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ÍNDICE

LEGAL FEMINISM AND CRIMINAL JUSTICE: CHALLENGES OF LAW AS AN INSTRUMENT OF SUBVERSION OF THE NARRATIVES OF DOMINATION*

Feminismo jurídico y justicia penal: desafíos del Derecho como instrumento de subversión de las narrativas de dominación

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Abstract: Gender equality represents one of the seventeen goals of the 2030 Agenda for Sustainable Development without which it is not possible to implement the

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universal plan of action aimed at protecting the planet, strengthening universal peace, guaranteeing shared prosperity and ensuring the personal development of all human beings in dignity and equality. However, serious situations of inequality still persist in societies and the Law does not remain oblivious to this social context as it is permeated by the same oppressive logics and narratives of domination that govern the structure of life, perpetuating the discrimination that already exists in the social discourse, and therefore also gender stereotypes. In this way, the main objective of this paper is to critically analyse the specific situation of the victim of gendered violence in the Spanish criminal justice system, and to make proposals to give visibility to the real will of the victim and to take it into account through the emancipatory character presupposed by Law as an instrument of change, due to its ambivalent nature of conformity and subversion of the narratives of domination.

Keywords: feminism, restorative justice, criminal mediation, gendered violence, secondary victimisation

Resumen: La igualdad de género representa uno de los diecisiete objetivos contenidos en la Agenda 2030 para el Desarrollo Sostenible sin el cual no es posible llevar a cabo el plan de acción universal dirigido a proteger el planeta, fortalecer la paz universal, garantizar una prosperidad compartida y asegurar el desarrollo personal de todos los seres humanos en dignidad e igualdad. Sin embargo, aún asistimos a importantes situaciones de desigualdad en las sociedades y el Derecho no permanece en modo alguno ajeno a dicho contexto en la medida en que está permeado por las mismas lógicas de carácter opresivo y las mismas narrativas de dominación que rigen la estructura de la vida en sociedad, perpetuando las discriminaciones existentes en el discurso social y, por tanto, también los estereotipos de género. Así pues, el objetivo principal del presente trabajo será analizar de forma crítica la situación particular de la víctima de violencia de género en el sistema de justicia penal español elaborando propuestas que permitan dar visibilidad y atender a su verdadera voluntad a través del carácter emancipatorio que se le presupone al Derecho como un instrumento de cambio debido a su naturaleza ambivalente de conformidad y subversión de las narrativas de dominación.

Palabras clave: feminismo, justicia restaurativa, mediación penal, violencia de género, victimización secundaria

I. INTRODUCTION

The fact that gender equality is one of the seventeen goals of the 2030 Agenda for Sustainable Development[1] should make people reflect on the in-

[1] Adopted by Resolution of 25 September 2015, it represents an action plan articulated around 17 goals and 169 related targets —all of which are of an integrated and indivisible nature, combining the economic, social and environmental dimensions— designed to follow on from the Millennium Development Goals and achieve what they were unable to do. In this way, these goals are to be implemented by all countries and stakeholders through a global partnership based on a spirit of solidarity in order to be able to act over a period of 15 years in all areas of relevance for the planet and humanity, thereby improving the living conditions of all people and, as a consequence,

equality and discrimination that women have suffered and continue to suffer throughout history. In other words, to think about what progress has been made in the fight for gender equality and what challenges and problems remain to achieve.

In this sense, according to UN Women[2], it is necessary to highlight that the achievement of gender equality, as well as the enjoyment of human rights in general, are two key elements without which it is not possible to implement the universal plan of action aimed at protecting the planet, strengthening universal peace, guaranteeing shared prosperity and ensuring the personal development of all human beings in dignity and equality. That is, there can be no sustainable development if half of the world's population is still denied access to all spheres and areas of life on the basis of equal opportunities and conditions.

In that way, gender equality is understood as essential for progress on each of the Sustainable Development Goals (from now on, SDGs). Yet, it is not just a tool to achieve the goals, but a goal in itself. Thus, SDG-5 on gender equality aims to "*achieve gender equality and empower all women and girls*" and, under this auspice, Target 5.C proposes the adoption and strengthening of sound policies and enforceable laws to promote gender equality and the empowerment of all women and girls at all levels as a means of implementation.

However, it seems that there is still room for improvement in the fight for equality when, in the light of the positions defended by certain voices belonging to new political ideologies, particularly those linked to the extreme right both in Europe and in Spain, a significant step backwards can be seen in the conquest of fundamental rights such as those rights that make equality between women and men possible and which, even today, are sometimes questioned by populist political tendencies.

These populist currents, with a strong "white supremacist ethno-nationalist" character coming from the extreme right and to which certain strata of the working class who are willing to listen to their proposals are attracted, are particularly linked to neoliberalism and capitalism. This is because class and status injustices are rooted in the current "financialised" capitalist sys-

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transforming the world as society knows it, where sustainable development is currently at a critical juncture.

2 UN Women (2018: 2-3).

tem, in which the harms experienced by the working class must be connected to those suffered by women, migrants and LGBTQI+ people[3].

In this sense, the dynamics of the neo-liberal capitalist system and the economic model of growth established in today's Western societies which, far from any attempt to promote equality, leads to an exponential increase in the inequality of social relations, must be added to the above[4].

In that way, despite the explicit recognition of gender equality at international level and in the constitutions of Western countries, situations of inequality still persist in these societies, in the face of an apparent conquest of rights that has already been achieved[5]. Therefore, neither justice nor the Law remain oblivious to this social context of inequality, as they are permeated by the same oppressive logics and narratives of domination that govern the structure of life in society[6]. Thus, understanding Law as a contextual social construction, it perpetuates the discrimination that already exists in the social discourse[7], and therefore also gender stereotypes[8].

Thus, by analysing how second-wave feminism sought to expose the androcentric character of capitalism through the slogan "The Personal is Political"[9], and attributed a legal-criminal relevance to the phenomenon of gendered violence, it will be examined how this also led to the adoption of so-called "no-drop policies", which ignore the real will of the victims of this kind of violence[10] and reflect the existence of a judicial system that is often based on stereotypes and prejudices.

In this sense, the main objective of this paper is to critically analyse the specific situation of the victim of gendered violence in the Spanish criminal justice system, and to make proposals to give visibility to the real will of the victim and to take it into account. In particular, that which represents the current of restorative justice and the practice of criminal mediation as a tool aimed at the revaluation and empowerment of the victim of gendered violence, which will be examined from a feminist perspective. In this line, the aim is to assert the emancipatory character presupposed by Law as an instrument of change, due to its ambivalent nature of conformity and sub-

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3 In this regard, see Fraser (2020: 94 and 186).
4 On this issue, see De Sousa Santos (2005: 181).
5 Barona Vilar (2018: 29-30).
6 Of this opinion are Soriano Arnanz and Simó Soler (2021: 188-192).
7 See De Lamo (2022: 45).
8 Martínez García (2018: 23).
9 Fraser (2013: 1).
10 On this issue, see Sanz Mulas (2019: 63-74).

version of the narratives of domination that govern today's globalised and capitalist society.

