivation of liberty.

Consequently, it becomes compulsory to impose the sentence related to article 48.2 of the Penal Code which states that *"the ban on getting near the victim, or those of her relations or other people that the judge or tribunal determines, prevents the convicted person from getting near them, anywhere they may be, as well as getting near their home, or their working place and any other places that are frequented by them, suppressing the parental access, communication and stays with the children that would have been granted, in its case, within the civil sentence; up to the total compliance of the sentence"*.

Moreover and concerning the suppression of the parental access mentioned in the above mentioned article, an important amendment introduced by the Organic Law 15/2.003, established that the rights depriving sentence consisting of the ban on getting near the victim or other people would be tied to the legal consequence of a suppression "*ex lege*" of the parental access, communication and stays with the children granted within the civil judgement. The automatic suppression of the parental access will last up to the total compliance of the sentence of restrictive measures. But it is only applied as regards the parental access that would have been agreed already, and it would not be enforceable to the later civil judgement that might be passed. Within the analysed judgement, no sentence has been passed on the suppression of the parental access previously agreed upon.

The sentence consisting of the ban to get near the victim has been specifically passed on 356 of the analysed judgement, even though in one of the cases the judgement from the Provincial Court has not picked up the full ruling of the judgement passed by the Penal Court, which might bring on its implementation on a bigger number of rulings. Adding to the sentence consisting of banning the convicted from getting near the victim, within 16 of the analysed cases, the prohibition for the convicted to get near the relatives of the victim or other persons designated by the victim has also been applied.

3.- Deprivation of the right to posses and carry arms.

A total of 333 sentences of this nature have been passed.

c) As supplementary options are considered:

1.- Ban on the communication with the victim. Article 57.1 of the Penal Code in relation to article 48.3 of the same Code, states that "*The ban on the communication with the victim or those of her relations or other people that the judge or tribunal determines, prevents the offender from establishing any written, oral or visual contact with them by any means of communication or computer network"*. This sentence can only be contested by the judge or the tribunal, and being different from the restraining order, the ban on communication is optional since the legislator might appeal to the fact that the judges "*will be able to impose it, if the case requires it*".

A total of 285 orders of this nature have been issued, as well as 10 more orders banning the communication with the relatives or other people appointed by the victim.

Since this order can be contested, its implementation is effected in a smaller number than the restrictive order which is a compulsory one.

2.- Deprivation of the right of residence in a particular place, which coincides with the home of the victim or her workplace, according to article 57.1 of the Penal Code related to article 48.1 of the same Code.

It has a wider radius of application than the restrictive order itself which is fixed at between 200 to 500 metres, while this one covers a particular town, widening the frame of the restrictive order beyond a few meters of distance.

Thus, article 48.1 of the Penal Code mentions the contents of this order as: *"The deprivation of the right to live in particular places or to go there, prevents the defendant from residing or going to the place where he has committed the offense or where the victim or her family live, in case it is not the same."*

A total of 10 sentences of this nature have been passed.

3.- Deprivation of parental authority, tutelage, guardianship or care.

A total of 7 sentences have been passed on sentences of this nature.

d) Concerning the sentence imposing a fine, its implementation is specifically forbidden for the proper offense types related to gender violence, including the violation of precautionary measures or sentences related to article 468.2 of the Penal Code. Even the possibility of its replacement is forbidden, and article 88.1.3 of the Penal Code establishes that *"In the case where the defendant had been convicted due to an offense related to gender violence, the prison sentence can only be replaced by works for the benefit of the community. In these cases, and in addition to a sentence compelling the defendant to comply with some specific programs related to his re-education and psychological treatment the Judge or Tribunal will demand that he should comply with the observance of the obligations or duties specified in rulings 1 and 2 of section 1 of article 83 of this Cod"..*

A total of 23 sentences of this nature have been issued, although they refer to infractions.

e) Supplementary orders: Article 56 of the Penal Code states:

"For prison orders under ten years, the Judges and Tribunals will impose as supplementary orders, depending on the seriousness of the offense, one or some of the following ones:

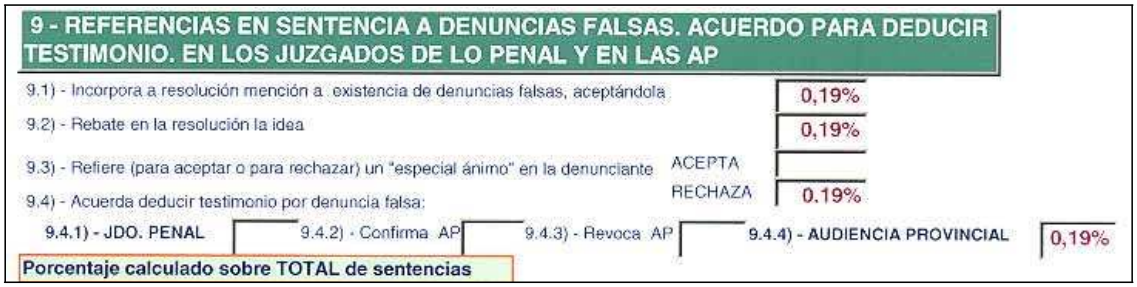
1st. Suspension of employment or public position.
2nd. Special deprivation of the right to be a candidate for the elections during the time of the conviction.
3rd. Special deprivation of a public employment or position or profession, trade, industry, commerce or any other right, if these had had a direct relationship with the offense committed, having to specifically point out this connection within the judgement notwithstanding the application of what is stated in article 579 of this Code.

