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CRIMINAL PROCEDURE AND THE GENDER PERSPECTIVE*

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ABSTRACT

This paper analyzes what the gender perspective brings to the criminal process. In the sphere of the criminal justice system, the gender perspective has to play a defining role in both the investigation and in the prosecution stages. Within this last phase, special attention will be paid to how the gender perspective influences the evaluation of the evidence and specifically in the victim's testimony when this constitutes the only evidence against him, as well as in the need for its corroboration through peripheral elements. This corroboration is essential to safeguard the right to the presumption of innocence; but only by applying the gender perspective will the victim's right to evidence be respected.

RESUMEN

Este trabajo trata de analizar qué puede aportar la perspectiva de género al proceso penal. Se parte de la base de que la perspectiva de género está llamada a jugar un rol relevante en las dos fases fundamentales del proceso penal: la fase de instrucción y la fase de enjuiciamiento.

Dentro de esta última fase, se prestará una especial atención a la aplicación de la perspectiva de género en los supuestos en que la declaración de la víctima constituye la única prueba de cargo y, dentro de ello, especialmente, al modo en que debe entenderse la corroboración de su testimonio a través de la prueba de determinados elementos periféricos como requisite indispensable para su posible valoración. Esta corroboración es exigencia fundamental para el respecto del derecho a la presunción de inocencia del acusado pero solo desde su correcta interpretación se salvaguardará, también, el derecho a la prueba de la víctima.

KEYWORDS

Gender perspective; Victim's testimony; Criminal process; Presumption of innocence; Right of defense.

PALABRAS CLAVE

Perspectiva de género; testimonio de la víctima; proceso penal; presunción de inocencia; derecho de defensa.

ABBREVIATONS

CC: Spanish Civil Code / CP: Spanish Penal Code / LECrim: Spanish Criminal Procedure Law
SC: Spanish Constitution / STC: Sentence of the Spanish Constitutional Court
STS: Sentence of the Spanish Supreme Court

I. INTRODUCTION

The aim of the work that follows is to analyse what the gender perspective can offer to criminal justice; but, at the same time, it will seek to dispel certain doubts caused by a tendency -deliberately malicious, in my opinion- to discredit its application accusing it of allegedly attacking constitutional rights such as -and, essentially- the presumption of innocence.

The need to apply the gender perspective to prosecution -not just in the criminal sphere, by the way- is derived from the existence of biases and stereotypes caused, as we will be explaining, by a social structure constructed on the basis of androcentrism and that has had the effect of relegating women to a lower social position in which they have always performed a secondary or subordinate role.

Following the approval of the Spanish constitution (SC) and the enshrinement of an equality that was not just formal (art. 14 SC) but also material (art. 9.2 SC), it is clear that judges are obliged to correct any inequality that the application of the rules, even from a position of axiological neutrality, may cause. Thus, in the sphere of the criminal justice system, the gender perspective has to play a defining role in both the investigation and in the prosecution stages; and in relation to the latter, this work will be devoting particular attention to its application in relation to the sole testimony of the victim and how the need for corroboration should be understood.

In my opinion and as I will seek to justify, a proper understanding -with the gender perspective, - of the need to corroborate the declaration of the victim using peripheral elements will lead to advocating that requirement for corroboration, not so much with regard to the criminal offence, but regarding the declaration itself, strictly speaking. In this regard, we will explain that, *e.g.*, injury reports or the declaration of a witness describing the facts do not constitute peripheral elements of corroboration of the victim's statement, but genuine evidence for the prosecution that will have to be assessed with the judge together with the declaration, which will, as such, no longer constitute the only evidence for the prosecution. I believe, and will be arguing as much in this work, that if we consider -as case law has repeatedly and constantly asserted- that the victim's declaration can constitute sufficient evidence to potentially justify the conviction, the elements of corroboration of the same cannot be directed at the commission of the offence directly, or on a prima facie basis, as this would be tantamount to rejecting its status as sole evidence for the prosecution.

This position also respects the set of constitutional rights and guarantees that apply to criminal procedure. Far from considering that the victim's declaration constitutes "privileged" testimony, we will be looking to offer a measured reading of the judgments that literally maintained as such[1] -in unfortunate and deplorable terms- in order to show that, even while disagreeing with it, a reading in line with the constitutional process is possible and indeed necessary as it is the (only) one that should, as such, be advocated.

However, there are many who, as we underline in the work, blame the gender perspective for directly attacking the presumption of innocence when applied in criminal procedure on the one hand, and, on the other, blame "feminism" for the same thing when, as we will be showing,

1 Supreme Court Judgment 247/2018, of 24 May; 282/2018, of 13 June.

neither the former nor the latter constitute accurate assessments.

Let us begin then by addressing all those ideas that, as I have been saying, are those that constitute the subject of this work.

II. SOME CONCEPTUAL ISSUES REGARDING THE GENDER PERSPECTIVE

The fact that society is structured on the basis of an androcentric pattern has historically generated a design of legal relationships in which women have always occupied a secondary position with regard to men and that, even today, conditions how social conduct and relations are understood and evaluated. This assertion, which is vital for reflecting on the role that the gender perspective can and should play, should be beyond any kind of doubt, but, in any event, it has been supported by the provisions in force in the legal system right up until extraordinarily recent times.

If we focus our attention on our most immediate historical precedent, it is easy to see that, for example, during the Francoist dictatorship, women were clearly relegated to a position of inferiority compared to men; the State's function with respect to women was essentially protectionist: they had to be protected -as the lesser sex- and the superiority of men in the governance of social and family matters was guaranteed. The legal system enshrined and consolidated both positions so that, *e.g.*, the labour legislation of the time –the Labour Charter- prohibited women from doing night work, and also prohibited married women from working; in this regard, point two of the same stated that the State "(…) will prohibit night work by women (…) and will release married women from working in workshops and factories". And that is indeed what happened. So that was function of the State -to ensure that married women stayed at home -and as for that of women -it was to stay at home-, both enshrined in law and with the lasting impression that assumption of the same represented socially, beyond the term of validity of the rules.

Simultaneously, with a view to guaranteeing that exclusively domestic role, the Civil Code (CC) of the time consisted of a whole series of rules designed to enshrine the supremacy of the male in law. A woman's obligation to obey her husband was established by law ("a husband will protect his wife, and she will obey her husband" -art. 57 CC-); she was prevented from deciding on her place of residence, as she was obliged to follow her husband wherever he decided to live (art. 58 CC); she was also prohibited from managing the family assets because, by law, the husband was the sole administrator of the assets of the marital partnership (art. 59 CC); and should any doubts remain regarding her reduced (or nil) legal capacity and ability to act, her husband became her legal representative, meaning that, without his permission, she could not appear in court, purchase or sell assets (purchases of jewellery, furniture and precious objects, carried out without the husband's permission, were only validated when he consented to his wife's use and enjoyment of such objects –art. 62 CC-), or assume what today are everyday obligations, such as applying for a loan or taking out a mortgage[2].

2 In fact, the Act that reformed these provisions of the CC was known as the "Legal Age of Married Women Act" (Act 14/1975, of 2 May, on the Reform of the Civil Code). However, we had to wait until 1981 for two fundamental acts on the road to equality to see the light: act 11/81 of 14 May, which amended the Civil Civil Code in relation to parentage, parental authority and the

Without aiming to be too exhaustive, but at the same time desirous of completing the design of the social context in question, we would also have to look at the consideration of women in the criminal sphere. So, for example –among many other provisions-, adultery was configured as an offence committed by a married woman (never the husband)[3]; and the husband was given full powers of disposal over the criminal consequences[4], which helped to consolidate a sense of ownership of women –and her destiny- which was, in any event, already socially accepted.

However, the object of this work is not to establish a detailed catalogue of the provisions that enshrined the inferior position of women in law; it will contribute to the same, exemplifying with actual data and situations the conditions of social stratification that will, consciously or unconsciously, determine a specific way of understanding the world and relationships. It is not just that, from that social structure that had androcentrism as its backbone, there is a greater or lesser degree of inequality; or that it slows down the development of a progressive social sense regarding the rights of women… It is, above all, a matter of highlighting that we belong to and are integrated into a society that has been constructed on the basis of institutionalised inequality; not just consented to, but created and favoured by the State, with the entire regulatory apparatus at its disposal. And that history, whether consciously or unconsciously, conditions the way in which each one of us (individually and collectively) perceives that reality.