II. LAW AS AN INSTRUMENT OF CONFORMITY AND SUBVERSION OF INEQUALITY

As mentioned in the introduction to this paper, despite the explicit recognition of equality between women and men in constitutional texts, situations of inequality can still be observed. It is true that this inequality is even greater, and much more pronounced, in less developed and developing countries, where equality is not even formally recognised at the legal level. The living example of the fact that there is still a long way to go towards achieving this desideratum is the kind of paradox that can be observed in developed Western countries where there is an aesthetic discourse of progress, recognition and absolute respect for human rights, but which clashes head-on with a very different reality[11].

A reality in which it is necessary to continue fighting to achieve this desire for equality, equity and visibility. And this requires a profound transformation of thought and culture that allows the empowerment of those who for centuries have remained on the margins of the hegemonic core of the dominant discourse, under the existence of stereotypes and patriarchal roles, being silenced, forgotten and marginalised[12].

But this situation, which is still reproduced in the less developed countries, is particular worrying in those countries where, at least formally, equality between men and women is proclaimed as a conquest that has been achieved, a regression in rights and guarantees can be perceived in a society that, despite political, economic, cultural and technological progress, is drifting towards greater inequality and injustice[13].

In this sense, justice —one of the fundamental pillars on which the rule of law is based— is no stranger to this social context of inequality and stereotyping, even if it is disguised by an apparent discourse of equality based on the recognition of formal equality in Western countries at the international and constitutional levels. But neither justice nor the Law —as the neutral institution that it should be— is oblivious to this context. It goes without saying, then, that if there is one thing that characterises the world in which

11 Barona Vilar (2018: 29-30).
12 Barona Vilar (2018: 31).
13 Barona Vilar (2019b: 35).

we live, it is its vast inequalities. Inequalities that are not only economic, but also linked to status hierarchies, which at the end of the last century led to demands for legal and cultural recognition, that is, "recognition policies" for the sake of equality and the prohibition of discrimination[14].

What is less clear, however, is to admit that this structural inequality present in society has permeated neutral institutions such as the Law and, consequently, the justice system[15]. Nevertheless, this can be understood in terms of the phenomenon of globalisation that characterises modern society today, especially in relation to the neoliberal capitalist system and the economic growth model since neoliberalism, beyond representing a specific version of the capitalist model of production, constitutes a model of civilisation based on the exponential increase in the inequality of social relations[16].

It should be noted that neoliberal thinking, based on the ontology that each individual is his or her own entrepreneur, and on the epistemology that truth depends on the market, eliminates the function of resolving conflicting interests insofar as they are subordinated to the interests of capital accumulation. In other words, it eliminates the political function of social transformation, oriented towards the search for equality and the emancipation of subjects and collectives[17].

Thus, the capitalist crisis that today's society is experiencing is therefore not only an economic or financial crisis, but it goes beyond that and crosses other dimensions, namely social and political. Hence the emergence of social movements that fight against the injustices mentioned above, such as feminism, environmentalism, LGBTQI+, anti-racism or pro-immigrant movements. In other words, this is not simply a crisis of inequality, precarity, migration, ecology or politics[18]. In fact, capitalist society is facing a general crisis affecting the entire social order, characterised by dynamics of domination and oppression, and leading to structural injustices. That is, different forms of social injustice such as class exploitation, racial-imperial oppression and gender and sexual domination[19].

In this line, going into the framework of Law, it should be pointed out how the social contract that has traditionally governed social organisation in the West has taken as its subject of reference an archetype of the indi-

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14 Along this line of thought, see Fraser (1996: 18).
15 Soriano Arnanz and Simó Soler (2021: 188).
16 In this regard, see De Sousa Santos (2005: 181).
17 Reverter Bañón (2020: 200).
18 Fraser (2020: 10).
19 Fraser (2021: 104).

vidual that does not represent the population as a whole, leading either to the non-recognition or to the late recognition of the rights of those subjects who do not fit this model of the individual[20]. In other words, after the liberal revolutions of the 18th century and the first declarations of human rights in the West —Virginia (1776) and France (1789)—, legal systems were shaped by the liberal approach and the individual who became the subject of rights was limited to male, white, adult, with purchasing power, etc[21]. In this sense, understanding that Law is a contextual social construction, it seems easier to assume that it will be permeated by the same oppressive logics and narratives of domination that govern the structure of life in society[22].

Thus, one can understand the existence of norms in which the political-legal referent subject followed for their interpretation and subsequent application has been the male, white, heterosexual, cisgender, with economic resources and without disabilities, which has led to the traditional social exclusion of certain groups also being enforced by the Law[23]. In this sense, the social contract in modern states entailed the creation of relations of domination in the public sphere, subordination in the private sphere, and exclusion in the criminal sphere[24].

When an individual or social group blocks a sphere of power relations, turning them into a fixed and immovable element through political, economic or military instruments, a state of domination is created[25], which in the case of patriarchy it materialises in a situation of generalised oppression of women and the domination of men[26].

In this sense, the marginalisation of those groups that do not fit the archetype of the referent subject, due to their gender, sexual or racial diversity, from the process of approving the rules and their application, completely obscures the universal, objective and rational nature of the Law, which is inherent to it. In other words, excluding women, LGBTQI+ people or migrants from this process reinforces the performative nature of Law in order to legitimise power structures. In this way, it becomes a kind of "labelling" which, from the moment it is embodied in judicial decisions, constitutes a legitimising mechanism for these power structures insofar as the authority

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20 Along this line of thought, see Soriano Arnanz and Simó Soler (2021: 191-192).
21 De Lamo (2022: 42).
22 Soriano Arnanz and Simó Soler (2021: 191-192).
23 Of this opinion is Simó Soler (2019: 95).
24 Sánchez-Moreno (2020: 5).
25 See Foucault (1999: 711).
26 Brunet Icart and Santamaría Velasco (2016: 63).

with which it is invested allows it to proclaim, standardise and normalise a reality. In this case, the relations of domination[27].

Thus, the exclusion and marginalisation of women outside the process of law-making and its subsequent interpretation and application by legal actors means that the Law acquires an irrational, subjective and personalised character that revolves around the figure of the man, hence the existence of stereotyped responses and decisions based on prejudices[28].