Seven judgements have agreed on a complete disqualification of the defendant and 1 has led to a suspension of employment and position.

f) Control of the restraining order by electronic means. It only appears in one judgement, although it does not really refer to a conviction but to a control measure of its compliance. Therefore, its imposition in a judgement is not compulsory and it can be adopted as a final penal measure.

II.11. ON THE ALLEGED WOMEN'S FALSE REPORTS

The following graphic, based on the sentence rulings issued after the evaluation of the related oral proceedings they refer to, proves the lack of consistency shown by the allegations that assert that women often make false reports when stating that they are victims of a chauvinist violence.



II.11.1 Introduction

Even though the offense of false reports is not an offense of gender violence, but, on the contrary, it is framed within the offenses against the Justice Administration (Title XX of Book II of the Penal Code), it has been deemed necessary, in this first study on the implementation that the Justice Courts effect as regards the Comprehensive Law, to analyse the existence of the rulings,

within the legal resolutions, that might reflect the incidence of the alleged false reports that, from certain sectors, have been attributed to women.

Chapter V from Title XX of Book II of the Penal Code, comprising articles 456 and 457, refers to the offenses of false accusation and reports as well as to the simulation of offenses.

Article 456.1 from the Penal Code typifies the offense of false accusation and reports, stating that it is referred to *"Those who knowing its falseness or by a reckless disregard for truth, charge somebody with some actions that, had they been true, they would have meant some penal infraction, if this charge were to be made before a legal or administrative civil servant with a duty to proceed to its clarification"*. Its section 2 states that *"It will not be possible to proceed against the reporter or plaintiff until there is a firm ruling or a firm resolution related to a dismissal of the proceedings or until they are filed by the Judge or the Court that has dealt with the charged infraction. Those will order to proceed ex-officio against the plaintiff or accusing party as long as enough evidence is found within the principal cause concerning the falsehood of the charge, notwithstanding the fact that the action can also be pursued after the offended makes the accusation"*.

On the other hand, article 458 of the Penal Code, framed within the next Chapter VI, typifies the offense of false testimony, that is perpetrated by "*The witness that is not telling the truth in his testimony within the legal cause"*.

The legal statistics do not contain the different offenses that are object of investigation for the instruction courts, which are meant to instruct, among others, the offenses committed against the Justice Administration. This specific precision can only be found within the statistics bulletins on offenses related to the domestic violence and gender violence regulated by the Comprehensive Law. None of the legal statistics bulletins contain the offenses ruled by the Penal Courts or by the Provincial Courts.

Therefore, the approximation that could be made to the possible commission of an offense of false accusation or false reports is by means of the cases where the legal body –which has acquitted the person that had been accused of an offense- agrees, through considering that there is enough evidence to support the falsehood of the imputation initially effected, to infer an statement about the actions, in order for the Instruction Court to investigate the possible commission of the new found offense.

Naturally, the basic right to the presumption of innocence prevents –as in all offenses- to evaluate the inference of the statement for the investigation of some facts as an equivalent to having performed the action that is meant to be investigated. As in the other cases, the presumption of innocence does not yield but up to the time when a firm ruling is passed.

Additionally, the decision to infer a statement, very especially in these cases, is qualified by the specificity of the legal behaviour of the victims of gender violence who, as previously stated, cope, as long as they do not succeed in definitely getting out of the circle of violence, within a situation of aggression-reporting-remorse-aggression. In more than a few occasions, the difference between the initial allegations and the ones made during the oral trial, when it has a penal relevance, can be placed better within the sphere of the offense of false testimony (going back on the initial report to prevent the consequences of the penal process on her partner or ex-partner) than within that of false allegations or accusations. In this sense, the inference of the statement that may grant the legal body allows the investigation of the possible commission of either one or the other offense, without judging in advance the final result of the actions (dismissal of the proceedings, filing, acquittal or sentence for one or the other offense).

This inference of the statement means, indeed, the possible penal relevance of the differences existing between the initial report and what has finally been proved in the oral proceedings. But, until a sentence ruling for the false accusation or reporting offense is not firm, everyone –including the reporting parties of offenses related to gender violence, of course- is entitled to the right of the presumption of innocence and, with it, to getting the treatment and consideration of innocent.