Therefore, equipped with an understanding of this situation, it makes sense to consider the inevitable existence of bias and stereotypes in the way in which citizens address, judge or assess the reality that surrounds them. These cognitive biases that lead us to interpret the external information that we perceive according to preconceived structuring rules[5], affect judges in the same way that they affect any other citizen[6]. So, beyond the need to merely flag up their existence, it is necessary to be aware of it and use mechanisms designed to combat them, or at the very least mitigate the negative influence they can have on the decision-making process[7].

Based on the social reality to which we have just been referring, descended from the same values in which the current judicial structure is rooted, we see –among other things- what can be termed the "gender stereotype". If stereotypes constitute a collection of characteristics or qualities that, culturally or ideologically, are attributed to a certain collective as being its own and defining its essence, the gender stereotype

economic regime of marriage and Act 30/81, of 1 July, known as the Divorce Act

3 Adultery is committed by "a married woman who lies with a man who is not her husband" (art. 448 pf 2°, of the 1870 Criminal Code (CP); in force until 1978).

4 "A husband can reduce the punishment imposed on his consort at any time" (art. 450 CP 1870)

5 MUÑOZ ARANGUREN, A., "La influencia de los sesgos cognitivos en las decisiones jurisdiccionales: el factor humano. Una aproximación", in Indret 2/2011.

6 At a time when the expansion of artificial intelligence (IA) has reached judicial decision-making, the existence of bias in the process whereby the systems learn and, as such, reproduction thereof in the decision ultimately taken, becomes a particularly relevant problem. Apart from this we also have the fact that the lack of transparency of the algorithm(s) makes it hard to prove that this is necessary. A study of this topic goes beyond the remit of this work, but you can find an interesting approach in FERNÁNDEZ HERNÁNDEZ, C., "Modelos para identificar y gestionar los sesgos en Inteligencia artificial", Diario La Ley, Nº 60, Sección Ciberderecho, 21 March 2022, Wolters Kluwer.

7 On whether it is possible to eliminate these biases and on specific measures to be adopted in this regard, see MUÑOZ ARANGUREN, A., "La influencia (…)", cit. pp 28 et seq.

could be defined as the set of characteristics that, consciously or unconsciously, is attributed to mean and women as members of that group to which they belong[8]. These qualities that are understood to be associated with one collective or the other are beliefs assigned based -as we have seen- on an unequal and discriminatory social structuring; and, as a result, when individual conduct or acts are interpreted as being in line with the role assigned, or not, the inequality on which the very structuring is based is perpetuated, whether consciously or unconsciously.

Meanwhile, a poor understanding of (formal) equality as an interpretative criterion leads one to overlook the different meaning that certain situations have when they are experienced -suffered- by women, as opposed to when experienced by men. As has quite correctly been illustrated, "there are cases of 'identical behaviour' that have different consequences, such as, for example, the fact of a woman being followed by a group of men at night, or a man being followed by a group of women; identical behaviour with diverse meanings and consequences; just as touching a man's chest is not the same as touching a woman's, because it is not identical behaviour when the 'relevant properties' are not"[9].

The gender perspective is precisely the conceptual tool that, based on an awareness of the historical and current position of women, makes it possible to contribute valid criteria for understanding and explaining society, revealing situations that directly or indirectly legitimate discrimination and proposing new measures, mechanisms or institutions that achieve and promote situations and conditions of effective equality between men and women[10]. As RAMIREZ ORTIZ quite correctly maintains, applied to the legal sphere "the gender perspective can serve to show those legal institutions, rules and practices that create, legitimise and perpetuate discrimination, in order to derogate, transform and/or replace them. (…) To that end, they propose to eliminate prejudices and customary or any other kind of practices that are based on the idea of the inferiority or superiority of either of the sexes or on stereotyped functions of men and women"[11].

Thus, the gender perspective is required to act on several fronts within the legal sphere; on a legislative level, of course, but for the purposes

8 On the relationship between group bias and gender stereotype, see RAMIREZ ORTIZ, J.L., "El testimonio único de la víctima en el proceso penal desde la perspectiva de género", in *Questio Facti*. International Journal on Evidential Legal Reasoning", no. 1, 2020, pp. 201-246; pp. cits. 228 and 229

9 LARRAURI, E, "Una agenda feminista para la criminología", Jueces para la Democracia, no. 101, 2021, p. cit. 9. The author concludes, in relation to this, that "incorporating the gender variable implies analysing how it causes alterations in precisely the rules and institutions that are drafted neutrally and represents an admission of the possibility that the outcomes for the genders are not 'identical'".

10 On the inevitable relationship between the gender perspective and feminism, see GAMA, R., "Prueba y perspectiva de género. Un comentario crítico", in *Quaestio facti*. International Journal on Evidential Legal Reasoning, no. 1, pp. 285-298. According to this author, "disconnected from the feminist theories from which it emerged, the gender perspective loses much of the force and demands that gave rise to it. This lack of recognition means, on occasion, that the gender perspective is simply mentioned rather than effectively used and incorporated, remaining as a mere generic reference that does not question the causes and continuity of discriminatory practices. It is necessary to underline and highlight the feminist roots of the gender perspective because in using and disseminating this perspective as a public policy applied on a cross-sectional basis to a variety of disciplines and activities, the word "feminism" tends to be hidden. When talking about proof and the gender perspective, feminist perspectives and methods should be incorporated into the sphere of evidence".

11 RAMIREZ ORTIZ, J.L., "El testimonio (…), op. cit., p. 203.

of this work, also from a procedural standpoint[12]. This will represent not just the need to insist on its relevance at the prosecution stage, but also undoubtedly during the investigation phase.

However, the legitimacy of the gender perspective as a mechanism to be applied by the Courts or, more particularly, by the Judge when weighing up the evidence, has, in recent times, been the subject of abuse, deliberately, in my opinion[13]. There is often criticism –of the talking shop type rather than scientific reflection; but that, in any event, I will be rebutting when the time comes – which simply believes that judging with the gender perspective directly attacks the presumption of innocence. This assertion is far from being true; today the role of the gender perspective is that of a principle that informs the legal system -and as such must be applied- and that, like the other principles in a constitutional context, not just respects, but promotes the rights and guarantees of criminal procedure, as we shall see[14].

The design of the fundamental rights of the SC involved a double recognition of equality: what has come to be known as formal equality, contemplated in article 14 SC and what is termed material equality, regulated in art. 9.2 directing a clear mandate to the public powers -judges, among others- in order to promote conditions so that the freedom and equality of individuals and the groups to which they belong, are real and effective; as well as removing the obstacles that prevent or hinder their full effect.

Recognition of equality, together with liberty, justice and political pluralism, as one of the higher values of the legal system (art. 1.1 SC) on which the social and democratic rule of law is based, also obliges the judiciary, (not just the legislature or the executive) to promote equal application of the rule that guarantees that the outcome of the same does not perpetuate, legitimate or consent to situations of discrimination.

And it is precisely in developing this constitutional mandate, art. 4 of the Equality Act (*Ley 3/2007, de 22 de marzo para la igualdad efectiva de mujeres y hombres*) raises the gender perspective to the category of a principle that informs the legal system, stipulating that "equal treatment and opportunities for men and women is a principle that informs the legal system and, as such, it will be integrated and observed in the interpretation and application of legal rules" [15].

12 It should be remembered, however, that it is applicable and should be taken into account in all branches of the legal system. This, for example, on its application in the sphere of benefits and labour law, see SANCHEZ QUIÑONES, L., "Perspectiva de género. Concepto y alcance", Diario La Ley, Wolters Kluwer, nº 9896, Sección Tribuna, 21 July 2021.

