

THE PROHIBITION ON APPROACHING THE VICTIM IN CASES OF INTIMATE PARTNER VIOLENCE: UNRESOLVED ISSUES



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INTRODUCTION-

♦The **intimate partner violence** is a social scourge of transcendental importance.

(This fact has been reflected in the repeated legislative changes that have taken place in the Spanish legislation **over the last 14 years**).

♦One of the manifestations of the gradual tightening of the punitive response to this kind of violence was materialized through the reform carried out in the Spanish Criminal Code by the **Organic Law 15/2003**. On the basis of this law, the imposition of the judicial orders preventing the abuser from approaching the victim became mandatory in cases of intimate partner violence.

This modification was added to the article **57.2 of our Criminal Code**←↵

OBJECTIVE-

The main objective of this paper is presenting a discussion of law issues referred to the suitability of the binding nature of this measure, according to the art. 57.2 of the Spanish Criminal Code.

METHODOLOGY-

In order to achieve the mentioned objective, a bibliographic review has been made. The different judicial and doctrinal points of view about the mandatory contact ban have been studied. Once this has been made, the most problematic issues about the prohibition on approaching have been defined, and they will be exposed in the following lines. In a brief way, these problematic issues revolve around:

- **LEGAL NATURE**
- **CRITERIA FOR THE APPLICATION**
- **DURATION**
- **CONTROL MECHANISMS**
- **BREAKING A SENTENCE**

As a result, this work seeks to deepen in these issues and demonstrate the need for a review of the same, finally including some proposals for the amendment of the mentioned article 57.

CONTENT-

1) LEGAL NATURE

- Despite the fact that the prohibition has the nature of an accessory penalty, this issue is not peaceful from a doctrinal point of view.
- Some authors consider that, if we take into account that there is a statutory obligation to impose this measure when some concrete offences are committed, we should consider it as a principal penalty.
- There is a problem referred to the need to impose this mandatory measure, allowing the judge to know about the specific case, without discretion to assess whether the measure, by itself, is required or not.
- The majority of authors and the jurisprudence support the idea of removing this mandatory measure.

CONTENT-

2) CRITERIA FOR THE APPLICATION

There are **two different requirements** to impose the mandatory contact ban.

2.1 Some of the offences referred in the first paragraph of the article 57 must have been committed:

HOMICIDE—ABORTION—INJURIES—OFFENCES AGAINST THE FREEDOM—TORTURES—OFFENCES AGAINST MORAL INTEGRITY—HUMAN TRAFFICKING—CRIMES AGAINST SEXUAL FREEDOM—OFFENCES AGAINST INDEMNITY, PRIVACY, RIGHT OF PERSONAL PORTRAYAL AND INVOLABILITY OF THE HOME, THE HONOR, THE HERITAGE AND SOCIOECONOMIC ORDER.

The suitability of the application of the measure in some cases is questioned, for example when the offence is against the heritage or the socioeconomic order (how do we protect the victim with the measure in these cases?)

2.2 The crime must have been committed against:

- The actual or past spouse.
- Against a woman with whom the aggressor has or has had an analogous relationship.
- There is a broad consensus about the limits of a legal marriage. However, which should be the criteria used to concrete the analogous relationship is a very discussed issue.

➔➔➔Jurisprudence of Provincial Courts claim different requirements. As a consequence, the determination of the “analogy” of the relationship depends on the court knowing about the individual case←←←

3) DURATION and EXTENSION

There are some doubts about the criteria used by the judges to determine the duration and the extension. The Criminal Code establishes a lower and a upper duration threshold. However, there is no defined element to concretize the specific duration of the penalty, so judges usually impose it regarding the duration of the principal penalty.

Moreover, we have the same problem with the extension of the penalty. There are some recommendations about establishing the prohibition in 500 metres, but this is not possible in some cases (f. e., when the aggressor and the victim live in a very small village (this penalty could turn into an exile)).

4) MONITORING MECHANISM

The monitoring of this kind of measure through telematic means presents some functionality problems too. The Spanish legislator has introduced a new offence in the article 468.3 CP. According to this, the person who tries to manipulate or break this mechanisms will be punished. However, there is an important discussion about the suitability of the penalty associated to this offence (fine from 6 to 12 months).

5) BREAKING OF THE SENTENCE

The cases in which the aggressor breaks the sentence and continues approaching the victim have not received an unique judicial treatment by the Courts.

- Some Courts have considered that, if the victim consents the approaching, there is no offence.
- Others, however, consider that we cannot take into account the consent of the victim because, if we would do it, we would be acknowledging that this person has the right to dispose over the penal norm.

CONCLUSIONS

- The regulation of the contact ban needs a deep revision.
- The binding nature of the measure should be modified. It’s necessary a judicial assessment (regarding the individual case). In that case, we could consider the measure as an accessory penalty. However, if we keep the actual regulation, the contact ban should be considered as a principal penalty.
- Courts should unify the criteria to determine the analogy between some kinds of relationships and marriages (because the current situation contributes to disturb the legal certainty. Maybe it could be used a different requirement from the analogy.
- Judges should establish some items in order to define the extension of the measure.