Thereby, if the legal norm is understood to be masculine, then the application of Law is an exercise in masculine reasoning, because by emphasising the value of neutrality, and understanding that it exists in the Law, the dynamics of the legal system become enveloped with masculine power. In this sense, insofar as women's discourse cannot adopt the masculine point of view, it cannot therefore claim to be objective. Thus, if women's discourse is subjective, this only leads to its marginalisation by the legal system[29].

Along these lines, according to UN Women[30] laws in fact reflect and reinforce the privileges and interests of those who hold power, whether in terms of social class, racial origin, religion or gender. Following this scheme, therefore, justice systems also reflect such imbalances and inequalities.

Indeed, one of the many ways in which gender stereotypes are perpetuated over time is through the laws, policies and practices of states. In this sense, when a state uses these instruments to implement, enforce or perpetuate a gender stereotype, what it is actually doing is furthering its institutionalisation by giving it the same force and authority as the Law. In other words, the legal system as a state institution promotes the application, enforcement and perpetuation of stereotypes by creating a situation of legitimacy and normality[31]. In reality, however, it is not the Law that creates discrimination per se, but rather, as an instrument of conformity, it perpetuates discriminations that already exist in the social discourse[32].

Nevertheless, this should not lead to ignoring the emancipatory nature of Law as an instrument of change by its very nature and virtuality, since it is also a space for transformation in that it can recognise the traditionally

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27 Soriano Arnanz and Simó Soler (2021: 191-192).
28 Simó Soler (2019: 95-96).
29 On this issue, see Jackson (1992: 210).
30 UN Women (2011: 11).
31 Cook and Cusack (2009: 42).
32 Of this opinion is De Lamo (2022: 45).

forgotten and marginalised subjects and their experiences, as well as contribute to the reparation of the harmful effects of the norms[33].

III. FROM ANDROCENTRISM TO THE FEMINISATION OF THE JUSTICE SYSTEM

In this sense, women's right of access to justice cannot be addressed separately and independently from the treatment of women in society or, in other words, from the inequality and discrimination they suffer because, as it is has said, the Law, and therefore the judicial system, has the capacity to reflect the same logic of oppression that structures social life. This is because the evolution of societies throughout history has followed a single order, namely the order designed, established and conquered by men, which has meant that all social progress and achievements have been made without women, and even at their expense. Family, religion, justice and democracy have been built within the framework of an androcentric society inspired by a single worldview that has led to the silence, invisibility and marginalisation of women[34].

Thus, if Law is power, then the design of legal-procedural institutions has been configured on the premise that conflicts have had only one protagonist, who has been the man, leading to the marginalisation of women's experiences and singularities with the consequent legitimisation of inequality by the Law itself and its application through outdated and repealed rules that denied women citizenship rights such as the right to vote, among many other examples[35].

All of this has resulted in a judicial system that —at times— reflects the same stereotypes and prejudices that exist in society, inherited from successive legislations marked by the absence of a gender perspective. Indeed, as early as the 1970s, the movement known as "Feminist Jurisprudence", which originated in the Anglo-Saxon and Scandinavian academic world, denounced that the Law is *(i)* masculine because it sees and treats women in the way men do; *(ii)* sexist insofar as it ignores the experiences and needs of women; and also *(iii)* gendered insofar as power relations —patriarchy, if preferred— are faithfully reflected in the legal norm[36]. In

33 Soriano Arnanz and Simó Soler (2021: 192).
34 Barona Vilar (2019b: 32).
35 Martínez García (2019: 62).
36 Martínez García (2018: 23).

other words, the state is male from a feminist perspective insofar as it constitutes the social order following the interest of men as a gender, and this is done through its legitimising norms, its relation to society and its substantive policies[37].

In the same vein, firstly, the Law is sexist because when differentiating between men and women, it placed women at a disadvantage, that is, *(i)* it gave them fewer material resources (think of marriage and divorce); *(ii)* it judged them on the basis of prejudice (see sexual promiscuity); *(iii)* it denied them equal opportunities; and finally *(iv)* it ignored the harms caused to women when those harms were to the advantage of men (prostitution and rape laws). Secondly, the Law is masculine not because legislators and lawyers are men, but because the notes of neutrality and objectivity that should characterise the Law are masculine values that have acquired the quality of universality. Finally, the fact that the Law is gendered means that, contrary to the previous statement, it does not imply establishing a category or an empirical referent that is male or female, but rather a subjective position that is endowed with gender, but which is not associated with sex by biological, psychological or social elements[38].

This is why feminist legal theory questions the supposed neutrality of the Law, based on the conception that legal systems follow a design marked by an androcentric perspective. This can be seen by way of example in the identification of the diligence of an average person in the Spanish Civil Code with the "diligence of a good father of a family". Thus, this idea of the patriarchal design of legal systems began to be developed from the 1980s onwards by academics from radical feminism and "Critical Race Theory" such as Mackinnon, Scales and Thorton, as opposed to liberal feminism, which until that time had conceived legal systems as neutral systems in which some discriminatory provisions could be corrected through reforms[39].

In essence, what the "Feminist Jurisprudence" movement sought to make visible was the subordinate position of women in society —understanding, in turn, that the Law favoured the maintenance of this discrimination— and to defend a theory in which women's perspective would make it possible to subvert all those prejudices and structures of legal discourse inherent to androcentrism. In this sense, that movement was based on the

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37 MacKinnon (1983: 644).
38 Smart (2000: 34).
39 De Lamo (2022: 44).

assumption that behind the Law there was a false neutrality based on the invisibility of women through the legal language derived from androgynous thought. But also, a false objectivity insofar as the thinking of those who proceeded to its application was linked to the norm, so that there was not a single legal discourse but as many as there were people participating in its construction, since there were factors that conditioned this false objectivity, such as androcentrism, classism or racism. This is why, although it is true that progress has been made, it is still possible to observe, as mentioned above, certain judicial decisions in which the legal argumentation reflects a masculine dialogue mainly translated into the application of stereotypes and prejudices[40].

Thus, the Council of Europe has identified gender stereotypes as one of the main obstacles to women's access to justice at two levels, namely at the institutional/legal level ("gender stereotypes and prejudices on the part of legal professionals") and at the socio-economic and cultural level ("gender stereotypes and cultural attitudes")[41].

The desideratum to be achieved is not only to fight against the glass ceiling and the sticky floor, but to promote a substantial change in thinking, discourse and interpretation through the internalisation of certain values that go hand in hand with gender equality education, in order to ultimately contribute to the transformation of dialectics and legal language[42].

In this sense, the key lies in subverting the methodology that studies the Law by looking at who makes and interprets the rules. To do so, it is necessary to introduce the perspective of those to whom they apply. In this case, this is called "feminist self-consciousness", a methodology that incorporates women's experiences into the study of Law in order make visible the origins of the violence they suffer, and which was promoted by radical feminism in the 1960s and 1970s in the United States[43].