13 I had the opportunity to discuss the hermeneutic value of the gender perspective in "La perspectiva de género en el proceso penal. ¿Refutación? de algunas conjeturas sostenidas en el trabajo de Ramírez Ortiz «El testimonio único de la víctima en el proceso penal desde la perspectiva de género»", in *Quaestio facti*. International Journal on Evidential Legal Reasoning, No. 1, 2020, pp. 271-284. Page Ref. 275 et seq.

14 This is the standard interpretation of the gender perspective, echoed in the criminal and criminal procedure practice and doctrine. In order to combat any interpretation of the gender perspective that could contravene constitutional rights, virtually all the studies that address the issue. In relation to all, see, *e.g.*, the special edition of the Revista de Juezas y Jueces para la Democracia "Boletín comisión penal. Perspectiva de género en el Proceso Penal", No. 10, December 2018, where the works of authors like LÓPEZ ORTEGA, RAMIREZ ORTIZ, SANMIGUEL BERGARECHE, VALLEJO TORRES or DIEZ RIPOLLÉS defend the hermeneutic value of the gender perspective and its compatibility with the Constitution. In the same vein, see LARRAURI PIJUAN, E, *"Una agenda feminista (para la criminología)"*, in Jueces para la democracia, No. 101, 2021, pages 5-20.

15 On this issue, GARCÍA PORRES, I. y SUBIJANA ZUNZUNEGUI, I., "El enjuiciamiento penal con perspectiva de género", SEPIN, SP/DOCT/75846 (September), pp. 1-13.; p. ref. 2. In the same vein, VALLEJO TORRES, for whom, in view of the provisions of the 2007 Equality Act "the application of the gender perspective is not a desideratum, or a recommendation directed at

It is true that, in their task of judging, Judges are subject to the principle of legality; but that principle can only be understood in light of the interpretative criteria contained in art. 3 CC and, specifically, for the purposes of this work, of the "social reality" of the time in which the rule has to be applied. The obligation will then be to interpret the rule in line with the social reality of our time, which means that the Judge has to remove any obstacle that prevents or hinders the achievement of applying real and effective equality (which the Judge is entitled –and indeed obliged- to do under article 9.2. SC), with the gender perspective thus becoming a guiding principle of the legal system, even aside from the express recognition found in the 2007 Equality Act cited above.

In accordance with all of this, as GARCÍA PORRES and SUBIJANA ZUNZUNEGUI have rightly summarised, "judging with a gender perspective is equivalent to implementing legal techniques in judging that facilitate the achievement of the objective of actual equality of men and women in the use and enjoyment of rights and freedoms. Specifically, the gender perspective aspires to ensure that the parameters that the justice system uses to interpret and apply the law do not reinforce, by means of an axiological neutrality linked to formal equality, the relations of power of men over women, thus consolidating the discrimination of the latter. What it ultimately postulates is that the justice system use techniques of differentiation that, being proportionate, manage to arrive at destination of final alignment when the starting point was unequal"[16].

III. THE GENDER PERSPECTIVE AT THE PROSECUTION STAGE

Starting with the division of the process in two main stages –investigation and prosecution- and overlooking the existence of an intermediate stage designed in broader or narrower terms depending on the type of procedure brought, the prosecution stage tends to be identified with the holding of the oral hearing when, in fact, it encompasses prior phases and, of course, subsequent procedural acts, such as the assessment of the evidence or the issue of the judgment.

So, if we consider the full breadth of the prosecution stage, the gender perspective has to play a relevant role at various points and in relation to certain actions. Among these, it is worth highlighting, not just due to its possible influence in assessing the sole testimony of the victim, but also, intimately linked to this, the vital relevance in the taking of prima facie evidence as a mechanism for the corroboration of that testimony or in the very determination of the subject of that corroboration; nonetheless, the interpretative role it can play in terms of the victim's decision to opt not to declare in the oral hearing is undoubtedly relevant; or, for example, with a view to recommending a proactive attitude on the part of the Judge in managing the examination or even his/her direct participation in the same. They are all cases in which the gender perspective could help to counteract the unequal effects that an apparently neutral application of the rules can have.

The impossibility of addressing all these scenarios, both for reasons of space and of consistency

the public powers in general, but a legal mandate". VALLEJO TORRES, C., "El género en el derecho y su perspectiva en el proceso penal", in Boletín Comisión Penal; Perspectiva de género en el proceso penal vol. 2, Revista Juezas y Jueces para la Democracia, no.10, December 2018, p. 43.

16 GARCÍA PORRES, I. and SUBIJANA ZUNZUNEGUI, I., "El enjuiciamiento (...)", op. cit, pp. 1 & 2.

with what is required of a chapter in a collective work, means that I will be devoting the following pages to continuing to delve into the influence of the gender perspective in assessing the testimony of the victim when it is the only evidence for the prosecution in a case. This core issue, however, will raise interesting questions that will of course have to be addressed, with regard to how to understand the necessary corroboration of the declaration using peripheral data pursuant to the gender perspective and, finally, with regard to whether or not the declaration of the victim effectively constitutes privileged testimony.

1.- The gender perspective and the testimony of the victim as the only evidence for the prosecution. Some considerations regarding corroboration

Much has been written and reflected in relation to the testimony of the victim when it is the only evidence for the prosecution. Without wishing to repeat ideas that have arisen in the context of fruitful and enriching debates in which I have had the opportunity to participate and to which I refer anyone looking to go into the topic in greater depth[17], I would like to approach this issue from an angle that is as clear as it is synoptic: what the gender perspective can and cannot offer to the assessment of evidence, in a trial in which the only evidence for the prosecution is the testimony of the victim.

Whatever the answer is, it involves assuming that it will necessarily depend on the corroboration that the testimony has achieved and, as such, its degree of reliability; something that is ultimately submitted by the Judge to the rule of free assessment of evidence.

In any event, resolving the question raised (what the gender perspective can and cannot offer when all we have in terms of evidence is the declaration of the victim) requires that we start by analysing where we are, genuinely, in a sole testimony scenario and how it can be assessed, in line with existing case law; and I would warn the reader that the situation is -I fear- not as obvious as it may initially appear.

The constant and reiterated assertion that the sole testimony of the victim can subvert the presumption of innocence under certain assessment requirements and the evidence that we will be dealing with a single testimony scenario when the accusations were unable to contribute any other incriminating data to the body of evidence, encounters a first obstacle in the very requirements established by case law for the potential assessment of such testimony.

It is settled case law today that the victim's declaration can constitute sufficient evidence to overcome the presumption of innocence when the following three characteristics are met: 1) absence of a subjective lack of credibility of the victim; 2) persistence of incrimination; and 3) corroboration of the declaration via certain peripheral data[18].

17 The Journal "*Quaestio facti*. International Journal on Evidential Legal Reasoning" hosts a section entitled "Conjectures and rebuttals". Issue 1 of the same contains a fruitful exchange of opinions on the gender perspective around a RAMIREZ ORTIZ article in which ARENA, CASIRAGHI, GAMA and I myself participated. Subsequently, in issue 2 of the journal, RAMIREZ ORTIZ had the intellectual courtesy to seek to respond to all the different issues. In my opinion, as a whole it offers a suggestive debate on the matter and I would recommend that anyone interested in the topic consult it.

18 There are innumerable Supreme Court Judgments (STS) that can be cited in this regard. For example, STS 172/2017, of

These evidentiary requirements apply in relation to the assessment of the victim's testimony in any kind of offence and not, exclusively, to the declaration of victims of gender-based violence. In fact, this existing case-law position reached its ultimate expression as of the 1980s, being applied to sexual assault (then "honour crimes") in order to avoid the swathes of impunity caused by the fact that, with only the victim's declaration as evidence for the prosecution, the application of the "*testis unus, testis nullus*"[19] maxim always and inevitably led to the acquittal of the accused[20].

As these three assessment requirements were initially set out in the judgments, the requirement of corroboration was –and continues to be today- presented ambivalently. Normally, after some lax references, what was established was the need to assess the "plausibility [of the testimony], insofar as it is deduced from peripheral corroborations"[21]. However, just what the subject of the corroboration should be was never quite established with complete clarity, it is still the case today. And this issue is vital because, clearly, whether or not the testimony of the victim alone can overcome the presumption of innocence effectively depends on it. In this context, the gender perspective is a key interpretative factor in terms the right way to address what the peripheral data must corroborate.

