

European Judicial Cooperation and Protection of Gender-Based Violence Victims, Fact or Fiction?*

Avrupa Adli İşbirliği ve Cinsiyete Dayalı Şiddet Mağdurlarının Korunması, Gerçek mi Kurgu mu?

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*This article exposes some of the conclusions of my Doctoral Thesis defended on December 13th 2019. Throughout this article I use both the first person in singular and the first person in plural. This differentiation has been made in order to distinguish between my personal opinion and the ideas explained in my PhD. Consequently, almost all the conclusions will be in plural.

ABSTRACT

Judicial cooperation between EU member States shows us the limits of the EU. These limits are not only encountered by the European legislator; national legislators and judges encounter them too. The existence of different legal systems complicates mutual recognition. The difficulties during the creation process of the Directive 2011/99/EU on the European Protection Order show us how much the EU needs to be built still. During the negotiations there was a real political will and the member States had the necessary sensitivity to propose the creation of protection measures at a European level. What failed was the lack of previous harmonization which exceedingly complicates mutual recognition and the refusal from the member States to let go of their last redoubt of national sovereignty. Gender-based violence victims find an additional problem: the non-existence of a gender concept in the EU. We must ask ourselves if we are building the EU in a proper way. Throughout this article we will discuss the creation of a European Criminal Law with gender-based violence victims as an example. At the end we propose several measures in order to fight against ignorance and fear towards using mutual recognition instruments.

Keywords: European protection measures, judicial cooperation, criminal law

Submitted: 18.03.2020 • Revision Requested: 22.04.2020 • Last Revision Received: 23.04.2020 • Accepted: 29.05.2020 • Published Online: 00.00.0000

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Citation: Borges Blázquez, R, 'European Judicial Cooperation and Protection of Gender-Based VIOLENCE Victims, Fact or Fiction?' (2020) 8(1) Ceza Hukuku ve Kriminoloji Dergisi-Journal of Penal Law and Criminology, 95.

1. Introduction

The main objective of this investigation is to analyze the protection offered to victims of gender violence throughout the European Union (EU). Freedom of movement and the right to be safe are essential human rights, which enable criminal, civil and administrative law to protect the quality of human life and to seek for a better future for the present and next generations. Nevertheless, this protection cannot be effective without a real mutual recognition (real mutual recognition implies that there is mutual trust between States) within the EU.¹ In the following pages, I present the global context that provides the basis for the current dissertation and the main objectives that are pursued, together with the structure and methodology followed to conduct the research. Throughout this article I am going to focus on the limitations of European Union Criminal Law by carrying out a two-level study that involves national Spanish law and European law. However, most of these limitations can be easily found by other national legislators due to the fact that the main problem is the lack of harmonization.

2. Background and Objectives

Protection orders are meant to protect a person against an act that may endanger their life, physical or psychological integrity, personal liberty, sexual integrity or dignity. The aim is to avoid contact between the offender and the victim.² This kind of protection measures can be adopted as part of civil and criminal proceedings depending on the European Country in which the procedure is taking place. This is the reason why we have: 1) Directive 99/2011/UE on the European Protection Order (EPO) and 2) Regulation (EU) 606/2013 on mutual recognition of protection measures in civil matters (EPM). **Most EU countries, including Spain, have** civil protection measures in place.³ This raises an issue that needs to be solved: the effectiveness in mutual recognition of civil and criminal protection measures. This question is connected with the use and abuse of criminal law⁴ that we have been facing in recent years. It is necessary to think deeply about how, when and under which circumstances we have to use criminal law.

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- 1 Francisco Javier Garrido Carrillo and Valentina Faggiani, 'La armonización de los derechos procesales en la UE' (2013) 16 Revista General de Derecho Constitucional 2.
 - 2 Suzan Van Der Aa, Johanna Niemi, Lorena Sosa, Ana Ferreira and Anna Baldry, 'Mapping the legislation and assessing the impact of Protection Orders in the European member States' <http://poems-project.com/wp-content/uploads/2015/04/Intervict-Poems-digi-1.pdf> 5.
 - 3 Ibid 5.
 - 4 Silvia Barona Vilar, 'Justicia penal desde la globalización y la postmodernidad hasta la neomodernidad' (2018) 27 Rev. Boliv. de Derecho 36.

In a border-free EU there are many situations in which individuals in need of protection require specific attention at EU level. A fact that complicates this investigation is the lack of a protection measure database in the EU. This situation leads to the fact that we can only analyze the utility of transnational protection measures by analyzing gender violence victims which already have a protection order and foreign nationality. The day in which these victims have to return to their original countries they will lack protection. There are several reasons for them to return and they can be temporary (visiting a family member) or definitive (a new job). For example, out of the 9,530 protection orders issued in Spain in the first three months of 2019, 32.3% concerned non-Spanish citizens. This raises the critical question of this investigation: If someone that is currently benefiting from protective measures issued in one member State decides to travel or reside in another member State, how can she/he be ensured that those measures are valid and enforced outside the member State of origin? This is only possible with a good implementation of Directive 99/2011/UE on the European Protection Order and Regulation (EU) 606/2013 on mutual recognition of protection measures in civil matters, from which we will be able to ensure that those measures are valid.

