GENERAL COUNCIL OF THE JUDICIARY

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CERTIFIES: THAT THE PLENUM OF THE GENERAL COUNCIL OF THE JUDICIARY, IN ITS MEETING OF TODAY, APPROVES THE REPORT ON THE ORGANIC DRAFT BILL CONCERNING INTEGRAL MEASURES ON VIOLENCE AGAINST WOMEN, IN ACCORDANCE WITH THE FOLLOWING:

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I.

PRECEDENTS

Under date of 7 June, the Organic Draft Bill concerning integral measures on violence against women was entered, which the Honourable Minister of Justice remitted the previous day of 4 June to this General Council of the Judiciary in accordance with what is envisaged in Article 108 of the Organic Law of the Judiciary.

Having designated the **Honourable Mrs. Montserrat Comas d'Argemir I Cendra** as Speaker for the elaboration of the report, said report was not approved in the meeting of the Studies and Reports Committee of 15 June 2004, the Committee agreeing on the designation of a new Speaker, which fell to the **Honourable Mr. José Luis Requero Ibañez,** and elevation to the Plenum of the deferral request to the Government of the Nation, inasmuch as the emission of the report had been obtained by the urgent channels referred to in Article 108.2, in the face of the impossibility of issuing the report in the brief period of fifteen days from the reception of the text of the Draft Bill.

The plenum of the General Council of the Judiciary agreed in its plenary session of 17 June to convene a new extraordinary Plenum, with the aim of issuing the report within the fifteen day period initially requested by the Government of the Nation.

In the Studies Committee of 21 June 2004, the report elaborated by the Speaker was approved, as was its remission to the Plenum for definitive approval.

II.

LEGAL AUTHORITY OF THE REPORT OF THE GENERAL COUNCIL OF THE JUDICIARY

1.- The reporting activity of the General Council of the Judiciary is regulated by Article 108 of the Organic Law of the Judiciary, fundamentally in relation to Draft Bills and general resolutions of the State and Autonomous Communities which affect totally or partially, among other matters expressed in the remainder of Article 108.1 of that Law, "*procedural rules or affect constitutional legal aspects of protection before ordinary courts regarding the exercise of fundamental rights and any others that affect the constitution, organisation, functioning and governing of Courts and Tribunals"* as well as *"criminal laws and rules regarding correctional regimes".*

Nevertheless, the legal authority of the report of the Council has been understood in broad terms. Thus, the General Council of the Judiciary has gradually been delimiting the scope of its legal authority, starting with the distinction between a strict scope, which coincides in literal terms with the material scope defined in the aforesaid Article 108.1 of the Organic Law of the Judiciary, and a enlarged scope derived from the position of the Council as a constitutional government body of the Judiciary. Therefore, within the first scope, the report to be issued must refer, mainly, to the matters set forth in the aforesaid precept, avoiding, at least in general, the formulation of considerations relative to the content of the Draft Bill in all those matters not included in the aforementioned Article 108 of the Organic Law of the Judiciary. As for the enlarged scope, the General Council of the Judiciary must also express its opinion on the aspects of the Draft Bill that affect basic rights and freedoms, owing to the prevailing and immediate effectiveness of position they

enjoy as established in Article 53 of the Constitution. On this point, the point of departure should in particular be the pronouncements of the Constitutional Court, as the supreme interpreter of the Constitution, whose resolutions issued in all manner of proceedings constitute the direct source of interpretations of constitutional precepts and principles, uniting all judges and courts.

Moreover, in accordance with the principle of collaboration between constitutional bodies, the General Council of the Judiciary has been indicating the opportunity to execute in its reports other considerations regarding either purely technical legal issues or terminology with the desire of contributing to improving the correctness of the regulatory texts as well as their effective applicability and influence regarding trials, and thus the jurisdictional bodies are the ones that must subsequently implement the corresponding rules in practice.

2.- The Draft Bill which is the subject of the report contains provisions that directly affect the organisation and functioning of Courts and Tribunals, procedural rules and substantive rules affecting legal-constitutional matters concerning protection before ordinary Courts of the exercise of fundamental rights, and criminal laws; therefore we find ourselves before the very scope of the government body of Judges and Courts which the Organic Law of the Judiciary considers should be the object of the report.

Apart from any consideration regarding the political opportunity of the Draft Bill, this Council must make a pronouncement concerning adaptation of the rule to the Constitution, regarding the influence the new rule has on judicial organisation, without precluding dealing with other technical matters of the regulatory text.

III.

STRCTURE OF THE ORGANIC DRAFT BILL

The remitted Draft Bill contains an Exposition of Motives, a Preliminary Heading, five Headings, eight Additional Provisions, two Transitional Provisions, a Single Repealing Provision, and sixteen final Provisions.