If the requirement for peripheral corroboration is understood to mean that some other evidence –even if only peripheral- of the offence must be contributed (for example, a medical report certifying injuries in an assault has incorrectly been classed as peripheral), in reality, this means that the potential of the victim's testimony to be the sole evidence for the prosecution is being denied[22]; because in reality it would imply

21 March (Rec. 1705/2016) states that: "1) The case law of this Chamber and of the Constitutional Court indicates the ability for the declaration of the victim alone to overcome the presumption of innocence, but it is necessary to adopt special precautions as we are dealing with a testimony that has unique connotations. Case law has been demanding oversight in relation to the testimony of the victim in order to be able to ascertain the authenticity or inauthenticity of what is declared. These oversight parameters are: a) Absence of a subjective lack of credibility, which rules out any motive of resentment, conflict or revenge. b) Plausibility, which exists when the peripheral corroborations support the reality of the fact. c) Persistence and resoluteness of the testimony".

19 "*Unius testimonio non esse credendum*" [The testimony of a single person should not be admitted] PAULO, *Digesto* 48, 18, 20.

20 I have gone into this issue in greater depth in "Valoración de la prueba indiciaria y declaración de la víctima en los delitos sexuales", in *Problemas actuales de la administración de justicia en los delitos sexuales*, Ed. Defensoría del Pueblo. Perú, 2000, Lima, Perú.

21 STS 8031/1992, of 28 October. This Judgment literally sets out the three requirements for assessing the testimony of the victim: "a) Absence of a subjective lack of credibility derived from a spurious motive (for example, resentment or animosity) as a result of existing relations between accused and accuser. b) Plausibility, insofar as it is deduced from peripheral corroborations. c) Persistence of incrimination, manifested by its continuation over time, by the plurality and by the absence of ambiguities and contradictions"; and it also cites past case law making the same point: "In these conditions, we can only find that the case contains sufficient evidence for the prosecution, as the case law of this Chamber has repeatedly found in similar cases (Judgments of 31 March 1987, 11 March 1989, 21 May 1990, 19 June 1991 and 13 April 1992), as well as Constitutional Court case law (For example, Judgment 173/1990, of 12 December)"

22 This is exactly the situation that tended to exist –and is still often the case today – and that arose (among others) in STS 8031/1992, of 28 October, cited above. In it, after referring to the three classical requirements of the victim's declaration in order for it to be able to constitute evidence for the prosecution (a. absence of a lack of subjective credibility; b. Plausibility deduced from peripheral corroborations; and c. Persistence of incrimination) it states "there is nothing in the case that objectifies the presence of a deviant purpose in the incrimination. The reality of the occurrence of the event, which, together with determining the perpetrator, is the genuine area of evidence designed to undermine the interim truth of non-culpability of which the presumption of innocence consists, is not doubtful and is fully accredited by the medical reports included in the case. Finally, the complainant identified the accused, now the appellant, as the perpetrator at all times". As you can see, the medical reports are presented as elements that corroborate the victim's declaration when, strictly speaking, they are sources of

requiring some other evidence of the criminal act. Only when the requirement of corroboration is for the purpose of rendering the victim's declaration more reliable, albeit by means of peripheral data –that is, data that does not refer to the commission of the criminal act itself-, is the declaration being considered sufficient to overcome the presumption of innocence.

In view of the lack of clarity with which case law has expressed itself with regard to the need for corroboration of the victim's testimony and the disparity of interpretations arising in relation to the same, it has become an area in which the gender perspective should play a vital role, definitively establishing that its object must be to enhance the reliability of the victim's declaration, corroborating it by means of any other peripheral data that objectively make it plausible.

To understand that the corroboration of the victim's declaration by means of peripheral data requires the presentation of evidence that, directly or circumstantially, refers to the criminal event that the victim asserts was committed, is tantamount to denying the sole testimony the validity to constitute sufficient evidence for the prosecution[23]. It would imply requiring, in such cases, that there be other evidence in the case that, together with the testimony of the victim, proves that the offence was committed: if an injury report, a witness declaration, a WhatsApp message or any other source of evidence is required, the subject of which is the commission of the offence itself, and not the plausibility, credibility or reliability of the victim's declaration[24], what is required is that some other source of evidence of commission of the criminal

evidence of the commission of the offence itself. At present, we continue to commit the same interpretative error and so, by way of example, 25 years after this Judgment, the Palma de Mallorca Court of Appeal Judgment (Section Two) of 24 May 2017 (subsequently appealed and giving rise to STS 119/2019, of 6 March), asserts that evidentiary value is attributed to the sole testimony of the victim in order to overcome the presumption of innocence, because it meets the three requirements that case law stipulates in order to be taken into consideration: "We find that the victim's declaration meets the requirements to be taken as sole evidence for the prosecution as it meets the well-known requirements of subjective and objective credulity, persistence of incrimination and existence of peripheral corroboration, in relation to the facts that constitute the offence of habitual abuse and abuse, but not, as we will see later, of sexual assault. Indeed, the declaration by the injured party is internally consistent, we see no spurious desire for vengeance or resentment that could affect the assessment of the declaration. It sets out the facts clearly, distinguishes the situations, those present, the reasons, and, what is even clearer and shows the absence of an intention of harming the accused, differentiates between the facts that took place habitually, and those that did not, and those in which the accused was very drunk and what were their normal, day-to-day relations. Therefore, we find that the required plausibility is present, and the declaration has been persistent in the different phases of the proceedings, without any contradictions or gaps or changed versions that would lead us to consider that she is not describing the facts as they occurred". Having thus reached the moment of justifying the corroboration of the testimony by means of peripheral data, elements or factors, the Court of Appeal Judgment cited states that "(…) Mr… also corroborates the complainant's version with regard to the events occurring on 31 December in the street, indicating that he was present at the argument in which he punched her twice in the face, that they were arguing because he was very drunk, the complainant wanted to take him home and he did not want to go". We find ourselves, once again, in a case in which other evidence of the events is contributed, apart from the victim's declaration. It is not, then, a question of the reliability of her testimony, or clearly of any peripheral data; it is an eye witness of the events whose declaration constitutes evidence of the commission of the offence (not of the plausibility of the victim's declaration). In this case the victim's declaration was not the only evidence for the prosecution in the case either, there was also the witness declaration.

23 This is what, in reality, STS 172/2917, of 21 March -cited earlier- requires when stipulating that plausibility will exist "when the peripheral corroborations support the reality of the act". In my opinion, and as I will seek to justify in the text, peripheral corroborations must be aimed at making the victim's declaration reliable -via "peripheral aspects", that do not constitute the criminal act-.

24 I agree with RAMIREZ ORTIZ regarding the advisability of using the term reliability rather than credibility in order to enhance the objective nature of the knowledge that the Judge must acquire in relation to this testimony, its potential intersubjective transmissibility and, as such, its epistemic validity. In this regard, see RAMIREZ ORTIZ, J.L., "El testimonio único de quien afirma ser víctima desde la perspectiva de género", in Boletín Comisión Penal; Perspectiva de género en el proceso penal

act be provided; thus rendering the assertion that the victim's declaration can, by itself, have the validity necessary to overcome the presumption of innocence, absurd, as well as fallacious[25].

In any event, it is important to highlight the fact that the victim's testimony meets those three characteristics does not automatically make it damning evidence; it simply means that it has evidentiary value and can, therefore, be assessed by the Judge together with the rest of the evidence in the case which will – if this is the only evidence for the prosecution- necessarily be evidence for the defence. It is possible then, that even if the three jurisprudential requirements are met, the victim's testimony is not ultimately sufficient to overcome the presumption of innocence of the accused, in a specific case. As the Supreme Court has rightly found "in those scenarios in which, ultimately, the body of evidence is limited to the victim's declaration and the declaration of the accused, this is where the triple test established by case law to assess the reliability of the victim's testimony is particularly apposite -persistence in the statement (i), corroborating elements (ii), absence of motives of a lack of credibility other than the criminal act itself- (iii). This triad is not being defined as a condition for validity or usability. These three references do not mean that when the three conditions are met, the testimony has to be believed "by legal imperative". Nor does it mean, on the contrary, that when one or more is missing, the evidence cannot then be assessed and, *ex lege*, by operation of the law -or of the legal doctrine in this case-, it is considered insufficient for constituting the grounds for a conviction. Neither one nor the other"[26]. To assume that this were the case would represent granting the victim's testimony "privileged" status over that of the accused which would represent an attack on the constitutional procedural principles and, in particular, on the right to the presumption of innocence.