We have to take into account that the European Protection Order is a legal instrument of judicial cooperation. As a mechanism of judicial cooperation, the European Protection Order has to be interpreted together with other instruments of judicial cooperation: Council Framework Decision 2009/829/JHA, Council Framework Decision 2008/947/JHA and Regulation (EU) 606/2013. On the one hand, both Council Framework Decisions involve situations in which the aggressor is the one that moves to another Country. On the other hand, Regulation (EU) 606/2013 deals with the cases in which the protection measure is civil rather than criminal. Furthermore, as a mechanism for victim protection, compensation for its shortcomings should be completed through the application and the implementation of Directive 29/2012/EU (Victim's Directive). Therefore, the European Protection Order Directive should be interpreted together with the Victim's Directive to fully guarantee victims' procedural rights in criminal proceedings and to improve their protection.

The three protection measures included in Directive 99/2011/EU and in Regulation (EU) 606/2013 are found in the national legislation of all the member States. These are: to not communicate with the victim, to be banned from visiting certain places and to keep a safe distance from the victim and her/his family or friends. Their inclusion in the Directive and the Regulation seeks to establish a minimum standard of protection

for victims, without modifying the internal legislation of the member States.⁵ The Directive was supposed to lead to an approximation of this diversity. Actually, the different national systems for the protection of victims are maintained. This is why we have to ask ourselves: Are we on the right track with the Directive 99/2011/EU or are we just losing time? Is the instrument of the European Protection Order actually useful or is it only a false promise of protection to the victims? In the second case scenario, we must find a solution studying both European legislation and our national legislation.

The little use of protection measures confirms our starting question: European protection measures are not working because the EU is far from what it was supposed to be (there is no real trust between States as seen in the Puigdemont Case). We must ask ourselves if we have built the EU in a proper way. This raises new questions that I will try to answer during this research: is it possible to use the principle of mutual recognition without a higher harmonization amongst the different member States? Do we really want to build an EU without internal borders? Can we continue approaching legislation without previous harmonization of substantive law? Do our legal practitioners know the instruments of mutual recognition? Do our judges feel like European judges?⁶

This lack of harmonization leads to another problem: the lack of a concept of gender violence victims at a European level.⁷ Only when we study this element can we realize the importance of the sociological and the juridical factor working together. Only by contextualizing the national and supra national reality can we understand the reasons why each State has its own concept of gender violence. Statistic data and official reports are key elements in order to raise awareness of the problem of gender violence. A critical eye to official figures and its cost shows the need to create protection measures at a European level. According to Fundamental Right Agency (FRA) data, one out of three European women -33%- has suffered physical or sexual violence since they were 15 years old. This proportion is lowered to nearly one out of four European women -22%- if we only consider violence suffered by the partner or ex-partner. One out of three European women -32%- has suffered psychological mistreatment from her partner

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- 5 Manuel José García Rodríguez, 'Aplicación de la Orden Europea de Protección a las víctimas en el sistema de justicia penal español a través de la ley de reconocimiento mutuo de resoluciones penales en la Unión Europea' (2015) 37 *Revista General de Derecho Procesal* 7-8.
 - 6 E J E Van De Watering, 'Criminal Protection Orders: Effective legal remedies or False promises to victims? An explorative research on the effectiveness of criminal protection orders' (2013) 52-54.
 - 7 Víctor Merino, 'La concepción de la violencia de género en los ordenamientos de los Estados Miembros' in Teresa Freixes and Laura Román (dirs.), Neus Oliveras and Raquel Vañó (coords.), *La Orden Europea de Protección. Su aplicación a las víctimas de Violencia de Género* (Tecnos 2015) 46.

or ex-partner. Another fact to bear in mind is the global cost of gender violence.⁸ According to a survey from the Spanish government called “*El impacto de la violencia de género en España: una valoración de sus costes en 2016*,” in 2006 each European citizen paid between 20 and 60 euros in order to provide different social services to gender violence victims. Five years later, the total cost of gender violence within the EU was 288 billion euros (1,8% Gross Domestic Product).⁹

Despite all of these initial difficulties, I firmly believe that protection measures are essential if we want to continue building Europe. Furthermore, protecting citizens against particulars that may endanger their integrity or life is a positive State obligation. If the State does not protect us, it could be a failure of its obligations to protect us.¹⁰ European protection measures are totally necessary instruments if we want to create a real Space of Freedom, Security and Justice. Victims will only be free to move around the EU if we guarantee their right to feel secure. Moreover, only real Justice (where real implies that the Justice is inclusive and without bias or prejudice) can guarantee Freedom and security. As a consequence, in these pages I acknowledge the need for cooperation between different European States as the only way to fight against crime in a globalized society.

3. Methodology

The methodology followed for the development of this investigation is based on traditional doctrinal research, which involves the review of doctrine, legislation, jurisprudence and statistic data in order to analyze the current situation of a particular legal instrument and construct an argument which is consistent within the discipline in order to develop proposals to improve protection measures within the EU. Therefore, the sources used to carry out the current research can be classified into the following groups: scientific literature, official reports, legislation and jurisprudence. The importance of each varies according to the different fields of study and stages of the research: gender and domestic violence victims, State positive obligations and protection measures in Spain and in the EU.

8 Violencia de género contra las mujeres: una encuesta a escala de la UE. Resumen de las conclusiones. (2014) FRA. European Union Agency for Fundamental Rights 17.