II.11.2. Analysis of the court rulings that are the object of study in this matter

The study effected on the representative sample of legal resolutions that rule on the matter of gender violence regulated by the Comprehensive Law allows to draw out the conclusion that the statements that, within some sectors, are made concerning the fact that the women that report offenses of gender violence are making false statements, do not have the smallest foundations, both on the intended generalization of the *false reports* that would justify to consider it as an extended phenomenon or, even, if we consider it a case provided with a minimum and singled out relevance.

In fact, out of the 530 resolutions studied, only one, that means 0,19% of the total ones, is directly related to a case that could be framed within this scope, without prejudice of other possible readings.

It is Judgement number 171/2.007, dated 14th June, from Section 2 of the Provincial Court of Las Palmas, which resolves in appeal, an appeal against a sentence ruling issued by the Penal Court number 2 of Las Palmas.

The Penal Court had condemned the accused, as the perpetrator of an offense of mistreatment within the family scope, for having hit his sentimental partner during an argument, in various occasions, and for having pushed her heavily, causing her injuries consisting of traumatism at the left cervical area and the chin, as well as an anxiety attack. The plaintiff who had maintained her accusation at the instruction phase, took refuge in her right to be silent as per article 416 of the Rules of Criminal Procedure, during the oral proceedings. The Attorney General read her summary statements and kept the request for a convicting sentence. The Penal Judge, who must have weighed, both, her initial statements, at least in part, and the injuries caused by the actions (which is inferred from the appeal judgement that refers to the “remaining evidence practiced during the trial”), sentenced the accused, as has already been mentioned.

Both the convicted person and, curiously enough, the plaintiff (who, obviously, was not the legal party damaged by the sentence) gave notice of appeal against the sentence, interested as they were in the acquittal of the first one.

In common agreement, both parties based their respective appeals in the "evident wrong evaluation of the evidence" effected within the same sentence object of the dispute because, according to the plaintiff herself, surprisingly, for the first time along the proceeding, she had lied during her initial report.

The Provincial Court considers the appeal "not because the Penal Court's actuation" had not evaluated correctly the evidence practised during the trial but, because the Court had had the possibility to enjoy the immediacy of the new statement of the plaintiff who was interested in the hearing. In this hearing, the plaintiff stated that the days she placed the complaint, she distorted the facts and she exaggerated them because she was very angry with the accused. She added that the defendant had not hit her at all and "*she got the injury on her chin from hitting a door accidentally, due to her nervous state owed to her discussion with ... and his intention to give up the relationship"*.

From this statement from the plaintiff, made after her sentimental partner had been sentenced, in spite of her having taken refuge in her right to be silent during the oral proceedings, according to article 416 of the Legal Prosecution, the Court issued two conclusions:

- The first one, the recrimination to the plaintiff

  "regretting that a legal prosecution devised to protect the victims of gender violence should be used as an arm against the party in the couple that does not comply with the sentimental demands of the other party".

- The second, the consequence which could not be ignored by the lawyers of the two parties, the Court agrees

  "to infer an statement from the actions in case the plaintiff Mrs. ... had incurred in an offense of false accusations... given the statements of the same, both, in the writing made for the appeal and during the hearing celebrated at this Court".

Other resolutions take up these particularities, although reaching very different conclusions.

Thus, for example, Judgement 513/2.007, dated 26th June, from Section27 of the Provincial Court of Madrid, confirms the instance sentence. The sentence from the Penal Court number 3 in Getafe had not granted efficiency to the statements of the victim during the plenary, pointing out that she had lied during the trial in other occasions, and condemned the accused, as the author of the offense of mistreatment within the shared home, based on his own statements, together with the medical report on the injuries and the report of the forensic doctor. The defence places an appeal, alleging a so-called infraction of the penal order that typifies the offense he had been convicted of , arguing the falsehood of the accusations and the fact that the actions took place due to the provocation of the wife. The Court rejects the motifs of the appeal, underlines the correction of the substantiating evaluation of the appealed sentence and also rejects the implementation of the privileged subtype from section 4 of article 153 of the Penal Code, appreciating that there is no concurrence of a lesser seriousness when the defendant has hit his wife on her face and on her abdomen, with his fists, when she was pregnant, thus considering that, even regarding this fact, the instance evaluation was correct and right.

Judgement number 797/2.007, dated 8th October, from Section 27 of the Provincial Court of Madrid also takes up the new exonerating statement from the victim, not only without deriving against it the inferring statement for the investigation of a possible offense but also confirming the statement of sentence from the Penal Court.

In this case, the Court confirms the sentence on the offense of threats, even though the victim exonerated her husband during the oral proceedings.

> *"stating that he had not threatened her and that he meant to use the knife that he had in his hand to cut the bread; while the accused stated something similar"*.

Since the judge *a quo* availed of additional evidence. On the one hand, he had the statements of two eyewitnesses who, at the time the events took place, shared a flat with both of them and who told that the accused, brandishing a knife, threatened to take his wife's life. On the other hand, he had the allegations of an agent of the Guardia Civil who said that, when he arrived at the couple's address, he found the victim under the bed, crying and very nervous.

