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The protection of migrant women subjected to domestic  
violence under the framework of the Council of Europe.  
A feminist approach.

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# Summary

Migrant women facing domestic violence in the Council of Europe have been traditionally characterised, except in some national countries, as not having any legal possibility to leave the situation with proper resources, or being able to guarantee their stay in the country they are living.

Since the approval of the Council of Europe Convention on preventing and combating violence against women and domestic violence, on May 2011, there is an option for those migrant women with dependent residence status to escape from the spiral of violence and get an independent residence status. However, the article containing this provision, Article 59, is susceptible to reservation. Thus undocumented migrant women may be left outside the scope of the Convention.

This paper provides an analysis of the Council of Europe's Convention on Preventing and Combating Violence against Women and Domestic Violence. It goes on to examine the problems faced by undocumented migrant women and those whose residence status is dependents upon their spouses. In addition it will present the common problems of the two groups. It also explores different feminists' theories in order to deal with the patriarchal problem that is domestic violence. In conclusion, the paper will present the author's opinion of the most reasonable and useful model in the fight against domestic violence suffered by migrant women under the framework of the Council of Europe.

The paper also examines concepts of public international law, such as the rules on reservations and the principle of non-discrimination. Finally the Spanish experience will be taken as an example, as the protection offered by this State is seen to extend further than that offered by the Convention offering. By using this example, of options provided by the State to undocumented migrant women, I manage to criticise the Spanish project from both the practical application of measures and the results achieved. The aim of these three analyses is, on the one hand, to use public international law, to argue that from a human rights perspective, Article 59

of the Convention, should not be open to reservation, and, furthermore, to assert that a minimum core of provisions should be contained regulating the situation of undocumented migrant women suffering this violent situation. Using the feminists' theories and the Spanish experience, I conclude by suggesting some improvements for fighting against domestic violence suffered by migrant women. The first one is an effective application of the due diligence principle by the State. Keeping in mind the political factors influencing the debate, I offer what I consider to be improvements to the current Convention as an effort to effectively fight against domestic violence suffered by migrant women, both undocumented and those with a dependent residence status, being aware of the role that politics has in all the process.

# Preface

I would like to express my gratitude to Ulrika Andersson, my supervisor, and professor. Thanks for her useful comments, cooperation, support and recommendations.

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As well, to my people, for their patience: Samira, Marina, George, Carlos, David and Juan. Thanks.

My biggest thanks to my parents for being the most supportive persons I have in my life. Without them, I would not be myself. Thanks for showing me the meaning of effort and discipline. Thanks for loving me.

# ABBREVIATIONS

CEDAW Convention on the Elimination of Discrimination against Women.

CRC Convention on the Rights of the Child.

CRPD Convention on the Rights of Persons with Disabilities.

GREVIO The group of experts on action against violence against women and domestic violence.

ICCPR International Covenant on Civil and Political Rights.

ICESCR International Covenant on Economic, Social and Cultural Rights.

VCLT Vienna Convention on the Law of the Treaties.

*How many years can some people exist before they are allowed to be free...*

Bob Dylan.

# 1. Introduction

## 1.1 Research proposal

Istanbul, Turkey. 11<sup>th</sup> May 2011. The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, so on, ('The Convention') is approved.

This Convention will enter into force three months after having been ratified by ten States, including eight Member States<sup>1</sup>. At present<sup>2</sup>, 18 states have signed it, and it is lacking two more ratifications.

The aim of this thesis is to analyse the protection offered by the Convention to migrant women against domestic violence. The study will focus on violence against migrant women between heterosexual couples who are former or current spouses or partners, regardless of whether or not the perpetrator shares or has shared the same residence with the victim<sup>3</sup>. It will be analysed through two perspectives: the case of undocumented migrant women and the case of women whose residence permit is based on an application lodged by the husband or as part of a couple.

The nature of domestic violence has to be taken into consideration. As a problem that occurs in the private sphere of the family or the house, it is difficult, and at times impossible to identify. In some cultures more than others, it is considered a private problem, so persons such as family, friends or neighbours of the couple might not react when confronted by this situation. Indeed many tolerate it or even go so far as to encourage the woman to remain in the relationship. The legislative, judicial and administrative framework should offer multidisciplinary and effective ways to help them. However given the nature of the problem, policies of

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<sup>1</sup>Article 75 of the Convention.

<sup>2</sup>5<sup>TH</sup> march 2011.

<sup>3</sup>In conformity with the definition of domestic violence provided on the Convention, Article 3 b.



intervention are difficult to implement and in addition the question is raised whether society is truly open to providing assistance to women in these situations.

If a country has a protective law, but the implementation is doubtful, women might not ask for help from public authorities, and then the problem may be perpetuated. This multidisciplinary way must also tackle the whole society in order to change the possible patriarchal mentality and make all persons aware that domestic violence is a public problem, which constitutes a grave violation of human rights. So, it deserves to be treated from a public perspective, even if it occurs in the intimacy of a couple.

In the cases of migrant women, prevention, detection and assistance are more difficult due to the following factors: the lack of visibility that some can have; their administrative status; and other problems that will be explained. These reasons demonstrate why they need extra protection and concrete measures, because as migrants these women face another form of discrimination.

I will analyse the position of two types of migrant women, which are defined by their administrative status, who are facing domestic violence: undocumented migrant women and women with a dependent residence status. However, some problems faced by women who seek asylum during the process, are similar to those faced by undocumented migrant women. Despite this fact, the procedure of asylum will not be analyzed. However, these concrete situations they might face during the time the procedure takes will be briefly mentioned.

In the case of undocumented migrant women, the Convention does not provide any protection. This means that an undocumented migrant woman suffering from domestic violence is completely outside the system. She cannot have access to any of the possible resources provided by the State, such as economic help, shelters, possibility of education and so on. She cannot lodge a complaint in the police because her irregular status would be discovered and consequently she could be expelled from the country. So, the situation of these two categories of women is the most vulnerable dangerous and the most unprotected.

In the case of migrant women with dependent residence status, the Convention has a very protective legislation; however the specific article, that is Article 59 on residence status, only contains a short list of possible beneficiaries of protection, which will be later analyzed, and is also susceptible to be under reservation.

The problems that these women can face, which are briefly synthesized in this introduction, is that, if they do not have the possibility to obtain an independent status, they can be expelled of the country; together with the husband or couple, when lodging a complain and as a result of the criminal procedure against him. If he is expelled, the woman, who is administratively dependent, could be –and would in most cases be- expelled as well. This can result in the denial of both justice and help towards hers, and put her in a dangerous position because she would be sent back to her country of origin, where the rules might not be protective with women in cases of domestic violence. In addition, other problems of access to resources may arise from a dependent residence status.

The main purpose of this thesis is to review the protection of these two cases of women.

For this, a feminist approach will be taken into consideration in the implementation of better resources and effective ways to fight domestic violence within the context of migrant women

Following the permissibility line of thought on the Vienna Convention on the Law of the Treaties, I will argue that legally, it should not be possible to make a reservation under Article 59, and consequently, migrant women with dependent residence status should be offered additional protection, in addition to being granted an independent administrative regime. Explaining the scope of the principle of non-discrimination, I will argue that a minimum core of provisions regarding undocumented migrant women should be included in the Convention.

I am aware of the role of politics in international law, which obviously also affects the Council of Europe; as well as the reasons why the reservations are permitted in this particular case. However, I do consider that these two

purposes are achievable and should be required, from not only a human rights but also legal perspective.

Finally, the thesis will end with some recommendations to improve the situation of migrant women. For this, the Spanish experience will be taken into consideration. The reason is because some years ago, the law regarding domestic violence was amended. Thereby, granting access to some forms of protection and a means to escape from domestic violence to both administrative forms of migrant women; undocumented and with residence status dependant on the husband or couple.

## **1.2 Methodology**

The methodology will be based on a descriptive method through the theories detailed in different texts. The use of legally binding and non-binding texts will be an important tool. First of all, the Convention as well as the explanatory report will be relied upon. The Council of Europe Recommendation Rec (2002) 5 of the Committee of Ministers to Member States on the protection of women against violence is important for me, because of its high quality regarding the protection of women, even if he text is not binding.

Some feminist perspectives which draw upon the bases of feminism will be used in addition updated sociological and feminist legal theory articles will be used to illuminate the problem of domestic violence on migrant women through a feminist perspective.

Finally, I will use other binding materials as the Vienna Convention on the Law of the Treaties. As well as, different articles of the core human rights conventions as the International Covenant on Civil and Political Rights- so on ICCPR-, the International Covenant on Economic, Social and Cultural Rights –so on ICESCR-, the Convention on the Elimination of Discrimination against Women –so on CEDAW-, the Convention on the Rights of the Child –so on CRC- and the Convention on the Rights of Persons with Disabilities –so on CRPD. General Comments will be especially useful for building my arguments regarding the validity of

reservations and the principle of non-discrimination, together with illustrated books of public international law.

The Spanish national law will be taken into consideration in the explanation of the Spanish experience dealing with domestic violence and the particular specificities of the regime governing migrant women. Reports from NGOs, especially those from Amnesty International and Human Rights Watch will be used to exemplify problems of implementation and problems faced by migrant women in all countries.

### 1.3 Chapters

The thesis will be divided in five chapters, including this introduction.

In academia, the current main approach to domestic violence is through the assumption that it is a gender-based problem that is rooted in patriarchal structures, which needs to be challenged. This is the approach taken by the Convention, which, however, also extends the protection to men and children when they are the victims.<sup>4</sup>

The discussion at the present time divides the problem of domestic violence, or intimate partner violence, into four sub-categories: coercive controlling violence or intimate terrorism; violent resistance; situational couple violence and separation-instigated violence<sup>5</sup>. All the sub-categories will be briefly explained in Chapter Two. However the main focus of the research will be regarding intimate terrorism or coercive controlling violence, which is the one that the Convention covers, together with intergenerational violence, when it talks about domestic violence.<sup>6</sup>

Firstly, I will provide a classification of the four sub-categories previously mentioned. The reasons for explaining the four sub-categories is to make the reader aware of how difficult it can be to discover the existence of an incidence of domestic violence and to implement policies that target these

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<sup>4</sup> The Convention, article 1.1.c

<sup>5</sup> J. B Kelly, M. P. Johnson, 'Differentiation among types of intimate partner violence: research update and implications for interventions', Vol. 46 No 3 *Family Court Review*. July 2008. pp. 475-489.

<sup>6</sup> Council of Europe Convention on Preventing and Combating violence against women and domestic violence. Explanatory Report. Paras. 41 and 42.

different forms of violence. Furthermore the explanation is intended to demonstrate how statistics, which group all forms of domestic violence, can be misleading and not provide a true picture of the problem.

The specific problems that migrant women facing domestic violence have to deal with will be also explained in this chapter. The problems will be divided as follows: the problems suffered by undocumented migrant women; the problems of women with residence permit dependent on the husband or couple; as well as the problems shared by both groups.

Finally, the last sub-chapter will analyse the situation right now regarding statistics on domestic violence, from a critical point of view.

The thesis will then move to chapter three to present a feminist approach, which is drawn from feminist legal theory as well as sociology. The aim is to find out how domestic violence on migrant women should be approached, taking into consideration the private nature of this problem, the necessity of empowerment of victims, the intersectionality approach and an integrative feminist model.

In Chapter Four I will analyse the Convention, by first giving a general overview of it. I will then move to examine in a more detailed way the general obligations, that is: Chapter VII of the Convention, which deals with migration and asylum; the two articles contained in Chapter XII; and the final clauses, concretely the reservations, permitted to one of the three articles contained in Chapter VII.

In chapter Five I will analyse the reasons motivating the protection of migrant women from an international public law perspective. In addition I will include explanations regarding the legal framework and different schools of interpretation on the validity of reservations to human rights treaties as well as the principle of non-discrimination, which is linked at all the times to the treatment received by migrant women.

This second part of this chapter will explain the Spanish experience. Special focus will be given to the Constitutional Act 1/2004 of 28 December, On Integrated Protection Measures against Gender Violence, as it was the starting point of a new era of legislation against gender violence. This law

created rehabilitation centres and special courts for domestic violence; improved assistance to victims and procedures for protection; and implemented strong awareness-raising campaigns addressing the different parts of society. However, the analysis of Spain's experiences will focus specifically on the State's treatment of migrant women. Initially, these women did not fully benefit from the new law; however, subsequent amendments to different national laws made some of them potential beneficiaries. The chapter will not only discuss the problems faced before the amendment of the relevant national laws, but also the problems encountered afterwards. As highlighted, prior to the European Convention, Spain had implemented measures to assist irregular migrant women in situations of domestic violence. Thus the reason for including this chapter is to highlight the approach of Spain in respect to its attempts to combat and eradicate the issue of domestic violence and discusses such efforts.

Finally, I will provide a last chapter detailing conclusions and suggestions. Firstly, from a human rights perspective, any reservation in regards to Article 59 of the Convention should not be legally allowed. Furthermore, the principle of non-discrimination requires that regulations for undocumented migrant women should be provided. Secondly, some feminist suggestions will be given for helping this group of women who may be subjected to dual forms of discrimination, on account of them being migrant women, or even an additional form if they are undocumented. In conclusion, suggestions for the improvement of the Convention will be proposed.

## 2. Domestic violence.

### 2.1 Sub-categories of domestic violence.

The issue of domestic violence was consistently raised during the seventies. In this initial period, a simple classification was made: the victims were “battered women” and the perpetrators were “batterers”<sup>7</sup>. This categorisation determined the approach of the legal framework, and corresponding policies on education, interventions, etc.<sup>8</sup> However, currently, both academia and workers within the field generally accept that domestic violence, or intimate partner violence should be categorised further than the classification used in the 1970’s. The further categorisation of domestic violence has been accepted as taking into consideration the different types of violence has proven to assist with more concrete solutions when approaching the problem.<sup>9</sup>

The main categories used and which I also find especially useful and accurate are: “coercive controlling violence” or “intimate terrorism”; “violent resistance”; “situational couple violence”; and “separation-instigated” violence. Despite the fact that these categories of domestic violence are used by a lot of authors, the main material I will focus on are the descriptions provided by Michael P. Johnson, Emeritus Professor of Sociology, Women’s Studies and African American Studies<sup>10</sup> as I find him accurate and well respected in academia. However, I am aware he is not the only respected sociologist on the field.

The categories have a common interesting point that makes them different: the issue of control over the other, which is in practice the degree of control. The gender of the violence will be taken into consideration as well. As we

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<sup>7</sup> *Supra* note 5, p. 475.

<sup>8</sup> *Ibid*

<sup>9</sup> *Ibid*, pp. 476-478

<sup>10</sup> More information about his work: <http://www.personal.psu.edu/mpj/MPJ/Welcome.html>

will see, the violence that is most characterised as being a consequence of patriarchal roots is “coercive controlling violence”, which consequently is also the form, which this thesis mainly deals with. I am not diminishing the seriousness of the other types of violence; however, I do consider that “coercive controlling violence” is the most dangerous, as the reasons behind it are drawn from the roots of some societies and mentalities.

For practical reasons, the description will use the terms used “perpetrator” and “victim”, to make it easier for the reader. However, I would like to state that I have issues with the term “victim” as being a victim does not invite persons to become empowered.

Furthermore it should be noted that this sub-chapter does not focus on the domestic violence faced by migrant women, but rather on domestic violence in general, as I consider it necessary to understand the different faces of domestic violence, as well as the consequent lack of efficient policies and interventions. This general overview of domestic violence will clarify the difficulties attached to the recognition, detection and prevention of domestic violence to the reader. Later on, the specific problems faced by migrant women will be explained.

### **2.1.1 Coercive controlling violence**

This kind of violence was firstly named “patriarchal terrorism”<sup>11</sup>. Later, it was changed to “intimate terrorism”, in recognition of the following factors: not all cases are rooted in patriarchal structures; neither are they exclusively committed by men.<sup>12</sup> However it can be still affirmed that men commit the majority of cases, so this violence is highly gendered.

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<sup>11</sup> Johnson, 1995.

<sup>12</sup> *Supra*, note 5, p. 478.



This form of violence is the one, which is most clearly identified with power and control. It is an attempt to take a general control over the partner.<sup>13</sup> It includes: intimidation; emotional abuse; isolation; minimising; denying and blaming; use of children; asserting male privilege; economic abuse; and coercion and threats. Abusers do not necessarily use all of them, but a combination that they feel are most likely to work for them. This kind of violence does not always involve high levels of physical violence.<sup>14</sup> The psychological effects on the victims are fear, anxiety, and loss of self-esteem, depression and posttraumatic stress.<sup>15</sup> The process is slow, and puts the victim gradually in a spiral that they do not know how to stop. At first, the development implicates annulling the person, in a process that alternates violence with non-violent periods that can be long in time and that makes the victim irrationalise it. This routine of violence results in a victim's confusion and ultimately in them justifying these acts.<sup>16</sup>

There are, as well, in this kind of violence, a lot of false myths that neither helps society to understand it nor the victim to escape it. Examples of these myths consist of the following: that women look for these violent situations; that they deserve it; or that women do not escape because they do not want to.<sup>17</sup> This might sound as part of the past, of some countries in the Council of Europe; however, we cannot forget the cultural diversity among all these States, which makes me confirm that these myths are still alive. Other myths are that the perpetrators are non-educated people, of low class or with alcoholic problems.<sup>18</sup> However there are perpetrators that do not fit this profile. Just as domestic violence, such as "coercive controlling violence", may affect any victim; any person, regardless social class, education or

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<sup>13</sup> M. P Johnson, 'Domestic violence: the intersection of gender and control', in L. O'Toole, J.R. Schiffman and M. K. Edwards (Eds.), *Gender Violence: Interdisciplinary Perspectives* (2<sup>nd</sup> edition. New York University Press, in press. New York) p.2

<sup>14</sup> *Supra* note 5, p. 481.

<sup>15</sup> *Ibid*, p. 483

<sup>16</sup> L. M Cantera, 'Domestic violence', 8 *Lectora* 2002. p 73. (only available in Spanish 'La violencia doméstica')

<sup>17</sup> *Ibid*, p. 72.

<sup>18</sup> *Ibid*.

other factors may perpetrate it. This lack of a concrete profile is one of the problems in the creation of effective interventions.

“Coercive controlling violence” is the most visible form of domestic violence in law enforcement, agency settings, shelters and hospitals.<sup>19</sup> It was the prototype of domestic violence for the battered movement. It combines physical and/ or sexual violence with non-violent control tactics. In the case of migrant women, these non-violent tactics include threats to report them to immigration authorities.<sup>20</sup>

In heterosexual relationships, men are the ones clearly, in almost all cases where there is domestic violence, which commits “intimate terrorism”<sup>21</sup>. The reasons are mainly gendered. However it can be subdivided in two, as it is individual misogyny and gender traditionalism<sup>22</sup>. This background of this kind of violence is characterised by extreme control over the partner, which might be encouraged or at least supported by conventional or hostile attitudes toward women.<sup>23</sup> Some authors consider another reason for this type of violence biology, is the difference in size and strength between men and women.<sup>24</sup> However I do not consider it a reason, rather a consequence that might aggravate violence in some cases.

The problem with the use of surveys for the identification of victims is that some of them might not answer truthfully as they fear retaliation.<sup>25</sup> However, victims of this kind of violence, compared with victims of situational couple violence, look for more formal mechanisms of help, such as public institutions, like the police. The reasons could be that the consequences of this violence, such as physical injuries, psychological

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<sup>19</sup> *Supra*, note 5, p. 482.

<sup>20</sup> M. O Johnson, ‘Gender and types of intimate partner violence: a response to an anti-feminist literature review’ 16 *Aggression and violent behaviour*. 2011. p. 290.

<sup>21</sup> *Supra*, note 13, p. 12.