This point, in my opinion, deserves a more detailed analysis; and I will be devoting the next few lines to this. Before that, however, I would like to underline that, despite the recently transcribed case law affirmation, it will be hard to find –in my opinion- situations in which, when one of the above three requirements is not met, the sole testimony of the victim manages to become sufficient evidence for the prosecution. Thus, if, despite the full subjective reliability of the testimony and corroboration thereof, there are relevant contradictions in the narration of the facts that prevent a solid version or account of the same being told, it will be difficult, in terms of argument, to articulate a reasoning that defeats the presumption of innocence. I also believe that, in the event the sole testimony does not attain the reliability provided by corroboration by means of peripheral elements, in no way would it be possible to hand down a conviction on that basis, despite the absence of spurious motives in the declaration and the incrimination being constant and free of contradiction[27]. Perhaps, this would only be possible when, despite the declaration lacking subjective credibility due to spurious motives in the victim's testimony, for example, the incrimination was constant and reached objective reliability via the corroboration of certain peripheral elements; perhaps only in this

vol. 2, Revista Juezas y Jueces para la Democracia, no. 10, December 2018, p. 14.

25 This is an idea that I have been maintaining –and reporting on- for decades: depending on how the requirement of corroboration is understood, the statement that the victim's declaration can be sufficient as the sole evidence for the prosecution may or may not be true. Examples of arguments of how, in the 80s and 90s, despite this assertion being used, it was difficult to find scenarios in which the victim's declaration constituted the sole evidence for the prosecution -in sexual offences, at least- can be found in my work "Valoración de la prueba indicaría y declaración de la víctima…", cit.

26 STS 68/2020, 24 February 2020, Rec. 10588/2019.

27 RAMIREZ ORTIZ, J.L. is categorical and eloquent on this point in "El testimonio (…), op. cit.

case (constant and objective reliable declaration, but in which feelings such as, let's say, vengeance are noticeable) would the absence of one of the requirements make it possible to base the conviction exclusively on the declaration of the victim[28].

I believe that, *de facto*, fulfilment of these three requirements -with the sole qualification explained- becomes a necessary factor for the sole testimony of the victim to achieve evidentiary value. Whether or not it is, in effect, sufficient to overcome the presumption of innocence will depend on the particular case and the body of evidence in each one that, for our purposes, will always be for the defence. Because it is worth noting that the assessment of the sole testimony of the victim (that meets the above three requirements) will not necessarily have the same outcome in proceedings in which, for example, the accused remains silent and does not provide evidence for acquittal[29] -or offers a confused or contradictory declaration-; as the assessment that maybe made in proceedings in which, opposing the victim's declaration, in addition to the accused's declaration exonerating himself, there is also conclusive evidence for acquittal (e.g.: several witnesses). As I have maintained in the past, automatically attributing evidentiary value to the victim's declaration when it meets the three requirements analysed, is tantamount to granting it a specific value placing it above the rest of the sources of evidence, giving it a privileged nature that would clash with the constitutional procedural principles or, to put it another way, with the guarantees of due process. And, as I have also mentioned above, this point –and the use being made of the above premises- merits special attention, in my opinion.

2.- Does the victim´s declaration constitute privileged testimony?

It has been maintained in recent times, in somewhat alarmist fashion in my opinion, that case law supports a kind of statutory assessment of the victim's testimony which grants it, being recognised to have a superior position, viability to overcome the presumption of innocence with the mere finding of subjective intensity on the part of the victim providing it[30]; with the principle of im-

28 SAN MIGUEL BERGARECHE expresses this in particularly graphic terms, maintaining that "a) one can be resentful (your life has been ruined) because the event took place; b) you cannot be a friend of someone who has acted like that (according to the perspective you set out in the complaint); c) you also want revenge (subjecting someone to criminal proceedings is an effective form of revenge) and you really want the person to be convicted. Does all of this lead one to lie? What the argument of the absence of a subjective lack of credibility shows is the prevention against the stereotype (the behaviour of women in this kind of complaint) on the part of the court: that is, first we examine the person, her psyche and relations, and only then do we listen to her account". SAN MIGUEL BERGARECHE, M.N., "Juzgar y castigar ¿Con perspectiva de género?", in Boletín Comisión Penal; Perspectiva de género en el proceso penal vol. 2, Revista Juezas y Jueces para la Democracia, no. 10, December 2018, p. 33

29 Going into greater depth regarding the procedural relevance of the accused's silence falls outside the remit of this work, despite the fact that it may have certain implications for the subject of the same; nonetheless, I have carried out a detailed study of the matter that can be consulted at "El derecho al silencio y sus consecuencias en el proceso", Revista General de Derecho Procesal, Iustel, no. 46.

30 I share LARRAURI's indignation when this trend is presented as a further feminist conquest, which is accused of advancing on constitutional rights, attacking the presumption of innocence: "it incenses me when 'feminists' or the 'gender perspective' are blamed for onslaughts on 'liberal criminal law'. For example, Muñoz Aranguren warns of the risk of introducing the reversal of the burden of proof envisaged in LO 3/2007, for the effective equality of women and men in criminal law and cites as criticism several judgments that give the victim the status of 'privileged witness'. The risk is that the presumption of innocence be watered down, but the fight, as far as I can see, is not with 'the feminists' but essentially with a series of judgments all handed down by the same senior judge rapporteur (…)". LARRAURI, E., "Una agenda feminista para la criminología", Jueces para la democracia, No. 101, 2021, p. 14. I disagree, in any event and as I try to argue in the text of this work, that it is a position through which the Supreme Court is championing a watering down of the presumption of innocence in these cases; I believe that these Judgments can be read in line with the principles of constitutional procedure and that is of course what should

mediacy of the Judge who witnesses the taking of evidence being vital in this evaluation. And while it is true that some Supreme Court judgments can be cited in which, on the basis of a similar interpretation to the one set out here, the victim's testimony is expressly described as "privileged" –which is a terrible mistake, I believe, on the part of that Court -[31], duly contextualised, in reality it is neither recognising the nature of the same as such, and neither it is it a case-law thesis that is in any way consolidated; what is more, it is a thesis that –perhaps because it has been criticised- has been duly clarified and qualified by the same judge rapporteur in subsequent Judgments[32]. Let us have a closer look at how it has evolved.

The victim has always been considered to be a witness with a "special status". Special, because, while not a third party uninvolved in the process (what defines a witness), he/she was present (and has suffered) the criminal act, thus being in an ideal situation to describe what happened[33]; taking into account, nonetheless, with regard to the ultimate evidentiary assessment, the possibility of the testimony being based on spurious motives, moved by feelings of revenge, hatred or animosity. As a result, the possibility of assessing their declaration as evidence has always existed, although the three requirements we have already seen have to be met when it constitutes the only evidence for the prosecution.

We can take two significant factors from the above consideration that should be qualified: one, that the requirement of the triple test already referred to is only stipulated in cases in which the victim's declaration is, in effect, the only evidence for the prosecution in the trial (a relevant factor because, on occasion, this evidentiary possibility is ruled out due to one of these requirements not being met, even though there is other evidence for the prosecution); and two, that this qualified status that case law grants to the victim's testimony is born of the mistrust that

be done. I do however believe that there is a huge veiled interest in slowing down advances in equality –an interest that has existed for centuries and centuries – and that, from that perspective, it is useful to raise false alarm with threats of a supposed violation of the constitutional order that, in reality, neither the Supreme Court nor, far from it, "the feminists" are proposing. This generates a collective belief that, down this road (that of equality) lies an attack on the presumption of innocence and the end of the constitutional procedure… It is a covert way of halting any possible advance that is proving tremendously successful. The scant attention that, strangely, the similar treatment of police testimony has received by both the case law and article 717 of the Criminal Procedure Act (LECrim), has been addressed by SAN MIGUEL BERGARECHE, M.N., "Juzgar y castigar…"op. cit., p. 36

31 STS 247/2018, of 24 May; STS 282/2018 of 13 June

32 See, in this regard STS 199/2019, of 6 March or STS 684/2021, of 15 September (judge rapporteur: Mr Vicente Magro Servet) and note the qualified manner in which the theses of STS 247/2018, of 24 May, by the same judge rapporteur, are incorporated.