The same judgement rejects the pretended infraction for an improper implementation of article 130.5 of the Penal Code, while the defence proposes the extinction of the criminal responsibility due to the pardon granted by the victim. Notwithstanding the fact that the mentioned pardon seems to clarify the exonerating statement of the victim during the oral proceedings, the Court states:

> *"Focusing the question in this way, the first motive wielded can clearly not prosper since the victim's pardon, according to article 130.5 of the Penal Code, conforms one of the reasons why the penal responsibility is extinguished only in the cases where the law anticipates it so, among which the offense of minor threats that are the object of the accusation and sentence are not considered, the latter being treated as an infraction of public nature legally pursued, and for the prosecution of which the pardon granted by the victim is irrelevant".*

Other judgements refer to the allegations of the defence of the appealing party about the spurious motivations of the formulated accusations, which they reject.

Thus, judgement number 253/2.007, dated 5th June, from Section 4 of the Provincial Court of Girona, takes up this allegation made by the defence, together with an additional one introduced by the latter, which cannot be considered alien to the earlier one: the alleged "unconstitutional predominance that is granted to the statements of the woman with destruction of the general norms on the distribution of the evidence charge".

Concerning this last subject, the Court states forcefully:

> *"And as regards the assertion about the predominance of the woman's statements over those of the man, reassigning the distribution of the charge of the evidence in such a way that it is the accused who needs to prove his innocence and not the plaintiff, we will simply state that it is a false one. That rule does not exist and has not been applied either. The fact that the Judge of the instance should have given credit to the allegations of the damaged party rather than to the accused and the witnesses he supplied, is clearly explained*

within the arguments used for his judgement, which we will examine at a later stage when we come into the evaluation of the evidence, in which neither of them supports the hypotheses that because of his/her sex, he/she should be granted a bigger credibility".

At a later stage, after remembering that the evaluation of the allegations is not regulated by numeric or quantitative criteria but by principles of credibility, the Court takes up the allegation concerning the spurious motivations:

"This attention we claim is the one provided by the judge "a quo" acknowledging that he had been specially attentive when the damaged party explained the conversation she had had with the son of the accused a about withdrawing her accusations if she was economically rewarded. In fact, that allegation has found an explanation that is considered not only sufficient but also logical, considering the norms of the experience concerning the fact that in spite of having suffered the offense, there was no special interest in maintaining the accusation if the damage suffered was paid for. This does not entail illegitimate coactions but a reflection on the true personal value of the accusation and of the penal procedure".

In a similar way, Judgement 136/2.007, dated 29th May, from Section 1 of the Provincial Court of Valencia, takes up this question tangentially. This resolution, studies the allegation of the appealing party, concerning the assumed evaluating error of the judge in the Penal Court number 3 of Valencia. The appealing party had been convicted as the author of an offense against article 153 of the Penal Code, consisting of an aggression to his girlfriend, with whom he had had an engagement type relationship that lasted for a year and a half, twisting her wrists and punching her leg. The Legal Basis number 2 of the appealing sentence rejects the allegations, because the Court shares the *"right criteria and the rationality of the inferring judgement made "* by the appealed sentence, adding up:

"without the possibility that the interested allegations of the appealing party and the partisan conjectures concerning the intention leading the plaintiff, should prevail over the right conclusions that the judge has reached".

On the other hand, Sentence number 361/2.007, dated 26th April, from Section 27 of the Provincial Court of Madrid, confirms the sentence given by the Penal Court number 8 in Madrid, which sentenced the accused for an offense of threats. The latter had sent a letter to his sentimental partner, who has just left him, in which, among other considerations, he said: "I have taken the *jamonero* (a device that holds dry-cured ham so that it can be cut into fine strips) I do not want to hurt you but you decide I will be waiting"(sic). The victim, during the oral proceedings, tried to play down the facts, saying that it had not worried her specially. The Court states:

> *"It is true that, during the plenary, Mrs. … had a clearly exonerating attitude concerning the actions of the appealing party, which could already be discerned when, at the time she appeared in the Court of Violence against Women, she stated that she wanted to withdraw her accusation; an attitude that is very common, as shown by the practical experience in cases of gender violence and violence within the family, due to the affective, social, familiar and economic connections that unite the victim and the aggressor… On the other hand, no matter how much the plaintiff alludes, in a vague and imprecise way, to the existence of certain pressures from her brother and, it seems that, even also from the police, when she says that among them, they all tried to convince her to formulate an accusation at the Police Station, this statement does not resist a purely objective analysis, and more so when she also states that she had to go into a Refuge, a decision which only the fear to suffer some type of aggression could force her into and which contradicts that tranquility she says she enjoyed at the time".*

II.12. REASONS FOR A NULLITY, IN CASE OF EXISTING

In general, we can state that the nullity of proceedings is ordered in a very limited number of the sentences that are object of study, and the ones that refer to the enforcement of the exemption from making statements following article 416 of the Rules of Criminal Procedure, stand out.