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*, p. 13

<sup>24</sup> *Ibid.*, p. 13

<sup>25</sup> J. M. Leone, M. P. Johnson, C.L. Cohan, ‘Victim help seeking: differences between intimate terrorism and situational couple violence’ 56, *Family relations*. 2007. Copyright by the National Council on Family Relations. p. 429. In reference to Johnson, 1995.

distress and perceived social support<sup>26</sup> are greater in comparison to other patterns of domestic violence. These formal sources assist with looking for help to escape for the relationship, and not only short-term solutions to deal with the direct risks such as getting injured.<sup>27</sup>

The reasons to avoid looking for informal help would be that victims feel that it would pose a risk to the loved ones that are aware of the situation. Secondly, this kind of violence involves forced social isolation from friends and family. This means/signifies that in a lot of cases, the perpetrator controls the victim's methods communication or that the victim and perpetrator share the same friends. However, if and when victims do look for informal help, they approach family members, rather than friends.<sup>28</sup>

Different reasons have meant that most policies and interventions have directed to fighting against this type of violence. The first being that the women's movement brought this particular issue to the public, thereby securing important steps in education and concrete results on criminal law.<sup>29</sup> Secondly, due to the chronic character and / or degree of high levels of violence, this form of violence might be more easily detectable than other types of violence, as victims might seek additional help to handle the violence or to escape from it.<sup>30</sup> Finally, this kind of domestic violence results in the most homicides<sup>31</sup>, which makes it more publicly visible, through media coverage. In turn, this public exposure makes society want to create policies and interventions to eradicate it, as it is perceived as more dangerous than other forms.

Also when dealing with intervention measures, to avoid the creation of more problems for the victims, the safest approach is to assume "worst-case" scenario. That is that the case of domestic violence is one that involves

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<sup>26</sup>*Supra*, note 25.

<sup>27</sup>*Ibid*, p. 436.

<sup>28</sup>*Ibid*, p. 437.

<sup>29</sup>*Supra*, note 13, p. 19

<sup>30</sup>*Ibid*.

<sup>31</sup>*Ibid*.

“coercive controlling violence”<sup>32</sup>, and later change the approach if necessary. However, the consequences for the perpetrator, in a case that it is not coercive controlling violence, are obvious. The perpetrator might feel that the treatment received is not correct and even humiliating; whereas the presumption of innocence is ignored. This presumption should be applied in all the spheres of our lives, including, as well, intervention programs. However, I do consider it necessary, to create positive discrimination, as the consequences of using a different approach to intervene with a victim of “coercive controlling violence” could have terrible consequences, even resulting in their death.

## **2.1.2 Violent resistance.**

This type of violence is an attempt to get out of the violence received from the partner or couple. It occurs on a regular basis when the victim acts with the intention to stop or in an attempt to stand up against the violence received.<sup>33</sup> It is a reaction to the “coercive controlling violence”.<sup>34</sup> As with coercive controlling violence, this type of violence is generally gendered, but in this case, the main perpetrators are women.<sup>35</sup> They try to resist “coercive controlling violence” through the use of violence.<sup>36</sup> However of course each case is different, and there are situations that could, from a criminal point of view, be seen as self-defence. This violence does not mean it, as it does not refer to an immediate answer during an attack of the perpetrator, rather a premeditated attitude.

The cases that get the attention of the media are those of women who murder their abusive partners, after years of being victims of frequent attacks, injuries, sexual abuse and or threats against themselves or others.<sup>37</sup>

This kind of violence in heterosexual relations is not effective at all and only makes the situation worse for women.<sup>38</sup> When this violence proves to be

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<sup>32</sup>*Supra*, note 13, p. 19

<sup>33</sup>*Supra*, note 5, p. 479

<sup>34</sup>*Ibid*

<sup>35</sup>*Supra*, note 20, p. 291.

<sup>36</sup>*Supra*, note 5, p. 484

<sup>37</sup>*Ibid*.

ineffective, some of the perpetrators<sup>39</sup> consider that the only useful solution is to kill their couples or partners.<sup>40</sup> A common factor of the majority of women involved in this violence is that they attempted or seriously considered committing suicide, as they felt that they would not survive their relationship, nor that they would manage to leave it safely.<sup>41</sup>

### **2.1.3 Situational couple violence.**

This kind of violence is gender symmetric<sup>42</sup>. It rarely appeared in statistics due to its characteristics. This is partially attributed to the invisibility of the form, as it is less likely to need the services of hospitals, police and shelters.<sup>43</sup> Moreover, it is a kind of violence that is normally rejected by both, the perpetrator and the victim.<sup>44</sup>

When some sociologist or psychologist claim that domestic violence is not gendered, and that men and women perpetrate it equally, they are describing “situational couple violence”.<sup>45</sup>

This violence is one of the most common types of aggression in cohabiting couples or partners.<sup>46</sup> It is not linked with a relation of control and power but is the consequence of arguments or situations that lead to incidences of physical violence.<sup>47</sup> So the main difference with “coercive controlling violence” is that it is not related to attitudes of misogyny or control. However, there are cases where these incidences of violence might be combined with jealousy and accusations of infidelity, but the difference, is that this particular model of controlling, intimidating or stalking behaviour does not represent a chronic pattern<sup>48</sup>.

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<sup>38</sup>, *Supra*, note 5, in reference to Pagelow, 1981, p.6.

<sup>39</sup> That is the women reacting to “coercive controlling violence”.

<sup>40</sup> *Supra*, note 20, p. 290.

<sup>41</sup> *Supra*, note 5, p. 485.

<sup>42</sup> *Ibid*, p. 481.

<sup>43</sup> *Ibid*.

<sup>44</sup> *Ibid*.

<sup>45</sup> *Ibid*.

<sup>46</sup> *Ibid*, p. 485.

<sup>47</sup> *Ibid*, p. 485.

<sup>48</sup> *Ibid*, p. 486. In reference to Leone et al. 2004.

### **2.1.4 Separation instigated violence.**

This type of violence is not gendered. It is characterised as an unexpected act of violence perpetrated by a person that has always been non-aggressive and with positive behaviour.<sup>49</sup>

The factor that produces it is normally linked with a traumatic separation. Examples of these might include: a humiliation of a prominent professional by allegations of child or sexual abuse; or the discovery of the existence of a lover. In spite of it materialising as a high form of violence, it represents an atypical and serious loss of psychological control, which can include screaming, throwing objects or destroying property among others. However, it is unlikely that it will occur on a regular basis.<sup>50</sup>

The specificities of this kind of violence makes the perpetrator feel ashamed, as they are aware and accept the behaviour committed. On the other hand, the partner or couple and the children, if they exist, can become extremely afraid, as they have never seen a pattern of violence on the person. The most extreme cases can result in the partner receiving a new frightening or dangerous image from the ones who were present for/during the act of violence.<sup>51</sup>

## **2.2 Specific problems faced by migrant women in the context of domestic violence.**

In all cases, escaping from a situation of intimate partner violence is hard. But, when the victim is a migrant woman, the situation becomes harder for different reasons. I will focus on “coercive partner violence”, as it is potentially the most dangerous form and the only violence where resources are, in theory, available in all the countries of the Council of Europe.

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<sup>49</sup>*Supra*, note 5, p. 487.

<sup>50</sup>*Ibid*

<sup>51</sup>*Ibid*

There is currently a legal and political theory that is built around the liberal traditional concept of a “universal human subject”.<sup>52</sup> The concept of dependency has been relegated to a zone of privacy and the responsibility of family failures on the State, ignored.<sup>53</sup> The individual vulnerability, faced by migrant women within this particular case, should not only take into consideration the past and the distant future, but also the possibility of immediate harm<sup>54</sup>. The ignorance of institutions as to this particular vulnerability, which is normally left to the private sphere, makes institutions in some cases exacerbate it. A migrant woman’s awareness of her vulnerability combined with her distrust of institutions<sup>55</sup> isolates her even more in a domestic violence situation and effectively entraps her. The vulnerability is produced when a person is lacking physical, human and/ or social assets.<sup>56</sup> Institutions distributing wealth and property provide the basis for physical assets.<sup>57</sup> Human assets are linked with health and education, and such resources that the individual invests in themselves.<sup>58</sup> Social assets are conformed by our network of relationships.<sup>59</sup> In this sense, without the two previous ones, it is difficult to imagine how to create effective networks. This lack of assets can be a reality in the analysis of the two types of migrants, especially in the case of undocumented migrant women. The lack of these assets is what reinforces vulnerability. In this sense, the State should be responsible for responding to the vulnerability of individuals and institutions.<sup>60</sup> This approach suggests that protection should go further than the established model that differentiates, in order to protect, taking into consideration gender, race and ethnicity, as it creates disadvantages just to focus on these three.<sup>61</sup> This vulnerability mode proposes a deeper and penetrating equality analysis, in the relocation of

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<sup>52</sup>M. A. Fineman, ‘The vulnerable subject: anchoring equality in the human condition’ 20 *Yale J.L & Feminism* . 2008-2009. p. 10

<sup>53</sup>*Ibid*, p. 11

<sup>54</sup>*Ibid*, p. 12

<sup>55</sup>*Ibid*, p. 13

<sup>56</sup>*Ibid*, p. 14 in reference to Kirby.

<sup>57</sup>*Ibid*.

<sup>58</sup>*Ibid*.

<sup>59</sup>*Ibid*.

<sup>60</sup>*Ibid*, p. 15

<sup>61</sup>*Ibid*, p. 16

institutions to the centre of the analysis as assets providers.<sup>62</sup> Equality should then be applied to all the persons when the State is committed to providing assets towards social policies<sup>63</sup>. This can sound obvious in the Swedish context, but the reader must keep in mind that the concept of social welfare is not widely defended or implemented throughout the Council of Europe.

Some of the problems exposed might affect non-migrant women, as well. There could be some restrictions in accessing some shelters, such as the imposition of drug consumption criteria or restrictions on the age of the children who accompany the women. We will divide the chapter into the following concerns: problems faced by undocumented migrant women; problems faced by women with a dependent residence status; and problems that can be faced by both groups.

### **2.2.1 Problems faced by undocumented migrant women**

These women often arrive by illegal ways into a new country. There are different reasons; these may include escaping from wars, looking for a better life, being smuggled, personal reasons and so on. Ways and reasons will not be analysed in this paper. Even if they manage to correct their administrative situation at a later date, these women are initially defined by some parts of the society as “illegal immigrants”. This classification applies to all women whose administrative situation do not fulfil the requirements of the migration law, and are under an irregular administrative condition.

These women are the most vulnerable of all. They are vulnerable and invisible, facing three grounds for discrimination, as women, migrant and undocumented.<sup>64</sup> As irregular persons, they do not have access to any of the protection mechanisms. As persons without working permission, their

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<sup>62</sup>*Supra*, note 52 p. 18

<sup>63</sup>*Ibid*, p. 24.

<sup>64</sup>‘Undocumented migrant women. Until when without protection in front of gender violence?’ Amnesty International. Spanish section. 24-11-2005. p. 5 (only available in Spanish: ‘Inmigrantes indocumentadas, ¿hasta cuándo sin protección frente a la violencia de género?’)



economic dependence on their aggressor is another handicap.<sup>65</sup> Normally, these women do not have a social structure to help them, such as friends and family. Neither do they have access to or confidence in the public institutions, especially the police, which they perceive with distrust and fear.<sup>66</sup>

In the first place, they are completely outside of the system. The resulting problems, which are also in part shared by men, are obvious. These people are not able to have access to a job and are faced with the sole option of working without a contract. Without any contractually established minimum rights these individuals are unable to control the conditions of the job, or job security. In the case of women facing domestic violence, it means a direct economic dependence on their partner or couple. Besides, these women will not have access to any benefits of the social welfare system established by the State, including specific help for victims of violence against women, thereby including domestic violence.<sup>67</sup> Another problem, then, as a consequence of their irregular status is the lack of access to social welfare and authorities, such as police. As approaching the police may initiate the procedure of expulsion of the country.

Another issue, which I will briefly mention is the treatment of the asylum seekers. Until their status is determined, they may face a similar set of circumstances as an undocumented migrant in respect to accessing a regulated job, social welfare and approaching public authorities.

The fact of being undocumented creates *per se* arbitrary distinctions in the fulfilment and protection of their rights, including measures that can contribute to reinforcing their invisibility, thereby leaving them more unprotected and vulnerable.<sup>68</sup>

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<sup>65</sup>*Supra*, note 64, p. 5

<sup>66</sup>*Ibid*, p. 6.

<sup>67</sup>*Supra*, note 52, p. 16.

<sup>68</sup>*Ibid*, p. 2

## 2.2.2. Problems faced by migrant women with a dependent residence status

These women enter as an “annex” to their partner or husband’s administrative permission. It is also known as “family reunification”. Despite it being legally possible for women to apply to bring their husbands and dependants, at present there is still a masculine perception of the migratory process,<sup>69</sup> which might justify the general tendency for men to come to the new country first.

Having a residence status does not guarantee a working permission. So, even if women manage to have an independent residence permit, they may not be economically independent if they are not granted permission to work. A woman in this situation is not covered by any social benefit, and if she decides to leave the family house because of domestic violence, she may be expelled if she does not show that she has a fixed source of income.<sup>70</sup>

Another important problem faced by these victims of domestic violence is if the country does not grant them concrete migratory protection, so if victims lodge a formal complaint against their husband or partner, the result could be the expulsion of the aggressor. Consequently, as these women are administratively dependant on their husbands/partners, they could be expelled as well. These women might not be interested on being expelled; for personal reasons, as well as for the possible existent conditions in the country of origin regarding domestic violence. Thus women may be hesitant to approach the police because of the repercussions that a complaint may have on their administrative procedure; that is future decisions regarding their residence status may be complicated or the victim may be expelled from the country.<sup>71</sup>

Obviously, a possible expulsion could lead to an asylum petition; however, this step could be avoided if it was possible to obtain an independent

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<sup>69</sup>L. Martínez Ten and M. Tuts, ‘Human Rights, women and migration: towards an intercultural education in class’ *Plataforma de los Derechos Humanos de las Mujeres*. Collaboration of *Instituto de la Mujer*. Spain. p. 44 (Only available in Spanish: *Derechos humanos, mujer e inmigración: hacia una educación intercultural en el aula*’.)

<sup>70</sup>*Ibid.*

<sup>71</sup>*Ibid.*, p. 11.

residence status in the cases of domestic violence. And, as it was previously explained, a woman who is involved in an asylum petition might face the same issues as undocumented migrant women when seeking for help for domestic violence. In addition it is noted that there are migrant women facing domestic violence that would not be granted with refugee status, as they would not fulfil the necessary legal requirements.

As to the legal framework of the Council of Europe, the countries that decide not to make a reservation to Article 59.2 of the Convention<sup>72</sup> are free to determine by internal law the applicable conditions for the suspension of an expulsion proceeding initiated against a victim. Before the existence of this Convention, Spain decided to effectively stop the expulsion in cases where it resulted with a judicial decision condemning the aggressor for domestic violence. However, judicial statistics show that it is not always easy to have a condemnatory decision<sup>73</sup>, this may be linked with different reasons that will be analysed later on.<sup>74</sup>

Another problem for women escaping a situation of domestic violence can be their children. There are shelters in different countries that establish/set a minimum age for children that are allowed in their shelters.<sup>75</sup> Or if the children are very young, some countries might not guarantee public nursing places, or scholarships for them.<sup>76</sup> Furthermore, there is a general lack of policies guaranteeing the effectiveness of the idea of conciliation within the private and public life. Thus migrant women, who have children and lack social benefits, might face technical impossibilities to escape from situations of domestic violence.<sup>77</sup>

A residence status subordinated to the partner or couple has proved to create legal insecurities and a non-effective fulfilment of the right to defence for

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<sup>72</sup>*Parties shall take the necessary legislative or other measures to ensure that victims may obtain the suspension of expulsion proceedings initiated in relation to a residence status dependent on that of the spouse or partner as recognized by internal law to enable them to apply for an autonomous residence permit.* See chapter 4.3 “Chapter VII: migration and asylum” for further elaboration.

<sup>73</sup>*Supra*, note 52, p. 11

<sup>74</sup>See chapter 5.2 “The Spanish experience” below.

<sup>75</sup>For example, some shelters in Spain, boys of more than 13 cannot have access.

<sup>76</sup>*Supra*, note 69, p. 44.

<sup>77</sup>*Ibid.*

women in these situations.<sup>78</sup> Even countries that provide legal advice to their citizens, cannot guarantee that it will be provided in all the needed languages, or that the lawyers from legal aid will be able to communicate with the victims. However, even if the victims have the right to legal aid, they might not be aware of it. The lack of information or the difficulty of accessing it for someone coming from another country, might be a consequence of an inadequate legal assessment, insecurity, and in the worst case scenario, the possibility of not ending with a legally provided solution.<sup>79</sup> This in turn endangers the life, freedom and security of the victim and her children.

Furthermore, the arrival countries generally lack a cultural perspective that take into account diversity. The institutions seem to forget that it is possible that they do not have an analogous institution in some countries of origin. It is this fact that necessitates the reorganisation of the institutions in order to correctly guarantee that each person can enjoy his or her rights.

### **2.2.3. Problems faced by undocumented migrant women and migrant women with a dependent residence status**

It is well known that a lot of women, who arrive in Europe, during the first years, try to reproduce the life that they had in their countries of origin.<sup>80</sup> I consider that this is the case for any human being moving to another country with a different culture, as it is a way for them to live/maintain/preserve their own culture and identity in the world. However, this can be prolonged in some cases, especially where the women are low skilled. I am not discussing the debate universalism versus cultural relativism, but rather the difficulties that can be faced when arriving in a new country and neither speaking the language nor having the strength and/or the skills to get informed and aware of the conditions of the new country; such as rules, traditions and so on. This situation can make women completely dependent

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<sup>78</sup>*Supra*, note 69, p. 47

<sup>79</sup>*Ibid*, p. 48.

<sup>80</sup>*Ibid*, p. 42

on their husbands or partners for any procedure regarding public administration. Thus they are effectively dependent on their men for anything linked with the public space.<sup>81</sup> Another suggested factor in the case of Europe is the cultural shock that might affect a lot of women who come from traditionally more community based, as opposed to the famous European individuality.<sup>82</sup> Then, if the State does not have sufficient resources to provide suitable conditions to accommodate in the new culture, these women may isolate themselves in their cultural group.<sup>83</sup> This tendency has been more visible within cultural groups that are clearly patriarchal, such as those groups coming from very religious backgrounds. The problem that can potentially happen is that women are kept in the private sphere, and the models of discrimination that previously existed in the country of origin are repeated in the new country. This dependence on their male partner or couple, in combination with a lack of interaction with the outside world, apart from their own culture, further isolates them and deprives them of the possibility of enjoying and exercising their fundamental rights.<sup>84</sup> Therefore isolation is a common problem amongst migrant women suffering domestic violence.<sup>85</sup> Depending on the victim and perpetrator's cultural background, the problem of domestic violence can be aggravated by its acceptance in the culture in question.<sup>86</sup> Thus, in some cases we would not only have problems relating to the implementation of existing legislation, but also the added complication of not being able to bring the private sphere into the public.<sup>87</sup>

The principle of non-discrimination, which will be discussed, further on<sup>88</sup>, particularly affects migrant women. Discrimination, in the case of undocumented women, might be even more pronounced, however, in general, migrant women without a clarified and independent administrative

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<sup>81</sup>*Supra*, note 69, p. 42

<sup>82</sup>*Ibid.*

<sup>83</sup>*Ibid.*

<sup>84</sup>*Ibid.*

<sup>85</sup>N. Ghafournia, 'Battered at home, played down in policy: migrant women in Australia', *16 Aggression and violent Behaviour*. 2011. p. 208

<sup>86</sup>*Ibid.*

<sup>87</sup>See chapter 3.1 "Domestic violence: a problem on private sphere? The influence of feminism".