The Exposition of Motives is divided into three parts which analyse the phenomenon of violence against women and the necessity that public powers get involved in the fight against violence against women, adopting sufficient measures for making the rights to freedom, equality and non-discrimination real and effective, all from a comprehensive approach, as recommended by international bodies. To this end, prevention, educational, social, welfare, and subsequent attention measures for victims must be included, without affecting protection in criminal and judicial matters. Section III contains a summary of the content of the Law, Heading by Heading, and regarding what concerns this report, the aggravation of specific crimes perpetrated against women is opted for, and it is insisted upon that proceedings must be expeditious and summary, combining civil and criminal matters and opting for the creation of Courts of Violence against women as a method of specialisation within the criminal system.

The two sections of the Preliminary Heading concern the Law and the purposes and principles that motivate it.

Heading I regulates sensitization measures, its three Chapters dealing with education, advertising and the media, and public health.

Heading II includes the rights of women that are victims of violence in such a way that Chapter I regulates the guarantee of victims' rights, the right to

information, the right to integral public assistance and the right to legal aid. Chapter II regulates labour and social security rights, a specific employment programme in the framework of the Kingdom of Spain National Action Plan for Employment, and the accreditation of situations of violence perpetrated against female workers. Chapter III deals with the rights of female public administration employees, among which are included the right to transfer and voluntary extended leave of absence, the right to adjustment of the work timetable, and accreditation of situations of violence against female government employees. Lastly, Chapter IV regulates economic rights, including social welfare and priority for access to housing.

Heading III refers to institutional protection and envisages the creation of the Government Delegation on Violence against Women and a National Observatory on Violence against Women, as well as the creation of a specialised State security corps and forces and the collaboration of local police, elaborating collaboration plans among the different administrations with competence in this matter.

Title IV regulates protection in criminal matters, with special emphasis on the obligation of the National Observatory on Violence against Women to remit to the Government an annual report regarding the implementation of Sections 148.4., 171.4., and 172.2 of the Penal Code, while at the same introducing reforms in Sections 171 and 172 of the Penal Code and envisaging the elaboration of specific programmes for inmates convicted of this type of crime.

Title V deals with protection in criminal matters, and is divided into five Chapters consisting of the following: Courts of Violence against women (territorial organisation, competence, appeals in criminal matters, appeals in civil matters, training, initial staff of Courts of Violence against Women); civil procedural rules (territorial competence, competence on the basis of connection); judicial measures of protection and security of victims (general

provisions, protective order, protection of information and limitations on advertising, measures for leaving the domicile, separation or discontinuation of communication, measures for discontinuation of parental authority and custody of minors, of visitation rights, of the right to possess, bear and use arms, guarantees for the adoption of measures and maintenance of precautionary measures), and the Public Prosecutor of violence against women.

The Additional Provisions regulate the widow's/widower's pension, protocols of action, modification of Prison Regulations, evaluation of the implementation of the Law, remissions and regulatory authorisation, funding for the functioning of integral public assistance and agreements regarding housing.

The Transitional Provisions regulate the implementation of measures and the competence of the bodies which currently hear civil and criminal proceedings related to violence against women, while the Single Repealing Provision repeals any rules, of equal or inferior level, which are in opposition to what is established by law.

Lastly, the Final Provisions modify the precepts of the different laws affected by the Organic Law of measures on violence against women, such as the Organic Law on General Regulation of the Education System, Regulatory Organic Law on the Right to Education, the General Advertising Law, the Workers' Statute, the General Social Security Law, the Law of Measures for the Reform of Public Responsibility, the Organic Law of the Judiciary, the Organic Statute of the Attorney General's office, the Penal Code, the Law regarding Districts and Staff, the Law of Criminal Procedure. The last four Final Provisions concern transposition of Directive 2002/73/EC of the European Parliament and of the Council of competence authorisation, the nature of the Law and its entrance into effect, and regulatory elaboration.

An accompanying economic report estimates the cost of the measures that affect the competence of the Ministries of Labour and Social Affairs, of Education and Science, of the Ministry of Justice and of the Interior. In the section on estimation of the cost of the measures that affect the Ministry of Justice, analysis is made of the staff of the Courts of Violence against Women, the estimated costs of the creation of the new Courts and of the adaptation of already existing ones, the economic impact supposed by the extension of free legal aid, of the creation of the figure of the Public Prosecutor against Gender Violence, of sign language translation services and the creation of integral forensic evaluation units on violence.