9 Elena Mañas Alcón, Luis Felipe Rivera Galicia, María Teresa Gallo Rivera, Oscar Montes Pineda, Carmen Figueroa Navarro and Pablo Pietro Sánchez, *El impacto de la violencia de género en España: una valoración de sus costes en 2016* (2019) Ministerio de la Presidencia, Relaciones con las Cortes e Igualdad 44.

10 Opuz v. Turkey núm. 33401/02 (ECHR, 9 June 2009); Elena de Luis García, ‘El Derecho a una investigación efectiva en la jurisprudencia del TEDH’ (2019) 27 Rev. Boliv. de Derecho 497.

In reference to the first part, looking at the emergence and expansion of women's and children's rights to a life without violence the research has focused mainly on the analysis of national and international legal tools, official reports and the most recent jurisprudence of Spanish and European Courts. The information gathered from these sources has been completed where possible with national and international literature. Regarding the second part of the study, related to the protection measures for victims in the EU, the point of departure has been the analysis of scientific literature regarding the emergence and expansion of a criminal European law. Therefore, the research has involved the review of general literature about the construction of the EU and the most important mutual recognition instruments for the protection of victims.

4. Structure

The current research is built around two main pillars: 1) gender and domestic violence victims and 2) the positive obligation of the States to protect them within the EU (the first part of the research). With the prior premises made, we can focus on the practical part of protecting our victims: using protection instruments such as the European Protection Order (the second part of the research)

The first part refers to gender and domestic violence victims and the positive obligation of States to protect them. The link between both these concepts is risk. Gender Violence victim's risk is specific to these victims and differs from the risk which victims from other crimes suffer. In this part it is necessary to study the reasons that make this risk specific. One of the main reasons is the affectivity relationship that exists between the victims and the aggressors. As a result, these victims are not able to assess the risk which they are exposed to objectively because there are sentimental feelings involved. During the discussion in this part I support the idea that gender and domestic violence victims are the only ones to love their aggressor.¹¹ This issue makes the judicial procedure even more complicated and offers an advantage to the aggressor, as he or

11 Miguel Lorente Acosta, 'Violencia contra las mujeres: peligrosidad y valoración del riesgo' (2002) 19 *Revista Europea de Derechos Fundamentales* 186; Suzan Van Der Aa, 'Protection Orders in the European Member States: Where do we stand and where do we go from here?' (2011) *European Journal on Criminal Policy and Research*, núm, 18, 184; Dolores Calvo, *What is the Problem of Gender? Mainstreaming Gender in Migration and Development Policies in the European Union*, University of Gothenburg (2013) 20-28; Richard J Gelles, *Intimate Violence in Families*, (SAGE publications, 1997) 36.

she knows the victim's routines, which increases risk even more.¹² The latest judgements from the Spanish courts support this theory.¹³ The second factor to increase the risk of our victims is silence, the accomplice from civil society and the State. The doctrine about positive obligations of the State was created to fight against this accomplice silence.¹⁴ The State has the obligation to protect its victims and if it fails to do so it should answer to the damage inflicted to them (Istanbul Convention, CEDAW).¹⁵

The second part of the investigation consists in a discussion about the EPO as an instrument for protection against risk for the victims. It goes without saying that States are facing real difficulties to fight crime in an individual way. Consequently, a united European fight against crime is needed.¹⁶ Then I study the instrument of the EPO and its procedure of adoption, going as far as criticizing the possible reasons why it is not working as intended (data on the poor application of the Directive can be found at the end of the article).¹⁷

Finally, once the previously explained issues have been addressed, three proposals are presented in relation to the premise already pointed out, which posits that if a person has already been protected within one EU member State, in a border-free EU, those measures should be valid and enforced outside the member State of origin.

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- 12 “Violence against women is the greatest Human Right scandal of our time. From birth to death, in times of peace as well as war, women face discrimination and violence at the hands of the State, the community and the family. Violence against women is not confined to any particular political or economy system but is prevalent in every society in the world and cuts across boundaries of wealth, race and culture”. Ingrid Vledder, ‘It’s in our hands. Stop violence against women’ in Ingrid Westendorp, Ria Wolleswinkel, (eds.), *Violence in the domestic sphere* (Intersentia, 2005) 7; Beth Sipe, Evelyn Hall, *I am not your victim. Anatomy of domestic violence* (SAGE publications, 2014) 257.
- 13 Judgement Spanish Supreme Court 342/2018, 10-7-2018 (TOL 6.670.815); Judgement Spanish Supreme Court 542/2018, 12-11-2018 (TOL 6.921.780); Judgement Spanish Supreme Court 282/2018, 13-6-2018 (TOL 6.639.816); Judgement Spanish Supreme Court 398/2019, 14-2-2019 (ECLI:ES:TS:2019:398).
- 14 Laura Román, ‘Violencia de género, Unión Europea y protección de las víctimas’ in Teresa Freixes and Laura Román (dirs.), Neus Oliveras and Raquel Vaño (coords.), *La Orden Europea de Protección. Su aplicación a las víctimas de Violencia de Género* (Tecnos 2015) 25-26.
- 15 Carmen Tomás-Valiente Lanuza, ‘Deberes positivos del Estado y Derecho penal en la jurisprudencia del TEDH’ (2016) Indret 5.
- 16 M. Isabel González Cano, ‘Justicia penal e integración europea: hacia nuevos modelos de cooperación judicial penal’ in Katixa Etxebarria Estankona, Ixusco Ordeñana Gezuraga and Goixeder Otazu Zabala (dirs.), *Justicia con ojos de mujer. Cuestiones procesales controvertidas* (Tirant Lo Blanch 2018) 783.
- 17 María Morgades Cortés, ‘La Orden Europea de Protección como instrumento tuitivo de las víctimas de violencia de género’ (2014) 3 CEEJ 107; Maoly Carrasquero Cepeda, ‘Orden Europea de Protección: Un paso adelante en la protección de las víctimas’ (2014) 2 CEJ 113; Paula Sánchez Martín, ‘La Orden de Protección Europea’ in Elena Martínez García, (dir.), Juan Carlos Vegas Aguilar (coord.), *La Prevención y Erradicación de la Violencia de Género. Un estudio multidisciplinar y forense* (Aranzadi 2012 481-506; Ana María Rubio Encimas ‘Parte V: La Orden Europea de Protección (Título VI LRM) Capítulo II: Cuestiones prácticas relativas a la Orden Europea de Protección’ in Coral Arangüena Fanego, Montserrat de Hoyos Sancho and Carmen Rodríguez Mendel-Nieto (dir. and coord.) *Reconocimiento Mutuo de Resoluciones Penales en la Unión Europea. Análisis teórico-práctico de la Ley 23/2014, de 20 de noviembre* (Aranzadi 2015) 303-319.