<sup>88</sup>See chapter 5.1. 2 "The principle of non discrimination".

status, do not have the same rights as the nationals or the ones administratively independent. This administrative situation might determine access to protection, assistance and rehabilitation and undermine the right to justice and reparation and put lives and personal safety of victims in danger. These issues contravene the principle of non-discrimination in relation to the protection of women who suffer domestic violence.<sup>89</sup>

Being undocumented, with either no residence status or alternatively having a residence status dependent on the husband or partner, might determine the availability of economical help; access to a shelter or to any or all sources linked with domestic violence.<sup>90</sup>

The national system might also require that a formal complaint be lodged with the police prior to access to the protection mechanisms being granted. However this pre-requisite only aggravates the situation of migrant women; both undocumented and administratively dependent. The recommendations of the Council of Europe in this sense are contrary to these actions by some national systems, in that they recommend that victims not be obliged to present a complaint on the police.<sup>91</sup> The access to other resources might also be conditional on the migratory status of the victim. For example, social services might only be granted to national women or women with their administrative situation. In brief migrant women that try to gain access to a shelter or to any specific resource created for victims of domestic violence might find that they are sent to resources for migrants or for homeless people.<sup>92</sup> However, the gravity of domestic violence requires that more concrete resources be provided for all the victims.

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<sup>89</sup>*Supra*, note 52, p. 2

<sup>90</sup>*Ibid*, p. 5

<sup>91</sup>Council of Europe. Committee of Ministers. Recommendation Rec (2002) 5 of the Committee of Ministers to member states on the protection of women against violence. Para. 23: Ensure that victims, without any discrimination, receive immediate and comprehensive assistance provided by a co-ordinated, multidisciplinary and professional effort, whether or not they lodge a complaint, including medical and forensic medical examination and treatment, together with post-traumatic psychological and social support as well as legal assistance; this should be provided on a confidential basis, free of charge and be available around the clock.

<sup>92</sup>*Supra*, note 52, p. 15.

Another form of discrimination that migrant women face is their lack of knowledge of local language. Countries, like Sweden, whose system for teaching the local language is fully ruled by the public authorities, provide voluntary programmes that allow people to learn the language, free of charge, once they enter the system. In contrast, certain countries, like Spain for example, have non-governmental organisations and associations carrying the main responsibility. The consequence of this latter system is that the provision of services is heavily dependent on volunteers. In spite of volunteers having good intentions might lack the professional skills needed to carry out a lot of these services, such as knowing the necessary language.<sup>93</sup> However, the characteristics of the services provided by Spain, allow for undocumented migrant people to be accepted, as learning Spanish is considered to be a part of the process to try to regularise their situation.<sup>94</sup>

The lack of information on migrant women whose assessments of rights depends on their partners or couples is a factor, which makes them extremely vulnerable. The fear of being deported is used by husbands or couples as a weapon to control the victim<sup>95</sup>, as well in the cases of undocumented couples. The result being that, in a lot of cases, women are afraid of police and the legal system that in addition might not have appropriate services for migrant victims, thereby making it easier for them to be subjected to domestic violence.<sup>96</sup> This entire situation makes it harder to find evidence of the existence of this domestic violence<sup>97</sup>, and to raise awareness amongst the relevant authorities.

It is also necessary that each country ensure that they provide a good and specialised training for lawyers who will assist all victims of domestic violence. If this training is not provided, the result can be an omission of

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<sup>93</sup>*Supra*, note 69, p. 48.

<sup>94</sup>Personal experience of the writer, who volunteered teaching Spanish in a local NGO from Barcelona. Akawa foundation.

<sup>95</sup>*Supra*, note 85, p. 208

<sup>96</sup>*Ibid.*

<sup>97</sup>*Ibid.*

care or even a lack of correct legal information for victims. The consequence may be that attorneys receive a bad image and that victims begin to distrust legal assistance,<sup>98</sup> which, whatever the victim's opinion or perception is completely necessary.

It is important to extend this training to all the institutions involved, such as police or judges. In doing the training we must keep in mind the cultural differences between the countries of the Council of Europe. For example, in Finland, the absence of a traditional masculine role prevented the development of both a patriarchalised culture and institutions.<sup>99</sup> However in spite of this, the number of reported cases of domestic violence is higher, than more traditionally patriarchal countries, such as Spain.<sup>100</sup> This fact can be considered under different interpretations.<sup>101</sup>

Another country of the Council of Europe, which has presented more problems linked with structural and embedded patriarchal institutions, is Turkey. Difficulties have been reported in the implementation of the 1998 national law dealing with domestic violence.<sup>102</sup> In the Turkish reality, women trying to escape from domestic violence might face problems when dealing with some prosecutors, enforcement officers or judges, who have neglected their duties. Sometimes this may be attributed to a lack of expertise, other times to a lack of will.<sup>103</sup> It has been a general complain, especially in smaller cities and towns, that, when women report domestic violence to the police, the members of it prioritise the preservation of the family unit, sending the women back to their homes or “reconciling” them

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<sup>98</sup>Report ‘Spain: beyond the paper (making real the protection and justice for women facing gender violence in the family).’ *Amnesty International*. 2005. p. 53. (Only available in Spanish: España: más allá del papel. (hacer realidad la protección y la justicia para las mujeres ante la violencia de género en el ámbito familiar).

<sup>99</sup>C. Pérez Belda, ‘Domestic violence in Finland and Spain’, 11 *Alternativas. Cuadernos de trabajo Social*.2003. p. 136 (only available in Spanish ‘Violencia doméstica en Finlandia y España’)

<sup>100</sup>*Ibid*, p. 140.

<sup>101</sup>See as well chapter 2.3” Statistics within the framework of Council of Europe. Critical remarks on statistics. “

<sup>102</sup>Law No. 4320 on the Protection of the family.

<sup>103</sup>Report ‘He loves you, he beats you. Family violence in Turkey and access to protection’. *Human Rights Watch*. 2011. p. 4



with the husbands rather than pursuing a criminal investigation and getting protection orders.<sup>104</sup> The problem becomes worse when non-Turkish women are involved. The Kurdish living in the southeast of Turkey do not trust the authorities, especially the police as a consequence of the regional conflict lived during years. As a consequence, women suffering from domestic violence would not ask the public authorities for help. Furthermore, the lack of interpreters, limited opening hours of family courts, in addition to the awareness of the risk that they may be sent back to their country of origin, discourage them from asking for help.<sup>105</sup> The situation is not made any easier by a general environment that lacks sensitivity towards domestic violence. Despite the existence of the previously mentioned 1998 national law, the government of Turkey is accused of being inconsistent in their response to domestic violence. This accusation is drawn from the fact they enacted a law, but did not giving enough funding to correctly implement it.<sup>106</sup>

The case of a woman, Masha M is not the only one. She was originally from Ukraine and was married with a Turkish man whose complaint was not accepted by the police because of her nationality and residence status; being “invited” to go back to her country of origin, because, as a foreigner, the Turkish authorities did not understand “why they should deal with her”.<sup>107</sup> Undocumented migrant women, including asylum seekers, are outside of any possible resource created for fighting against domestic violence as local authorities consider that they are not allowed to use public funding on women without legal status in Turkey.<sup>108</sup> However it cannot be denied that the amendment and the inclusion of monitoring and training procedures to the police is an improvement to the general situation.<sup>109</sup> Furthermore, Turkey ratified the Convention in March 2012.

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<sup>104</sup> *Supra*, note 103, p. 5.

<sup>105</sup> *Ibid*, p. 6.

<sup>106</sup> *Ibid*, p. 15

<sup>107</sup> *Ibid*, p. 31

<sup>108</sup> *Ibid*, p. 45

<sup>109</sup> *Ibid*, p. 33.

The reader might find the situations of the Turkish context exaggerated. Maybe the reader considers them not useful within the context of all the countries of the Council of Europe. However, together with the Finnish example, allows me to raise certain points. Firstly, that even in countries with better social welfare system and theoretically more gender equality, domestic violence is still a problem.<sup>110</sup> Secondly, there exists an added vulnerability in the case migrant women, which becomes exacerbated in the case of the undocumented ones. Keep in mind that the majority of situations reported in this chapter have become public knowledge because of the tasks carried by NGOs, so the problem is invisible for a lot of sectors of society. Thirdly, without aiming to create a categorisation between some countries and others, there are countries where the problem is structural, and so probably it will require more time and efforts to solve it. The correct implementation of measures to protect these women will require: funding; efforts; and what is more important, and probably lacking in all the Council of Europe, even in the Nordic countries: a real perception, by all sectors of the society, of the scale of the problem of domestic violence. And specially of the problem of domestic violence suffered by migrant women as what it is: a human rights violation that, consequently, requires human rights perspectives in its treatment.

Until countries assume a human rights perspective in the issue of migrant women facing domestic violence, the situation will not be solved. Until access to the existent sources is not established on the fact that the woman is a victim we will not be able to talk about non discrimination<sup>111</sup> nor to eradicate this problem or, at least, to bring it clearly into the public sphere.

## **2.3 Statistics within the framework of Council of Europe. Critical remarks on statistics.**

At this stage of the thesis, the reader could be expecting a table organised by countries and divided by the four types of domestic violence previously

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<sup>110</sup>*Supra*, note 99, p. 140.

<sup>111</sup>*Supra*, note 52, p. 5

discussed. As well, the reader might expect the number of victims of each kind of violence subdivided as migrant and non-migrant women, and the details of the non-migrant women further subdivided into how many were undocumented and how many had a dependent residence status. In effect, the purpose of this sub-chapter was to make the reader aware of the extent of the problem of migrant women facing domestic violence. However I cannot provide this table as not only does it not exist but even if it did exist, it would not be reliable.

Without concrete data, statistics or numbers, some human rights professionals, as well as other experts in related fields or even completely different fields cannot imagine how serious the problem is. Without trying to diminish the work of statisticians, according to my point of view, a human rights defender should analyse a situation from another angle, rather than from statistics. A human rights professional should be able, with facts in one hand, and human rights law in the other, to determine whether there is a violation of human rights or not. However, I consider that it is important that countries start to recompile information, create a database and exchange information and research techniques between them. I trust that the new Convention will help with the tasks<sup>112</sup> for the correct fulfilment of Articles 10 and 11. However, some improvements should be made to these articles in order to have better and more useful statistics.<sup>113</sup>

As a starting point, the reader must know that domestic violence can potentially affect all women, which consists of half of the population at least.

According to a vast majority of professionals, only 10 per cent of women suffering domestic violence report it to the police.<sup>114</sup> However the collated results may be completely different, due to the fact that there are many ways to configure statistical research. For example some statistics might use

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<sup>112</sup>See chapter 4.1 “General overview”.

<sup>113</sup>See chapter 6 “Conclusions”.

<sup>114</sup>E. Bosch Fiol, M. Gili Planas, V.A.. Ferrer Pérez, ‘Domestic violence as a form of expression of misogynist’, *Faculty of Psychology. University of Balear Islands*. p. 57 (Only available in Spanish: ‘Attitudes’ La violencia doméstica como una forma de expresión de las actitudes misóginas)

agency samples from law enforcement, when others from hospitals, courts, shelters and so on.<sup>115</sup> Furthermore, statistics try not to define different types of domestic violence, and instead class them all together under the general heading of domestic violence. This perspective does not take into consideration concrete facts such as the fact that only serious or chronic violence is brought to the attention of public authorities. This means that surveys based in hospitals, shelters or law enforcement might show the subtypes of coercive controlling violence and violent resistance<sup>116</sup>, and of course, not situational couple violence or separation instigated violence. Furthermore, apparently, victims from coercive couple violence are more likely to look for formal help, from for example the police, than victims of situational couple violence. This may be another reason why situational couple violence might not appear in statistics.<sup>117</sup>

Going country by country, some data can be offered; however I do not consider it useful to recompile them and attempt to create reliable statistics, as the methods of compilation have not been the same. In the majority of the cases the methodology used was unknown. And, due to the reasons previously stated, I do not consider that the data shows the real magnitude of the problem. I consider that, until a clear and common procedure for data compilation is established, it should be enough to mobilise society by making them aware that the problem can potentially affect any women and that migrant women find it more difficult to escape such a situation.

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<sup>115</sup>M. P Johnson, 'Langhinrichsen-Rolling's confirmation on the feminist analysis of intimate partner violence: comment on "controversies involving gender and intimate partner violence in the United States"', 62 *Sex Roles. Feminist Forum.* 2010. p. 212

<sup>116</sup>*Supra*, note 20, p. 290.

<sup>117</sup>*Supra*, note 25, p. 429.

# **3. Feminist approaches to domestic violence faced by migrant women**

## **3.1 Domestic violence: a problem in the private sphere? The influence of feminism.**

Traditionally, issues or situations that happen in the privacy of the houses have been kept private. Thus finding cases of domestic violence and solving them has, traditionally, been difficult or impossible. The situation of migrant women is harder, as they are, traditionally, disadvantaged subjects<sup>118</sup> whose situation is more hidden, and thus deeper within the private sphere.

The responsibility of the State in certain situations such as domestic violence within the private sphere is something that has been discussed in the last few years through the due diligence concept. However, the perception of it as a private problem, which does not involve the rest of the public, still affects all societies, some more and others less. The reasons for it are different, as are the possible responsibilities.

A repeated reason suggested for the privatisation of the personal sphere is that the general norms regarding intimate heterosexual relations are, despite recent changes, heavily gendered and rooted in a patriarchal heterosexual model that continues to validate the power of men.<sup>119</sup>

If a society shows empathy towards violent men, such as family members, relatives, State representatives etc., and thereby turns a blind eye or fails to take into consideration the seriousness of violence, they risk prolonging the abuse as the victim is denied access to resources and the perpetrator is able

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<sup>118</sup> See chapter 2.2 “Specific problems faced by migrant women in the context of domestic violence”.

<sup>119</sup> *Supra*, note 5, p. 15 in reference to Dobash 1979, Dobash 1992, Yllö and Bograd 1988

to rationalise his behaviour through available discourses.<sup>120</sup> This has happened and continues to happen when domestic violence is kept in the private sphere.

The role of the State in the privacy of the personal life has been traditionally treated as separate sphere ideologies between the public and the private domains, such as government bodies being treated as public entities and families as private. Through this distinction, the development of the concept of family privacy has avoided the interference of State control.<sup>121</sup> But, despite the general perception of entities, such as families as being natural, it cannot be forgotten that these institutions are socially constructed and legitimised by law, and are therefore, in effect, created by the State.<sup>122</sup> Thus as the State legitimised this private aspect, they are able to remove it. Moreover it is responsible for what happens inside the “privacy” of a family, especially when human rights violations occur. Support for this proposition derives not only from the logic set out above, but also from the due diligence principle. It appears obvious, at least for me that, nowadays, no one with legal knowledge would question the responsibility of the State for what happens in the private sphere, being necessary to assume that the radical feminists were right, and the personal is political. However, the problem rests more on the society, in question, rather than on legal theorists. But the responsibility of it, especially when it comes to public institutions, still remains on the State. It is the State, which creates the institutions and legally organises it, so it has the capacity to not only to change them, but also to control them.<sup>123</sup>

When talking about those individuals who are left behind in society, is a common issue of the liberal State to point to their own individual failures of these individuals, considering that unsuccessful persons did not demonstrate individual responsibility using the opportunities that all States give to everybody. But the key question should be: why has the system provided

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<sup>120</sup> D. Gadd, ‘Masculinities and violence against female partners’, 11:61 *Social & Legal Studies*. 2002. p. 63

<sup>121</sup> *Supra*, note 52, p. 5

<sup>122</sup> *Ibid*, p. 6

<sup>123</sup> *Ibid*, p. 7

more advantages to some individuals than others?<sup>124</sup> The current liberal system has been constructed from concepts of autonomy and independence that ignore vulnerability as a part of the human existence. It is necessary to reconstruct the role of State and recognise any responsibilities that it might have. Thereby implementing an effective equality regime that empowers those who need it.<sup>125</sup> This discourse is, not only applicable to migrant women who suffer domestic violence. Thus the State must guarantee equality as a universal resource for everyone and not exclude the traditionally known “private space”.<sup>126</sup>

Within the feminists’ movements, radical feminists were the only ones that managed to get the world’s attention in this private/public dichotomy by claiming that the personal is political. Their opening and central declaration, that the “personal is political”, has guided a line of thought, which is characterised by the belief that women suffer certain disadvantages because of the highly patriarchalised structure of society.

Despite the different theories on the concept of sex and gender and intersectionality, which will be analysed in the next sub-chapter, it is considered that this line of thought is highly connected with existentialism.

Politicising the personal life implies that in order to have a real women’s liberation, a change is necessary/needed in the male-female relations.<sup>127</sup> The radical feminist movement has also been very effective with raising society’s awareness of the dangerous nature of domestic violence, specifically coercive controlling violence. This was achieved not only through the reasons of visibility previously explained<sup>128</sup> but also through educational campaigns that managed to effect both the public and the justice system.<sup>129</sup>

Feminism is a revolutionary project that aims to create consciousness-raising, so to raise society’s consciousness, first through one of its artifices

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<sup>124</sup> *Supra*, note 52, p. 18

<sup>125</sup> *Ibid*, p. 19

<sup>126</sup> *Ibid*, p. 24

<sup>127</sup> K. Wendling, ‘A classification of feminist theories, Volume 3 number 2 *Les ateliers de l’éthique* (2008). p. 9

<sup>128</sup> See chapter 2.1.1 “Coercive controlling violence”.

<sup>129</sup> *Supra*, note 13, p. 19

Mackinnon and later through all different lines of thought.<sup>130</sup> Another well known feminist, Simone de Beauvoir, considered that women's effort has never being anything more than a symbolic agitation<sup>131</sup>, they –women- live dispersed among males and stay closer to them than to other women. The bond that unites women to their oppressors is not comparable to any other.<sup>132</sup> Even with rights that are legally recognised, the reality is different. For example, the economic spheres in which men receive better salaries and positions.<sup>133</sup> In my opinion, Simone de Beauvoir might be right when she called the feminist cause a symbolic agitation as these words were written in 1949 and things have not changed that much since then. However it is a fact that, 20 years later, the radical feminists managed to bring the issue of women's rights to the public sphere.

The question of consciousness-raising has been a key issue on all the feminists' agendas. However, it is not considered the way to change the male dominative system, but rather an important step that makes women understand their oppression; possible ways to change it; and also it brings the private sphere into the public. Once consciousness-raising is a fact, we can expect a change in institutions. Consciousness-raising is conceived as a group activity where women share experiences of injustice and challenge each other for change through the inclusion/use of a feminist perspective.<sup>134</sup> It means resisting the traditional and prevailing norms.<sup>135</sup>

For other feminists, as Monique Wittig, the problem starts in the categories "woman" and "men", which she considers political ones, not eternal. For her, the fight should focus on suppressing men as class, as a political struggle. Once this goal is achieved, and so the conception "men" and "women" there will not be slaves, as there are not slaves without masters.<sup>136</sup>

Wittig's solution would be based on the destruction of the heterosexual system, which is based on the oppression of women by men and which also

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<sup>130</sup> C. Chambers, 'Masculine domination, radical feminism and change,' *Feminist Theory* 6:325 (2005). p. 3

<sup>131</sup> S. de Beauvoir, *The second sex*. p. 7

<sup>132</sup> *Ibid*, p. 8

<sup>133</sup> *Ibid*, p. 9

<sup>134</sup> *Ibid*, p. 14

<sup>135</sup> *Ibid*, p. 15

<sup>136</sup> M. Wittig, *The straight mind*. 1992. p. 313.



produces this differential doctrine between sexes that justifies oppression.<sup>137</sup>

In my opinion, the implementation of this idea has already started in some parts of societies through long term projects that focus on educating society on different lifestyles that are not tied to the heterosexual model. These projects work on two levels: socially, they normalise alternative types of lives and emotionally, they decriminalise them.