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40 Barona Vilar (2018: 32-64).
41 Council of Europe (2017: 13).
42 Barona Vilar (2019a: 56-58).
43 De Lamo (2022: 48).

IV. MANIFESTATIONS OF AN ANDROCENTRIC CRIMINAL JUSTICE SYSTEM

1. The Role of Gendered Violence Victims in Spanish Criminal Proceedings

Along this line of thought, one of the manifestations where this scheme can be easily observed is in the field of gendered violence, where the so-called "no-drop policies" take place within the framework of the criminal policy of prevention and state protection of the victims of this type of violence by overcoming the idea that it is a problem that belongs to the private sphere and attributing legal-criminal relevance to it. In this way, this has meant ignoring the real will of the victim of this type of violence in all matters relating to the initiation, continuation and termination of the corresponding criminal proceedings, as well as in matters relating to the adoption of precautionary measures and the penalties to be imposed. All this with the basic aim of protecting and safeguarding the victim, even if this is done against her real and true will, to the extent that the generalised —stereotyped— opinion persists that the female victim is a vulnerable, weak and defenceless being[44].

In the same vein, Hanna also refers to the no-drop prosecution policy, whereby cases are pursued regardless of the victim's wishes, and to the paternalistic criminal intervention insofar as a consensus has not been reached by violence against women advocacy community as to the extent to which the state should force women to collaborate in the prosecution of their offenders[45]. In this sense, the author explains how, once the police began to arrest alleged perpetrators, advocates focused their reform efforts on prosecution practices to the extent that victims' non-cooperation, suspicion or refusal to proceed led to the absence of criminal prosecution. Thus, pro-prosecution or no-drop policies were adopted, encouraging women victims to proceed through the criminal justice system, as well as not allowing prosecutors to dismiss charges at the woman's request, but instead having an obligation to continue with the proceedings and require the victim's cooperation[46].

In that way, no-drop policies can take two dimensions, namely "hard" policies, whereby cases proceed regardless of the victim's wishes if there

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44 On this issue, see Sanz Mulas (2019: 63-74).

45 Hanna (1996: 1853).

46 Hanna (1996: 1860-1862).

is sufficient evidence, and "soft" policies, where prosecutors do not force victims to participate in criminal proceedings, but provide them with assistance services and encourage them to continue the process[47].

Thus, from this hegemonic canon, gendered violence victims have been silenced by the legislation itself —sponsored by a criminal policy of prevention and maximum protection against this social scourge— within the framework of the criminal justice system, being excluded from the decision-making process regarding the resolution of the criminal conflict generated insofar as their real and true will becomes absolutely irrelevant[48].

In this sense, this will is replaced by a will that is considered to respond to the protection of the victim, but which is erroneously based on a stereotyped image of the woman who faces this type of violence and which leads, within the criminal justice system, to an exposure to the negative effects of the phenomenon of secondary victimisation.

All of this is reflected in a series of manifestations that I will examine below and against which I will defend the absolute need to revalue the role of the victim of gendered violence in the Spanish criminal justice system, which has traditionally led to her exclusion and marginalisation within the hegemonic core that has characterised the model of justice that persists to this day, still inspired —on certain occasions— by a male vision and discourse that is based on a set of stereotypes and prejudices, and which reproduces and feeds on the same logics that structure society.

In this line, by recovering these silenced voices, the aim is to assert the emancipatory character that is presupposed in Law as an instrument of change due to its ambivalent nature. In other words, with the potential to constitute a space of transformation by restoring the leading role to those subjects traditionally located on the margins, such as women victims of gendered violence, subjects of Law capable of subverting the (male) legal discourse and contributing, in short, to the achievement of the desideratum of gender equality in society.

2. Portraying the Phenomenon of Secondary Victimisation in Gendered Violence Crimes

For a long time, the victim was denied the leading role that he or she really has in the criminal process, being exposed to the expropriation of his or

47 Hanna (1996: 1863).

48 In this sense, I do share the view expressed by Ortiz Pradillo (2016: 9-12).

her own conflict by the state and being neutralised by the institutions themselves, which is why for centuries he or she has been defined as the "great forgotten one" of the criminal procedural system and even ignored. In this way, it was understood that the competence to react to the commission of a criminal act belonged to the state, which had to play the main role in criminal protection, as it was understood that the crime was committed against the state and society, so that the victims could not intervene in the reaction to the criminal offence, thus eliminating any possibility of revenge. Thus, the victim has traditionally been exposed to the effects of the phenomenon known as "secondary victimisation", which have resulted in the criminal justice system's inability to provide an adequate response to the protection of the victim's rights and needs[49].

This has recently led to reflection on the role of the victim within the criminal process, acquiring an increasingly greater role within the framework of the proposal for reform of the current model of the criminal procedural system represented by the current of restorative justice —and within it, the practice of criminal mediation— in which the movement that advocates the revaluation and protagonism of the victim in the resolution of criminal conflicts is framed[50].

In this sense, although it is true that the protection of the rights and interests of the victim of a criminal act is an essential function of the criminal process —which is not open to discussion within the framework of a democratic state— it is no less true that the exercise of this function has not always been carried out in an adequate manner, resulting in the aforementioned phenomenon of secondary victimisation, which will be discussed in more detail below and which represents one of the causes that are usually associated with the crisis that plagues the criminal justice system[51].

Thus, in connection with this tradition of systematic neglect to which the victim of crime has been subjected in the framework of the criminal justice system, we find the so-called phenomenon of secondary victimisation, which means, in essence, that the victim not only has to bear the violation of their rights and legitimate interests produced by the offender, but that the institutions themselves neutralise them, leaving aside the protection of their own rights without offering an adequate response to their needs. In other words, as a consequence of their relationship with the criminal justice sys-

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49 Barona Vilar (2019a: 64-65).

50 Flores Prada (2015: 11 and 18).

51 Rodríguez-García (2017: 275-277).

tem, the victim suffers an increase in the harm and negative effects that are already directly caused by the commission of the criminal act itself (primary victimisation), which leads, therefore, to a process of re-victimisation or double victimisation (secondary victimisation)[52].

This phenomenon of secondary victimisation is especially frequently observed in the framework of criminal proceedings for crimes of gendered violence where women victims perceive a justice system that in no way adequately addresses their needs and meets their expectations, leading to an increase in the intensity of the psychological-emotional damage, which in turn generates a sense of helplessness and a feeling of guilt, vulnerability and insecurity[53].