33 The special statute of the witness/victim has been fully enshrined in case law since the late 80s, early 90s. See the STS of 31 March 1987, 11 March 1989, 21 May 1990, 19 June 1991 or 13 April 1992, among others; also, STS 173/1990, of 12 December. It is worth noting that the STS of 28 October 1992 maintains that "the evidence taken into account by the appealed judgment as for the prosecution based on the rules contained in article 741 LECrim, was the victim's declaration. However, unlike in civil proceedings, in which status as a party rules out the possibility of that party's declaration being accepted as testimony, generally speaking (arts. 1.247 CC and 660 of the Civil Procedure Act (LECiv)), and it is only exceptionally admitted in the context regulated by Act 30/1981, of July (Additional provision h), in the criminal system, the possibility of incriminating testimony from the injured party is expressly recognised in art. 368 LECrim ("anyone making accusations regarding a particular person"). It is not, as the Judgments of this Chamber of 28 September 1988 and 2 April 1992 indicate, testimony strictly speaking, as the victim can be a party to the proceedings pursuant to articles 109 and concordant provisions of the LECrim; but it is valid as such if the following circumstances are met: a) Absence of a lack of subjective credibility derived from a spurious motive (for example, resentment or animosity) resulting from existing relations between accused and accuser. b) Plausibility, insofar as it is deduced from peripheral corroborations. c) Persistence of incrimination, manifested by its extension over time, by the plurality of the same and by the absence of ambiguities and contradictions".

the declaration merits, *a priori* and due to the subjectivity that may derive from having suffered the offence (it is therefore a question of recognising a series of conditions that, when met, make it possible to overcome that underestimation that this declaration warrants, a priori).

Nevertheless, and paradoxically, it is affirmed today in a variety of spheres that the victim's testimony has achieved "privileged status" and that a conviction can be handed down based exclusively on the fact of it being given; basically the idea that a victim's declaration is, in itself, sufficient to trump the accused's presumption of innocence[34].

Were it possible to take that leap, going from considering the victim's testimony as having "special status" to considering it to constitute "privileged testimony", I would undoubtedly be categorically against it. However, beyond a regretful terminological error in which, it is true, the odd Supreme Court Judgment states that the testimony of the victim is privileged testimony, the reality is that it justifies -in that and in other Judgments- the need to argue and verify compliance with the three evidentiary requirements, thus denying it any kind of privilege as evidence as a result.

The problem, then, arises specifically with the wording of STS 282/2018, of 13 June, in which, while it is true that the term "privileged" is expressly used to describe the victim's testimony, an objective, calm reading of that Judgment, and indeed of subsequent ones by the same judge rapporteur, hardly lends itself to the interpretation that the intention was to grant it superior evidentiary status.

The position of the Supreme Court has thus been clarified and qualified in subsequent judgments from which it is clear –and fully justified- that "it is not a question of a confrontation in order to see in these cases which of the declaration of the victim and the declaration of the accused have the greatest value in criminal proceedings, it is rather a casuistry that is adaptable and appropriate for each specific case and based on the principle of immediacy and the taking of the evidence resulting from the specific factual situation. So there is no question of a struggle between the preeminent value of the victim's declaration and another declaration, that of the accused, in criminal procedure, as neither one can be superimposed on the other; it should rather be the specific case and the taking of evidence that determines which is the one the Court finds more convincing, on the basis always that the presumption of innocence is what must be overcome by the credibility of the victim's declaration, confirmed and corroborated in this case by other means of evidence, where possible, if the victim's declaration, even with the solitude that

34 We were warned about this trend, by LÓPEZ ORTEGA for example, who maintains that "in recent months we have witnessed certain events in which a profound rupture has taken place between public opinion and our justice system, the most visible expression of which has been the marches and protests under the "I believe you" banner. As a result of this debate, which has a profound impact on the public, two Supreme Court Judgments have established in certain cases, basically violence against women and sexual offences, that the victim's declaration has enhanced credibility, because in addition to her status as witness, she is also the victim of the offence. Moreover, the first of them, handed down in a gender-based violence case, had a major impact as it was the first, according to the news that was reported, in which the gender perspective was applied (STS 247/2018, of 24 May). The second also constitutes an important milestone in our case law, as it is the first time in which, in a case of child sexual abuse, the greater interest of the child was set against the right to the presumption of innocence, as if they were two conflicting values (STS 284/2018, of 13 June)". LÓPEZ ORTEGA, JJ, in "Yo sí te creo", Juezas y jueces para la Democracia, Boletín comisión penal "Perspectiva de género en el proceso penal", volume 2, no. 10, December, 2018, p. 1.

the victimisation entails in these cases, can be connected to other means of evidence that the court can consider"[35].

But, returning to the origin of the conflict, it is worth noting that STS 282/2018, of 13 June, was followed by others such as 199/2019, of 6 March, by the same judge rapporteur, also cited as the seed of the supposed elevation of the interpretative status to be granted to the victim's testimony[36]. And the fact is that it does not justify or argue in favour of this alleged "privileged nature" that would lead the victim's declaration to take precedence over that of the accused, thus generating a kind of reversal of the burden of proof and, in addition, as some maintain, a violation of the right to the presumption of innocence. In fact, the above-mentioned judgment literally maintains that "this Chamber of the Supreme Court starts out from the consideration that victim declarations are not completely comparable to those of a third party; indeed, the Constitutional Court, duly respecting the exclusive sphere of the criminal justice authority that the Constitution grants to ordinary judges and courts, had indicated that the declaration of the victim or complainant can be valid evidence for the purpose of overcoming the presumption of innocence, obliging the sentencing court to assess it, although this does not of course mean that such declarations automatically subvert the presumption of innocence by reversing the burden of proof, considering the accusation proven and obliging the accused to undermine the presumed presumption of truth of the accusation made, but merely that such evidence is not invalid for the purposes of its assessment as another element of evidence by the sentencing court, which, as is obvious in any such assessment, must apply criteria of reasonableness that take into account the special nature of the evidence in question".

That judgment does not even literally state that the victim's declaration has or should have a "privileged" status; this being a confused and unfortunate term that, it is true, was used in the previous Judgment –STS 282/2018 of 13 June- but which was never, or at least never clearly, given the meaning that some attribute too it, as constituting a kind of violation of the right to the presumption of innocence of the accused, by granting, straight off the bat and without further consideration, greater reliability to the victim's testimony than that of the accused; which does not make the term used by the Judgment any less dangerous or unfortunate, but does not justify the intended involution that some have claimed.

STS 282/2018, of 13 June claims, literally, that:

> "(…) in cases of gender-based offences in which the victims are facing a genuinely dramatic episode, such as seeing how their partner, or former partner, as is the case here, takes the decision to take their life, this means that the version that they can offer of the episode they experienced is of great relevance, but not as a mere eyewitness, but as a privileged witness, whose declaration is assessed by the Court under the principles already explained in order to ascertain the credibility, persistence and plausibility of the version offered in the different phases in which he/she has explained how events occurred which, in cases such as the one described in the facts as found, the visualisation of a such a serious

35 STS 684/2021, of 15 September. Judge Rapporteur: Mr Vicente Magro Servet.
36 LARRAURI, E., "Una agenda …", op. cit., p. 14.

scene is engraved in the memory of the victim, who is conscious of the fact that what the aggressor, her partner or former partner, has actually done is take the decision to end her life.