Alternatively different lines of thought hold that one of the key reasons behind the successful domination by males is that the ability to make social distinctions based on biological differences emerges naturally.<sup>138</sup> For MacKinnon, gender is not a matter of biology, morality or psychology but rather a matter of politics and power.<sup>139</sup> MacKinnon holds that inequality comes first and difference after.<sup>140</sup> So, there are biological differences between men and women that are used through gender to create social differences, giving importance to differentiating between one group and the other the sexual difference. Traditionally, family has been a place to perpetuate gender norms, but it is noted that it is not the only one.<sup>141</sup>

Regardless of the approach taken towards the construction/basis of male domination, there is currently no legal theory, which provides strong justifications for the consideration of domestic violence as a matter confined to the private sphere where the State holds no responsibility. Even if one were to use cultural relativist discourses, when it comes to domestic violence the violation of human rights is so obvious that any discourse towards the privatisation of this problem would not be able to sustain itself.

### **3.2 The need of empowering women**

Empowering women implies liberating them of the label of victims and making them aware that they are the owners of their lives. It changes the perspective of “poor victims” to persons in charge of their lives with real

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<sup>137</sup> *Supra*, note 136, p. 317

<sup>138</sup> *Supra*, note 131, p. 5

<sup>139</sup> MacKinnon, *Towards a feminist theory of the State*. 1989 p. 109

<sup>140</sup> *Ibid*, p. 219

<sup>141</sup> *Supra*, note 131, p. 9

and visible capacities for making it.<sup>142</sup> However, the process of empowerment might not be an easy one without the correct resources. The reader has to keep in mind the mental status of victims of domestic violence.<sup>143</sup> Plus, the empowerment of a migrant woman who might be stigmatised or discriminated on other grounds<sup>144</sup>, needs additional resources from a multi-approach point of view. Thus the empowerment model means working with the victim to manage the violence in the relationship. It includes: providing temporary shelters; the effective involvement of Courts for the arrest of perpetrators or protection of victims with abuse orders; the development of a safety plan that takes into consideration the immediate future of the victim; and where warranted the creation of public strategies that allow victims to escape from the relationship<sup>145</sup> is another way of oppression. The administrative nature of migrant women mean that, consequently in addition to the forms of oppression that they face as women, they also face additional forms of oppression as a consequence of it.

The personal difficulties a victim might have when facing an intimate relationship contaminated by domestic violence makes it necessary to use strategies for the empowerment of victims. These strategies incorporate a mixture of emotional tools and public resources to raise awareness amongst victims that it is possible and viable to change their situation.<sup>146</sup>

### **3.3 The question of intersectionality**

Adopting an intersectionality approach means challenging the primacy of gender in the explanation of domestic violence and focussing on other forms of inequality and oppression, such as racism, ethnocentrism, class and heterosexism; all of which intersect with gender oppression. The guiding principle is to adopt a synchronised observation of the multiple and

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<sup>142</sup> N.J Sokoloff, I. Dupont, 'Domestic violence at the intersections of race, class, and gender' Vol. 11 No. 1 *Violence against women* (2005). p. 49

<sup>143</sup> See chapter 2. 1 "Sub-categories of domestic violence."

<sup>144</sup> See chapter 2.2 "Problems faced by migrant women in the context of domestic violence"

<sup>145</sup> *Supra*, note 13, p 20.

<sup>146</sup> *Supra*, note 16, p. 76

interlocking forms of oppression on individuals.<sup>147</sup> Examples of these interlocking systems are gender, race and class.<sup>148</sup>

Intersectionality tries to subvert race/gender binaries in order to theorise about identity in a more complex way. It also aspires to provide a broad vocabulary to answer the critics of identity politics and centres the project on voicing those subjects normally ignored.<sup>149</sup>

It aspires to challenge the essentialisms theories traditionally linked with the oppression of women by including it in possible explanations for this oppression.<sup>150</sup> It does not describe how privilege and oppression intersect, but rather inform each other about the subject's experiences.<sup>151</sup>

This approach ignores the previous approach defended by different lines of feminism that tried to highlight the common experiences of battered women to create a strong feminist movement that would be able to end women's abuse.<sup>152</sup> Through this approach, domestic violence would be analysed from the single common fact that the victim is a woman and taken into account the corresponding gender inequality. Intersectionality responds as a critique to what was known as a "Eurocentric" view of feminism. Intersectionality, rejects explanations regarding violence against women that are based solely on being a woman. Gender inequality is modified when it intersects with other systems of power and oppression<sup>153</sup>, such as the previously mentioned forms class, race and gender. Other factors linked with these three, which may also comprise part of it, include, for example, the lack of availability of sources and institutions that help victims to escape domestic violence.<sup>154</sup>

The previous feminist conceptions also considered men as a uniform category, without taking into consideration their individual difference that might affect the concept of masculinities.<sup>155</sup> Examples of these differences

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<sup>147</sup>*Supra*, note 142, p. 39

<sup>148</sup>Note that class is the less developed. *Ibid*, p.40

<sup>149</sup>J. C Nash, 'Re- thinking intersectionality', 89 *Feminists review* (2008). p. 2

<sup>150</sup>*Ibid*, p. 4

<sup>151</sup>*Ibid*, p. 12

<sup>152</sup>*Supra*, note 142, p. 41

<sup>153</sup>*Ibid*, p. 43

<sup>154</sup>*Ibid*, p. 44

<sup>155</sup>S. Adu-Poku, 'Envisioning (black) male feminism: a cross-cultural perspective' p. 1

include race, ethnicity, class or sexuality. For some male academicians it is not conceivable to appeal to the common cultural experiences of women in order to exclude men from the discussion of feminism and genders studies as it implies ignoring the different concerns of individuals within the categories of 'women' and 'men'.<sup>156</sup> I agree with this theory. I consider that consciousness-raising is an activity where men should be involved, or at least informed. A possible option for some women, which is suggested by some radical feminists, is to stay in areas that are just for women but it might not be an option to other women that might want to interact with men in their personal lives through intimate relations. This case represents a heterosexual context, which I do not find useful as the woman is aware of her oppression by her partner and the man not. Thus, the problem of domestic violence will either continue, or the relationship will not work. I understand feminism as a way to re-educate society, as a whole, on the real equality between men and women. For that purpose, it should arrive to the roots of patriarchy, including men on the discourse. Furthermore, as the limits of intersectionality are still not clear, I do not find reasons, from a theoretical point of view, to exclude them from the debate. I then agree with the theory that feminism can find alternative explanations for the concept of identity and the corresponding practical implications, through the incorporation of cross-cultural dimensions in the analysis of gender.<sup>157</sup>

Another fact that must be taken into consideration and which does not make it easier is the question of the concept of violence. Each culture defines it differently<sup>158</sup> so a universal concept of violence is impossible to create. However the creation of human rights standards –both regional and universal- can be used in the Council of Europe context. Albeit some cultural or national groups cohabiting in the Council of Europe might consider these standards a utopia or a western perception. At this point, cultural relativism would enter the game. In the name of cultural relativism, some cultures have denigrated their women through a religious or cultural justification. It is well known that the argument of culture consistently is

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<sup>156</sup> *Supra*, note 155, p. 163.

<sup>157</sup> *Ibid*, p. 166.

<sup>158</sup> *Supra*, note 142, p. 42 in reference to Yoshihama, 1999.

raised in the various oppressive and violent situations of migrants.<sup>159</sup> However, culture should not be confused with patriarchy, and rather an analysis of the patriarchal structure within each culture is needed.<sup>160</sup> Nevertheless, cultural relativism is not the topic of this thesis, but it is important to keep in mind the difficulties attached to it and the fact that regardless of the cultural approach intersectionality only benefits women. It gives a voice to women that have been ignored, marginalised or hidden from the dominant culture, in order to improve the situations of women from different backgrounds.

A different cultural background is not the only issue. Different religions, sexual orientations and so on might play a part and therefore require different interventions and multicultural perspectives on the issue of domestic violence.<sup>161</sup>

However, this is an emerging field, so the problems are far from settled mainly because of a lack of methodology, which affects as well the possible implementation process. While different methods have been suggested during the last few years, there is still no general consensus about how to collect data and research from an intersectional approach. Furthermore, the application through politics complicates the situation even more. Research on this area is focused on the knowledge gap between the theoretical construct of intersectionality and its practical application.<sup>162</sup> Even if recommendations exist, some decision makers keep adopting public policies that have a one-dimensional approach such as gender-mainstreaming or gender-based policies.<sup>163</sup>

To conclude, despite that fact that the methodology is still not clear, intersectionality can be helpful in the fight against domestic violence suffered by migrant women. The next chapter will propose some suggestions for the inclusion of an intersectional approach that focuses on an analysis of the relationship of gender, race and class. I do not pretend to

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<sup>159</sup> *Supra*, note 142, p. 42 in reference to Yoshihama, 1999, p. 44

<sup>160</sup> *Ibid*, p. 47.

<sup>161</sup> *Ibid*, p. 50

<sup>162</sup> O. Hankivsky and R. Coermier, 'Intersectionality and public policy: some lessons from existing models', 64:217 *Political Research Quarterly*. 2011. p. 223

<sup>163</sup> *Ibid*, p. 220

create a legal parallel legislation for migrant women, however, following extensive research, it seems logical to me that some positive discrimination should be made. In order to act efficiently and effectively, public policies cannot focus solely on the fact that the victim is a woman with an irregular administrative status, rather in more factors

### **3.4 An Integrative Feminist Model.**

An Integrative Feminist Model adopts the gendered analysis of violence from the feminist perspective and also incorporates alternative theories and critiques to it.<sup>164</sup> This results in the combination of a traditional feminist model, which focuses on challenging male entitlement and privilege, and the inclusion of the traditional concept of not opening the private sphere to public.<sup>165</sup>

As previously explained the intersectional approach focuses on the relationship between gender, race class, national origin, sexual orientation, age and disability. These factors are taken into consideration by black feminists, international feminist and lesbian feminists and used by them to arrive to different conclusions about domestic violence.<sup>166</sup>

The Integrative Feminist Model keeps the main characteristics of the traditional feminist model, such as the gender analysis and the empowerment of women but tries to introduce new elements in the analysis. In effect it goes further than the intersectionality approach as, for example, it includes elements that were not previously mentioned, such as female aggression.<sup>167</sup> This model expands the traditional existentialist feminist model and improves upon the original idea of intersectionality by including all possible elements that might have an effect in a relationship of domestic violence. Furthermore, when looking to elements such as female aggression, the model can, potentially analyse the different types of domestic violence

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<sup>164</sup> B.A. McPhail, N.B.Busch, S. Kulkarni, G. Rice, ‘An integrative feminist model: the evolving feminist perspective on intimate partner violence’, 13:817 *Violence against women*. 2007. pp. 817-818

<sup>165</sup> *Ibid*, p. 818.

<sup>166</sup> *Ibid*, p. 818 and see chapter .3.3 “The question of intersectionality”

<sup>167</sup> *Ibid*, p.823

previously explained<sup>168</sup>, whereas the feminist model tackles only coercive controlling violence.

The Integrative Feminist Model is represented by a puzzle whose pieces must fit together. These pieces are: the adoption/inclusion of the construct/idea/statement that the “personal is political”; acknowledging male victims and female perpetrators; changing policies and institutional responses; integrating explanatory models of violence causation; exploring alternative interventions such as restorative justice solutions; increasing victim choice and voice by crafting personalised solutions; and a feminist analysis of power differentials, based on gender, class, race, national origin, disability, sexual orientation and age.<sup>169</sup> All these pieces, together with the piece of integrative feminist model, must fit with each other to complete the “picture” that is the model.<sup>170</sup>

This model is still embryonic, so the elements of analysis are still unclear. Some causes of violence have been suggested, but those working directly with domestic violence have met them with reluctance. An example of a suggested cause is the idea that violence is innate and human.<sup>171</sup> It is an expanding model that includes other theories of violence.<sup>172</sup> The use of these new elements include the need to consider the following elements: explanatory role of physiological and neurological factors; evolutionary psychology; substance abuse; childhood experiences of violence; intergenerational transmission of violence; shame and humiliation; attachment disorders; lack of anger control; psychopathology and difficult personality traits; general communication and coping skills deficits; personal inadequacy; and the use of violence as a tool for constructing masculinity.<sup>173</sup> The model encourages focusing on individual behaviour rather than identity, and combines notions of empathy and accountability.<sup>174</sup>

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<sup>168</sup>See chapter 2. 1 “Sub-categories of domestic violence.”

<sup>169</sup>Supra, note 164, p. 825, figure 1.

<sup>170</sup>*Ibid*, p. 825

<sup>171</sup>*Ibid*, p. 827.

<sup>172</sup>*Ibid*, p. 833

<sup>173</sup>*Ibid*, p. 833

<sup>174</sup>*Ibid*, p. 834

Another issue introduced by this model has been acknowledging the female role in violence and accepting that women can be perpetrators as well. Some feminists did not like this idea.<sup>175</sup> I consider that the discourse of women's responsibility can be a double-edged sword. On the one hand, it can encourage antifeminist and patriarchal discourses to blame the violence on low marital satisfaction<sup>176</sup> or to justify domestic violence or other such myths. For example that some women are violent or that they want to be in this relationship. In my opinion, these discourses are harmful for the fight against domestic violence and should be eliminated from the scientific discourse. However, it is a fact that antifeminist literature exists and benefits from the lack of knowledge on the different existent types of violence; mixing perpetrators and facts to arrive at conclusions that are not linked with gender reasons regarding domestic violence.<sup>177</sup>

The positive part of including the responsibility of women in domestic violence would be that the different types of domestic violence explained under a clinical perspective would be included in the discussion. These could, in turn, be closely analysed and consequently, better policies for its detection, prevention and intervention could be implemented.

This way of dealing with it would make it possible to create individualised treatments, such as individual counselling or, if in the case of situational couple violence, couple counselling.<sup>178</sup>

Another focus of this model is the treatment received by perpetrators. Without advocating for decriminalisation, the model focuses on mandatory arrests and prosecutions and claims that a major community involvement is necessary. As a new area of research, this concrete part of the model has not been explored enough<sup>179</sup>, however, the suggestion seems to go along the line that the perpetrators be "recovered". This is to be attempted through the provision of treatments and options that aim to emotionally re-educate

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<sup>175</sup> *Supra*, note 164, p. 828.

<sup>176</sup> L. Dixon, N. Graham-Kevan, 'Understanding the nature and etymology of intimate partner violence and implications for practice and policy', 31 *Clinical Psychology Review*. 2011. p. 1147.

<sup>177</sup> See chapter 2.1 "Sub-categories of domestic violence" and 2.3 "Statistics within the framework of Council of Europe. Critical remarks of statistics."

<sup>178</sup> *Supra*, note 164, p. 834

<sup>179</sup> *Ibid*, p. 837



perpetrators and demonstrate that they are able to have emotionally healthy relationships free of violence.

In my opinion, this model is the most complete despite the fact that it presents the same problems as the intersectionality approach, such as for example the lack of concrete methodology. Furthermore not only does it go further than the intersectional model but also, in contrast to the existentialist model, the integrative feminist model can be used to provide new tools to fight against domestic violence.

# **4. The Council of Europe Convention on preventing and combating violence against women and domestic violence.**

## **4.1 General overview.**

According to the Preamble, the Convention was based upon different legal instruments. Such as the Convention for the Protection of Human Rights and Fundamental Freedoms, different recommendations of the Committee of Ministers, case law of the European Court of Human Rights-so on ECHR-, regarding the International Covenant on Civil and Political Rights-so on ICCPR-, the International Covenant on Economic, Social and Cultural Rights-so on ICESCR-, the Convention on the Elimination of Discrimination against Women- so on CEDAW-, Recommendation 19 of CEDAW Committee, and norms of criminal and humanitarian law. The Preamble recognises the equality between men and women. The main objective of the Convention is considered to be the elimination of violence against women and domestic violence in Europe. The Convention, approved in May 2011, is divided in twelve chapters with a total of eighty-one articles.

Articles 1 to 6, of the First Chapter, include the purposes, definitions, equality and the general obligations. The purposes, in Article 1, address how to deal with the main purpose of the Convention. As previously stated, the main purpose is the elimination of violence against women and domestic violence in Europe. The same Article announces the creation of a specific monitoring mechanism. This mechanism is detailed in Chapter IX, from Articles 66 to 70.

The Convention is always applicable, even in times of war.<sup>180</sup> The basic pillar of the responsibility of States is the due diligence principle.<sup>181</sup>

Chapter II copes with integrated policies and data collection, from Articles 7 to 11. The Chapter invites the State Members to take coordinated policies,<sup>182</sup> with the participation of non-governmental organisations and the civil society.<sup>183</sup> The State Members must undertake a data collection of relevant statistics.<sup>184</sup> A co-coordinating body will be responsible for the analysis and dissemination of the results<sup>185</sup> of this data collection.

Chapter III is dedicated to prevention. Articles 12 to 17 establish the States' general obligations and measures. The objective is to change the social and cultural behaviour of men and women regarding prejudices and roles.<sup>186</sup> Programmes in cooperation with national human rights institutions will promote awareness-raising; using the dissemination of information as a tool.<sup>187</sup> The Convention invites the inclusion of information that seeks to end gender roles and fight for equality between men and women, in formal curricula and at all levels of education.<sup>188</sup> Prevention and treatment programmes for perpetrators should be created. States must adopt the necessary legislative and other measures to create prevention and treatment programmes for perpetrators.<sup>189</sup> The private media should also be involved in this process.<sup>190</sup>

Chapter IV arranges protection and support, in Articles 18 to 24. The recovery of victims should be guaranteed by general support services<sup>191</sup>. This Chapter also invites States to provide: sufficient shelters; anonymous and free of charge telephone lines that are available 24/7; guarantee of the

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<sup>180</sup> Article 2.

<sup>181</sup> Article 5.

<sup>182</sup> Article 7.

<sup>183</sup> Article 9.

<sup>184</sup> Article 11.

<sup>185</sup> Article 10.

<sup>186</sup> Article 12.1.

<sup>187</sup> Article 13.

<sup>188</sup> Article 14.

<sup>189</sup> Article 16.

<sup>190</sup> Article 17.

<sup>191</sup> Article 20.

protection of child witnesses; and other measures that guarantee support and protection.<sup>192</sup>

Chapter V, Articles 29 to 28, establish the substantive law. Regarding civil law, the Convention suggests that States should provide the necessary legislative measures for creating civil remedies against the perpetrators.<sup>193</sup> States should also provide the legislative changes to make it possible to claim compensation.<sup>194</sup>

Forced marriages should be criminalised;<sup>195</sup> and easily annulable; without extra costs to the victim.<sup>196</sup> Other acts that should be criminalised are stalking, physical violence, sexual violence including rape, female genital mutilation, forced abortion, forced sterilisation and sexual harassment.<sup>197</sup>

The jurisdiction applies to all actions taken in the States' physical territories; on board nation ships and aircrafts and by a national and by a person that has habitual residence in the territory.<sup>198</sup> States shall legislate to take into consideration aggravating circumstances. The ones mentioned in the Convention are repetition, victims that are vulnerable for particular reasons, acts performed in front of a child, or extreme levels of violence.<sup>199</sup>

The Convention contains the creation of a mechanism that would allow all the State Members to access the final sentences passed by other Parties to the Convention, in relation to offences established by the Convention.<sup>200</sup>

The creation of alternative dispute resolutions is forbidden.<sup>201</sup>

Chapter VI, Articles 49 to 58, regulates investigation, prosecution, procedural law and protective measures. This Chapter invites States to make the necessary legislative changes to not only create an immediate response for the prevention of violence against women and domestic violence, and the protection of women;<sup>202</sup> but also to grant the authorities enough power

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<sup>192</sup> Articles 22, 23, 24, 26, 27, 28.

<sup>193</sup> Article 29.

<sup>194</sup> Article 30.

<sup>195</sup> Article 37.

<sup>196</sup> Article 32.

<sup>197</sup> Articles 34, 35, 36, 38, 39 and 40.

<sup>198</sup> Article 44.

<sup>199</sup> Article 46.

<sup>200</sup> Article 47.

<sup>201</sup> Article 48.