The most frequent manifestations of the phenomenon of secondary victimisation within the criminal justice system are usually found in different moments or stages[54], namely *(i)* in a pre-procedural phase at the time of filling the complaint by receiving certain stereotypical comments from police officers, downplaying the importance of the alleged facts and even prejudging them and the lawyers specialised in gendered violence, not providing information, or even having to wait for long periods of time in police stations or in the duty courts; *(ii)* when criminal proceedings have already begun victims are sometimes not treated in a sensitive and appropriate manner, in some judicial districts there are no victim assistance services, or in judicial offices obstacles are imposed to request information about the proceedings or to obtain documents necessary for the exercise of their rights; and finally *(iii)* in the oral trial phase, it is also common for some courts to prevent the use of screens or the development of disrespectful questioning, but without doubt one of the moments that lends itself most to this phenomenon within this phase is the one related to evidence.

3. The Statement of the Victim as the Only Incriminating Evidence

In this line, it will be in the field of evidence in which I will delve in more detail into the effects generated by the phenomenon of secondary victimisation in the framework of gendered violence through, on the one hand, the assessment of the victim's statement as the only incriminating evidence and, on the other hand, the so-called "legal exemption from the duty to

52 On this issue, see Gutiérrez et. al. (2009: 50-51) and Araya Novoa (2020: 40).
53 Gil (2018: 241-243).
54 Gil (2018: 243-245).

testify" which has caused so much ink to flow not only in doctrine but also in case law.

As a starting point, it should be noted that one of the aspects that generates most debate and concern in criminal proceedings for gendered violence crimes is indeed the one related to evidence. This happens because, in these cases, the victim of the offence is not only a victim but also a witness, and the evidentiary material available to the judge is often particularly scarce as, generally, it is only made up of the woman's statement due to the commission of such offences in a private environment[55]. In that way, the victim of the criminal act herself will often be the only one who may relate the sequence of events without any other evidence in the criminal process than her own statement, which makes her a main character not only by the simple fact of being able to become a private prosecutor in criminal proceedings, but also by subordinating the obtaining of a conviction or a guilty judgement to her statement at the oral trial phase on the basis of the exercise of the right not to testify against the defendant, in other words, the exemption from the duty to testify[56].

Beginning with the evidentiary issue raised by the statement of the victim of gendered violence as the only incriminating evidence, it should be noted that this is by no means a futile issue because, in line with what has been explained in this paper, the statement of the woman "witness-victim" is not generally understood, generating a certain amount of mistrust on the part of legal operators based on prejudices and preconceptions about the archetype of the victim[57].

In this sense, it should be pointed out firstly that the double condition of victim and witness that converges in the woman who has been the passive subject of a crime of gendered violence places her in a particular procedural status insofar as she is not a mere witness to the criminal act. In other words, a third party who is in any case alien to the offence committed, which is what defines the figure of the witness, but who is also the victim of the offence itself, which attributes certain singularities to him or her with respect to the former with repercussions on the position held within the criminal process, especially with respect to the statement that she —if she does not avail herself of the exemption from the duty to testify— may give. This is how the distinction between the figure of the witness in the strict

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55 Of this opinion is Fuentes Soriano (2018: 4).

56 González Monje (2020: 1630).

57 Of this opinion is Laurrari (2022: 155).

sense and that of the "witness-victim" or qualified witness who is granted a privileged procedural position or status, is created, but only at a doctrinal and jurisprudential level insofar as there is still no comprehensive regulation on the treatment that the victim's statement should have within criminal proceedings, except for the modification of Article 433 LECrim by Law 4/2015, of 27 April, on the Statute of the Victim of the Crime, which allows witnesses who are victims to testify accompanied by their legal representative and a person of their choice[58].

Thus, the recognition of the victim's statement in criminal proceedings as the only incrimination evidence with the power to undermine the presumption of innocence of the defendant has been widely accepted by Spanish jurisprudence (both by the Supreme Court and the Constitutional Court) for several decades, but always and in any case subjected to the concurrence of certain circumstances that would allow its plausibility to be extracted[59]. Hence, the establishment of certain parameters or criteria that should allow the judge to form his/her conviction and to attribute evidentiary value to the statement given, considering *(i)* subjective credibility (lack of subjective unbelievability of the victim); *(ii)* objective credibility (verisimilitude of the testimony); and *(iii)* persistence in the incrimination[60].

The first of the assessment parameters revolves around how to assess the credibility of the testimony. In this way, the lack of subjective credibility of the victim may be due either to the physical or psychological characteristics of the witness, such as sensory disabilities, blindness, deafness or mental disorder, to the extent that, although it is true that they do not completely nullify the testimony but weaken it. Also, the concurrence of spurious interests based on previous relations with the perpetrator, such as hatred, revenge or enmity, or for other reasons such as the intention to protect a third party[61].

The third of the parameters, which, like the previous one, is not controversial, concerns the analysis of the persistence in the incrimination and implies *(i)* the absence of substantial changes in the successive statements made by the victim, that is to say, material persistence in the incrimination

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58 On this issue, see González Monje (2020: 1631-1634) and Araya Novoa (2020: 57-59). See Supreme Court Judgment no. 282/2018, 13 June 2018 (Legal Ground 3º).

59 Fuentes Soriano (2018: 5).

60 Supreme Court Judgments no. 238/2011, 21 March 2011 (Legal Ground 2º); no. 964/2013, 17 December 2013 (Legal Ground 2º); and no. 717/2018, 17 January 2018 (Legal Grounds 2º, 3º, 4º and 6º).

61 Supreme Court Judgment no. 717/2018, 17 January (Legal Ground 3º).

materialised in the record of the various statements made; *(ii)* concreteness in the statement with no room for ambiguity, generality or vagueness; and *(iii)* the absence of contradictions between successive statements, which requires a logical connection in the narrative[62].

The interesting debate on the issue at hand arises with the requirements under the second parameter of assessment based on the plausibility of the testimony or objective credibility analysis. This requirement refers to the need for internal logic or coherence in the statement, which I do not dispute, but it also refers —and this is the important nuance— to the requirement for additional objective data support of a peripheral nature or external coherence. It should be noted that this requirement in fact prevents the recognition of the virtuality of the victim's statement in order to rebut the presumption of innocence when it is the only evidence for the prosecution in the process, insofar as it is required to provide certain evidence to corroborate its verisimilitude. In this sense, although such circumstantial evidence does not necessarily have to prove the guilt of the accused, it acquires a probative value that is at least indisputable[63].

The consequence, therefore, is that the demand for this requirement nullifies the jurisprudential affirmation that the victim's statement, even if it is the only prosecution evidence, is sufficient to rebut the presumption of innocence of the accused, as the contrary, beyond pretending to give an image of predisposition to give credibility to the testimony of the woman victim of gendered violence, makes no sense at all[64].