This, however, does not mean that the credibility of the victim is different to that of the rest of the witnesses, in terms of the value of her declaration, or grant a kind of presumption of truth always and in all cases, but the Court can find and observe with greater precision the manner in which the occurrence of an event is narrated by someone who has experienced it first-hand and who is the victim of the offence, meaning that it will pay particular attention to the way in which she recounts the experience, her gestures and, above all, take into account whether there may be some kind of animosity in the declaration. With regard to this last point, it is vital to remember that the circumstance that there has been some kind of confrontation between the perpetrator of the offence and the victim, or the fact that the victim suffered other criminal acts previously, does mean that the veracity should be questioned, as the existence of antecedents should not reduce credibility, her declaration will simply be assessed with the privilege of the immediacy that the Court enjoys. The fact that the victim may take some time to report the facts in gender-based violence will not be a negative element either, given the special circumstances that surround these cases in which the victims may take some time to adopt the decision to report and it involves reporting their partner, or former partner, which is something that can affect the doubts that victims have when in that particular psychological position in which they person who has attacked them is their own partner, something that they could never have expected at the start of their relationship. They are a series of elements to be taken into account in assessing the victim's declaration as a qualified witness, given their status as the injured party. Therefore, it is a question of assessing the victim's declaration, the injured party in the offence, in a qualified position as a witness who has not only "seen" an event, but has "suffered it", meaning that the Court will assess their declaration when perceiving how she recounts the event experienced first-hand, her gestures, her replies and her steadfastness when being examined in plenary with respect to her position as a qualified witness who is, at the same time, the victim of the offence".

The paragraphs transcribed from the Judgment, apart from being unfortunate for the reasons already explained, are worth being considered from two angles which I will try to set out as follows: the first has to do with the alleged privileged nature that is, apparently, attributed to the victim's declaration in offences committed on the basis of gender; and the second is the interpretative value attributed to immediacy and that, with the qualifications I will be explaining, I do not share.

In relation to the first of the considerations, I believe that the paragraphs transcribed clearly show that the term "privileged" applied to the victim's testimony –apart from being deeply unfortunate- was not used for case law purposes in order to affirm that it has a higher evidentiary value than the testimony of the accused. Prior

to that, on the contrary, it insists on the idea that it must be analysed under certain filters to ensure its reliability–filters that are not required to analyse the reliability of the testimony of the witnesses (who are not victims)- in order to achieve evidentiary value, as the case may be.

The judgment recognises the traditional value of "qualified testimony" or that special statute that case law grants to the victim's declaration (for any offence and whether or not it is the only evidence for the prosecution) in order to underline that the victim is not just narrating what he/she has seen or heard -as an uninvolved third party would; having experienced the suffering of the offence means that he/she may have knowledge of certain aspects that a third party may not have perceived that, however, precisely for that reason, would have to be observed through the prism of certain precautions when assessing it (the classic triple test of subjective credibility, corroboration of peripheral elements and persistence of incrimination)[37]. So we can see that, in reality, far from granting the victim's declaration a privileged value, it is assumed to have a possible risk of partiality that is not recognised in the case of witnesses, as uninvolved third parties; and it must be verified in a manner that the accused's does not[38], as the reliability of the accused's declaration, benefitting from the presumption of innocence and the right to remain silent –or, even, it has been maintained: to lie-[39] is a factor of little relevance, unless it serves to rebut that of another co-accused parties[40]. If the assessment of

37 On this interpretation of the Judgment, see DOLZ LAGO, M.J., "El Tribunal Supremo aplica por primera vez la «perspectiva de género»: tentativa de asesinato", Diario La Ley, No. 9245, Sección Comentarios de jurisprudencia, 24 July 2018, Wolters Kluwer.

38 The questionable reliability of the victim's testimony is a historically consolidated position in Spanish case law, which moves away from that allegedly "privileged" nature that it is said some want to give it and which is particularly eloquently expressed in the STS of 16 February 1998 when, in order to argue for the need to pass the triple filter mentioned above, it maintained even then that "the breaking point in terms of the constitutional right to the presumption of innocence being in jeopardy occurs when the only evidence for the prosecution is the declaration by the supposed victim of the offence. The risk becomes extreme if the alleged victim is precisely the party that brought the proceedings, by means of the corresponding claim or complaint, and is further accentuated if this person is bringing the accusation, as in that case the only evidence of the accusation is the self-same accuser. It is sufficient to bring the accusation and maintain it personally in order to apparently transfer the burden of proof to the accused, obliging his party to demonstrate its innocence in the face of evidence for the prosecution consisting exclusively of the word of the accuser. There can even be a more extreme scenario in those cases in which the declaration by the accuser is not just the only evidence regarding the alleged perpetrator, but also of the very existence of the offence itself, for which there is no proof other than the statements of the person making the accusation, with the complete deprival of the right of defence being perfected when the accusation, based exclusively on the accuser's word, is so imprecise in terms of the circumstances or the time that it precludes any possibility of evidence to the contrary (…)". That position, which has been maintained unchanged, is hard to reconcile with the privileged status that -some claim- current case law wants to give a victim's testimony.

39 In favour of a tacit recognition of the right to lie, see ASENCIO MELLADO, JM, *Derecho Procesal Penal*, (ASENCIO MELLADO, Dir., FUENTES SORIANO, Coord.), 2nd Edition, Tirant lo Blanch, Valencia, 2020, p. 86. The author maintains that "this right [referring to the right not to incriminate oneself and not to declare oneself guilty], with the recognition of the right to remain silent, must, logically, mean that the accused is granted a right to lie". On a relative–not absolute- recognition of the right to lie, see PASTOR RUIZ, F. "El derecho a mentir: el tratamiento de la mentira del imputado", Diario La Ley, Nº 8155, Sección Tribuna, 24 Sep. 2013, Year XXIV.

40 ASENCIO GALLEGO insists on the mixed nature (means of evidence/means of defence) of the declaration of the accused and even highlights its gradual devaluation as a means of evidence. He maintains, in this regard, that "the consideration of the examination of the person under investigation as a means of evidence has lost virtually all of its validity nowadays (…). Because (…) the results of a declaration can only be those that the person under investigation voluntarily offers. This is why, even though details can be obtained on the facts and the perpetrators, the ability of this procedure to be of any use will depend exclusively on what the person under investigation wants. This person is the owner of his/her declaration, not those who are

the victim's testimony is ruled out when it is the only evidence for the prosecution, the testimony of the alleged aggressor will be irrelevant because, the accused –inevitably- does have a privileged position in our constitutional process derived from the right to the presumption of innocence. The problem is that, the way it is drafted, the Judgment does give the impression that the special status of the victim, that consideration as a "qualified" witness due to having experienced the events first-hand, is sufficient to grant their narration credibility, ahead of any other consideration.

In conclusion, then, we can but profoundly regret the erroneous classification of "privileged" that the Judgment applies to the victim's testimony. It is erroneous on all fronts: because the way in which it is treated in no way implies that it is considered as such, meaning that, it is therefore possible to make an "optimistic" reading of the judgment that is respectful of the presumption of innocence (otherwise, how is it of any use); and because it has generated great alarm regarding the alleged disappearance of the presumption of innocence in gender-based violence trials[41] (something of which, as we have seen, "the feminists" are unfairly accused when, in reality, we can neither be accused of this and, in actual fact, this effect has not taken place).

The second observation, as I mentioned earlier, in relation to the paragraphs of the transcribed Judgment, leads me to disagree with the importance it attributes, in terms of the evidentiary value that the victim's declaration may potentially have, to the way in which the victim narrates the experience or even the gestures used. I do not believe that this is the purpose of the immediacy nor, indeed, can it be relevant when it comes to the reliability –which is what this is about, when it is the only evidence for the prosecution- of the victim's declaration. In this regard, I agree with LÓPEZ ORTEGA who says "consis-

requesting or establishing it by means of the examination. The object of the declaration is not, then determined by the accuser or the Court, but by the person under investigation, as that person will reply or declare whatever he/she sees fit. This is a substantive difference compared to the rest of the procedures». ASENCIO GALLEGO, J.M., *El derecho al silencio como manifestación del derecho de defensa*, Tirant lo Blanch, Valencia 2017, pp. 172-173.