<sup>202</sup> Article 50.

to act in emergency situations.<sup>203</sup> This includes being able to provide protective orders and fulfil them;<sup>204</sup> as well as other protective measures granting the offenders the legal guarantees of criminal law.<sup>205</sup> National legislation should guarantee legal aid to the victims.<sup>206</sup>

Chapter VII, Articles 59 until 61, regulates migration and asylum. Under the regime of residence status asylum requests;<sup>207</sup> that are based in gender – based violence are allowed.<sup>208</sup> It also reiterates that victims must be protected with the international principle of *non-refoulement*.<sup>209</sup>

Chapter VIII, Articles 62 to 65, gives State Members the principles for international cooperation. It establishes that certain measures should be taken into consideration for persons at risk<sup>210</sup>. This group includes victims of sexual violence, forced marriage, female circumcision and forced abortion. Victims of domestic violence are not included.

Chapter IX, Article 66 to 70, regulates the monitoring mechanism GREVIO. The mechanism consists of 10 professionals; however 5 more members will be elected when 25 States ratify the convention. This Committee will adopt its own rules of procedure.<sup>211</sup> It can also adopt resolutions that will be submitted to each national parliament.<sup>212</sup>

Chapter X is about the relationships with other international instruments. It is composed of only Article 71, and it gives a legal mandate of not affection of other previously existent obligations from other international instruments. State Members can conclude bilateral and multilateral agreements for issues linked with the Convention to guarantee that the purpose and provisions of the Convention are upheld.

Chapter XI regulates the amendments to the Convention.<sup>213</sup>

Chapter XII, Article 72 to 81, establishes the final clauses.

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<sup>203</sup> Article 52.

<sup>204</sup> Article 53.

<sup>205</sup> Article 56

<sup>206</sup> Article 57.

<sup>207</sup> Article 59.

<sup>208</sup> Article 60.

<sup>209</sup> Article 61.

<sup>210</sup> Article 63.

<sup>211</sup> Article 66.

<sup>212</sup> Articles 69 and 70.

<sup>213</sup> Article 72.

## 4.2 General obligations.

The general obligations are established in Chapter I of the Convention. This section will analyse the core of this chapter.

Article 4 establishes the fundamental rights, equality and non-discrimination. It encourages States to *protect the right for everyone, particularly women, to live free from violence in both the public and the private sphere.*<sup>214</sup>

The drafters considered it important to give more emphasis to the protection of women, as they are considered to be the predominant victims of gender-based violence.<sup>215</sup>

This Article condemns all forms of discrimination against women. It provides suggestions to States to articulate, at the constitutional level or through other legislative act(s), the principle of equality. It also prohibits discrimination against women and suggests the inclusion of sanctions for it. Finally, it also proposes that States abolish practices and laws, which discriminate women.<sup>216</sup> Firstly, the Article guarantees that everybody, both men and women should be equal, and also opens the door for positive discrimination for women, in order to fight against violence, mentioning the often ignored private sphere, in Article 4(1).<sup>217</sup>

The drafters based the creation of article 4(2) on the recent case of the ECHR, *Opuz v. Turkey*. In *Opuz v. Turkey*, the Court discussed the relationship between discrimination and violence against women. The Court considered that gender-based violence is a form of discrimination, which primarily affects women, as they are not afforded the same legal protections, as men.<sup>218</sup>

The procedures taken under the Convention have to guarantee non-discrimination *on any ground such as sex, gender, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, sexual orientation, gender identity,*

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<sup>214</sup> Article 4.1

<sup>215</sup> *Supra*, note 6, para. 48.

<sup>216</sup> Article 4 (2)

<sup>217</sup> Article 4 (1) *to live free from violence in both the public and the private space.*

<sup>218</sup> *Supra*, note 6, para. 49

*age, state of health, disability, marital status, migrant or refugee status, or other status.*<sup>219</sup> It is not a coincidence that this Article is not only a copy of article 14 of the European Convention on Human Rights but also the list contained in article 1 of Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms<sup>220</sup>.

Positive discrimination is implicit in Article 4 (1) and explicitly referred to in Article 4 (4). Article 4 (4) allowed the concession of *special measures that are necessary to prevent and protect women from gender-based violence*, as the literal of it says. It is based on Article 4 of CEDAW.<sup>221</sup> The drafters used ECHR cases to clarify that not every distinction or difference of treatment amounts to discrimination.<sup>222</sup>

Some authors find meaningful that the Convention directs its mandate primarily to the legislator, which, when adopting the rules, should avoid discriminating, privileging or disadvantaging a particular group of people.<sup>223</sup>

Article 5 is about State obligations and due diligence. Divided into two parts, the first is addressed to State actors, whereas the second is for non-State actors. The drafters are aware that the principle of due diligence is set out in the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts (2001), which are extensively recognised as customary international law.<sup>224</sup> The drafters considered it important to include the due diligence principle in the Convention as an obligation of means, and not of result.<sup>225</sup> This is a requirement to State Members to act diligently to fulfil the so-called "3 P structure" that guides

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<sup>219</sup>Article 4.3

<sup>220</sup>*Supra*, note 6, para.52

<sup>221</sup>The Court stated this in the *Abdullaziz, Cabales and Balkandali v. the United Kingdom* judgement. *Ibid*, para. 55

<sup>222</sup>*Supra*, note 6

<sup>223</sup>R. A. Alija Fernández, 'Domestic violence against women and the development of normative Human Rights standards on the Framework of the Council of Europe'. 24 *Revista General de Derecho Europeo* (2011). Only available in Spanish: 'La violencia doméstica contra las mujeres y el desarrollo de estándares normativos de derechos humanos en el marco del Consejo de Europa'

<sup>224</sup>*Supra*, note 6, para. 57

<sup>225</sup>*Ibid*, para. 59

the Convention: that is Prevention, Protection and Prosecution.<sup>226</sup> However, the drafters added an extra P, “integrated policies”,<sup>227</sup> in Chapter II.

Diligence shall be addressed in the prevention, investigation, punishment and reparation of acts of violence committed by non-State actors.<sup>228</sup> When it comes to State actors, Parties *shall refrain from engaging in any act of violence against women and ensure that State authorities, officials, agents, institutions and other actors acting on behalf of the State act in conformity with this obligation.*<sup>229</sup>

“Reparation” may include different forms; some forms considered under international human rights law are: restitution; compensation; rehabilitation; satisfaction; and guarantee of non-repetition.<sup>230</sup> One must remember that GREVIO does not have binding powers. Thus reparation can only effectively be guaranteed at national level, or through the ECHR. Furthermore, the characteristics of GREVIO, entail that the guarantee that States fulfil the due diligence principle is dependent on the principle of good faith.

The term “non-state actors” refers to private persons. The concept is taken from the point II Council of Europe Recommendation Rec (2002) 5 on the protection of women against violence.<sup>231</sup>

Article 6 regulates the necessity of having gender-sensitive policies. The Article calls for implementing or evaluating any measure previously taken, from a gender perspective. This Article encourages States to implement equality, through the empowerment of women. The Convention at this point appears to try and change the traditional victimisation oriented approach to one of empowerment.<sup>232</sup> This approach complements Articles 4 (2),<sup>233</sup> and 5.

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<sup>226</sup>*Supra*, note 6, para. 63

<sup>227</sup>*Ibid*, para. 63

<sup>228</sup>Article 5 (2)

<sup>229</sup>Article 5 (1)

<sup>230</sup>*Supra*, note 6, para. 59

<sup>231</sup>*Ibid*, para. 60.

<sup>232</sup> It should be noted that the empowerment approach has been consistently? demanded in academia. Y. Ertürk, ‘The due diligence standard: what does it entail for women’s rights?’, Report of the Special Rapporteur on domestic violence, its causes and consequences. *The due diligence standard as a tool for the elimination of violence against women*. UN Doc.e/CN.4/2006/61, 20 January 2006



### 4.3 Chapter VII: Migration and asylum.

Before explaining in detail the meaning of the articles contained in Chapter VII, it is necessary to examine the meaning of “victim”, as a person of this classification is subject of these articles. A victim is *any natural person who is subjected to the conducts specified in points a and .b*<sup>234</sup>. As I understand it, the term, “natural person”, is not linked with the administrative status. Thus the Convention guarantees the possibility of being a victim to all women, regardless of their administrative status.

The Convention considers that violence against women is *a violation of human rights, and a form of discrimination against women and shall mean all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty whether occurring in public or in private life.*<sup>235</sup> Again, the drafters copied a part of the definition from previous instruments, such as the Council of Europe Recommendation Rec (2002) 5 of the Committee of Ministers to Member States on the Protection of Women against Violence, the CEDAW Committee General Recommendation No. 19 on Violence against Women (1992) and Article 1 of the United Nations Declaration on the Elimination of All Forms of Violence against Women. But, the term “economic harm”, as it related to psychological violence, was added.<sup>236</sup>

The definition given to domestic violence is *all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim.* Even if the definition is gender-neutral, the drafters consider that domestic violence disproportionately affects women and therefore is clearly gendered.

Chapter VII is divided into three articles: Article 59 dealing with residence status, Article 60, about gender-based asylum claims, and Article 61 of *non-refoulement*.

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<sup>233</sup> *Supra*, note 6, para. 62.

<sup>234</sup> Article 3 (e)

<sup>235</sup> Article 3 (a)

<sup>236</sup> *Supra*, note 6, para. 40.

Article 59 is the longest one, and probably the most controversial. It gives Member Parties concrete guidelines to legislate on residence status and is susceptible of reservation.<sup>237</sup> However, it also grants a lot of space for national law to legislate on this sense.

Firstly, the Article invites States to take legislative measures for victims, who are administratively dependent of the spouses. Furthermore, it proposes that, *in the event of particularly difficult circumstances*, States give partners an autonomous residence permit, which is independent to the length of the relationship or marriage.<sup>238</sup> Moreover the drafters have recognised the existence of reliable studies that show that perpetrators have avoided that victims request official help under the threat of being subjected to deportation or to lose their residence status.<sup>239</sup> The majority of the Member States of the Council of Europe require that the partners or couples remain together one to three years in order to obtain an autonomous residence. The result being that, victims of domestic violence are forced to stay in the relationship in order to retain their administrative status.<sup>240</sup> Considering the seriousness of this situation, the drafters considered that losing a residence status should not be an obstacle for the victims to escape from domestic violence.<sup>241</sup>

The term “difficult circumstances” refers to all the forms of violence covered by the Convention,<sup>242</sup> as a consequence domestic violence is included.

The independent residence status would allow victims to have access to all measures provided by the protective system of the country. Besides, they will not feel fear of retaliatory effects, such as the loss of their residence benefits which was dependent on the partner or the perpetrator.<sup>243</sup> Finally, Article 59 (1) provides protection to non-married couples. However, it lets the domestic law decide how to show that they have or had a relationship.<sup>244</sup>

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<sup>238</sup> Article 59 (1)

<sup>239</sup> *Supra*, note 6, para. 301.

<sup>240</sup> *Ibid.*

<sup>241</sup> *Ibid.*, para. 302.

<sup>242</sup> *Ibid.*, para. 303.

<sup>243</sup> *Ibid.*, para. 304.

<sup>244</sup> *Ibid.*, para. 305.

The article encourages States to stop the initiated expulsion procedures linked with a dependent residence partner or spouse and to enable the victim to apply for an autonomous residence permit.<sup>245</sup> This article is configured for victims that came under family reunification and who might face expulsion for a variety of reasons. For example, if the perpetrator is facing an expulsion procedure.<sup>246</sup> Thus as the victim is directly – administratively speaking - dependent on the perpetrator, the couple or partner might be repatriated as well. The consequences could potentially be a denial of protection, as the victim might continue to be abused back in the country of origin.<sup>247</sup> The drafters were particularly worried about the countries with low standards in prevention, protection and prosecution in regards to domestic violence and violence against women. Thus this Article is a means by which Party Members are encouraged to let the victims apply for an independent residence status on humanitarian grounds.<sup>248</sup> This article is applicable to cases of domestic violence.<sup>249</sup>

Article 59 (3) establishes cases where State parties should give renewable residence permits to victims. The entire article is inspired by article 14 (1) of the Council of Europe Convention on Action against Trafficking in Human Beings (ETS No. 197).<sup>250</sup>

The first is, attending to the personal circumstances of victims, which make it necessary that the person stays in the country.<sup>251</sup> These circumstances may include, however is not limited to, the victim's: safety; health; family situation; or situation in the country of origin.<sup>252</sup> The second case is in situations where the victims are required to collaborate and cooperate with the public authorities in investigations or criminal proceedings.<sup>253</sup> It can be deduced that domestic law will regulate the exact conditions, such as the extension of the renewals.

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<sup>245</sup> Article 59 (2).

<sup>246</sup> *Supra*, note 6, para. 306.

<sup>247</sup> *Ibid.*

<sup>248</sup> *Ibid.*

<sup>249</sup> *Ibid.*

<sup>250</sup> *Ibid.*, para. 307.

<sup>251</sup> Article 59 (3) (a).

<sup>252</sup> *Supra*, note 6, para. 307.

<sup>253</sup> Article 59 (2) (b).

Article 59 finishes with a last paragraph dedicated to victims of forced marriage. Due to the purpose of this thesis, it will not be analysed.

Article 60 regulates asylum claims that are based on gender. Divided into three parts, the first paragraph invites states to recognise gender-based violence *as a form of persecution within the meaning of Article 1, A (2), of the 1951 Convention relating to the Status of Refugees and as a form of harm giving rise to complementary/subsidiary protection*. The drafters were aware that the ignorance towards gender issues as a danger that would require asylum protection; has been translated into situations where international protection was needed and states ignored it.<sup>254</sup> However, the drafters acknowledge the ascendant tendency of Member States of the Council of Europe to recognise some of the forms of violence against women as a form of gender-related persecution, in accordance with the meaning of article 1 (A) 2 of the 1951 Convention relating to the Status of Refugees.<sup>255</sup> Serious domestic violence is one of the acts of violence against women that have been used as forms of persecution.<sup>256</sup> However, despite the inclusion of the term “serious domestic violence” in the explanatory report, a more precise definition is not provided.

The drafters with this article pretended that State Members recognise gender-based violence as a possible form of persecution and serious harm, which might give rise to complementary and subsidiary protection.<sup>257</sup> The right to international protection does not only derive from the 1951 Convention, but from standards given by the ECHR, as well as the European Union Qualification Directive.<sup>258</sup>

The second paragraph of Article 60 asks for a gender-sensitive interpretation of the grounds contained in the 1951 Convention. The intention, as derived from the drafters, is to distinguish and understand the possible impact of gender as reasons behind the different forms of persecution or harm suffered.<sup>259</sup> However, it does not mean that all women will be granted

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<sup>254</sup> *Supra*, note 6, para 310.

<sup>255</sup> *Ibid.*

<sup>256</sup> *Ibid.*

<sup>257</sup> *Ibid.*, para. 311.

<sup>258</sup> *Ibid.*

<sup>259</sup> *Ibid.*, para. 312.

refugee status. As with the previous procedures, the procedures for determining the acceptance or not of refugee status depend on a case-by-case analysis, in order to determine what amounts to well-founded fear or persecution.<sup>260</sup> The drafters final recommendation to the parties is to refer to the UNHCR Guidelines on International Protection: Gender-related Persecution within the context of Article 1 a (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, May 2002.<sup>261</sup>

Finally, paragraph 3 invites States to legislate and develop *gender sensitive reception procedures and support services for asylum seekers as well as gender guidelines and gender sensitive asylum procedures*.<sup>262</sup> The drafters suggest a non-exhaustive list of measures, which include psychosocial, and crisis counselling or medical care for trauma. The idea is that the measures also encapsulate the empowerment of women.<sup>263</sup>

The guidelines should be culturally and religiously sensible. Furthermore, despite the guidelines being essential to raising awareness of special protection needs, they cannot be useful without clear implementation<sup>264</sup>.

The meaning of gender-sensitive asylum procedures, in line with other instruments, such as resolutions of the Parliamentary Assembly as 1765 (2010) and Recommendation 1940 (2010) on gender-related claims for asylum;<sup>265</sup> entails measures such as: giving concrete information to women; when necessary, interviewing them separately and alone; and specific training for the professionals who will potentially identify a possible gender-based asylum claim. That includes providing the possibility to women to have a translator, and speak with a female professional, if they prefer, as well as confidentiality in the process.<sup>266</sup> However in the end the implementation of this Article is in the hands of each national legislator.

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<sup>260</sup> *Ibid.*

<sup>261</sup> *Ibid.*, para. 313.

<sup>262</sup> Article 60 (3).

<sup>263</sup> *Supra*, note 6, para. 315.

<sup>264</sup> *Ibid.*, para. 316.

<sup>265</sup> *Ibid.*, para. 317.

<sup>266</sup> *Ibid.*, para. 317.

Chapter VII ends with Article 61, which codifies a principle of customary international law, such as *non-refoulement*. As the principle is reflective of customary international law, all States are bound by it.

The extension of *non-refoulement* will not be further discussed, as the meaning is already well known. However, it is positive that the Convention reiterates the principle to the Member States, and in doing so links it with victims of gender-based violence who might fear persecution if they are repatriated to their country of origin.<sup>267</sup>

The second paragraph of Article 61 further emphasises the principle of *non-refoulement*, by pointing out that *victims of violence against women who are in need of protection, regardless of their status or residence, shall not be returned under any circumstances to any country where their life would be at risk or where they might be subjected to torture or inhuman or degrading treatment or punishment.*<sup>268</sup> Thus to conclude, this article indicates that all cases should be examined. Even if the procedure results in the rejection of the refugee status claim, under this principle no women should be returned to a country where they would face a real risk of torture, inhuman or degrading treatment, or punishment.<sup>269</sup>

#### **4.4 Chapter XII: Final clauses. Reservations.**

Articles 78 and 79, in the last Chapter, deal with reservations. Article 78 is divided into four paragraphs. The first, states that reservations cannot be made. However exceptions to this statement are provided in the second and third paragraphs. The second paragraph details a list of articles that are susceptible of being subject to reservations. Article 59, regarding residence status and as a corollary, the protection of migrant women, is susceptible to reservation, if a State wishes so. The basis for the creation of this list is the fact that there remains a lack of unanimous agreement on these particular topics. Thus it proposed that the reasons are political, as the drafters accepted it in order to have the largest possible number of ratifications

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<sup>267</sup> *Supra*, note 6, para. 321.

<sup>268</sup> Article 61 (2)

<sup>269</sup> *Supra*, note 6, para.322.

*whilst permitting Parties to preserve some of their fundamental legal concepts.*<sup>270</sup>

The third paragraph allows States to reserve the right to provide for non-criminal sanctions to apply to the offences listed in articles 33 and 34. These are psychological violence and stalking, which were originally legislated to carry criminal sanctions.

The last paragraph allows the State Members to withdraw a reservation, at any moment, by making a declaration to the Secretary General of the Council of Europe. This declaration would be effective from the date it is received by the Secretary General.<sup>271</sup> The drafters assumed here that the process would make it easier as it would reduce the future differences between the national laws of the State Members, which joined the Convention.<sup>272</sup>

Article 79 refers to the validity and review of reservations. The first paragraph states that reservations contained in Article 78 (2) and (3) are valid for five years, and are susceptible to renewal by periods of the same duration. This five-year period was done with the intention that reservations be progressively eliminated and that Party Members be given sufficient time to re-examine their reservations.<sup>273</sup>

The second paragraph provides that the Secretariat General of the Council of Europe will remind the Party member, eighteen months in advanced, that the reservation is about to expire. It requires that, three months prior to expiration date, States notify the Secretariat General on their decision uphold, amend or withdraw their reservation.<sup>274</sup> In the absence of notification, the reservation will be extended for six months. If by the end of this period, a State has failed to notify the Secretariat General of their intention, in respect to the reservation, the reservation will lapse.<sup>275</sup>

Finally, Article 79 (3) provides that a Party that makes a reservation may, before renewing it, or upon request, give an explanation to GREVIO to

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<sup>270</sup> *Supra*, note 6, para. 380.