4.1. The construction of Europe through judicial cooperation in matters of protection of victims of gender-based violence: Where do we stand now?

General Recommendation num. 19 CEDAW states that “*Under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation*”. The Istanbul Convention positions itself in the same way. Both rules establish that the State could incur responsibility for the criminal actions committed inside its territory in the case of not fulfilling due diligence obligations.¹⁸ Jurisprudence is little by little including gender perspective and State responsibility for not fulfilling the obligation to protect.¹⁹

4.2. The change in paradigm of the gender violence phenomenon treatment. Contextualizing is giving concepts power

We can observe a change in how several States treat violence against women and children within the home. After having performed a study involving Spanish judicial and social reality as well as the treatment received by the gender factor in the EU, we can say that gender violence has become a public and State matter. Aggressions within the home are no longer treated as private matters. A turn back or a minimization of the disvalue related to these conducts is currently not possible in the European ambit. The ECtHR (European Court of Human Rights) recognizes Criminal Law as an instrument required for the protection of some Human Rights.²⁰ The Spanish Organic Act 1/2004 pronounced itself in the same way 16 years ago.

The issue is that changes are slow and it is naive to think that society is going to change at the stroke of the OSG (Official State Gazette) or OJEU (Official Journal of the European Union). What we need to change is not only the legislation but also the society. It has been necessary to invest in education and in sensitization campaigns²¹ in order to make

18 . Morgades (n18) 93-94.

19 As a sample I decided to write about the protection of gender and domestic violence victims in order to argue about the judicial cooperation within the EU because there is no single definition of what a gender-violence or domestic-violence victim is. This situation complicates the criminal judicial cooperation much more.

20 X and Y v. The Netherlands num. 8978/80 (ECHR, 26 March 1985); Francesco Viganò, ‘Sobre las obligaciones de tutela penal de los derechos fundamentales en la jurisprudencia del TEDH’, in Santiago Mir Puig and Mirentxu Corcoy Bidasolo (dirs.), Víctor Gómez Martín (coord.), *Garantías constitucionales y derecho penal europeo* (Marcial Pons 2012) 311-312.

21 Elena Martínez García, ‘La igualdad y la violencia de género: elementos para la reflexión en España y en Europa’ in José Hurtado Pozo (dir.) Luz Cynthia Silva Tiellacuri (coord.) *Género y Derecho Penal* (Instituto Pacífico 2017) 279-318.

European society, and Spanish society in particular, aware of the problem. Only by fully comprehending the systematic violation of Human Rights of certain collectives (women and children within them) that has been committed for centuries can we understand the judicial measures that have been adopted for the fight against this scourge.

We are optimistic because the ECtHR each time shows itself to be more favorable towards: 1) judging with gender perspective and 2) referring to the need of using Criminal Law to sanction severe attacks against fundamental character rights. The Cases Rumor (2014)²² and Talpis (2017)²³ provide a good account for the change in paradigm that we can see in the diverse European societies during the past few years.

The Strasbourg Court went from considering gender violence between partners as 1) a private matter if the violence does not reach a point in which the State is obliged to investigate (especially if the victim resumes a cordial relationship with the aggressor voluntarily, by exchanging emails or if the victim takes back what was alleged in the declaration in order not to incriminate the (ex) partner), to 2) treating it like a Human Rights violation. The Court advised that these cases can never be treated as an issue between the two partners, but instead that they must involve the State's obligation to investigate what is happening inside the homes, if there is a presumption of a Criminal offence. This change occurred with only a three-year difference between both cases. Society is changing little by little. We can see that the ECtHR has begun to show a greater sensibility towards the high number of women that are gender violence victims in the hands of their partners. Moreover, it places immigrant women in particular as a vulnerable group.

In Spain, our Supreme Court is also showing a recent sensibility towards victims of gender violence within the home. It recognizes that they possess several characteristics which prevent Procedural Law from always working accordingly due to the "atypical" procedural behavior of gender violence victims.²⁴ Furthermore, it makes specific reference to underage victims of this kind of violence, which are in many cases witnesses and "invisible" victims of the aggressions.²⁵

22 Rumor v. Italy num. 72964/10 (ECHR, 27 May 2014).

23 Talpis v. Italy num. 41237/14 (ECHR 2 March 2017).

24 Judgement Spanish Supreme Court 247/2018, 24-5-2018 (TOL 6.630.740); Judgement Spanish Supreme Court num. 282/2018, 13-6-2018 (TOL 6.639.816).