However, these parameters have recently been qualified in the latest line of case law pointed out by the Supreme Court in this area, and specifically in the context of gendered violence, indicating up to eleven factors that must be taken into account in the process of assessment by the judge of the victim's statement in order to confer credibility and verisimilitude on it[65]:

> (i) *security in the statement before the Court by the interrogation of the Public Prosecutor Service, the lawyer of the private prosecution and the defence;* (ii) *specific account of the events which are the subject of the case;* (iii) *clarity of exposition before the Court;* (iv) *convicting "gestural language". This element is of utmost importance and it is characterised by the way whereby the victim expresses herself in terms of the "gestures" with which she accompanies herself in her statement before the Court;* (v) *seriousness of exposition that distances the Court's belief from a figurative, fabricated or not very credible account;* (vi) *descriptive expressiveness in the account of the events that took*

62 Supreme Court Judgment no. 717/2018, 17 January (Legal Ground 6º).
63 Supreme Court Judgment no. 717/2018, 17 January (Legal Ground 4º).
64 Fuentes Soriano (2018: 6-9).
65 Supreme Court Judgment no. 119/2019, 6 March 2019 (Legal Ground 3º).

place; (vii) *absence of contradictions and concordance of the iter narrated of the facts;* (viii) *absence of gaps in the exposure story that could lead to doubts about its credibility;* (ix) *the statement must not be fragmented;* (x) *a full and unbiased account of the facts must emerge, not a piecemeal account of what is in her interest to testify and to conceal what is beneficial to her about what has happened; and* (xi) *she must tell what benefits her and her position as well as what harms her.*

Many of these factors are largely reminiscent of the parameters previously reiterated by the Supreme Court, such as the absence of contradictions and gaps, or the specific nature of the account of the events that took place, that is, those relating to what is has been called "persistence in the incrimination". However, many others refer to characteristics that are intrinsic to the victim's own personality whose appreciation acquires a subjective nature —see, for example, the importance of gestural language— which seem to be identified with the traditional stereotypes that exist about women victims of gendered violence. Thus, this leads to an even greater increase in the effects of re-victimisation and it generates a feeling of insecurity and mistrust in the victim which will eventually lead her to abandon the process and to end with the case being closed or with an acquittal. All of this because the latter factors to which we are referring to are simply a response to what is expected, as a prototype, of a victim of gendered violence, reinforcing the existing prejudices that are intended to be avoided and ignoring the special singularities of this type of crime[66].

In fact, the Supreme Court itself goes on to recognise the effect of re-victimisation that may be generated in the victim by having to relive what happened when recounting it before the Court in the plenary session after having done so, not only in police custody, but also in the pre-trial phase. In so doing, it lists another series of factors that must be taken into account in the assessment process and which qualify the previous ones[67]:

(i) *difficulties that the victim may express before the Court due to being in a setting that reminds her of the events he/she has been a victim of and that may lead to signs or expressions of fear of what has happened that come through in her statement;* (ii) *obvious fear of the accused for the commission of the act depending on the seriousness of what happened;* (iii) *fear for the family of the accused of possible reprisals, even if these have not occurred or have not been objectified, but remain the obvious and acceptable fear of the victims;* (iv) *desire to complete the declaration as soon as possible;* (v) *desire to forget the facts; and* (vi) *possible pressures from their environment or external pressures on their declaration.*

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66 González Monje (2020: 1646-1648 and 1653-1655).

67 Supreme Court Judgment no. 119/2019, 6 March 2019 (Legal Ground 3º).

Nevertheless, the parameters introduced by the Supreme Court seem to place the victim of gendered violence in a situation that is not very favourable insofar as this may be perceived as a requirement in terms of the standards that her statement must reach in order to achieve a certain degree of credibility, something that is completely distant from the objective of promoting her empowerment in order to advance towards the eradication of this type of violence[68].

In this order of things, if it is recalled what was said earlier in relation to the methodology of "feminist self-awareness", this means, in this specific field, broadening the study of Law to include the determination of the facts to which the rules apply, thus taking into account the perspective of those subjects to whom they are applied. Questions can therefore be raised about to how the courts are to assess the statements and witness evidence, in other words, how the facts of the persons to whom a rule is then to be applied are to be incorporated into the relevant judicial process. The answer to these questions is clear from feminist legal theory, which argues that the assessment of evidence by the courts is sometimes permeated by the same stereotypes and prejudices that exist in society. This phenomenon is known as "testimonial injustice" and is based on the lack of credibility of a witness in those cases in which this subject does not fit the existing stereotypes, leading to the determination of the facts introduced by them in the judicial process being subject to bias on the part of the judge. The direct consequence is the silence of the victims, who are unable to express their feelings and experiences for fear that their testimony will not be sufficiently credible[69].

4. The Exemption from the Duty to Testify

Continuing in the following paragraphs with the evidentiary problems associated with the exemption from the duty to testify, it should first be noted that all witnesses are under the obligation to testify everything that they know about what they were asked, as per Article 707 Spanish Criminal Procedure Act (from now on, LECrim), with the exception of the people set out in Articles 416, 417 and 418 LECrim, in their respective cases. Thus, following the provisions of Article 416.1 of the criminal procedure text before the latest reform in 2021, this obligation was waived for: (i) *family members of the defendant in direct ascendant or descendant lines*; (ii) *his/her spouse*

[68] González Monje (2020: 1654-1655).
[69] De Lamo (2022: 48-49)

or person linked to him/her by a de facto relationship similar to marriage; and (iii) *his/her whole or half blood brothers and sisters and blood lines up to the second civil degree*. The justification, which is easily deducible, lies in not placing the person obliged to testify in a situation of moral conflict or collision of interests between, on the one hand, his/her duty as a citizen to report the commission of a criminal offence for prosecution and to testify truthfully about it and, on the other hand, his/her duty of loyalty and affection towards people who are linked to him/her by family ties[70].

In this sense, the relevance of the exemption from the duty to testify is at least of utmost importance in the context of gendered violence in which women victims of this kind of violence, being at the same time witnesses to the facts, frequently avail themselves of this provision to avoid having to testify against their aggressor whom they may even have initially reported in their case, which ends up leading to the case being closed or with an acquittal. This occurs because despite the fact that Organic Law 1/2004, of 28 December, proceeded to reform multiple precepts and legal texts, it forgot to modify the provisions on evidence necessary for the application of measures of a criminal and criminal procedural nature, among them, Article 416 LECrim on the exemption from the duty to testify. Thus, the lack of a specific provision on this precept in matters of gendered violence led to its disparate application by the courts, which resulted in a broad debate on issues ranging from the very discussion on the applicability of the precept in this area to whether it could be applied in those cases in which the parties were no longer partners at the time of the trial, and whether the victim could avail herself of this right in the case of having reported the facts[71].