<sup>271</sup> Article 78 (4)

<sup>272</sup> *Supra*, note 6, para 383

<sup>273</sup> *Ibid*, para. 394.

<sup>274</sup> Article 94 (2).

<sup>275</sup> *Ibid*.

justify its maintenance. One must keep in mind that, given the characteristics of GREVIO, the control exercised will be formal and without binding consequences; as GREVIO can suggest, and control, but not compel.<sup>276</sup>

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<sup>276</sup> For more information, see the Convention, Chapter IX, Controlling Mechanism.



# 5. Legal arguments to protect migrant women.

## 5.1 Public International Law.

As the reader might know, the Vienna Convention on the Law of the Treaties – so on VCLT- established in 1969 the legal international regime for the creation of treaties between States.<sup>277</sup>

The general regime of reservations can be found in this Convention, from Articles 19 to 23. In order to continue with the research line of this thesis, I will focus on the relevant Article, which is Article 19(c). This Article establishes one of the conditions, under which a reservation is not possible. It states that a reservation cannot be made if *the reservation is incompatible with the object and purpose of the treaty*. The article does not offer a solution to the issue of reservations. From the abundant literature(?) on the topic, it can be said that the VCLT has created more uncertainties. An example of it can be the existence of two schools of interpretation; the permissibility school and the opposability school. The permissibility school considers that if the reservation is not objectively compatible with the purpose and object of the treaty, it cannot be accepted. The opposability school considers that the validity of the reservation depends on the other contracting states.<sup>278</sup> There is no official position in the United Nations about which one is the correct approach.<sup>279</sup> When it comes to human rights, the debate about the adequacy of the VCLT is even higher.<sup>280</sup> There have been views arguing that the VCLT should not be applicable to human rights treaties. The reason being that some consider that these treaties, belong to a different particular regime. In accordance to this line of thought, it should be the treaty body, which decides if the reservation is compatible with the object and purpose. However, nowadays this view is wishful thinking on the

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<sup>277</sup> Vienna Convention on the Law of the Treaties, 1969.

<sup>278</sup> United Nations document A/CN.4/470. First report on the law and practice relating to reservations to treaties, by Mr. Alain Pellet, Special Rapporteur. para. 102.

<sup>279</sup> *Ibid*, para. 103.

<sup>280</sup> M. D. Evans (ed.), *International Law* (Oxford, Third edition), p. 193.

part of an Utopianism, rather than a reality because State parties are reluctant to accept this solution to problematic reservations.<sup>281</sup>

However at the United Nations level, it was said that the VCLT is suited to address reservations in the human rights context<sup>282</sup>.

The regime of reservations nowadays is considered a “necessary evil” as they attract States but they have the predisposition to undo the spirit of treaties and create difficulties in the establishment of human rights standards.<sup>283</sup> The danger of reservations subjected to national law is that they can create significant upheaval in the system of human rights protection created by a concrete Convention.<sup>284</sup> The question of reservations is also seen as a political tool: that is the possibility of creating reservations motivates more States to become parties to the Convention in question. If this option were not available, the treaty would be more coherent and balanced, in spite of fewer States being party to the Convention.<sup>285</sup> This dichotomy between universality and integrity did not convince the first three rapporteurs on the law of treaties. Concretely, Lauterpach and Fitzmaurice thought that the classic rule that reservations must be accepted by unanimity is still held upheld. For them, this unanimity rule does not take into account the universality versus integrity dilemma.<sup>286</sup>

In the case of the Convention, some facts are relevant. Firstly, the purpose of Convention, as previously mentioned<sup>287</sup>, is *to create a Europe free from violence against women and domestic violence*.<sup>288</sup> In this sense, it cannot be concluded that only certain women are protected. All women are protected. For this, the principle of non-discrimination will also be analysed<sup>289</sup>.

However, from an opposability school perspective, the possibility of reservation to article 59 of the Convention is achievable, as the States which

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<sup>281</sup>I. Ziemele (ed), *Reservations to Human Rights Treaties and the Vienna Convention Regime. Conflict, harmony or reconciliation*. (The Raoul Wallenberg Institute Human Rights Library. Markus Nijhoff Publishers). p.xxiv.

<sup>282</sup>United Nations document A/CN.4/535, Eight Report on Reservations to Treaties, by Mr. Alain Pellet, Special Rapporteur. paras. 17-27.

<sup>283</sup>*Supra*, note 281, p. 150

<sup>284</sup>*Ibid*, p. 191

<sup>285</sup>*Ibid*, p. 155.

<sup>286</sup>*Ibid*, p. 161

<sup>287</sup>See Chapter 4.2 “General obligations”.

<sup>288</sup>Preamble, the Convention.

<sup>289</sup>See chapter 5.1. 1 “The principle of non discrimination”.

participated in the creation of it, agreed to its inclusion under Article 78. However, I am of the opinion that the drafters belong to the pro permissibility school, but they employed the provision on reservations, as the proverbial “devil’s” political tool, to encourage as many Contracting parties as possible. This political use of the reservations can be found in paragraph 380 of the Explanatory report of the Convention. However, I conclude that the regulation regarding reservations previously explained<sup>290</sup> lets me think that the drafters were guided by the permissible tendency. In this sense, as a reminder to the reader, Article 78 (4) of the Convention allows State Parties to withdraw, at any moment, from reservations by a simple declaration to the Secretary General. Furthermore, Articles 78(2) and 78 (3) make the reservations valid for 5 years and renewable thereafter. As mentioned; the drafters’ intention was to make State Parties re-examine their reservations on continual and regular basis.<sup>291</sup> Finally, Article 79 (3) obliges States to explain to GREVIO the reasons prompting their renewal of reservations.

From a human rights perspective, I submit that Article 59 of the Convention cannot be under reservation, as it goes against the purpose of the Convention, which is elimination of violence against women and domestic violence on the European context. In addition, it could contravene other international obligations such as the principle of non-discrimination.<sup>292</sup> However, even arguing the invalidity of this possible reservation under a permissible line of interpretation; I am aware of the potential consequences of not letting States make a reservation under this Article.

Moreover one must consider the issue of sovereignty in the debate, especially given that migration law represents a sensitive topic for some countries. However, it is expected that once States realise, through an observation of the experience of countries like Spain, that a lack of a reservation to this article will not produce an avalanche of applications by migrants claiming that they are victims of domestic violence, then reservations, which may be in place, will be removed.

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<sup>290</sup>See Chapter 4.4 “Chapter XII: final clauses. Reservations.”

<sup>291</sup>*Supra*, note 5, p. 394

<sup>292</sup>See chapter 5.1.1 “The principle of non discrimination”.

To conclude, I consider that, from a strict human rights perspective, the article should be binding for all States. I judge the possibility of making reservations by the drafters –even if I personally do not agree with reservations- on it an intelligent strategy that fights for middle or long-term equality for migrant women with dependent residence status. In this way, following the possibilities given by Articles 78 and 79 of the Convention, it is expected that States will remove their reservations under this article.

### **5.1.1 The principle of non discrimination.**

This principle is contained in different legal instruments. However, I will focus on the core United Nations Human Rights Conventions applicable to migrant women who suffer domestic violence. This principle tackles both migrant women under a dependant residence status and undocumented migrant women.

The ICCPR contains universal minimum standards of equality and non-discrimination. Article 2 guarantees that each State has to respect the enjoyment of the rights of the Covenant to all persons in its jurisdiction *without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status*. So, the nationality is explicitly mentioned as possible grounds for discrimination. In addition, the principles on the equality of all persons before the law and the guarantee of equal protection are established on Article 26. So, discrimination *on any ground* including on the list *national or social origin* is guaranteed.

The term discrimination is not defined in this Convention. In General Comment 18, the definitions of discrimination provided in CEDAW and ICERD are taken into consideration, even if the Conventions tackle discrimination on specific grounds<sup>293</sup>. The General Comment understands that discrimination in the ICCPR should be understood *to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other*

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<sup>293</sup>Human Rights Committee, General Comment 18. United Nations document HRI/GEN/1/Rev.1 at 26 (1994). para. 6.

*opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms*<sup>294</sup>. However, in the same General Comment, the Committee remarks that not all the differences on treatment equals to discrimination. The criteria for not considering different treatment discrimination is that the disparity of management is reasonable and objective, to achieve a legitimate purpose under the framework of the Covenant.<sup>295</sup>

The Human Rights Committee is aware that when article 2(1) ICCPR says that each State party must guarantee the rights of the Covenant *to all individuals within its territory and subject to its jurisdiction*, it covers everyone *irrespective of reciprocity, and irrespective of his or her nationality or statelessness*.<sup>296</sup> In General Comment 15, the Committee manifested its awareness about the fact that a lot of States do not guarantee rights to aliens that should be guaranteed, or limit them under unjustifiable bases<sup>297</sup>. General Comment 15 makes a list of all the rights that must be guaranteed for all aliens. Some of them are directly linked with possible consequences of domestic violence if the woman is excluded from the system. So, *aliens have an inherent right to life, protected by law, and may not be arbitrarily deprived of life. They must not be subjected to torture or to cruel, inhuman or degrading treatment or punishment; nor may they be held in slavery or servitude. Aliens have the full right to liberty and security of the person. (...) Aliens shall be equal before the courts and tribunals. (...) Their children are entitled to those measures of protection required by their status as minors. (...) Aliens are entitled to equal protection by the law. There shall be no discrimination between aliens and citizens in the application of these rights*.<sup>298</sup>

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<sup>294</sup> *Supra*, note 293, para. 7.

<sup>295</sup> *Ibid*, para. 13.

<sup>296</sup> Human Rights Committee, General Comment 15. The position of aliens under the Covenant. United Nations doc. HRI/GEN/1/Rev. 1 at 18 (1994), para. 1

<sup>297</sup> *Ibid*, para. 2

<sup>298</sup> *Ibid*, para. 7

Article 2(1) of the ICCPR includes legal measures that are both positive and negative in nature.<sup>299</sup> It means that States shall adopt *legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations.*<sup>300</sup>

The ICESCR guarantees in Article 2 the exercise of the rights of the Covenant *without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.* Article 3 guarantees the equality of rights between men and women in the framework of the Covenant. That is, the economic, social and cultural rights contained within the Covenant are established. The non-fulfilment of economic help, or access to different resources such as shelters to victims of domestic violence based in discrimination because of administrative status could be considered a form of formal discrimination which is not tolerated by the Covenant.<sup>301</sup> Furthermore it is to be noted that the economic, social and cultural rights shall be guaranteed independently of the nationality and legal status of the person.<sup>302</sup>

The provisions contained in ICERD, CEDAW, CRC and the CRPD are for specific groups. ICERD; in its Article 1(1) establishes the definition of racial discrimination, considering it *any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.* Article 5 gives a list of the areas covered by this possibility of non-discrimination, such as civil, political, economic, social and cultural rights.

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<sup>299</sup>Human Rights Committee, General Comment 31. Nature of the General Legal Obligation on State Parties to the Covenant. United Nations doc. CCPR/C/21/Rev. 1/Add. 13 (2004), para. 6

<sup>300</sup>*Ibid*, para. 7.

<sup>301</sup>Committee on Economic, Social and Cultural Rights. General Comment 20. United Nations Doc. E/C.12/GC/20 (2009), para. 8

<sup>302</sup>*Ibid*, para. 30.

Article 1 of CEDAW establishes gender, specifically being a woman, as a concept of grounds for discrimination. This is not applicable to the cases of migrant women facing domestic violence, because the discrimination is based on their administrative status, not on the fact that they are women. CRC also protects the Convention's subject group against discrimination, in Article 2(1). The standards for equality and non-discrimination under the CRPD can be found in Article 5. The issue of women with disabilities who suffer from domestic violence could be analysed in another paper, as a deep analysis of the CRPD would be necessary. For the purposes of this paper, I will not go further on it.

This general overview of the concept of non-discrimination makes it clear that all migrant women should be included in the legislation.

## **5.2 The Spanish experience.**

### **5.2.1 Constitutional Act 1/2004 of 28 December, on Integrated Protection Measures Against Gender Violence.**

This legislative Act, ("the Act"), was the starting point of a new era in Spain in the fight against domestic violence. The Act has sought a multidisciplinary approach, which has resulted in the amendment of different regional laws and protocols.

The Act's purpose is to fight against discrimination, inequality and relations of power of men towards women in the framework of personal relationships. The term "personal relationships" includes those who are or were spouses or who had an analogous relationship of intimacy, with or without connivance.<sup>303</sup> So the legal protection of the Act regarding the type of relationship and victims is the same as in the Convention.<sup>304</sup>

The Act refers to gender violence, defining it as any act of physical or physiological violence, including aggressions to sexual freedom, threats,

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<sup>303</sup> Article 1 (1).

<sup>304</sup> Article 3

coercion or deprivation of liberty.<sup>305</sup> Thus in comparison to the Convention, this Act does not focus on violence against women in general, but only on domestic violence as it is considered to be an explicit act and a direct consequence of gender violence.

As mentioned, this Act approaches domestic violence from a multidisciplinary point of view. It aims to coordinate different administrations and amends previous existing legislative Acts.

A key article contained in the Act that is very relevant in regards to the protection of migrant women is Article 17(1). A literal interpretation of this article would imply that all women, who are victims of domestic violence, are covered by the Act. In addition it is important that this protection is granted independently of their administrative status. Article 17(1) says *all women victims of gender violence, independently of their origin, religion or any other condition or personal or social circumstance are guaranteed any right recognised on this Act.*<sup>306</sup> This article, as I understand it, would allow all women, including migrant women; even undocumented, to have access to all the guarantees offered by this Act. However, in reality, it has not been like that. Migrant women faced different problems or even the limited, or even the denial of, access to the available resources. New amendments were done in regards to migration law to let some migrant women enjoy part of the rights guaranteed at the new Act. However, despite the Act being a positive legal improvement, access to the rights contained within is not fully guaranteed and migrant women, especially the undocumented ones, find themselves on the dichotomy of trying to escape from domestic violence and the possibility of facing administrative sanctions; worst case scenario, the expulsion of the country; or keep themselves in the same situation.

The Act is structured into a preliminary chapter, five chapters, twenty additional provisions, two transitory provisions, one derogatory provision and seven final provisions.

As it was previously mentioned, the Act tackled a lot of areas. In the case of education, the Spanish system shall include training regarding the respect

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<sup>305</sup> Article 1 (3)

<sup>306</sup> Translation made by the author. Original in Spanish.



for fundamental rights and freedoms between men and women; as well as in the exercise of tolerance and liberty within the democratic principles of connivance.<sup>307</sup> According to Article 4 all levels of education, starting with primary school until University and including education for adults, will provide information for students to be trained of these rights.

Consequently, teachers and professors should be permanently updated with extra training. The purposes of this training are to give them the techniques to: educate students on the respect of rights and fundamental freedoms;<sup>308</sup> education on the prevention of conflict and the peaceful resolution of them;<sup>309</sup> and the capacity to be able to detect early domestic violence.<sup>310</sup>

The Act also legislates how public media should deal with publicity however, the exact contents of it will not be explained, as it is not on the scope of this thesis.

Chapter III is devoted to the health sector. It encourages different health administrations to promote and boost the performance of professionals for an early detection of gender violence.<sup>311</sup> Awareness programs and continuous formation of the health professionals will be implemented in order to improve an early diagnosis, assistance and rehabilitation of women under situations of gender violence.<sup>312</sup> All National Plans of Health shall include a chapter on prevention and integrative intervention in gender violence.<sup>313</sup> I find it extremely useful to expressly mention that this Chapter being applied in general to all women. Due to the exclusion effect suffered by migrants, it is important that all administrations have concrete tools for the proper detection of a situation of domestic violence, which, as highlighted in previous Chapters, is more difficult to find out in the case of migrants.

Chapter II explains the rights of women victims of gender violence, starting with the previously mentioned Article 17. This article, according to my

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<sup>307</sup> Article 4 (1).

<sup>308</sup> Article 7 (a).

<sup>309</sup> Article 7 (b)..

<sup>310</sup> Article 7 (c)..

<sup>311</sup> Article 15 (1).

<sup>312</sup> Article 15 (2).

<sup>313</sup> Article 15 (4).

point of view, establishes the same rights between all women who are victims of gender violence, independently of their administrative status.

Article 18 regulates the right to information. Women victims of gender violence have the right to receive all available information and advice depending on their personal situation through the available services, organisms or offices of the public administration. This information shall include the measures contained in the currently analysed Act in relation to the rights to protection and security, economic help, where to find help for emergency cases, support and recovery.<sup>314</sup> The organisation of all these services will depend on the autonomous communities, as well as local entities. The principles that must be followed on this task of protection are permanent attention, urgent performance, specialisation and multidisciplinary professionalism.<sup>315</sup> The multidisciplinary performance must provide the following: information to the victims<sup>316</sup>; physiological attention<sup>317</sup>; social support<sup>318</sup>; monitoring on the reclamation of women's rights<sup>319</sup>; educational support to the family unity<sup>320</sup>; preventive prevention on values of equality towards their personal development and towards the development of non violent resolution of conflicts<sup>321</sup>; and support on the formation and labour insertion<sup>322</sup>. This Chapter also provides the possibility to have access to the right to legal aid for women victims of gender violence if they fulfil the previously established economic requirements.<sup>323</sup>

The Act also gives a mandate to the different national Bar Associations. The mandate stipulates that lawyers that want to provide professional services, in a legal aid capacity, to cases dealing with gender violence, will be required take a specialised training.<sup>324</sup> The different Bar Associations will establish a

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<sup>314</sup> Article 18 (1).

<sup>315</sup> Article 19 (1).

<sup>316</sup> Article 19 (2) (a).

<sup>317</sup> Article 19 (2) (b).

<sup>318</sup> Article 19 (2) (c).

<sup>319</sup> Article 19 (2) (d).

<sup>320</sup> Article 19 (2) (e).

<sup>321</sup> Article 19 (2) (f).

<sup>322</sup> Article 19 (2) (g).

<sup>323</sup> Article 20 (1).

<sup>324</sup> Article 20 (3).

mechanism that guarantees an urgent designation of lawyers for legal aid in cases related to gender violence.<sup>325</sup>

This chapter also deals with labour rights both for workers from the public sector, as well as the private. However, it is difficult to see any possible benefit in this case for undocumented migrant women, for obvious reasons. Regardless, special working conditions are granted for women that suffer domestic violence.<sup>326</sup>

The economic rights are established in article 27. The victims will need to prove the money that they earn. For having access to any public economic help, their income must not be superior of a concrete quantity already established by law. Instances where the victim will have serious problems finding a job, due to circumstances such as age, lack of education or social issues, will also be taken into account.<sup>327</sup>

Chapter III establishes the institutional guardianship. It creates new institutions and gives them mandates, which allow for concrete policies to materialise around the different administrations.

In regards to the security and police forces, the Act establishes the creation of specialised units on the prevention of gender violence and on the execution of the judicial measures ordered.<sup>328</sup>

Collaboration between administrations is also established, not only in general through the entire Act, but explicitly in concrete Articles. The Act gives special importance to the creation of collaboration mechanisms to guarantee the prevention, assistance and prosecution of acts of gender violence. The Act considers it important to foster coordination between the health administrations, justice, security and police forces, social services and equality organisms.<sup>329</sup>

The Criminal Code has also been changed, and allows Courts to take into account aggravating circumstances, such as where the victims are emotionally connected to the perpetrator, and to pass increased sentences in those circumstances. In cases where the perpetrator goes to prison because

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<sup>325</sup> Article 20 (4).

<sup>326</sup> Article 21 and 24.

<sup>327</sup> Article 27 (1).

<sup>328</sup> Article 31 (1).

<sup>329</sup> Article 32 (1).

of gender violence, the penitentiary administration will organise specific programmes for him and other perpetrators.<sup>330</sup> The results, taken from monitoring, of these programmes will be taken into consideration to decide whether or not to grant legal permission to leave the prison or cancel part of the punishment.<sup>331</sup>

A key aspect, at the judicial level, of this Act is the creation of Courts on Violence against Women.<sup>332</sup> Each of the judicial territories will have at least one Court on Violence against Women.<sup>333</sup> These Courts do not represent a new jurisdiction, but rather a specialisation inside the criminal jurisdiction, which is characterised by having competencies dealing with concrete issues of civil law. The intention of it could be to preserve the rights established for the criminal procedures.