IV

GENERAL CONSIDERATIONS CONCERNING THE DRAFT BILL

1. Legal precedents, integral character of the law, and making the issue a legal issue.

The proposed Organic Law continues a process of legal reforms, both at the state and autonomous level, whose aim is to improve our legal system in order to promote the equality of women ex Article 9.2 of the Constitution and, in particular, procure the highest level of prevention, protection and punishment for violence possible, if not domestic then violence against women. Moreover, as indicated in the Exposition of Motives of the reported text, Spain follows the line traced by various international bodies –which specifically state– and which have been pronounced *"in order to provide a comprehensive response to violence against women."*

For example, and in the area that interests this Council most, ever since the report of the *Committee on Ombudsman Relations and Human Rights charged*

with the study of abused women was published in the Official Bulletin of the Senate of 12 May 1989, and, a few days later, Organic Law 3/89, regarding reform of the Penal Code, was promulgated, it can be said that awareness of the shortage of existing legal means for confronting a social problem of the first magnitude has been growing.

Thus, the effort of lawmakers to improve our legal system in order to guarantee protection in criminal matters in the domestic sphere has been constant. It will suffice to state that in the last year, important reforms have been enacted. Such is the case of Organic Law 11/2003, of 29 November, *concerning concrete measures on citizen safety, domestic violence, social integration of foreigners*; of Organic Law 15/2003, of 25 November, *whereby Organic Law 10/1995, of 23 November, of the Penal Code is modified,* or Law 27/2003, of 31 July, *regulator of the protective order of victims of domestic violence.*

Beyond the strictly judicial sphere, concerning social welfare and benefits, pertinent are Laws 53/2002, of 30 December, and 62/2003, of 30 December, *concerning prosecutorial, administrative, and social measures* (in relation to promotion of employment); Organic Law 14/2003, of 20 November, *concerning reform of Organic Law 4/2000, of 1l January, regarding rights and freedom of foreigners in Spain and their social integration, modified by Organic Law 8/2000, of 22 December; Law 7/1985, of 2 April, Regulator of laws setting the main guidelines for local governing rules; Law 30/1992, of 26 November, concerning Regulation of Public Administrations and Administrative Procedure; and Law 3/1991, of 10 January, concerning Unfair Competition.* Also worth mentioning is Organic Law 1/2002, of 22 March, r*egulator of Freedom of Association* insofar as it concerns the public usefulness of associations that have as their aim promotion of women, etc.

On the other hand, and in the autonomous area, some Communities, within their sphere of competence, have already adopted integral law initiatives pertaining to the matter. This is the case, for example, of Law 16/2003, of 8 April, *concerning integral prevention and protection of women against gender violence,* of the Canary Islands, to which can be added Law 9/2003, of 2 April, *of the Government of Valencia, concerning equality between men and women;* Law 1/2003, of 3 March, *concerning equal opportunity for men and women in Castile and Leon;* Law 14/2002, of 25 July, *concerning promotion, attention and protection of children in Castile and Leon,* with respect to integral protection of children; Law 11/2002, of 10 July, *concerning young people in Castile and Leon,* with respect to integral protection of young people; or Law 12/2001, of 2 July, *concerning children and adolescents in Aragon.*

Of this regulatory series particularly relevant is Law 27/2003, insofar as it already established integral regulatory criteria for the matter. Thus, its Exposition of Motives set forth that *"necessary, in short, is an integral and coordinated action that brings together both criminal precautionary measures against the assailant, that is, ones oriented at preventing the perpetration of new acts of violence, and protective measures of a civil and social nature that prevent the defencelessness of victims of domestic violence, providing a response to their special situation of vulnerability."* It will be necessary to return to this regulation in order to view it in relation to the reported text.

In short, it may be said that our legal system has been dealing with all those areas encompassed in what could be called domestic or family life, having a bearing on the progress of equality of women, protection of children, and, particularly, on judicial protection in the face of criminal assaults.

Thus, materially there exists a regulatory panorama of integral protection – initiated by Law 27/2003 – understood as an ensemble of regulations dealing with all the aspects which have a bearing on the subject matter of regulation by

the reported text, a text that proposes an integral regulation insofar as the bulk of the aforementioned policies concerning women contains only one rule. **In this sense the integral Law should have the "encoder" value of regulations already present in the different branches of the legal system; now then, as will be set forth below, far from identifying what is "integral" with a revising function, with the reported text there will be a proliferation of different procedural regimes regarding the same matter, with the certain risk of overlapping and interference.**

In accordance with this, it should be assessed, in the scope of the legal authority of the report, what innovations the new law contributes to the already existing regulatory ensemble; but as a preliminary matter it is worth pointing out in regard to the *integral vocation* of law that of its 50 Articles, 22 deal with judicial protection.

Such an option implies making a legal issue of a social problem far more diverse than could be aired in front of and by judges. It is necessary to take note that judicial intervention is always the last resort, that the judge intervenes only when a conflict already exists – and in not a few cases, has been brewing for a long time –, and therefore it is mistaken to think that the main solution resides in the judge, especially in the criminal ambit.