In this order, with the aim of limiting the interpretation of the precept and putting an end to the contradiction between the different jurisdictional bodies, the Spanish Supreme Court adopted a first non-jurisdictional agreement establishing that "*the exemption from the obligation to testify provided for in Art. 416.1 LECrim extends to people who are or have been linked by one of the ties referred to in the precept. The following are excepted: a) testimony for events occurring after the dissolution of the marriage or the definitive cessation of the analogous situation of affection; b) cases in which the witness appears as a prosecutor in the process*."[72] However, new questions

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70 In that way, this can be read in Supreme Court Judgment no. 160/2010, 5 March 2020 (Legal Ground 2º).

71 See Fuentes Soriano (2019: 9-10) and Rodríguez Álvarez (2019: 264).

72 Agreement of the Non-Jurisdictional Plenary of the Second Chamber of the Supreme Court of Spain of 24 April 2013.

were not long in coming, among them, whether the victim who appeared as a prosecutor at an earlier stage, but he/she withdrew before the oral trial, can benefit from the exemption[73].

The Supreme Court had occasion to rule on this issue in Judgment 449/2015, of 14 July, when it declared that a victim who, although initially appearing in the process as a private prosecutor during the pre-trial phase, waived the subsequent exercise of criminal and civil actions before the oral trial act, appearing therein as a "witness-victim", could not avail him/herself of the exemption from the duty to testify. In this sense, the interpretative problems continued to flood the debates about the controversial precept 416 LECrim insofar as, after the Supreme Court's pronouncement in this latest decision, it was not so clear what should be understood by the exercise of the private prosecution in an "active" manner[74].

In this succession of jurisprudential milestones and in a *plot twist*, the Supreme Court adopted a second non-jurisdictional decision[75] establishing that "*the possibility of availing oneself of this exemption (416 LECrim) is not excluded for those who, previously having been constituted as private prosecutor, have ceased in that capacity*". Thus, this paragraph established a new interpretative line on the validity of the exemption throughout the process that contradicted the previous position contained in Judgment 449/2015, of 14 July, aligning itself with the majority position of the Provincial Courts that had been kept up to the date of that decision[76].

Nevertheless, far from a harmonious solution —and a *happy ending*— which seemed to be in sight as a result of the Supreme Court Agreement, the Plenary of the Criminal Chamber of the High Court changed its jurisprudential doctrine once again in Judgement 389/2020, of 10 July[77], by declaring that victims, once they have been constituted as private prosecutors and have previously reported the facts, do not recover the right to the legal exemption from the duty to testify in those cases in which they waive the exercise of this procedural position and cease to do so, being obliged to testify, therefore, in the act of the oral trial. A development that responds to

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73 Herrero Álvarez (2020: 4).

74 Fuentes Soriano (2019: 10-12) and Rodríguez Álvarez (2016: 3). See Supreme Court Judgment no. 449/2015, 14 July 2015 (Legal Ground 3º).

75 Agreement of the Non-Jurisdictional Plenary of the Second Chamber of the Supreme Court of Spain of 23 January 2018.

76 Rodríguez Álvarez (2019: 267-270).

77 Supreme Court Judgment no. 389/2020, 10 July 2020 (Legal Ground 11º).

the imperative need to promote the protection of victims and, in particular, victims of gendered violence[78].

This is something that in some way was already in the offing, on the one hand, due to the numerous proposals from certain voices in defence, either of the elimination of this exemption in all criminal proceedings against crimes related to gendered violence, or of its elimination, but limited to the concurrence of certain circumstances. For example, that the victim has filed a complaint or has appeared in the process as a private prosecutor. On the other hand, to the 2017 State Pact against Gendered Violence, which included among its measures that of "*avoid areas of impunity for abusers, which may result from the existing legal provisions concerning the right to exemption from the obligation to testify, by means of appropriate legal amendments*" (measure number 143)[79].

Thus, the reasons given for this change in doctrine were based on the fact that *(i)* the right not to testify is incompatible with the position of the complainant as a victim of the facts, and even more so in cases of gendered violence, where for some crimes, his or her procedural contribution is indispensable for the effective activation of the process; *(ii)* if the complainant is acting as a private prosecutor, he or she does not have the right to waive this right in any way, insofar as the lodging of the complaint and the bringing of the prosecution imply a waiver of that right and there is no reason to proceed to its recovery and to recover its content; *(iii)* when the victim takes the decision to denounce her aggressor (against whom there is no obligation as per Article 216.1º LECrim) there can no longer be any collision between the duty to testify and the consequences of the family ties that exist between the witness and the accused, thus resolving the conflict that, due to the ties that bind her to the aggressor, allowed her to abstain from giving evidence against him; *(iv)* the "victim-witness" cannot therefore be subjected to any coercion in his or her subsequent actions when giving evidence in order to avail himself or herself of the legal dispensation; *(v)* allowing the person concerned to opt in or opt out would mean successively and indefinitely accepting the possibility that he or she could occupy one or the other status; and *(vi)* as it is an exception, the legal dispensation must be interpreted restrictively, being accepted only in those cases that justify it[80].

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78 Marí Farinós (2020: 2).

79 Rodríguez Álvarez (2019: 271-274).

80 This is how the Supreme Court puts it in the Judgment no. 389/2020, 10 July 2020 (Legal Ground 11º).

Finally, this doctrine has been translated into legislation through the reform introduced by Organic Law 8/2021, of 4 June, on Integrated Protection of Childhood and Adolescence against Violence, which has modified one of the most controversial precepts and the one that has given rise to most debate, namely Article 416 LECrim. Thus, a number of exceptions to the exemption from the duty to declare are introduced, among them, "*when the witness appears or has appeared as a private prosecutor in the process*" (Article 416.1.4º LECrim) and "*when the witness has agreed to testify in the course of the process after having been duly informed of his/her right not to testify*" (Article 416.1.5º LECrim).

In this sense, and in view of the legislative amendment which has finally been made to the controversial exemption from the duty to testify, I must point out that, although I recognise that its application in the framework of criminal proceedings for gendered violence crimes means eliminating all the material of evidence available in a large number of cases insofar as in most cases only the victim's statement is available[81], I can only express my absolute opposition to the reform[82]. That is, it does not take into account the will of the woman victim of gendered violence, with the legislator deciding —once again— for her what is most convenient in the interests of her protection with the ultimate and main objective of obtaining a guilty verdict against the defendant that does not lead to his acquittal or to the case being closed. There is no doubt that I essentially share the same sentiment as the legislator, which is to provide the victims of this kind of violence with absolute protection through all the public policies which are necessary to eradicate this social scourge.

Nevertheless, what I do not agree with is that in order to put an end to the widespread impunity that occurs in these cases, the victim must be forced to testify against her will because this is only a reflection of another prejudice whereby the legislator assumes that the woman victim of gendered violence is a helpless and defenceless person. In short, this is another case in which the true will of the victim is clearly irrelevant[83].