25 John W. Fantuzzo, Wanda Mohr and Megan J. K. Noone, 'Making the Invisible Victims of Violence Against Women Visible Through University/Community Partnerships' in Robert A. Geffner, Peter G. Jaffe and Marlies Sudermann (eds.), *Children exposed to domestic violence. Current Issues in Research, Intervention, Prevention and Policy Development* (HMTP, 2000) 30.

If we take a look at the data from the Macroencuesta 2015,²⁶ which is the most recent publication, we can observe that the main reasons why women are not registering complaints are that they minimize the severity of the situation -44.6 %-, fear the possible retaliation or reprisal of the aggressor -26.6 %-, and due to shame or embarrassment. Regarding complaint withdrawal, the main reasons are that the aggressor promised that the aggressor would change -29.3 %-, fear -28.7 %-, the thought that the victim could change the aggressor -28.6 %- and because the aggressor was the father of the victim's children -24.9 %-. We need to end the fear that the victims have and guarantee the full effectiveness of their right to live free of violence.

4.3. The (ab)use of Criminal Law for the education and awareness of society

We are seeing how Criminal Law has been expanding slowly but surely to assume functions that do not belong to it.²⁷ The preventive and communicative effect that Criminal Law has, which is useful and required, does not have the ability to solve the problem of gender violence and neither was it created to do so.²⁸ We can understand the decision of the Spanish legislator which is stated in the Organic Act 1/2004. The Spanish legislator considered that the transformation of society's habits and values should have been done by the judicial system through the use of Criminal Law. This was probably one of the greatest achievements of the Organic Act 1/2004. The implementation of Criminal Law is the most overwhelming gesture that can be shown towards society. The State sends a message implying that these violations of Human Rights are inadmissible within its boundaries, contrary to the continuous inaction before the creation of the Organic Act 1/2004, which neglected to pay the required attention to the systematic violation of women and children's rights.²⁹

In the same way, since the X and Y Case, the ECtHR has affirmed in an unequivocal way that ECHR member States must protect some Human Rights through the use of Criminal Law. The lack of use of the *ius puniendi* would bring with itself the violation of the obligation of the States to respect Human Rights inside their territory.³⁰ Even

26 http://www.violenciagenero.igualdad.gob.es/violenciaEnCifras/estudios/colecciones/pdf/Libro_22_Macroencuesta2015.pdf

27 Barona (n5) 36. Patricia Laurenzo Copello, 'La violencia de Género en la Ley Integral: Valoración político-criminal' (2005) Revista Electrónica de Ciencia Penal y Criminológica 22.

28 Roberto Bergalli and Encarna Bodelón González, 'La cuestión de las mujeres y el derecho penal simbólico' (1992) 9 Anuario de Filosofía del Derecho 47.

29 Martínez (n22) 159.

30 X and Y v. The Netherlands num. 8978/80 (ECHR, 26 March 1985)

though Human Rights are susceptible to being protected by Criminal Law (Substantive and Procedural) they cannot lose sight of their essential purpose which serves as a limit to the *ius puniendi* of the State.³¹ In this sense, even though we show ourselves favorable to the use of Criminal Law for the punishment of certain attacks on Fundamental Rights which had been not punished previously, due to the fact that they were not given the disvalue that they deserved (for example: rape during marriage), we have to insist one more time that society will change through education. The Organic Act 1/2004 was created with the hope of it disappearing one day when gender-based discrimination in turn disappears. The day in which gender equality becomes real and effective will not require the imposition of more burdensome sanctions towards aggressions committed by men rather than by women. It will be unconstitutional for frontally attacking the principle of equality of article 14 Spanish Constitution.

Having to resort to Criminal Law should be evaluated with resistance, without losing sight of Criminal Law having to be the *ultima ratio* and we cannot deposit on it the obligation to educate and make society more aware of the issue. During the last few years we have been living through a “wave of fascination” for Criminal Law which is being used to please the citizens.³² Even though it might seem like gender violence victims (in a broad sense) are not part of this punitive populism of the last few years, an in-depth analysis proves otherwise. Society does not give the gender violence problem the importance it requires, but wakes up when it faces atrocious acts and demands exemplary sentences for the aggressors.³³ It does not stop to think that the aggressor is part of a system that discriminates against women and that measures such as permanent reviewable prison are not going to guarantee the gender violence victims’ safety, due to the fact that when the judicial machinery of the Criminal procedure starts up, it will already be too late. The aim is not to focus and generalize fear to the enemy but to end with the fear of becoming a victim. In order to do this, we need to guarantee in a real and effective manner the victims’ rights. Only by doing this can we end the policy of fear that seems to have established itself during the past few years amongst our society.

31 De Luis (n10) 511.

32 Francesco Viganò, ‘La arbitrariedad del no punir. Sobre las obligaciones de tutela penal de los derechos fundamentales’ (2014) *Polít. Crim.*, 436.

33 Silvia Barona Vilar, *Proceso penal desde la historia. Desde su origen hasta la sociedad global del miedo* (Tirant Lo Blanch, Valencia, 2017) 516.