These Courts will have competence to instruct the cases regarding criminal responsibility for homicide, abortion, injuries, foetal damage, and offenses against the person, freedom and sexual indemnity or any kind of violent offence, when the victim was the wife or a person who has had an analogous intimate relationship with the perpetrator, with or without connivance.<sup>334</sup>

The competence is extended to cases where the perpetrator attacks the sons or daughters of the victim.<sup>335</sup>

These Courts will also be competent to instruct the offences related to family rights and obligations<sup>336</sup>. In regards to its civil competence, the Courts can deal with processes of filiations, maternity and paternity. The Courts can also deal with the nullity of marriage, separation and divorce, adoption of measures, as well as custody of the daughters and sons.

The specificity of the Courts is that they are from the penal order but are also able to deal with civil matters. There are additional extra specificities, which will not be analysed here. For example, the civil measures decided by these Courts are considered precautionary measures. They are valid for 30

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<sup>330</sup> Article 42 (1).

<sup>331</sup> Article 42 (2).

<sup>332</sup> Article 43.

<sup>333</sup> Article 43 (1).

<sup>334</sup> Article 44.

<sup>335</sup> Article 44.

<sup>336</sup> Article 44.

days. After this period, the victim or the legal representative will have to access the civil jurisdiction in order to validate the civil measures.<sup>337</sup> It is prohibited to use mediation to solve any cases linked with gender violence.<sup>338</sup> Finally, the Act establishes the necessity to give information regarding equality and non-discrimination to all judicial professionals. Judges, prosecutors, legal secretaries, public prosecutors, security, police forces and forensics should be included.<sup>339</sup>

The Courts can deal with protection and security measures that are compatible with the ones adopted by the criminal and civil courts.<sup>340</sup>

The Act grants clear protection for the victim's privacy; this applies particularly, to the personal data and of the data of any person dependent on the victim.<sup>341</sup> Furthermore, judges can close the sessions off to the public and thereby ensure that the sessions are held privately.<sup>342</sup>

In order to protect the victim, the judge can prohibit the perpetrator from approaching her at any place she might be. This includes coming close to, or entering: her home; her place of work; or any other place that she might often go. For this; technological instruments<sup>343</sup> can be used. The judge can also specify to the perpetrator not to approach within a certain distance to the victim or prohibit him to go to certain places. This distance must be respected under criminal responsibility.<sup>344</sup>

The Act also establishes a new type of public prosecutor; the Public Prosecutor against Violence against Women, with concrete functions to fight against this particular offence.<sup>345</sup>

In cases of judgements by homicide in the framework of gender violence, the perpetrator will not have right to receive widower social benefits.<sup>346</sup>

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<sup>337</sup> Article 554 ter (7) Spanish Criminal Procedure Act.

<sup>338</sup> Article 44.

<sup>339</sup> Article 47.

<sup>340</sup> Article 61.

<sup>341</sup> Article 63 (1).

<sup>342</sup> Article 63 (2).

<sup>343</sup> The instruments are bracelets that the judge can mandate to the perpetrator to use, and that cannot be removed, and in case the person approaches the victim, the police would be informed immediately. As well as phones for the victims with direct connection to the police.

<sup>344</sup> Article 64 (3).

<sup>345</sup> Article 70.

<sup>346</sup> First additional provision, 1.

The Law, if correctly implemented, is very protective, since it approaches the problem from different angles. However, the implementation of Article 17 could not be completely fulfilled, due to the existence of other migratory laws that make this article impossible to apply. Consequently, in an environment which gives priority to migratory rules than protection from domestic violence, migrant women have been treated differently. In the case of undocumented migrant women, restricted access to sources has been the rule, thereby creating an arbitrary distinction for the enforcement of their rights<sup>347</sup>.

However, some legislative changes were introduced, giving migrant women the chance to potentially have access to assistance, protection and rehabilitation when victims of domestic violence. These changes for attempting to protect migrant women, despite I will raise criticism<sup>348</sup>, go further than the Convention, being more protective. It not only establishes what is said in Articles 59, 60 and 61 of the mentioned Convention, but also includes provisions for undocumented migrant women as well. The regulation regarding migrant women will be explained in the next sub-chapter.

## **5.2.2 Amendments to benefit migrant women.**

The basic law regulating the rights of migrant people in Spain is the Organic Law 4/2000, 11<sup>th</sup> January, on the Rights and Freedoms of Foreigners in Spain and their Social Integration. This Act was last amended in 2009, thereby changing a lot of articles; some of which will be analysed below as they are related to domestic violence.

The new article 31 (bis) guarantees all migrant women victims of domestic violence, regardless of their administrative situation, the rights contained in the previously explained Act. In addition, they are granted all the protective and security measures established under the Spanish legislation.<sup>349</sup>

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<sup>347</sup> *Supra*, note 52, p. 2.

<sup>348</sup> See Chapter 5.2.3 “Conclusions and critiques of the Spanish experience”.

<sup>349</sup> Article 34, copying the new article 31 bis( 1) of the Organic Law 4/2000, 11<sup>th</sup> January, on the rights and freedoms of foreigners in Spain and their social integration.

A person with a residence status under family reunification and whose residence status is dependent on the couple or partner can apply for an independent visa if they have sufficient economic means to cover their personal expenses.<sup>350</sup> Note that this article is written in reference to the male pronoun, that is “he/him”, which in Spanish means that both women and men are referred to.<sup>351</sup>

In the case that a migrant woman<sup>352</sup> is a victim of domestic violence and cannot have independent residence status on account of her economic conditions, the new Article 19 allows for the possibility for her to be granted an independent residence status and work permission. The change in administrative status is instituted from the moment that a judge decides upon a protection order or in the case that the public prosecutor indicates that there is evidence that the woman is subject to a situation of domestic violence.<sup>353</sup>

In the case of undocumented migrant women whose irregular administrative status is discovered when they lodge a formal complaint; the legally established administrative process for expulsion will be suspended until the case related to domestic violence is criminally resolved<sup>354</sup> with a sentence. Undocumented migrant women will also be allowed to apply for a resident and work permission when, due to exceptional circumstances, a judge grants a protection order or in the case that the public prosecutor indicates that there is evidence of a situation of domestic violence. However, the authorisation will not be solved until the conclusion of the criminal procedure regarding the domestic violence situation. However, the competent authority will be able to provide provisional authorisation for residence and working permission in exceptional circumstances. This was later changed by the Organic Law 10/2011, 27<sup>th</sup> July, of modification of

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<sup>350</sup> Article 21, copying the new article 19 (2) of the Organic Law 4/2000, 11<sup>th</sup> January, on the rights and freedoms of foreigners in Spain and their social integration.

<sup>351</sup> The Spanish language cannot be considered gender respectful in that sense. The masculine term includes women, whereas the feminine term never includes men

<sup>352</sup> Article only applicable to women.

<sup>353</sup> Article 21, copying the new article 19. 2 of the Organic Law 4/2000, 11<sup>th</sup> January, on the rights and freedoms of foreigners in Spain and their social integration.

<sup>354</sup> Article 34, copying the new article 31 bis ( 2) of the Organic Law 4/2000, 11<sup>th</sup> January, on the rights and freedoms of foreigners in Spain and their social integration.

Articles 31 bis and 59 bis of Organic Law 4/2000, 11<sup>th</sup> January 4/2000, on the Rights and Freedoms of Foreigners in Spain and their Social Integration. Since then, the provisional authorisation will be granted in all cases, even if the woman did not apply for it.<sup>355</sup> This provisional authorisation will finish when the main authorisation is either denied or accepted.<sup>356</sup> The determination of the residence status will depend on the judicial decision. If the perpetrator is condemned, the residence application under exceptional circumstances will be granted. In the case that the woman did not apply for it, she will be informed of this available option and of the deadline for applying. In the case that the sentence is not condemnatory, the previously initiated expulsion procedure against her, will continue.<sup>357</sup>

An asylum application on the grounds that the applicant is a victim of gender violence is not only recognised in international instruments, but also in the National Act 12/2009, regulating the Right to Asylum and Subsidiary Protection. This Act guarantees those women who hold the right to asylum the following rights: the right to education; health; housing; social assistance and social services; access to the rights recognised under the Spanish legislation for the victims of domestic violence; access to the social security system; and to the same integration programmes granted to Spaniards.<sup>358</sup>

### **5.2.3 Conclusions and critiques of the Spanish experience.**

Some conclusions can be made from the official data, gathered over the last 12 years, that compares the death of national and non-national women.<sup>359</sup> There are still no visible results from the implementation of the Act, with

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<sup>355</sup> Organic Law 10/2011, 27<sup>th</sup> July, of modification of articles 31 bis and 59 bis of Organic Law 4/2000, 11<sup>th</sup> January 4/2000, on the rights and freedoms of foreigners in Spain and their social integration. Article 1 modifying article 31 bis (3).

<sup>356</sup> Article 34, copying the new article 31 bis (2) of the Organic Law 4/2000, 11<sup>th</sup> January, on the rights and freedoms of foreigners in Spain and their social integration.

<sup>357</sup> Article 34, copying the new article 31 bis (4) of the Organic Law 4/2000, 11<sup>th</sup> January, on the rights and freedoms of foreigners in Spain and their social integration

<sup>358</sup> Article 36 (1) (f) National Act 12/2009, regulating the right to asylum and subsidiary protection.

<sup>359</sup> Available at Spanish ministry of health, social services and equality.



both national and non-national victims. However, nowadays the Act and its consequences manage to bring the topic of domestic violence to the public sphere. So, I trust that the situation will improve if the administrations continue to make this problem public and to collaborate between them.

The data fails to address the administrative status of migrant women from outside the European Union. This, in itself, is a clear example of the invisibility that they suffer.<sup>360</sup> This lack of information creates a knowledge gap as the public authorities do not have enough information of the extent of the problem. This in turn affects the possible creation of concrete protocols that the State's administration is able to use for more vulnerable women.<sup>361</sup> However whilst talking about the death of women is the most visible and tragic end to a situation of domestic violence, it is not the only one. It is important that the population is aware that the perpetrators that use violence, under ordinary bases or punctually are committing a criminal act. This violence, despite not being present all day in the media, is one that the Courts regularly deal with<sup>362</sup>.

Since the new Act, in general, women must lodge a formal complaint in order to be given access to the protection mechanisms. A lot of migrant women do not do it and therefore do not have access to all the available resources. This happens as a consequence of lack of information, vulnerability and distrust of the security and police forces.<sup>363</sup> Despite the Recommendation Rec (2002) 5 of the Council of Europe not being legally binding, it recommends to States that victims should have assistance in all cases, regardless of whether they lodge a formal complaint or not.<sup>364</sup> However this recommendation, and the current legislation and administrative practices, are ignored and the most affected are migrant women. Undocumented migrant women do not have access to economic

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<sup>360</sup> *Supra*, note 52, p. 6.

<sup>361</sup> *Supra*, note 99.

<sup>362</sup> Report 'Stubborn reality, outstanding Rights: three years of the law of comprehensive protection measures against gender violence' *Amnesty International*. 2007. Only available in Spanish: 'Obstinada realidad, derechos pendientes. Tres años de la ley de medidas de protección integral contra la violencia de género'. p 40.

<sup>363</sup> *Supra*, note 52, p. 13.

<sup>364</sup> Council of Europe Recommendation Rec (2002) 5 of the Committee of Ministers to member States on the protection of women against violence, para. 23

help as the requirement of “habitual residence” is interpreted restrictively and understood as “regularised residence” in conformity to the migration law.<sup>365</sup>

During the last Universal Peer Review, it was highlighted that the Commission Against Torture –so on CAT- had previously expressed concern for the number of acts of domestic violence reported as well as the fact that some of them ended in killings. The perception of the CAT was that Spain should go further; not only should they implement legislative changes but also take comprehensive steps to change society’s perception of women and to eliminate gender stereotypes.<sup>366</sup> CEDAW’s concerns, on the increasing incidences of murdered women and depravity of the acts of violence, were also raised.<sup>367</sup>

The CAT was especially worried by the vulnerability of migrant women in irregular situations, and recommended that existent legislation be amended to let these women apply and obtain an authorised residence permit or working permission.<sup>368</sup>

The available data regarding protection orders are from the first semester of 2005. In that year, 36.942 Spanish women lodged a formal complaint, and 14.302 got a protection order. In regards to migrant women, there is no available data about their migrant status. However, 11.358 lodged a formal complaint and 4.909 got an official protection order.<sup>369</sup> In the hypothetical case that all the women were undocumented migrant women, according to the new legislation, more than half of them would have been expelled from the country. This conclusion does not encourage victims to lodge complaints. Moreover even if victims are not aware of the possibility that they will be expelled, it puts their legal counsel in a difficult position as they have to advise them of this consequence. The expulsion of the victim is a

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<sup>365</sup> *Supra*, note 362, p. 43

<sup>366</sup> United Nations. General Assembly. Universal Peer Review. Spain. 2010. Document A/HRC/WG.6/8/ESP/2, para. 27 in reference to document CAT/C/ESP/CO/5 para. 24

<sup>367</sup> *Ibid*, para. 27 in reference to document CEDAW/C/ESP/CO/6 para. 19.

<sup>368</sup> *Supra*, 381, para. 28 in reference to document CAT/C/ESP/CO/5, para. 25.

<sup>369</sup> Spanish Supreme Judicial Council. Domestic violence in the judicial statistics. First semester of 2005.

direct consequence of not getting a condemnatory sentence for the perpetrator and a protection order.

Public administration system considers that the available data regarding the application of protection orders are the tip of the iceberg. Using data from 2007, the Institute of the Woman and the General Council of the Judiciary made the following estimations. In 2007, there were potentially 603.628 victims of domestic violence in Spain; 21 percent of whom, that is 126.293 women, lodged a formal complaint. Of the 21 percent 6, 27 percent, that is 37.826 women, asked for an official protection order. Only 4, 63 percent, that is 27.967 women, got it.<sup>370</sup> It should be noted that this data, does not take into consideration the many mentioned times where migrant women are extra vulnerable. In this sense, it would be necessary to make it easier to identify the process through which one is certified as a victim of domestic violence, using for example reports of other public institutions that victims attend, such as social and health services<sup>371</sup>.

In regards to the respect for the protection orders, it has been reported that there are no real consequences for the perpetrators that do not respect them. There are some public and notorious sad cases of women dying when the perpetrator continued to not follow the official protective order.<sup>372</sup> In all cases, the victims had the protection of the Court, a personal mobile connected with the police, and protection from various police bodies. However, the death of a migrant woman who had all these protective measures and never received a follow-up call from the police has been well publicised.<sup>373</sup> Furthermore, available data show that in 2005 a total of 3.170 women lodged complaints that perpetrators did not respect the imposed protection orders and in 2006 the number of complaints by women rose to 6.485.<sup>374</sup> This data sends a very dangerous message to perpetrators, and to society, that in spite of it being a criminal act, the failure to respect these orders goes unpunished

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<sup>370</sup>*Supra*, note 362, p. 26.

<sup>371</sup>*Ibid.*, p. 27.

<sup>372</sup>*Ibid.*, p. 32.

<sup>373</sup>*Ibid.*, p. 34.

<sup>374</sup>*Ibid.*, p. 35.

In spite of Article 17 of the Constitutional Act 1/2004 of 28 December, on Integrated Protection Measures against Gender Violence, undocumented migrant women are excluded from other protective measures granted under this Act. This is due to the fact that the mechanisms of protection require that a victim lodge an official complaint with the police. As mentioned this step will require her to inform the police of irregular status and thereby initiate an expulsion process. This fact of having to report officially; excluded them immediately for obvious reasons, such as the price of lodging a formal complain would be expulsion of the country together to the impossibility of accessing to the other resources available for victims. Despite the new legislation, there is an existent administrative practice that does not let undocumented migrant women access shelters for victims of domestic violence. Their only option is public shelters for homeless or attention centres for migrants.<sup>375</sup> In addition, they do not have access to the economic help, a fact that makes it more difficult to escape from the spiral of violence, especially considering the general economic dependence that they have on the perpetrator.<sup>376</sup> In this sense, access to help should only require that a victim of domestic violence demonstrate that they are with economically dependent on the aggressor.<sup>377</sup>

Also, the reality shows that in the Spanish context it is normal for migrant women to face/experience problems accessing help.<sup>378</sup> The resources are not prepared to attend women from different cultural backgrounds, for instance in a lot of cases service providers cannot understand the language and no translators are available(?). Furthermore, it has been reported that there is a general lack of sensitivity towards migrant women by some professionals in the available services; for example in the shelters that migrant women seek refuge in.<sup>379</sup>

The asylum regime has also received critiques. The clauses are considered to be too general. Besides, the new Act does not provide victims of domestic

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<sup>375</sup> *Supra*, note 52, p. 14.

<sup>376</sup> *Ibid*, p. 17.

<sup>377</sup> *Supra*, note 52, p. 17.

<sup>378</sup> *Supra*, note 99, p. 24.

<sup>379</sup> Interesting to note that this is the lower recorded number of accepted applications in twenty years. *Ibid*, p. 25.

violence with the possibility to re-examine asylum petitions that have been rejected and new elements linked to the petition are discovered. Furthermore, the practice shows that Spain does not accept many asylum seekers. The official data from 2008 demonstrates that of the 4.517 applications, only 169 were accepted.<sup>380</sup> In addition, there are reported cases of persons who were sent back to their countries, in spite of the Spanish authorities being aware that there was a real risk that the applicant would suffer torture and/or other degrading treatment.<sup>381</sup>

There have also been problems with some Bar Associations, as they do not provide enough lawyers for immediate assistance under the service of legal aid.<sup>382</sup> This is a consequence of the lack of concrete guidelines. The same is applicable to the creation of special bodies inside the police forces, which have proven to not be enough in some cities of Spain. The reason is that some of these bodies do not work exclusively on domestic violence.<sup>383</sup>

As a conclusion, whilst the Act and the migration amendments might look good on paper; more efforts must be taken to educate the professionals of the public sectors and other professionals working with cases of domestic violence. Spain needs to make more efforts to guarantee the fulfilment of the due diligence principle, adopting as a starting point the stance that domestic violence represents a violation of human rights.

The requirements for migrant women under dependent residence status should be more flexible. It should not solely depend on judiciary results.

In regards to undocumented migrant women, the risk is too high for them. Judicial statistics available on the provision of protection orders, under extraordinary circumstances, demonstrates the risk that victims face when attempting to change their residence permit status. More flexibility in these cases should be included, as previously stated this may be possible through the use of reports from other administrations, such as reports from social or health services. In addition, victims should have guaranteed access to shelters and other resources in order to be able to effectively escape from

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<sup>380</sup>*Supra*, note 366, para. 44 in reference to joint submissions made by local ngo's as well as Amnesty International.

<sup>381</sup>*Ibid*, para. 45 in reference to submissions of Amnesty International.

<sup>382</sup>*Supra*, note 99, p.29.

<sup>383</sup>*Supra*, note 362, p. 30.

situations of domestic violence. The legislation's failure to include these measures, in effect, results in the creation of "first" and "second class" women.

## **6. Suggestions and conclusions.**

### **6.1 Application of the due diligence principle**

The fight against domestic violence suffered by migrant women first requires something that might sound very basic to the reader: as the understanding that domestic violence, in all its form, is a real serious problem. Legally speaking, until governments take this issue as a human rights violation and include it in their human rights perspective, the principle of due diligence might be questioned country by country. As the Spanish case has demonstrated, or with the brief example of Turkey, there are States with positive national laws regarding domestic violence. However, the problem seems to be linked with the incorrect implementation of the laws, that is more concretely the incorrect fulfilment of the due diligence principle and an insufficiency of funding being allocated for this issue. In the case of Spain, I cannot in good conscience state that the country is doing its best in the fight against domestic violence. The problem is deepened in instances where migrant women are the victims. However, the law can be considered as multidisciplinary and comprehensive.