In view of this idea, it must be emphasised that the task of the judge is not to resolve social problems but, exercising the jurisdictional power of the State, protect the victim and judge in law the person who, presuming his/her innocence, is accused by the person who carries out the penal action of a crime or misdemeanour. The judge convicts or acquits according to what is alleged and proven by the person that executes this action, and for this reason greater relevance should be granted to the Attorney General's office and the security forces.

This observation is important insofar as it points to the need of a deeper and more audacious investigation as to *why* we are confronted with this violence, which would permit acting in view of its causes, if in fact they are isolable and curable, leaving the criminal or judicial response to its own sphere.

2. On the scope of protection of the integral law: exclusion of men, minors and the elderly.

a) Violence according to the reported text

Theoretically violence is an advanced stage of aggression. There is no violence, technically speaking, in act of isolated, sporadic aggression, but rather this aggression must occur in a context of subjugation of the victim. The assailant – the dominant subject – moves in an environment in which the victim is subordinate. This gradually results in a context of repeated aggression and correlative deterioration of the person of the victim. Thus, ultimately, this all leads back to moral violence. In this sense, one can speak of relations of dominance.

Traditionally, the dominant-subordinate subject relation is envisaged variously by criminal law, for carrying out illicit behaviour in the abuse of superiority is viewed as more reproachable conduct. But this relation of domination is not equivalent to the binomial man/woman couple relationship. **For this reason, while the rule can respond to situations of domination, it must be neutral with regard to the sex of the dominant subject.**

Current legislation had moved beyond the notion of violence exclusively as so-called “gender” violence, on the basis of which the criminological reality makes plain various types of domestic violence. It is worthwhile to clearly

distinguish, broadly speaking, three types of domestic violence in terms of the subject that suffers it:

- "Gender" violence
- Violence against the elderly
- Violence against minors
- And it is worth mentioning marginally violence of minors against parents and grandparents and violence among siblings.

Although violence against women represents the highest percentage of the judicial statistic (91.1% of cases), also present are violence against men (8.9% of cases), violence against parents and grandparents, and violence against minors. The exiguous number of cases of child abuse before judicial bodies makes plain that this type of violence remained outside judicial protection in a large number of cases, inasmuch as information on protection of minors of some Autonomous Communities points to a different reality. It has even been considered that since women are frequently the object of gender-based violence, statistically women appear as victims in greater measure.

b) Violence and relations of subordination: domestic violence

Violence being defined as a relation of subordination, this subordination is greater when it involves disabled people or minors, for the adult, the assaulted woman, tends to preserve a reactive capacity, albeit one that is diminished as a consequence of the clear superiority. **Consequently, violence against the elderly and children is more serious, if possible, precisely due to their total incapacity of defence and inability to lodge a formal complaint.**

The fact that individuals who are not women constitute a minority insofar as percentage is concerned should not prevent an integral law of

measures against violence in spheres of subordination from extending its scope of protection to these persons as well. If the law must protect minorities when the exigency of protection arises from a same source, the law must be integral also in the subjective sense in identical objective situations.

Therefore, greater protection for women is not achieved through the circumstance of the law protecting solely women, excluding from its reach minors and the elderly, and even men.

It is true that those other groups already enjoy adequate legal protection, but the most beneficial and strenuous measures that the law will eventually include should be extended to these other groups as well. The reason is simple: only in the event that the greater protective measures offered by the new law were limited rights incapable of applying to all would a restriction in the subjective scope of the law be justified. If not – and indeed this is not the case – it is because this Council believes that the protective scope of the law must include all those that find themselves in the same situation of dependence, subordination or inferiority.

In short, the Law takes as its starting point a notion of violence that often is confused with mere aggression, and in addition attributes the status of dominant subject solely to the man and the status of dominated subject solely to the woman, leaving aside other possible situations that require similar attention of the law. And it being certain that it corresponds to the lawmaker to determine the scope of the law, this Council must point out that **it does not find a reasonable explanation, aside from purely statistical data, for directing protection in criminal and judicial matters, as well as other educational and social measures, exclusively at women because of their sex**, without affecting the justification of certain measures in accordance with the theory of positive discrimination, as will be dealt with below.

3. The Draft Bill and "positive discrimination

a) What is positive discrimination?

The Exposition of Motives of the reported text states, paraphrasing Article 9.2 of the Constitution, that the public powers *"must adopt measures of positive action in order to make real and effective said rights* (freedom, equality, non-discrimination), *removing any obstacles that prevent or complicate their fulfilment."* The expression positive "action" is opted for instead of the expression positive "discrimination", as this latter expression is used neither in European nor constitutional jurisprudence, though perhaps it is necessary to specify for gauging its scope and, from there, the reach of the reported text.