II.12.1. In relation to the exemption from giving evidence

According to article 416 of the Rules of Criminal Procedure, the following are exempt from making statements: the defendant's older and younger direct relations, his spouse, his blood or uterine brothers and sisters and side blood relations up to the second civil degree, as well as the natural relatives referred to in number 3 of article 261 of the same proceedings text. In these cases, the instructing Judge will warn the witness that is included in the earlier paragraph that he/she has no obligation to make a statement against the defendant but he/she can make the statements that he/she deems appropriate, the reply given to this warning will be recorded. Following this line, Judgement number 106/2.007, dated 3rd May, from Section 2 of the Provincial Court of Las Palmas stresses the obligation of the victim (called as a witness) to show up at the trial (articles 410 and 702 of the Rules of Criminal Procedure) without prejudice that the same (once she has shown up) can plead for the exemption from making statements (under the protection of the mentioned article 416 of the Rules of Criminal Procedure), arguing that

> *"the truth is that the offense that is being tried, is an offense that may be pursued by the law, and the punitive consequences of the actions that the plaintiff reported and which could represent the offense he is accused of, could not be left to the whim of the plaintiff".*

An important section of the reasons for the nullity that the analysed sentences refer to, are related to the enforcement of article 416.1st of the Rules of Criminal Procedure, as previously stated.

In some cases, the analysed judgement order the nullity because there is no compliance with article 416.1st of the Rules of Criminal Procedure, when the latter was enforceable.

It has to be pointed out that, in the first place, in Judgement number 364/2.007, dated 28th March, from Section 20 of the Provincial Court of Barcelona, either the Penal Court Judge or the Instruction Court Judge did not comply with article 416 of the Rules of Criminal Procedure, and it was recorded that the victim stated before the Judge of the Instruction that she did not want to report her husband. The sentence adds that

> *"the High Court, in several sentences, only allows the evaluation of a statement from a relative that is included among the ones mentioned in article 416.1 of the Rules of Criminal Procedure, and who has not been warned concerning that article, when the victim spontaneously had shown up at the Police Station or at the Instruction Court to report the actions that the accused relative has performed against her (Sentence from the High Court dated 10-20-04, among others)... In the present case the referred witness did not show up to make the report against the accused at the Police Station and, moreover, when making her statement at the Court she expressed that she did not want to report the fact nor did she want to make an accusation against her husband".*

On the same line, Judgement number 25/2.007, dated 22nd February from Section 1 of the Provincial Court of Madrid, takes up a similar case:

> *"she has not been warned about article 416 of the Rules of Criminal Procedure, and not even, about the fact that she would not be charged with any penal responsibilities if she refused to make a statement, and it is recorded, within the performances, that she stated her wish to plead her right to avail of the provisions of the already mentioned article, while there is no record of her having renounced that right before the Judge of the Penal Court, at a later stage; this fact causes that her statements before the Court should be considered null and void, since the mentioned articles are meant to protect the convicted person and not to be detrimental to him and they lead to the acknowledgement of the right to not making any statements".*

And it adds up that

> *"this same doctrine is contained within four sentences of the European Court, as per the ones referred to the Kostovski case, dated 20th November 1.989, the Windisch case, dated 27th September 1.990, the Delta case, dated 19th December of the same year and the Isgró case, dated 19th February 1.991. All of them show that, faced with situations of similar characteristics (in them, the other way round: lack of warning during the instruction and refusal to make a statement during the plenary), the accused was not granted a fair trial and thus, section 1 of article 6 of the Human Rights Agreement was violated. And this is the criterion of our High Court in the judgements dated 11th April 1.996 and 26th May 1.999".*

In a different case, the nullity is given because the above mentioned article 416.1st of the Rules of Criminal Procedure was enforced in a non-appropriate way, and this is so because, at the time the trial took place the relationship between the victim and the accused had already been broken. Within this scope, Judgement number 21/2.008, dated 16th January, from Section 27 of the Provincial Court of Madrid must be pointed out; according to it,

> *"since the victim Mrs. M.., living with the accused at the time the events took place, acknowledges within the oral proceedings that, at the time of the trial, her sentimental relationship with the accused has already finished and she has not gone back to him, it has to be concluded that she was thus compelled to make a statement, not being able to seek the application of article 416 of the Rules of Criminal Procedure to her case, since she did not maintain any relationship similar to that of a married couple with the accused. And having been excused from making a statement by the Judge in the Penal Court, the right to the evidence of the Public Prosecutor has been limited, preventing him from practising evidence that was necessary and pertinent, of an easy and possible practice, and of an undeniable influence over the decision of the lawsuit. This means a violation of the constitutional right to the relevant evidence that is considered in article 24.2 of the EC which leads, to taking into consideration the adoption of an appeal to grant the nullity of the part processed since the start of the oral proceedings, in order for the trial to be reproduced before another Judge of the Penal Court, thus rectifying the omission of the witness evidence produced".*