4.4. The will to create a transnational protection and obstacles during its parliamentary process

Throughout this research it has been shown that legislative protection measures restricted to a national level are not enough in an increasingly globalized world. It is for this reason that the creation of the European Protection Order implies an advance in the protection of all kinds of victims in the Area of Freedom, Security and Justice. The EPO Directive was created after a proposal made when Spain assumed the Council Presidency of the EU, by using the mechanism of ordinary legislative procedure regulated in article 289 EUFT (European Union Fundamental Treaty). This being introduced as an advance might have been the cause for the own instrument's loss of essence.

At the beginning the Spanish Presidency wanted to create the EPO in the image and likeness of the Spanish Protection Order, so it was proposed with the support of several Member States. During the negotiations they needed to please the rest of the member States in order to create the EPO, so it ended up becoming a restraining order according to Spanish Law.³⁴ An instrument for the protection of gender violence victims could not be created as it had to be extended to include the victims of all types of crimes. One more time, the fight against gender violence was relegated to second place.³⁵ The concept of gender violence victims that the different States have is of vital importance in order to understand the instrument of the EPO Directive. The EPO Directive was supposed to be a protection order created in image and likeness of the Spanish protection order for the protection of gender violence victims in relation to the concepts established in the LO 1/2014 (LOVG). This concept of gender violence victim differs from the concepts that the rest of the member States offer, complicating even further its adoption. It is only possible to understand the aims of the EPO Directive by keeping in mind the concept of gender violence victim established by the LOVG.

The creation of this instrument was a political issue which led to the Commission and the alliance Council/European Parliament measuring their strengths. The Commission,

34 The Spanish Protection Order was created in 2003 (Act 27/2003). In the Spanish legislation the difference between a protection order and a restraining order is that protection orders also include civil and social measures. Furthermore, the protection order is exclusive to gender and domestic violence victims. The Spanish restraining order only includes three criminal measures which are the same ones that we can find in the DEPO.

35 Elena Martínez García, 'La orden Europea de Protección en el marco de la nueva ley de reconocimiento mutuo de resoluciones penales en la Unión Europea' in Elena Martínez García (dir.), Juan Carlos Vegas Aguilar (coord.), *La Orden de Protección Europea. Protección de víctimas de violencia de género y cooperación judicial penal en Europa* (Tirant Lo Blanch 2015) 42-43.

which is guardian of the treaties, indicated that the EPO Directive could only have criminal measures and that the criminal and civil natures of the different national protection orders of the member States would fall short of its ambitious original objectives. The Council/European Parliament wanted to move on forward. This led to the protection of victims, ending with the double regulation we have nowadays. On the one hand, a criminal instrument created by the Council/European Parliament is very distant to what the Spanish Presidency pretended it to be. On the other hand, the Commission created a civil instrument with the same three measures used to create the criminal instrument but with a much more automatic mutual recognition. Since its founding, the Commission has recognized the convenience of being the regulator of both civil and criminal instruments independently, due to their different legal basis. In order for them both to be a single instrument, the treaties would have had to be modified. The Parliament and the Council did not see it in this way and defended themselves, saying that there was enough judicial basis for the creation of the EPO Directive.³⁶

The reality is that during this titanic fight they lost sight of the really important matter: the necessity of protecting victims. Finally, the EPO Directive was promulgated with just three criminal measures and it was supposedly based on mutual recognition, but there were so many problems with its adoption that the victim might prefer to start a new procedure in the destination State.³⁷ It was here when the Directive lost all of its essence. In reality it is not an automatic instrument of mutual recognition. Moreover, the Act 23/2014 has reduced even further, if possible, the automatic recognition by imperatively establishing the judicial hearing of the person causing the danger, in order to issue an EPO and the possibility to appeal.³⁸ The EPM Regulation opts instead for a more direct recognition based on civil judicial cooperation. This in addition to the Framework Decision 2008/947/JAI and Framework Decision 2009/829/JAI make the situation even more complex for the victims and for judicial actors. The moment the instruments of the EPO Directive and the EPM Regulation start to be used, we will observe that there is not only the possibility of getting confused between them, but also the possibility of confusing them with other pieces of European legislation. In

36 Neus Oliveras Jané, 'La Directiva 2011/99/UE sobre la orden europea de protección' in Teresa Freixes and Laura Román (dirs.), Neus Oliveras and Raquel Vañó (coords.), *La Orden Europea de Protección. Su aplicación a las víctimas de Violencia de Género* (Tecnos 2015) 36-37

37 Suzan Van Der Aa and Jannemieke Ouwerkerk, 'The European Protection Order: No Time to Waste or a Waste of Time?' (2011) 19 *European Journal of Crime, Criminal Law and Criminal Justice* 271.

38 Luis Gómez Amigo, 'La Orden Europea de Protección y su aplicación en España' (2017) 43 *Revista General de Derecho Procesal*, 21.

conclusion, an amalgam of rules that were supposedly meant to be “fast and simple”exceedingly complicate the protection of the victims.