Frequently, positive discrimination is spoken of in allusion to policies aimed at improving the quality of life of disadvantaged groups, providing them with the opportunity to obtain the same levels of enjoyment of opportunities and exercise of rights as more advantaged groups. Through measures of this nature, the public powers endeavour to elevate – in order to make equal – the circumstances of those persons in a disadvantageous situation; thus initiatives are adopted for eliminating racism, sexism, and discrimination against the elderly and the disabled.

In the constitutional order, fundamental rights are the same for all citizens. However, institutional guarantee of their equal enjoyment is often insufficient, and thus, at least for a period of time, policies aimed at remedying situations of inequality are necessary. This was a step taken for the first time in the United States (affirmative action) through "techniques" of positive discrimination, consisting in rules which reserved a certain percentage of posts or public employment positions for groups which, up to then, had been at a disadvantage. The basic idea here is that if with these measures the

disadvantaged group begins to gain respect, the measures can gradually be retracted and equal opportunity or, ideally, equal results will be established. In short, positive discrimination was and is a valiant step in the struggle for equality in the enjoyment of citizen rights, but positive discrimination should not become a lasting principle.

As stated above, it is common to speak indistinctly of positive action or discrimination, the reported text opting for the former. In this regard, a nuance might be introduced, for within the theory of equality opportunity, *positive actions* are an exigency of the right to equal treatment and would be characterised, in what is of interest here, by advantages given to women that must not entail parallel detriment to men, nor constitute exception of freedom but precisely its expression. This is the case, for example, of measures that favour the balance of family and professional responsibilities, organising work in way that is suitable to women.

Per contra "positive discrimination" would be to exclude equal treatment and therefore could be illegitimate if it has an inescapable contrasting prejudice towards members of another group, in this case men. It entails exceptional measures that must be implemented according to a restrictive criterion, carefully, and always temporarily; moreover, recourse should be made to them only in the absence of any other possibility of equalising pre-existing situations of proven inequality.

But this concept of positive action still has in its elaboration a diffuse objective scope. It is allowed without doubt in the promotion of equality in the workplace; thus, for example, Directive 76/207 EEC, in Section 4 of Article 2, allows for the possibility of measures aimed at promoting equal opportunity between men and women, in particular for *remedying de facto inequalities*. Moreover, nowadays the quota system is considered in election matters or matters concerning political representation (thus, for example, the Belgian

election law of 24 May 1994, or Law 276/93, regarding the election of the Senate of the Italian Republic, or Italian Law 277/93, regarding the election of the House of Representatives).

Yet, as the Community Court of Justice made clear in its decision of 17 October 1995 – *the Kalanke case* –, there is no place for measures that go beyond the promotion of equal treatment, specifically, measures that are prejudicial towards someone solely because they are members of the male sex, and a system that automatically assigns priority to women is not considered valid. Thus, positive action should be understood in the context of prudence, taking into consideration, at any rate, that, as doctrine makes plainly clear (cfr. L. M. Díez-Picazo), **its aim is always the resolution of issues of equal opportunity as a way of assigning limited rights equally.** Article 23 of the Charter of Fundamental Rights of the European Union states that the principle of equality does not prevent the adoption of measures that offer concrete advantages in favour of the less represented sex, though always on the basis of the inadmissibility of pure automatism and the necessary temporal limitation of the measure.

In this sense, the concept of positive discrimination applied the statute concerning women has its natural place as a tool for promoting the equality of men and women. Its function resides in the fact that, due to circumstances, hindrances or social atavism, etc., women are in a situation of inferiority with respect to men. In view of this situation, the State opts for promotion of the aforesaid equality – especially for women in situations of greater weakness –, creating conditions for social advancement for women that would not exist to the same degree if society were left to evolve in this regard on its own. From this point of view, *positive discrimination is expressed in the form of favourable treatment consisting of work-related or public administration employee measures, of compatibility of family and professional life, of access to certain*

rights (housing, information, health, etc.) or special protection (vgr. degrading advertising).

And it is within this context where pronouncements of constitutional jurisprudence regarding positive action have taken place. For one thing, our constitutional jurisprudence (vgr. STC 128/1987) does not employ the expression "positive discrimination, albeit it does recognise that *"the action of the public powers for remedying, in this way, the situation of certain social groups defined by, among other characteristics, gender (and, it is worth noting, in the majority of cases by the condition of being female) and placed in positions of undeniable disadvantage in the sphere of labour, for reasons resulting from traditions and habits deeply rooted in society and difficult to eradicate, cannot be considered a violation of the principle of equality, even when it establishes for these groups more favourable treatment, for it involves different treatment for situations that indeed are different."*

Along these same lines, it indicates that "securing objective equality between men and women allows for the establishment of an *"unequal unequalness" right, that is, the adoption of rebalancing measures for pre-existing discriminatory social situations to achieve substantial and effective equalisation between women, socially disadvantaged, and men in order to ensure effective enjoyment of equality by women".* (Decision 229/92). Constitutional Court Decision 109/93 justifies the necessity of balancing the disadvantageous situation of women, with the aim of assuring real equality of opportunity.