41 Clear evidence of the enormous confusion caused by the Judgment is the treatment of and references to the same by RAMIREZ ORTIZ who maintains that "(…) it is worth remembering that on many occasions in judicial practice, corroborative value is attributed to informative elements that lack that property (e.g. expert evidence on the credibility of the testimonies). Moreover, as a result of the introduction by Chamber II of the Supreme Court of the doctrine of the privileged nature of the testimony of those who claim to be victims of gender-based violence, testimony that would be sufficient for a conviction, even when not corroborated, the de-problematization of the assessment of evidence has become more acute in judicial bodies. This is being constructed in terms of argument via a stereotyped formula, which appears to be newly created, but which is actually the recovery of classical formulas – a double affirmation is sufficient to verify the accusatory account: first of all, the victim's testimony is privileged; and, secondly, the judge, by virtue of the principle of immediacy, has believed the victim's version. As for the appeal, this has given rise to a relinquishment of control of events at second instance. An illustration of this state of affairs can be found in Judgment 2/2019 from section three of the Jaén Court of Appeal (ROJ SAP J 128/2019) which, facing a scenario with a single testimony, after reaffirming that the victim is providing privileged or qualified testimony «having been present at the event» as Chamber II says, concluded: «In this case, the original judge perceived that the victim, the accused's partner, was telling the truth, recounting the abuse and the experiences that this had involved». That is, as the victim's testimony has a specific evidentiary weight, greater than that of the accused, the judge «believed» her, and the conviction is justified. As can be seen, we are dealing with a peculiar combination of the system of legal evidence and the doctrine of intimate conviction, which prevents any institutional control", RAMIREZ ORTIZ, JL, "El testimonio único de la víctima en el proceso penal desde la perspectiva de género (2). Respuesta a los comentarios sobre «El testimonio único de la víctima en el proceso penal desde la perspectiva de género», published in *Quaestio Facti* 1/2020", *Questio Facti*. International Journal on Evidential Legal Reasoning", no. 2, 2021, p. 350

tency and corroboration are the two properties that make the account that is to be used before a court credible (plausible) and each one acts on a different level. While the requirement of corroboration involves considering reliability from an external perspective (verifiable objective data), consistency obliges us to take into account the congruence of the story in itself. From this second perspective, the internal one, what makes the account credible is that there is a central action that is easily identifiable and is associated with a context that provides an acceptable explanation of the behaviour of the subjects that intervene in it"[42]; that it is narrated in a manner that is more or less doubtful, affected, or devoid (or not) of the expression of certain feelings that would be expected of a victim is no more than the blossoming of those prejudices and stereotypes that the judge is obliged not to take into consideration; this is where the gender perspective will undoubtedly play a vital role.

I began this work affirming that its aim would be to try to specify what the gender perspective can and cannot offer to certain aspects of the prosecution stage. In this regard, we can conclude at this point that the gender perspective will contribute to helping the judge interpret both the legislation and the evidence in the case in such a way that underlying stereotypes do not prevent any doubts regarding the commission of the offence and to whom it should be attributed, being dispelled. If, as case law maintains, the victim's declaration can constitute valid evidence once the three above-mentioned requirements have been met, looking at the requirement for corroboration from the gender perspective, it cannot refer to both the commission of the offence itself (then it would not be the only evidence for the prosecution) and the very reliability of the declaration; an objective reliability that will be attained when other data disclosed by the victim in the declaration are corroborated externally, even if they do not constitute elements of the proscribed act in question.

However, and for the reasons explained, the gender perspective cannot supplement or overlook the necessary external corroboration of the victim's declaration by means of the assessment of subjective factors such as the way it is expressed, the gestures used or the nervousness or calmness of the delivery. Thus, I also believe that it cannot be used either to remedy any insufficiency that may be derived from the body of evidence taken in a particular case; and specifically, insufficient evidence derived from the victim's declaration when it constitutes the only evidence for the prosecution in the case and lacks external corroboration[43].

CONCLUSIONS

1. Equality, together with freedom, justice and political pluralism, constitutes one of the higher values of our legal system (art. 1.1 SC). This conditions the actions of the judiciary (and not just those of the legislative or the executive), obliging it to promote equal application of rules and to remove all obstacles to that ultimate objective (art. 9.2 SC). When applied in a prosecution, the gender perspective constitutes the conceptual tool that judges and senior judges can use to reveal those situations in which the axiological neutra-

42 LÓPEZ ORTEGA, JJ, "Yo sí te creo", cit., p. 4.

43 A stance I share with RAMIREZ ORTIZ ("El testimonio único…", op. cit.) and that I had the opportunity to address in depth in "La perspectiva de género…", op. cit.

lity of the rule perpetuates, promotes or legitimises situations of discrimination; making it possible to incorporate those interpretative measures or mechanisms necessary to achieve effective equality of men and women.

2. The declaration of the victim will constitute the sole evidence for the prosecution when it is understood that the corroboration of certain peripheral aspects required by case law is designed to verify the reliability of the declaration and not the confirmation of the offence via any other means, whether direct or circumstantial. Accepting this, thus requiring some kind of evidence -corroboration- that proves the commission of the criminal act, involves admitting, *de facto*, the viability of the victim's testimony for overcoming the presumption of innocence. So, interpreting with the gender perspective what the object of the corroboration is in order to consider the victim's testimony reliable becomes a necessary first step to make sense of the assertion that the victim's testimony by itself can attain sufficient evidentiary validity to overcome the presumption of innocence enjoyed by the accused.

3. The arguments for the triple test installed by case law in order to, potentially, grant evidentiary value for the victim's declaration will be enforceable when it is the only evidence for the prosecution in the proceedings and it aspires to overcome the accused's presumption of innocence, becoming the basis for a conviction. If there are other incriminating elements in the body of evidence, the victim's testimony will be just another source of evidence whose reliability will be freely assessed by the judge, evaluating it together with the rest of the evidence, regardless of whether or not it passes the triple test, regarding which, nonetheless, arguments will have to be presented when the judge wants to reject its evidentiary value.

4. The testimony of the victim (whether sole evidence for the prosecution or not) will always, like the rest of the sources of evidence in criminal proceedings, be subject to the principle of free assessment. This means that event if it meets the three requirements established by case law to be assessed, whether or not it attains evidentiary value and can (or cannot) be sufficient to constitute the basis for a conviction will depend on the specific case, the body of evidence on either side and how the judge assesses it. The gender perspective should ensure that those peripheral corroborations that enable the testimony to attain evidentiary value are taken into consideration; but once it has been attained, the gender perspective will not automatically and generally -as if it were statutory evidence - certify that the declaration has sufficient evidentiary value to overcome the presumption of innocence of the accused. However much certain sectors have sought to argue that this is the spurious aspiration of those calling for the application of the gender perspective in criminal procedure, that approach cannot be maintained in legal terms and I have never come across anyone attempting to do so (I have found -and cited in this work- those who say "it is maintained…", but I have never found anyone

maintaining as much, juridically).

5. With its profoundly erroneous and unwise terminology, it is true that STS 247/2018, of 24 May and STS 282/2018, of 13 June, refer to the testimony of the victim as "privileged testimony". But a slower, calmer reading of the same (and indeed of subsequent ones, including those of the same judge rapporteur) enable us to affirm that, despite their unfortunate paragraphs, they are not actually justifying -as some would have us believe- that the special position of the victim obliges the judge to take their declaration into consideration automatically, thus granting it a higher value than that of the accused or a direct ability to quash the latter's presumption of innocence.

6. Supported by the gender perspective, the victim's declaration cannot be given evidentiary value based on the manner in which the narration of events is expressed or the gestures used in that process. Indeed, expecting certain reactions by the victim in the explanation of the events illustrates the existence of certain prejudice or bias that should be flagged under the gender perspective in order to avoid any possible influence on the decision regarding the potential evidentiary scope of the declaration. The function of the principle of immediacy is not to grant evidentiary value to possible stuttering, embarrassment or nervousness when recounting.

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