We observe that the political will exists and member States had the necessary sensitivity to propose the creation of a European Order for the protection of victims at a European level. What failed was the lack of previous harmonization, which exceedingly complicates mutual recognition, and the refusal from the member States to let go of their last redoubt of national sovereignty. The difficulties during the creation process of the EPO show us how much the European Union needs to be built still. There is not any Criminal European Law and we are far from achieving it. Over a long period of time the EU has only had monetary interests. The necessity of creating a Criminal European Law emerged after Globalization, when we realized that crime has no borders. However, we observe that there are still misgivings from the States that involve accepting that their legislator is a subordinate legislator to the European legislator in some matters. As a result, we have a model in crisis where the measures to adopt end up being very different from what they were supposed to be. The EPO is only one of lots of examples of how lack of harmonization and trust complicate the effective application of the mutual recognition principle.

4.5. The pragmatism of the transnational civil protection

Spanish legislators did well in placing protection orders as criminal measures in 2003. The aim was to send a clear message of social reprobation to the citizens. Times have changed in comparison with seventeen years ago and nowadays, at least on paper or in theory, we cannot imagine a turn back or minimization of the disvalue related to these actions. That is the reason why we could open the debate about the possibility of civil protection measures.

The comparative study between EU member States shows us that almost all EU member States use civil protection measures. The fact that the EMP Regulation does not ask for double incrimination gives it a much more automatic mutual recognition than the EPO Directive recognition.³⁹ Regarding the EPO, European legislators considered that maybe, the executing State does not have a similar protection measure for the specific case. Therefore, the EPO provides a margin of discretion to the State: according to their national law they can adopt a measure as similar as possible to the original one in the issuing State. The civil certificate works in a different way. The member

39 Van Der Aa, Niemi, Sosa, Ferreira, Baldry (n3) 211-212.

State is obliged to recognize the measure without intermediary procedures. In other words, the only action that the executing member State can do is the automatic recognition. Even in the case that the executing member State does not offer that protection measure based on the same facts, it is still obliged to recognize the prohibitions included in the protection order from the other member State according to article 13.3 REMP and Recital (18) REPM.

Moreover, proof standards are different between criminal and civil procedures. In criminal procedures the fact must be proved “beyond any reasonable doubt”.⁴⁰ However, in civil procedures it has to be more likely than unlikely. The reason for using a civil protection measure is a practical one. States such as Germany or Austria opted for a civil system. Therefore, they can protect gender and domestic violence victims in a fast and immediate way. However, in Spain we prefer the political message implying that the fight against gender and domestic violence is a criminal issue and must be prosecuted in a criminal procedure.

Even though we do not have notice of EPO being refused due to double incrimination, the reality is that it cannot be claimed as a ground of refusal within the Regulation EPM. Consequently, even though as a jurist I could prefer the use of criminal protection orders, due to the fact that they typify acts with the disvalue that they deserved, pragmatism makes the civil way more effective. This situation shows that gender violence victims in Europe have an easier achievement of the recognition of a civil protection measure rather than a criminal protection measure.

5. Proposals

The *leitmotiv* during this investigation has been the requirement to keep building an EU where judicial cooperation is real and effective. I am aware that nowadays it is naive to think about the creation of a European Criminal Code. The creation of a European Criminal Code does not present technical problems. The problems are political, due to the complication that requires all the States to give up their different legislative histories in order to create common juridical categories. Procedural law is harmonizing legislation little by little. As long as we keep using the different mutual

40 Even though precautionary measures do not need to be proved “beyond any reasonable doubt” it is easier to achieve a protection precautionary measure in a civil procedure than in a criminal procedure. For example, if an act cannot be considered a Crime, the Criminal Procedure is going to end and therefore the precautionary measure will disappear. It is possible for this act to include a disvalue and it can involve a greater real risk of revictimization. However, in order to achieve a criminal protection measure a previous crime must exist.

recognition instruments we will approach the different legal systems to each other. I firmly believe that EU member States can learn from each other in order to improve our different legislations and offer a more real and effective protection to our victims. Therefore, I present three proposals in order to improve the use and effectivity of European Protection Measures:

5.1. The creation of a European register of protection measures

Recital (32) DEPO indicates that, *“in order to facilitate the evaluation of the application of this Directive, Member States should communicate to the Commission relevant data related to the application of national procedures on the European protection order; at least with regard to the number of European protection orders requested, issued and/or recognised. In this respect, other types of data, such as, for example, the types of crimes concerned, would also be useful”*. Article 22 DEPO also refers to the creation of a State database.

Member States ought to have transposed the DEPO 11 of January of 2015. Five years after this transposition we still do not have any databases. Furthermore, the EPM Regulation does not even refer to the convenience of the creation of these databases. Being able to fully understand the utility of these instruments without databases has been complicated. It also complicates the correct evaluation of the problem scope and prevents an effective response from being done. We do not know the exact number of EPO issued, but we can presume that there are few, due to the lack of knowledge of the instrument. I propose the mandatory creation of State databases of protection orders issued and recognized. All these data should be also registered in a European Database. These databases must be updated frequently for the information to be useful. As an example of good practice, we have the Spanish State: using CENDOJ (Center of Judicial Documentation from the CGPJ) we can know the number of protection orders issued by Spanish courts. However, I believe that this measure is not enough and that the Ministry of Justice should create a database in order to account for the EPO executed and issued by Spanish courts.