In short, the assumptions of positive action are:

1st A situation of real imbalance of women as a group.

2nd The need of measures for removing obstacles that prevent equal opportunity between men and women.

3rd That these obstacles can effectively be removed with support measures for the disadvantaged group, with the aim of ensuring real equality of opportunity.

4th That more favourable special treatment is necessary as a consequence of the limitation of rights that women must have access to.

b) The natural ambit of positive discrimination.

Conceived as such, the so-called positive action based on Article 9.2 of the Constitution seeks to remedy situations of real inequality in order to re-establish equality for those who are entitled to it according to Article 14. **But its own foundation makes clear that the limit of positive action is the restoration of balance, and it cannot lead to an overambitious inverse imbalance.** That is, with measures of positive discrimination the intention is to remove obstacles so that equality will be effective, correcting pathological imbalances generated by society, and therefore in social, educational, benefits, assistance, labour or public administration areas, policies of this nature have been implemented.

From what is stated above, it can be deduced that measures of positive action are inadmissible when in the concerned ambit there does not exist a situation of previous imbalance and, in addition, there is not a shortage of rights to which woman must have access. And in accordance with this, it is prudent to reflect on whether positive discrimination is admissible in relation to protection in criminal matters and judicial protection of women's fundamental rights.

Thus, **it can be asserted that the promotion technique that finds expression in measures of positive discrimination is not applicable in the criminal ambit, nor in the organic judicial ambit, especially when it is**

implemented mechanically and without any temporal limitation. Moreover, there is no concurrence in this sphere of the situations of imbalance which form the basis of the measures.

As **positive action cannot come about through measures of a punitive nature, the judicial ambit in principle is alien to those other ambits common to initiatives inspired in positive action, and as such a rule which, despite being called "integral", is in large part judicial and, nevertheless, based on positive action or discrimination would be misleading.**

c) The inappropriateness of positive discrimination in the criminal and judicial sphere

Indeed, **when it is a matter of protection in criminal and procedural matters, to the extent that fundamental rights are protected, it is not fitting to take inequality as a departure point –** neither in what refers to protection in criminal matters nor in regard to effective judicial protection. As stated above, **we are not faced with a situation of "scant rights",** that is**,** limited rights, so that only a favoured group has access to them.

This is the case insofar as, for example, in the protection of the right to honour (attacked by slanderous allegation) or freedom (attacked by threat or coercion), the man and the woman proceed from the same situation of protection by right, that is, there is no initial disadvantage; therefore a different criminal type that grants ultra-protection of the freedom of the woman, at the cost, precisely, of greater restriction on the freedom of the man, such as arises from the toughening of the sentence envisaged in the criminal type, is not clear.

And when this action or rather positive discrimination is transferred to the creation of judicial bodies that protect only the rights of women, even more serious is the imbalance for the following reasons:

1st **Judicial protection is not a limited right that does not permit, because of a supposed limited availability, its distribution and attribution to all those that need it; in other words, judicial protection is a right that does not demand the exclusion from its ambit of any human group** (men in this case) for giving deserved satisfaction to another more disadvantaged group (in this case women). Synthetically speaking: the possibility of judicial protection exists for all without excluding or postponing, which is to say, without eliminating or discriminating against anybody. Different would be the assumption that a legal limitation imposed a maximum number of matters to be resolved by the new judicial bodies envisaged for hearing matters of domestic violence, and that this limitation demanded then giving priority to women before men (distribution of a limited right, with preference for the more disadvantaged group). But such a thing does not occur, nor could it occur in the reported bill.

2nd Nor is it fitting to say that the limited right would be swiftness or promptness in the dispensation of judicial protection that must be given without improper delays; indeed, it is obvious that the inclusion of all citizens regardless of gender in the scope of competence of the new judicial bodies does not represent in any way a risk of improper procedural delays for women, nor does it require exclusion of men in order to ensure due provision to women. This is unthinkable for the same reason that the number of bodies to be created naturally will be sufficient for all, and the percentage of the masculine population that is the victim of domestic violence is much lower than that of women. **It is thus not clear what in fact is achieved in terms of judicial protection in favour of women by excluding men from the scope of the new judicial bodies.**

3rd It is not worth mentioning that previous arguments are incorrect in alleging that the exclusion of men does not discriminate against men insofar as judicial protection is concerned given that said protection can always be obtained before ordinary or general judicial bodies. It must be kept in mind that discrimination in this case does not reside in obtaining or not obtaining judicial protection, but in excluding men from the new judicial mechanism and the especially effective concrete means of obtaining this protection. These bodies are created for improving and satisfying needs which previously were not met or were met insufficiently. Thus, whether the new bodies do not add any advantage in protection in relation to current bodies – in which case their creation is useless – or they do add an advantage, the same right must recognize men, for positive discrimination may not express a judicial protection allowance for women at the expense of men, nor a better manner of applying this judicial protection.