Lastly, the nullity of the Judgement and of the trial that took place before the Penal Court is declared in a judgement. It concerns Judgement number 165/2.007, dated 14th June, from Section 2 of the Provincial Court of Las Palmas, which takes up a case where the victim made her statement before a Judge of the Instruction Court (in the presence and with the intervention of the defence and accusation's lawyers) but that, later, made use of the right of exemption granted by article 416 of the Rules of Criminal Procedure. This judgement analyses the problem related to the fact that, within these cases referred to the plaintiff's silence, the reading of her initial statement during the oral proceedings, should be considered as appropriate, following articles 714 and 730 of the Rules of Criminal Procedure. The Penal Court decided that it should not, considering that the case related to article 730 of the Rules of Criminal Procedure does not concur. Nevertheless, the Court considers that that reading should have been made, arguing that

> *"introducing the statement of the victim (plaintiff) of gender violence, within the proceedings, through the channel of article 714 of the Rules of Criminal Procedure, would have not damaged the right to a defence, since the plaintiff answered the questions made by the lawyer of the charged party, thus guaranteeing the principle of contradiction. And her silence during the oral proceedings can and must be evaluated by the Judge or the Tribunal as a kind of contradiction, although a tacit one, as regards her initial active positioning, consisting of giving notice of a report, voluntarily, and considering both (first statement and later silence), as well as the remaining evidence practiced within the oral proceedings, and then forming up his conviction, to acquit or condemn the accused, depending on the case".*

In this case, and bearing in mind that the reading of the statement the victim provided during the instruction did not take place, the trial and later judgement are declared null, so that a new trial takes place, with a different judge, in which, if the plaintiff were to make use of her right not to make a statement (article 416 of the Rules of Criminal Procedure), the statement made by her, made during the instruction phase, should be read, thus allowing the ruling Judge to evaluate all the evidence practised in that action, with a freedom of criterion.

II.12.2. Denegació de prova en primera instància i falta de suspensió del judici

Sentence number 559/2.007, dated 29th June, from Section 27 of the Provincial Court of Madrid, declares the nullity of the proceedings because two pieces of evidence proposed by the appellant were unduly rejected, giving way to defencelessness: the allegations made by her workmate who had been with the victim and seen the marks on her body a few hours after the action took place and the experts' psychological report that would allow to evaluate her credibility; thus, requesting to perform the two pieces of evidence in appeal before the Court, again. The Court considers the appeal because the evidence proposed by the now appealer was relevant, necessary, and possible; and its rejection gave way to defencelessness, when she was deprived of the possibility to produce some elements that were transcendental for a proper resolution of the proceedings. Nevertheless, the sentence does not order practising that evidence before the Court but it orders the nullity of the oral proceedings and the judgement.

> *"because, on the one hand, it is forbidden; when enforcing the law and the doctrine exposed, in order to prevent the division of the probative evaluation that would take place when integrating the result of some evidence practiced during the appeal with the result of others of a personal type, practised during the instance and, thus, excluded from the necessary immediacy, which would prevent this Court from getting the right conviction to gage its consistency and reliability. But, on the other hand, and specially, to prevent distorting the right to a double instance of the accused for whom, while acquitted in the sentence that is challenged, a convicting sentence is sought by this Court. (similar considerations may be found in the Judgement 103/2006, dated 25th April, from the Provincial Court of Asturias and Judgement 349/2006, dated 6th April, from Section 17 of the Provincial Court of Madrid) ".*

Judgement number 106/2.007, dated3rd May, from Section 2 of the Provincial Court of Las Palmas, which orders the nullity of the acquittal sentence (established by the Penal Court) because the trial was not suspended when the witness-victim did not appear in Court, should also be mentioned. On the other hand and as stated earlier, this resolution stresses the obligation of the victim (called up as a witness) to be present at the proceedings, notwithstanding that the same (once she shows up) might make use of her right to refuse making any statements (as awarded by article 416 of the Rules of Criminal Procedure).

II.12.3. Other reasons for nullity

The studied sentences also contain an heterogeneous series of cases where a motivation for nullity is considered.

In the first place, Judgement number 90/2.008, dated 7th February, from Section 1 of the Provincial Court of Alicante orders the nullity of the judgement and of the oral proceedings because the defence writing had been presented within the required time.

On the other hand, Judgement number 5/2.007, dated 11th January, from Section 3 of the Provincial Court of Cadiz, considers the nullity of the trial due to a summons fault.

Last, Judgement number 85/2.007, dated 23rd October, of the Provincial Court of Cuenca, orders the nullity of the trial because it understands that the First Instance Court passed a judgement when it was the Court of Violence on Women which should have been the competent authority for it, because it concerned a case of gender violence.