5.2. The training of legal practitioners in order to fight against ignorance and fear to use mutual recognition instruments

The starting point is a simple premise: we do not use the instruments that we do not know. The biggest problem that we find when we study the instrument of EPO is the

generalized ignorance from the legal practitioners.⁴¹ We cannot assess the wisdom or error of the EPO Directive because it is an unknown instrument. We must commit to training and informing our practitioners about European mutual recognition instruments in general and the EPO in particular. The University of Valencia, in collaboration with CGPJ and the Rovira i Virgili University, prepared a training course on the EPO for Judges. This training is part of the State positive obligations from the States (article 15 Istanbul Convention). Within this course, successful experiences were explained. One Judge who had issued several EPO said that he knew the instrument due to he had learned about it at the Judicial School. This anecdote allows us to be optimistic regarding the increase in use of EPO in the future. The moment the legal practitioners know this instrument, the moment they realize how useful it is and start to use it. Nevertheless, I would like to state that it is not an easy instrument to use, due to the fact that it does not exclude the possibility of confusion with Framework Decision 2008/947/JAI, Framework Decision 2009/829/JAI and Regulation (EU) 606/2013.

Even though in theory the different mutual recognition instruments are delimited, it is foreseeable that in practice, these instruments will collide at some point. The moment they collide we will have an important task of interpretation and application. This will allow us to detect the discrepancies and failures that this complex system has. The reality is that we have at least five different instruments that can interact or collide. Nowadays we are, the different member States, the ones called to cooperate for the application to be real and effective. We need a real will to continue building the EU.

National Judges must also act as European judges and lose the fear to use mutual recognition instruments. We observe that the Judicial School is making an effort to include matters related with mutual recognition in the training of future judges. Moreover, I acknowledge that the new generations of Judges are building the EU using instruments like the EPO. These small gestures will approach the different legislations little by little. There is always margin for improvement and the different European member States can learn one from one another in order to improve our different legislations and offer a more real and effective protection to our victims in general, and gender violence victims in particular. All these projects show us how much the European Union needs to be built, but even still we are on the right track.

41 Javier Hernández García, 'Notas sobre la Directiva 2011/99, reguladora de la orden europea de protección' in Elena Martínez García (dir), Raquel Borges Blázquez and Elisa Simó Soler (coords.), *La construcción de Europa a través de la cooperación judicial en materia de protección de víctimas de violencia de género* (Tirant Lo Blanch 2019) 44.

5.3. By way of a proposal *lege ferenda*. A civil provisional protective measure

We could raise the possibility of using civil protection orders to fight against the least severe cases in order to create a more real ASJF through the use of harmonization of the different legislations. Civil protection orders could be used for less severe unlawful acts: those which do not require the use of Criminal law, but if we do not stop them on time they will end being criminal offences in the future. For instance, in a contentious divorce we observe behaviors that, even though in that moment are not considered a criminal offense, will probably end up being considered as such if we do not stop them on time. In other words, forestall the unlawful act and prevent it from happening, instead of protecting the victim when it has already occurred. In this example there is no gender violence, just problems due to the separation. These problems are not crimes, but we can see some behaviors that will turn into toxic ones and later into crimes.

My argument is to try to prevent criminal measures before they are required, but they should never be avoided in cases where they are really required. We should bear in mind that the most serious acts must be investigated in a criminal procedure and punished if they can be proved beyond a reasonable doubt. Using this measure, we are not advancing Criminal Law to one step before, but preventing it from appearing. This civil advice not only benefits the victim, but also the possible future aggressor: none of them will have to suffer the consequences of the commission of a criminal offence. The three measures that we can find in Directive EPO and Regulation EPM do exist in our civil legislation (article 158 Civil Spanish Code).⁴²

I am aware that this proposal raises new questions that will have to be solved by future investigation. One difficulty is finding the competent court or procedure to adopt a provisional civil measure. Nevertheless, we think that harmonization of legislations regarding protection orders would facilitate mutual recognition between different EU member States. Even more, the essence of the EU is to give up to our particularities in order to create, little by little, a supranational European law to facilitate European citizens to move around the AFSJ with the guarantee that the protection from a member State will still be effective in the member State where the person is going to move.

42 Katixa Etxebarria Estankona, 'El reglamento (UE) 606/2013 relativo al reconocimiento mutuo de medidas de protección en materia civil. Algunas cuestiones sobre su aplicación', in Katixa Etxebarria Estankona, Ixusco Ordeñana Gezuraga and Goixeder Otaua Zabala (dirs.), *Justicia con ojos de mujer. Cuestiones procesales controvertidas* (Tirant Lo Blanch 2018) 395.

I propose a comparative study with foreign civil protection systems such as the German, Austrian or Italian systems, in order to approach ourselves towards other legal systems and make mutual recognition and cooperation easier. We would try to assess the effectivity of civil and criminal protection measures using five variables: 1) grounds for issuing a protection measure, 2) proportion of protection orders issued, 3) proportion of protection orders violated, 4) consequences of the violation of protection orders, 5) victim satisfaction with the protection measure and sense of security. After performing this study, we consider that we could evaluate the effectivity and convenience of using or not civil protection measures.

Peer-review: Externally peer-reviewed.

Conflict of Interest: The author has no conflict of interest to declare.

Grant Support: The author declared that this study has received no financial support.

Hakem Değerlendirmesi: Dış bağımsız.

Çıkar Çatışması: Yazar çıkar çatışması bildirmemiştir.

Finansal Destek: Yazar bu çalışma için finansal destek almadığını beyan etmiştir.

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*Note: In Spain we do not know the party names due to protection data. Judgements have numbers and dates. Therefore, the reference used in this chapter is ECLI or TOL depending on the Database.

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