As will be set forth below, the transfer to the judicial sphere of what in the law is understood as positive action produces illogical and unreasonable consequences, both in organisational and procedural matters, and thus a serious reconsideration of the option presented by the Draft Bill is advisable.

From the above it can be gathered that in the Draft Bill, so-called positive action is not even a case of positive discrimination, but rather negative discrimination. It entails toughening the punitive regime of certain behaviours which, being objectively the same, are more seriously sanctioned because the active subject is a man – that is, for reasons concerning the perpetrator- and not because of the greater gravity of the injustice, which leads to criminal criteria that would be viewed, fortunately, as alien. We will deal with this issue in more detail below. Furthermore, the creation of judicial bodies from which men are excluded as possible beneficiaries of their advantages, without justification of this exclusion of any kind, also constitutes negative discrimination.

V

ANALYSIS OF THE PROPOSED MEASURES

1. On the notion of violence against women

a) Importance of the notion

The protective ambit of the law cannot be appreciated without Article 1.2. This precept is the cornerstone of the reported rule, for on it depends the application of the entire law.

The aforesaid precept states what violence against women is, and in our view on that section depends the entire law for the following reasons:

1st First of all, because if the primary object of the law is to prevent this type of violence, the task of prevention entails:

- "Gender" violence
- information campaigns and sensitization measures (Article 3);
- the educational system making efforts to inculcate peaceful resolution of conflicts (Article 4);
- male-female equal rights being promoted in the educational system (Article 5);
- the presence of The Institute for Women in educational representation bodies (Article 6);

- ✍✍ vigilance of the dignity of women in the advertising sphere and
- ✍✍ early detection of violence against women in the public health sphere

2nd In addition, because the group of laws recognised by Title II are recognised for women who are victims of violence, confirmed in each and every one of the Articles of this Title, which envisage as a de facto assumption of the rule that the enjoyment of these rights is intended for women who are the victims of violence.

3rd Finally, the aforesaid notion is fundamental in the strictly judicial sense, for on it depends all the procedural and competence specialisations as well as the application of the reformed criminal types.

Moreover, it is necessary to point out that the declaration of said condition – "women who are victims of violence" – is the title (although provisional) that makes women deserving of the implementation of this new regulatory bloc, and as such this declaration is not the result of an administrative resolution or the direct application of the law through the more or less ruled verification of the concurrence of objective and normatively envisaged requirements but, to the contrary, all depends on a judicial declaration.

b) Improper introduction of the intentional element in the definition

With violence against women being defined in this manner, what is most relevant is the fact that it is not a definition introduced in the Exposition of Motives, nor in the part of the text elaborated as the descriptive portico of its scope, but rather apart from being the stopcock for the application of the entirety of the law, **it is based not on the appreciation of objective and**

external data but on the intent of the assailant. Only in subsection ii of this Article is a descriptive prevision included when relating in what manner this violence can be expressed (sexual assault, threats, coercion, etc,). But what is basic, what is central is that violence exists when it is employed *"as a means of maintaining discrimination, inequality and power relations of men over women".*

Therefore, upon verification of this intent, of clear criminal connotation – for in its descriptive part it refers to criminal concepts – depends all: the enjoyment of the set of rights to which women who are victims of violence can accede, the institutional measures envisaged in the rule, and what is more serious protection in criminal matters; and, even worse, judicial organisation apart from the procedural measures and said declaration, as has been stated, depends, in turn, on a judicial pronouncement given that only a judge of violence considers it in a criminal ruling, or when transferring for himself competence in civil matters, or, circumstantially, when adopting some precautionary measure.

Verification of that intent will present problems in concrete cases. **But, if in reality what is done is presume that all aggression against a woman is presided over by the regulatory presumption that the assault is perpetrated with those intentions or because of those objectives, then in the criminal sphere – as will be explained below – a criminal law of perpetrator is being reproduced and in the sphere of the judicial body a return is being made to the system of special jurisdictions characteristic of the *ancien règime* and surpassed at the end of the 19th century; for a special jurisdiction is being established, exclusive to women, based on the sex of the victim and the intent of the assailant, issues which will be further dealt with below.**

In short, it entails a definition based on the intent of the perpetrator and, because of the consequences it has (interpretation of classifications,

competence delimitation, procedural consequences), it must be abandoned as regards its content and effects.

c) Misleading effects worth considering

The entire Draft Bill rests on Article 1, particularly paragraph 2 of the same. Starting from the aforementioned verification, it will suffice to imagine some of the effects it may entail with regard to judicial organisation and procedural matters in order to realise that they can be truly absurd. For example, all judicial measures of protection and safety in Chapter IV of Title V are intended for those specific women inserted in Article 1.2, whereupon if the woman is assaulted for another purpose (revenge, jealousy, hate, fits, etc). the future law will not apply, nor will its specialisations.