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81 Fuentes Soriano (2018: 9-10).

82 Along this line of thought, see Rodríguez Álvarez (2021: 5), and Castillejo Manzanares (2020: 10-11). Against this opinion are Ortiz Pradillo (2016: 16), and Fuentes Soriano (2018: 12-13).

83 In this sense, I do share the view expressed by Rodríguez Álvarez (2019: 276).

5. The Prohibition of Criminal Mediation

Another manifestation of the situation of silence faced by gendered violence victims in the Spanish criminal justice system is the prohibition of recourse to mediation in relation to this type of violence as per Article 44.5 of Organic Law 1/2004 of 28 December, on Integrated Protection Measures against Gendered Violence. This prohibition has recently been extended to the area of sexual violence with the approval of Organic Law 10/2022 of 6 September, on the Integrated Guarantee of Sexual Freedom.

This is because, starting from the premise that gendered violence is the most brutal symbol of the existing inequality in society insofar as it is a kind of violence that is directed exercised against women by the simple fact of being a woman, the legislator assumes that there is a situation of imbalance between the two victim and aggressor that prevents the existence of a level playing field and, therefore, the impossibility of reaching an agreement[84].

However, it can be argued that the victim of gendered violence is not always and in all cases in a position of imbalance or inferiority in comparison to the perpetrator, even in the case of this kind of violence. That is, it does not imply that, in each and every particular case, the woman is subjected to the aggressor in such a way that she cannot assert her dignity or defend her interests[85].

Nevertheless, perhaps the argument that best justifies the opposition to the prohibition of mediation in gendered violence is precisely that it denotes a paternalistic attitude based on the stereotype that the woman victim of this kind of violence is an incapable person of making decisions and discernment and in need of protection, which demonstrates a total lack of trust towards in her decision-making capacity[86].

To put it in these terms, criminal mediation, as the most prominent practice within the restorative justice current, aims at rediscovering the victim, revaluing her and restoring the leading role that she really has in the resolution of the criminal conflict, as well as her integral reparation for the harm caused[87], allowing women to decide to be able to participate in this type of practice that contributes to their empowerment by not diminishing or removing their capacity to decide whether or not they wish to access

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84 Álvarez Suárez (2019: 1089-1090).

85 Of this opinion is Huertas Martín (2017: 395-401).

86 Ortiz Pradillo (2016: 9-12).

87 In this sense, I do share the view expressed by Carrizo González-Castell (2017: 251-253).

restorative justice services which, by their consequences, also favour this empowerment.

In fact, without prejudice to the fact that within the feminist movement itself, criminal mediation is not exempt from misgivings, voices of the Anglo-Saxon specialised doctrine in the framework of feminist legal thought conceive mediation as a manifestation of the necessary feminisation of justice in connection with the existence of stereotypes and prejudices still present in the justice system towards women victims of gendered violence[88]. This is because the mediation system marks a distance from the adversarial nature of the litigation that is submitted to the jurisdictional channel through the judicial process, and allows women to express their feelings and emotions, as well as their own interests and needs, through negotiation techniques and dialogue. In other words, to feel heard and validated, which is why mediation is seen as a manifestation of the feminisation of the justice system[89].

In this way, it is possible to glimpse one of the common elements that connects mediation with the feminist movement, which is empowerment and the promotion of decision-making capacity. In this sense, feminism shares with the philosophy underlying this self-compositional formula, firstly, the opposition to the adversarial model of justice that characterises the judicial process —in this patriarchal vision of Law as a hierarchical conception— and to the classic flows of power, as well as, secondly, the special relevance that the interests and needs of the parties take on with a view to their adequate satisfaction[90].

Feminism is not only a social and political movement in the sense of seeking to change the vision of reality —a vision that is therefore androcentric— and to propose new forms of social relations, but also a critical theory and an ideology based on the awareness of women as a group discriminated against and subordinated to men, with the aim of achieving the liberation of sex and gender by eliminating the stereotypes and prejudices that legitimise the situation of oppression[91].

Thus, once empowerment has been identified as a common element to mediation as a self-compositive system of conflict resolution and to the feminist movement, we understand that the right of women to decide to ac-

88 In this regard, see Hernández Moura (2018: 236 and 238).
89 Rubin (2009: 355).
90 Hernández Moura (2018: 241-242).
91 Facio and Fries (2005: 263-264).

cess restorative justice services and the submission of crimes of gendered violence to mechanisms such as criminal mediation fits perfectly into the set of policies that Goal 5 of the 2030 Agenda for Sustainable Development promotes strengthening to promote gender equality and the empowerment of all women and girls, insofar as this procedure allows not only the comprehensive reparation of the victim, but also the reintegration of the offender, thus contributing to reduce recidivism.

V. CONCLUSIONS

In the pages that precede the final reflections with which I conclude my research, I have highlighted different manifestations within the Spanish justice system in which the phenomenon of secondary victimisation in the field of gendered violence materialises, within the general framework of a legal and judicial system that is permeated by prejudices and social stereotypes that end up limiting women's exercise of their right of access to justice.

Thus, through the review carried out from a feminist perspective, I have identified the preconceived ideas about the victim of this type of violence, which, in short, translate into a paternalistic view of guardianship and a lack of confidence in her capacity to make decisions. I understand that this only reinforces their re-victimisation and reproduces the very thing that we are trying to combat, which is the structural inequality present in society.

The direct consequence is that the will of these victims becomes irrelevant, turning them into silenced voices that are placed on the "margins" of a justice system that does not attend to their real needs. In this sense, the idea of their necessary empowerment and revaluation within the criminal process should be emphasised, recovering their true protagonism through the emancipatory nature of the Law as an instrument of subversion of the unequal social reality.

In this sense, one of the proposals that I have been strongly defending since I began my research in this field of study and that I believe fits perfectly into the set of policies that the 2030 Agenda aims to strengthen in order to promote gender equality and the empowerment of all women and girls, is precisely the viability of criminal mediation in the field of gendered violence and, therefore, the right of women victims of this kind of violence to decide to access restorative justice services.

The purpose of empowerment in which, therefore, there can be no place for any prohibition such as that envisaged by the Spanish legislator on

criminal mediation in the matter examined, as it is the result of a clearly paternalistic view that I consider goes against any attempt to revalue the woman victim of gendered violence and to restore the undisputed leading role that by nature she has and should have in the criminal justice system. A vision which, as I have had the opportunity to analyse in depth in this paper, affects various areas within the framework of criminal proceedings for crimes of gendered violence, such as the statement of the victim as the only incriminating evidence and the exemption from the duty to testify, and which demonstrates the need to incorporate the gender perspective into the criminal justice system.

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