III. CONCLUSIONS

ONE. - *Distribution of the resolutions*

Most of the declarations within the Sections Specialized in Violence on Women of the Provincial Courts that have been part of our sample object of the present study -95,48%- relate to appeals against judgement s passed by the Penal Courts (89,06%) or by the Courts of Violence on Women, within trials for infractions (6,42%).

SECOND.- *Sense of the ruling*

Most of the resolutions passed by the Provincial Courts within this scope, either on the appeal phase or first instance trial, are condemnatory ones, and this happens in 84,91% of the judgements that have integrated the sample of study.

This is mentioned at this time, as in the case of the previous conclusion, to contextualize the forthcoming ones.

THIRTS.- *On the penal types that are the object of a convicting and acquitting sentence*.

The offense of occasional mistreatment mentioned in article 153 of the Penal Code is the penal type that is the object of trial most often within our Courts. They make up 59,33% (267 judgements) of the 450 convicting sentences and 65,35% (66 judgements) of the acquittals. They are followed by the offenses of minor threats and of violation of sentences or precautionary or safety measures.

The offense of regular violence related to article 173.2 of the Penal Code continues to be of a residual application: it gets 6,22% (28 judgements) of the convicting sentences and 11,88% (12 judgements) of the acquittals.

Therefore, we may conclude that the gender violence as regards to which accusations are formulated in a general basis and which, therefore, is the object of sanctions also in a general basis, is reduced to the types referred to minor actions.

FOUR.- *On the form of the judgements*

The complete integration of the account of proven evidence and of the ruling on the s judgements passed on an appeal by the Provincial Courts, allow us to know exactly the facts that are object of the accusation and to evaluate the assumptions of the argumentation followed by these Courts.

On the other hand, when the complete account of the facts declared proven by the Penal Court or the ruling passed is not incorporated to the resolution of the Provincial Court, the evaluation of the arguments of the judgement passed in the appeal is made extraordinarily difficult.

FIVE.- *Gender terminology*

The terminology of “gender” is settled for the legal resolutions, in coherence with the positive stress given to the concept by the legislator.

Nevertheless, a plurality of concepts are used within the resolutions to refer to the case of typified action (offense of gender violence, offense of violence against women, offense of domestic violence related to article 153.1 of the Penal Code, offense of violence within the family scope, injuries within the family scope, aggravated offense of gender violence, offense of mistreatment, aggravated offense of regular psychical domestic violence, simple and aggravated domestic violence offense...). A precise identification of the different penal types and their application in a uniform way in the legal resolutions is thus advisable.

SIX.- *On the arguments for acquittal*

Within an important number of cases, it is not possible to point out what causes have led to the total or partial acquittal of the accused parties, in the judgements of different provincial Courts that solve the appeals, either due to the concise arguments they are based on, or because the later are focused on other varied aspects that are being debated.

Specifically, some of the acquittal rulings are supported, exclusively, by the constitutional doctrine arisen from Judgement 167/2.002 of the Constitutional Court, which does not allow the Provincial Courts to condemn an accused person that has initially been acquitted, based on a new evaluation of statements from witnesses, experts and accused people during the first instance, if the appeal court has not been present at this evidence under the principles of publicity, immediacy and contradiction.

SEVEN.- *The specific projection of article 416 of the Rules of Criminal Procedure on the acquittal at the ruling of these offenses.*

The exemption from the requirement to give evidence, within the wording maintained in article 416 of the Rules of Criminal Procedure since the 19th century, originates a great deal of the acquittal rulings passed on the matter of gender violence

The wording of the ruling produces distortions within the scope of gender violence since, in a great number of occasions, these offenses take place within a private environment, thus, the victim's statement has a special relevance. Maintaining the present wording of the ruling, somehow, gets these offenses nearer to the consideration of private offenses.

EIGHT.- *The victim's statement as accusation evidence.*

Of the total sentences analysed, in 148 of them, the victim's statement is considered as accusation evidence, although in 114 of them there is a concurrence of peripheral corroborations that prove the content of that statement. Within the reminder, that is, in 34, the statement of the victim is the only evidence practiced; out of those, in 14, it helps get a condemning sentence and, in 11, to get an acquittal. Within the reminding 9, other aspects are evaluated in the Court judgement passed on second instance, such as the immediacy of the Judge *a quo*

or the absence of a statement from the victim within the oral proceedings, thus the accusation evidence consisting on the statement from the victim and those other aspects is not considered.

NINE.- *On the existence of a subjective element within the offenses of gender violence.*

Since the Comprehensive Law was enforced, some jurisdictional bodies have been requesting a subjective element (intention to degrade, subjugate or dominate) that was not required when interpreting the penal types connected with domestic violence (not even now), in order to satisfy the legal requirements of penal types connected with gender violence.

Most of the resolutions of the Provincial Courts do not examine this question, which means that the question related to the integration or non-integration of the finalistic element within the offenses of gender violence has not been taken up by the parties, in these cases. Whenever it has been object of debate or whenever the Provincial Courts have examined this ex-officio question, which has happened in 17% of the resolutions that integrate the study sample, 66% of the cases have opted to consider that article 1 of the Comprehensive Law defines a subjective element within the offenses of gender violence.