Compelling a country to do more in the fight against domestic violence, to improve the situation, and to commit all, it can be a problem regarding due diligence.

In order for States to meet their due diligence obligations in respect to migrant women suffering domestic violence, they must place the problem in the centre of the society to solve it. In more practical terms, it first means allocating more funding to the problem. A multidisciplinary approach is required to deal with this issue and fostering coordination amongst administrations and professionals with different backgrounds requires not only effort but also money. In addition, it is costly to have translators and professionals who are aware and sensitive to victims' cultural differences.

## **6.2 Concrete amendments on the Convention.**

I consider that the Convention can be amended to guarantee protection to migrant women, however I admit that it will take strong political will to put off these changes. That being said, it is my conclusion that the correct implementation will depend on funding and how serious each national State considers the problem.

The Recommendations contained in Rec (2002) 5 of the Committee of Ministers of the Council of Europe provides a complete and detailed framework of recommendations regarding the protection of women against violence. Some of which are detailed in this chapter.

### **6.2.1 Migrant women in general.**

The first amendment to the Convention that would benefit migrant women in general is to Articles 10 and 11 of the Convention. These articles deal with the co-ordinating body, data collection and research. In this sense, I consider that it would necessary to explicitly mention that information should be gathered on whether the victims are nationals or migrants. In the case that they are migrants, their administrative status should be stated. In addition, the Council of Europe should include in these statistics, and consequently in their policies, the subtypes of domestic violence. In this sense, I concur with Rec (2002) 5, that the compilation of different types of violence and their consequences, including statistics, should be made available to the public.<sup>384</sup>

This measure would, not only, allow for the problem of migrant women facing domestic violence to take a shape, but also for States to more easily provide solutions or mechanisms for its resolution.

### **6.2.2 Migrant women with dependent residence status**

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<sup>384</sup> paragraph 6 of the Recommendation



From a human rights perspective, and an application of the permissibility school of interpretation on reservations, I consider that Article 59 should not be susceptible to reservation. However, as I previously explained<sup>385</sup> I understand the political reasons for it. Moreover from a practical point of view, I believe that the system of removal of reservations contained in Articles 79 and 80 is a positive feature of the Convention, specially taking into consideration the role of politics. Thus in spite of the fact that human rights cannot be isolated from other vectors, one cannot deny the power and influence that politics has on its implementation. As a consequence, it would be unrealistic for me to claim that reservations should be possible.

However, Article 59 can also be criticised as Article 59(1) gives all the power to the national States to determine the conditions for granting residence status. Taking into consideration the Spanish experience, where the establishment of a residence permit was dependent on a judicial sentence condemning the perpetrator and a protection order for the victim; it is clear that an additional factor should be added. I think that the last paragraph should include a clause which states that the establishment of a residence status cannot be based solely on judicial decisions that seek to determine whether there is a criminal act of domestic violence or not. As we have seen from the statistics available on the Spanish experience, there are cases where victims were not granted with these two conditions. This may be due to the fact that the judge did not consider it appropriate to grant a protective order; alternatively it may be because there were not enough elements to prove the existence of a criminal offence. I do not propose that all migrant women with dependent status who claim to be victims of domestic violence should be immediately believed. Rather I suggest that the opinion of more professionals should be taken into consideration to decide whether or not this woman should be granted an independent status on the basis that she suffered domestic violence and that this process should be independent to the judicial proceeding which seeks to determine the existence of a criminal offence.

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<sup>385</sup>See chapter 5.1 “Public International Law”.

In regards to article 59(2)(b), where the Convention allows a renewable residence permit when their *stay is necessary for the purpose of their co-operation with the competent authorities in investigation or criminal proceedings* I see a possible framework for re-victimisation of applicants. In this sense, Rec (2002) 5, in paragraph 33 recommends that States *take all necessary measures to ensure that none of the victims suffer a secondary (re) victimization* and I consider that it can be applied to this case as well. A temporary residence permit, which is only applicable for the duration of the investigation should not be possible. Rather if such an investigation is required, then it should constitute grounds for a permanent residence status. To adopt the former approach and only grant a temporary permit that is subject to revocation fosters uncertainty in the victims' lives and, in effect, fails to recognise victims as human beings but rather as mere judicial and and/or administrative instruments.

### **6.2.3 Undocumented migrant women**

In regards to undocumented migrant women, the difficulty lays in establishing a middle point; that is a middle point which guarantees protection to those suffering domestic violence whilst ensuring that a weak system is not created, so people cannot abuse the law in order to gain legal benefits. I consider that the Convention should include additional article(s) stating minimum standards for the treatment of undocumented migrant women. A good approach to the evaluation of each application, would be to allow victims access to health and social services, as well to all the minimum standards included on Chapter IV, which details protection and support. Once that has been granted, different specialists should determine the veracity and seriousness of each case. During the process, shelters or temporary housing exclusively for victims of domestic violence should be available for these women. This decision process should be fast in order to protect the interests of women. In addition each of the State's resource, and the bureaucratic steps involved in the process, should include gender specialists and psychologists. Each country should regulate through its national law the procedure for the determination of who constitutes a

“victim”. However, the Convention should guarantee that it takes diverse approaches in this assessment, not only judicial decisions, as it occurs in the Spanish case.<sup>386</sup> Whilst it is sad that there is a need to evaluate the veracity of a story of domestic violence, we cannot forget the general drama lived by undocumented migrant persons that can lead to them trying to use the law to change their administrative status. In order to find a middle point, once the woman is believed by the system to be suffering from domestic violence, she should have the right to be granted a residence status under humanitarian grounds. Where there is doubt, the status should not be granted, nor should an expulsion procedure be initiated. Whilst this idea could be very controversial, it could result in the guarantee that real victims approach authorities. A way to avoid abusing the law could be to have a registered list of those women who approached the authorities. The list could be used to deduce a case of domestic violence, as each time a woman approaches the relevant authority it would be documented and if a false claim of domestic violence is determined then an expulsion process could be effectively initiated. This approach to facilitate the possible detection of a situation of domestic violence would obviously require a relaxation on each State’s national migration laws. However, migratory policies should not diminish human rights, especially in cases such as domestic violence, which is *per se* a violation of human rights.

Nevertheless, once again, to guarantee the equilibrium between human rights, national resources and politics, the procedure should take into account various professionals that might interact with victims of domestic violence, and in all cases psychologists and gender specialists.

### **6.3 Final suggestions**

The Convention lacks an explicit statement on the necessity of creating National Action Plans. In this sense, I consider that a chapter on it should be added after chapter VII, Migration and Status. The reason for adding it at that point of the Convention is because all the previous chapters deal with

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<sup>386</sup>See chapter 5.2 “The Spanish experience”.

national obligations, whereas, the chapters following the chapter on migration, detail/discuss international cooperation<sup>387</sup>, the monitoring mechanism<sup>388</sup>, relationships with other international instruments<sup>389</sup>, amendments to the Convention<sup>390</sup> and final clauses<sup>391</sup>.

The chapter dealing with National Action Plans should develop the tasks of the co-ordinating body mentioned in article 10. It should contain different professionals to monitor the provisions contained in Chapter VII and to guarantee the correct implementation of the Convention by the creation and implementation of National Action Plans. It could be a good idea if this co-ordinating body in charge of the National Action Plan was divided into sub-bodies of professionals who would control the implementation of each sub-chapter. In order to assure the correct multi-disciplinary approach, each subgroup should provide various representatives that would meet in a general meeting of the co-ordinating body. This body should prepare the report asked by GREVIO in Article 68 of the Convention, as well as the National Action Plan. Through this approach, GREVIO would be sure that the Council of Europe standards are applied, by the existing procedural mechanism of control. The addition of an obligation to submit National Action Plans to GREVIO for review, would ensure that the different cultural realities and necessities would be taken into consideration and the common Council of Europe's goal of creating a Europe free from domestic violence would finally be able to be achieved.<sup>392</sup> If the National Action Plans are reviewed by GREVIO, it is guaranteed that the minimum standards and guiding principles would be the same in all State Parties. Even if the concrete strategies vary from country to country, the parameters of the minimum requirements, as established by the Convention must be the guiding approach for all States. The recommended minimum standards of number of shelters per women, quota of advocacy centres per population and so on have already been established in previous documents and the

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<sup>387</sup>Chapter VIII.

<sup>388</sup>Chapter IX.

<sup>389</sup>Chapter X.

<sup>390</sup>Chapter XI.

<sup>391</sup>Chapter XII.

<sup>392</sup>The Convention. Preamble.

recommendation of the Council of Europe. These guidelines can be used for the correct creation of National Action Plans.

### **6.3.1 A feminist added value**

It is in the National Action Plans where the feminist approach should be included. Each sub group previously mentioned should have at least two experts on feminist approaches. In this sense, I consider that the correct approach is the Integrative Feminist Model. The reasons for it are because it includes the necessary approach of bringing that, which has been traditionally private, to the public sphere. In addition, it includes the tools used by the intersectionality approach to delve further into the explanations and solutions to domestic violence.<sup>393</sup> Apart from having experts on each sub-group, all these experts should conform *per se* to a sub-group in order to develop strategies on methodology. As we have seen, this is currently the weakest part of the Integrative Feminist Model<sup>394</sup>.

With all these strategies, the correct measures and policies for the prevention, protection, persecution of domestic violence, amongst both national women as well as migrant women, can be guaranteed. Migrant women, as we have seen throughout this paper, have special necessities to deal with, so an existentialist approach cannot even be taken into consideration.

Dealing with domestic violence suffered by migrant women includes the requirement that concrete services be implemented for them. As it has previously been mentioned, translators should be widely available. In addition cultural mediators should also be included in this process, as one should not forget that each culture might have different roles between men and women, or different conceptions of what means violence. I do not consider that the Council of Europe approach to these women should be imposing our ideals and values regarding domestic violence. Rather, I consider that it would be more useful to have cultural mediators that help all parties, nationals and non-nationals, to understand the dimension of the

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<sup>393</sup>See chapter 4.4 “The Integrative Feminist Model”.

<sup>394</sup>*Ibid.*

problem. Furthermore, cultural mediators that ideally could be members of their national or cultural community can make women understand that certain situations of domestic violence are not justified under their own culture or religion. I consider it important to keep the approach "culturally friendly" in order to be efficient .

The Convention does not fully consider an Integrative Feminist Model, as for example, it would include that States provide free treatment for perpetrators or future perpetrators. Rehabilitating those that have a criminal sentence is a good option, but it should be the last step, provided that there were alternatives previously available to them when they saw or were aware that they were not building healthy or equal personal relationships that could end in a final escalation of violence. For this purpose, a group of experts on the Integrative Feminist Model can be very useful, as this vector is considered to be *per se* included in the model<sup>395</sup>.

It is important that all these processes are not closed to the appointed experts of each groups of work, and that space to NGOs and other local groups, to act as the representatives of different cultures or nationalities and victims. Their experiences should be the base of the policies, rather than focusing only on theories. This is why NGOs, along with professionals of different sectors, such as lawyers, social workers, psychologist, police members and so on, should be present through the process.

The monitoring of Chapter VII, International Co-operation, should be parallel to the National Action Plans, as the aim of these plans is to be able to fit into each national reality. However, this cooperation should be somehow related with the meetings for the development of the National Action Plans, for example, having representatives at the General Meetings carried by all the previously mentioned groups, in order to share experiences between countries, and focus on the methodology and approaches towards domestic violence.

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<sup>395</sup> See chapter 5.3 "The Integrative Feminist Model".

## **6.4 Final conclusion**

As a final conclusion, it is the task of each member in each community to contribute to the fight against domestic violence. In the case of migrant women our awareness must be higher, on account of the added difficulties that they face. In a world ruled by politics and economic interests, it is the duty of human rights defenders to fight for equality in all fields. Without aiming to diminish the other types of discrimination that a human being could suffer, domestic violence, especially when it affects migrant women who suffer double discrimination on account of their status, should be at the epicenter of any democracy. We cannot achieve any basic human rights or be proud of our democratic systems if we do not fight to guarantee that half of the population – women - are able to be free from suffering and violence, or to escape with dignity from a situation of domestic violence. As a famous quote states, a man is not measured by how many times he falls, but by how many times he rises up. And the same may be said for women; however it is the common duty of all States and all human beings to facilitate the process

# 7. Bibliography

## 7.1 Normative sources

Convention on the Elimination of Discrimination against Women. United Nations General Assembly, 1979.

Convention on the Rights of the Child. United Nations General Assembly, 1989.

Convention on the Rights of Persons with Disabilities. United Nations General Assembly, 2007.

International Covenant on Civil and Political Rights. United Nations General Assembly, 1966.

International Covenant on Economic, Social and Cultural Rights. United Nations General Assembly, 1966.

Vienna Convention on the Law of the Treaties. United Nations General Assembly, 1969.

Council of Europe Convention on Preventing and Combating violence against women and domestic violence. 2011.

Council of Europe Convention on Preventing and Combating violence against women and domestic violence. Explanatory Report. 2011.

Council of Europe Recommendation Rec (2002) 5 of the Committee of Ministers to member States on the protection of women against violence  
Spain, Constitutional Act 1/2004 of 28 December, on integrated protection measures against gender violence.



Spain, Criminal Procedure Act.

Turkey, Law No. 4320 on the Protection of the family.

## 7.2 Books

M. D. Evans (ed.), *International Law* (Oxford, Third edition),

Ziemele (ed), *Reservations to Human Rights Treaties and the Vienna Convention Regime. Conflict, harmony or reconciliation.* (The Raoul Wallenberg Institute Human Rights Library. Markus Nijhoff Publishers).

S. de Beauvoir, *The second sex.* 1949

M. Wittig, *The straight mind.* 1992.

## 7.3 Articles

J. B Kelly, M. P. Johnson, ‘Differentiation among types of intimate partner violence: research update and implications for interventions’, Vol. 46 No 3 *Family Court Review.*

M. P Johnson, ‘Domestic violence: the intersection of gender and control’, in L. O’Toole, J.R. Schiffman and M. K. Edwards (Eds.), *Gender Violence: Interdisciplinary Perspectives* (2<sup>nd</sup> edition. New York University Press, in press. New York)

L. M Cantera, ‘Domestic violence’, 8 *Lectora* 2002. (only available in Spanish ‘La violencia doméstica’)

M. O Johnson, ‘Gender and types of intimate partner violence: a response to an anti-feminist literature review’ 16 *Agression and violent behavior.* 2011

J. M. Leone, M. P. Johnson, C.L. Cohan, 'Victim help seeking: differences between intimate terrorism and situational couple violence' 56, *Family relations*. 2007. Copyright by the National Council on Family Relations.

M. A. Fineman, 'The vulnerable subject: anchoring equality in the human condition' 20 *Yale J.L. & Feminism* . 2008-2009.

L. Martínez Ten and M. Tuts, 'Human Rights, women and migration: towards an intercultural education in class' *Plataforma de los Derechos Humanos de las Mujeres*. Collaboration of *Instituto de la Mujer*. Spain. p. 44 (Only available in Spanish: Derechos humanos, mujer e inmigración: hacia una educación intercultural en el aula')

N. Ghafournia, 'Battered at home, played down in policy: migrant women in Australia', 16 *Agression and violent Behaviour*. 2011.

C. Pérez Belda, 'Domestic violence in Finland and Spain', 11 *Alternativas. Cuadernos de trabajo Social*. 2003. (only available in Spanish 'Violencia doméstica en Finlandia y España')

E. Bosch Fiol, M. Gili Planas, V.A.. Ferrer Pérez, 'Domestic violence as a form of expression of misogynist', *Faculty of Psychology. University of Balear Islands*. (Only available in Spanish: 'attitudes'La violencia doméstica como una forma de expresión de las actitudes misóginas')

M. P Johnson, 'Langhinrichsen-Rolling's confirmation on the feminist analysis of intimate partner violence: comment on "controversies involving gender and intimate partner violence in the United States" ', 62 *Sex Roles. Feminist Forum*. 2010.

D. Gadd, 'Masculinities and violence against female partners', 11:61 *Social & Legal Studies*. 2002

K. Wendling, 'A classification of feminist theories, Volume 3 number 2 *Les ateliers de l'éthique* (2008).

C. Chambers, 'Masculine domination, radical feminism and change,' *Feminist Theory* 6:325 (2005).

N.J Sokoloff, I. Dupont, 'Domestic violence at the intersections of race, class, and gender' Vol. 11 No. 1 *Violence against women* (2005).

J. C Nash, 'Re- thinking intersectionality', 89 *Feminists review* (2008).

O. Hankivsky and R. Coermier, 'Intersectionality and public policy: some lessons from existing models', 64:217 *Political Research Quarterly*. 2011.

B.A. McPhail, N.B.Busch, S. Kulkarni, G. Rice, 'An integrative feminist model: the evolving feminist perspective on intimate partner violence', 13:817 *Violence against women*. 2007

L. Dixon, N. Graham-Kevan, 'Understanding the nature and etiology of intimate partner violence and implications for practice and policy', 31 *Clinical Psychology Review*. 2011

R. A. Alija Fernández, ' Domestic violence against women and the development of normative Human Rights standards on the Framework of the Council of Europe'. 24 *Revista General de Derecho Europeo* (2011) . Only available in Spanish: 'La violencia doméstica contra las mujeres y el desarrollo de estándares normativos de derechos humanos en el marco del Consejo de Europa')

## **7.4 Reports of non governmental organizations.**

'Undocumented migrant women. Until when without protection in front of gender violence?' *Amnesty International*. Spanish section. 24-11-2005.

(Only available in Spanish: ‘Inmigrantes indocumentadas, ¿hasta cuándo sin protección frente a la violencia de género?’).

Spain: beyond the paper (making real the protection and justice for women facing gender violence in the family).’ *Amnesty International*. Spanish section. 2005. (Only available in Spanish: ‘España: más allá del papel. (hacer realidad la protección y la justicia para las mujeres ante la violencia de género en el ámbito familiar’).

Stubborn reality, outstanding Rights: three years of the law of comprehensive protection measures against gender violence’ *Amnesty International*. . Spanish section. 2007. (Only available in Spanish: ‘Obstinada realidad, derechos pendientes. Tres años de la ley de medidas de protección integral contra la violencia de género’)

‘He loves you, he beats you. Family violence in Turkey and access to protection’. *Human Rights Watch*. 2011.

## **7.5 United Nations documents**

Y. Ertürk, ‘The due diligence standard: what does it entail for women’s rights?’, Report of the Special Rapporteur on domestic violence, its causes and consequences. *The due diligence standard as a tool for the elimination of violence against women*. UN Doc.e/CN.4/2006/61, 20 January 2006

United Nations document A/CN.4/470. First report on the law and practice relating to reservations to treaties, by Mr. Alain Pellet, Special Rapporteur.

United Nations document A/CN.4/535, Eight Report on Reservations to Treaties, by Mr. Alain Pellet, Special Rapporteur

Human Rights Committee, General Comment 18. United Nations document HRI/GEN/1/Rev.1 at 26 (1994).

Human Rights Committee, General Comment 15. The position of aliens under the Covenant. United Nations doc. HRI/GEN/1/Rev. 1 at 18 (1994).

Human Rights Committee, General Comment 31. Nature of the General Legal Obligation on State Parties to the Covenant. United Nations doc. CCPR/C/21/Rev. 1/Add. 13 (2004).

Human Rights Committee, General Comment 31. Nature of the General Legal Obligation on State Parties to the Covenant. United Nations doc. CCPR/C/21/Rev. 1/Add. 13 (2004).

Committee on Economic, Social and Cultural Rights. General Comment 20. United Nations Doc. E/C.12/GC/20 (2009).

United Nations. General Assembly. Universal Peer Review. Spain. 2010. Document A/HRC/WG.6/8/ESP/2