The totality of the sentences that are object of the present study, thus, reflect various interpretative positions: some consider that it is enough to deserve the penal reproach that the typical behaviour of the man towards his spouse or wife is carried on, that she is or has been attached to him by a similar affective relationship, even when they have not been living together; notwithstanding, others consider that it is necessary to prove a subjective element: the intention of the author to “degrade, subjugate or dominate the victim; a third one holds an intermediate position, stating that this intention to degrade and dominate is presumed when the offensive acts are performed by the man over the woman taking advantage of the affective relationship related to the couple, but admitting this presumption of evidence against him. These varied positions have produced – at least until the Constitutional Court has issued a statement on this matter in Judgement 59/2.008, dated 14th May- a number of different responses to the same problems, so that the principle of legal safety could be affected.

Specifically, an applicable consequence that has been noticed within the resolutions that require a concurrence of that subjective element is that of degrading the behaviour to an infraction.

TEN.- *Circumstances that may modify the criminal responsibility.*

The judgements analysed reveal the scarce incidence of the circumstances that may modify the criminal responsibility on the rulings related to convicting sentences within the offenses of gender violence; also, specifically, the ones connected with the influence of alcoholic drinks or drugs or narcotic substances on the possibility to attribute the authorship (which have been considered in 3.78% of the condemning resolutions as an extenuating circumstance and in 0,89% of them as an incomplete extenuating circumstance) or the psychical alteration (considered as an incomplete extenuating circumstance in 0,89% of those resolutions).

They show, in this way, percentages that are even rather smaller than the ones shown within the sentences passed in cases related to homicide and/or murder.

The aggravating circumstance that is most applied within condemning resolutions that are object of study is that of recidivism (21 sentences, that is, 4,67%) followed by that of kinship (13 sentences, 2,89% of them). In addition to the earlier ones, only the circumstance of abuse of superiority (1 sentence) and the circumstance of abuse of confidence (also 1 sentence) have been applied.

None of the sentences analysed considers the concurrence of a complete exemption.

ELEVEN.- *On the consent of the victim in relation to the consummation of the offense of violation of a sentence or precautionary measure*.

Within the resolutions analysed –passed prior to the non-jurisdictional Agreement of the General Court in the Second Division of the High Court dated 25th November 2.008- the legal debate, introduced “ex-novo” is maintained in its projection to cases of gender violence, concerning the relevance of the consent of

the victim in relation to the consummation of the offense of violation of a sentence or precautionary measures, as regards the measures adopted for the protection of the victims, very specially in what concerns the measure of restrictive measures (to prevent the offender from getting near the victim), offering different interpretative solutions.

TWELVE.- *Application of the concept "similar affective relationship"*

The majority of the resolutions analysed that take up the interpretation of this concept opt for the application of the Comprehensive Law to cases of engagements or to the new sentimental relationships that are originating in our society. Nevertheless, the legal term "similar affective relationship even when not living together" is a non-legal concept that allows for the different doctrines of the Provincial Courts to offer various solutions when subsuming or excluding the violence originated within this scope in the area of specific protection that is introduced with the Comprehensive Law.

THIRTEEN.- *Sentences imposed.*

Even though, the prison sentence and that of works for the benefit of the community are alternatively considered as the main sentences for offenses connected with gender violence, the first one is the more generally applied one.

Another prescriptive sentence in the offenses connected to gender violence, as is the restrictive order, to prevent the offender getting near the victim, has been specifically applied in 356 convicting sentences (79,11%), although the absence, in several cases, of a full reproduction of the ruling of the sentence of instance by the Provincial Court could have hidden a higher percentage. This ban referred to family members or third parties has been specifically applied in 16 (3,56%) of the convicting sentences.

The sentence related to the deprivation of the right to have or carry arms has been specifically applied in 333 (74%) of the convicting sentences, although the exceptions mentioned in the earlier paragraph should also be taken into account.

The sentence related to the ban on communicating with the victim, which is optional, has been applied in 285 (63,33%) of the condemning sentences,

raising to 10 (2,22%) of them the cases related to the extension of this prohibition to family members or third parties. Here, also, the exceptions mentioned in the earlier paragraph apply.

A total of 10 sentences banning the right to live in a particular place have been passed.

Within the analysed resolutions, no sentence concerning the suspension of the visiting rights previously agreed has been passed.

FOURTEEN.- *On the presumed false accusations.*

From the 350 resolutions that have been studied, only one, meaning 0,19% of the total, is directly related to a case that could be framed within this scope, notwithstanding the right to other possible readings.

FIFTEEN.- O*n the nullity of actuations.*

The nullity of actuations is passed in a very limited number of the judgements that are object of study, standing out the ones that are related to the application of the exemption from the requirement to give evidence as per article 416 of the Rules of Criminal Procedure.

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