In turn, some of the crimes that will be heard by judges of violence or some of the protective measures make sense if they are transacted before a Police Court judge and by way of speedy trials, whereupon in the ambit of assaults against women one can find the following panorama:

- Assaults of domestic violence and, therefore, also against women that are heard – not being envisaged in Article 1 – by examining magistrates or first instance civil and criminal court judges and to which the regime of Law 27/2003 applies;
- Aggressions envisaged in Article 1 which constitute the legal concept of violence against women whose hearing will correspond to judges of Violence
- Aggressions which equally constitute violence against women that are not heard by judges of Violence, but by first instance civil and criminal court judges and examining magistrates whose courts are made compatible for assuming these powers and which will apply

in addition the regime of Law 27/2003 for the first of the reported assumptions.

To the aforementioned it is worth adding – and we continue to be motivated by example – that these protective measures in Chapter II of Title V, being for women who are victims of violence, will be applied only in those specific cases, whereupon other victims of a situation of objective violence, but one not perpetrated with the intent indicated in Article 1.2, may not benefit from these measures. The absurdity does not stop here. For example, if we are before not specialised judges but rather judges that combine other lawsuits with cases of violence by virtue of their being contained in the assumptions of Article 87 bis 3 and 4: in their same court cases of domestic violence will be heard whose victims – be they women or not – will not be able to benefit from these measures since they do not concern the cases referred to in Article 1.

In short, in view of the fact that in the judicial sphere it seems that the idea of creating a specialised body has priority and that upon this idea has been made to pivot all the other innovations, it is recommended that this innovation be passed on to a work group in which authorities on adjective law, judges and magistrates, public prosecutors and other seasoned professionals in these matters can come up with a more viable organic and procedural design. This idea is more advisable from the moment of the existence of the regime created as a result of Law 27/2003, regulator of the protective order, within the framework of which a Monitoring Committee has been created, and from whose work the problems of efficient implementation of this order are deduced. If this is the case now, it is makes sense to foresee more complications when the reported text is added to the regime of Law 27/2003.

d) Suggested definitions

In view of the above, the General Council of the Judiciary therefore recommends that if a definition of violence is to be introduced, it must cover the entire phenomenon of domestic violence, for the reasons previously set forth in reference to criminal scope, a definition which, we repeat, at any rate, is a definition without connotations of intent nor of a sociological nature, that is, not an ideological definition.

In addition, at any rate , it is advisable that this capital point be reconsidered in the Draft Bill, and that this reconsideration be carried out with four aspects in mind:

- The necessity in itself of introducing a definition in the law.
- The reference only to women and not to the domestic sphere as a whole.
- The effects it is going to have on application of the rule.
- The inopportuneness of its containing intentional elements.

If these recommendations are denied, and, in particular, if broadening the scope of the law to include the idea of domestic violence in the criminal and judicial sphere is not accepted and its reach continues to be limited to the sphere of violence against women, there at least exists other regulatory definitions which are descriptive, alien to subjective or intentional elements, and therefore more appropriate. This is the case, for example, of Article 2 of Law 16/2003 of the Canary Islands, of 8 April, *concerning prevention and integral protection of women against gender violence*, and according to which:

> *“For the purposes of this Law, the term "violence against women" means any act of gender-based violence that, regardless of the victim’s age, results in, or is likely to result in, physical, sexual or psychological harm or suffering to women and is carried out within a situation of weakness or physical, psychological, familial, work-*

related or economic dependency of the victim with regard to the assailant"

Another acceptable definition is that of Article 1 of the Declaration on the Elimination of Violence against Women, adopted by UN General Assembly Resolution 48/104, of 20 December 1993, and according to which:

"For the purposes of this Declaration, the term "violence against women" means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life"

As it will be exposed down, the application of the previsions of the informed text, as it has been written, it will be settled with a really distorted consequences, which is seen not for a dogmatic yarning, but for the desire to avoid –now that the time has come- non-hypothetic real consequences.

2. On reforming the Penal Code

a) Legal precedents

Assessment of the present Draft Bill regarding this point should begin with an examination of the current legal landscape, with the aim of determining what it contributes to the substantive criminal plan.

Civil law deals with the phenomenon of abuse as the shattering of ineluctable family responsibilities which, as a result, have consequences in family law: thus, with respect to children, Section 166 of the Civil Code (deprivation of custody) and Sections 856 and 756 (disinheritance); and with

respect to the spouse (separation and divorce), and Section 855 (disinheritance).

Criminal policy in the face of this social problem has involved progressively broadening the content of the criminal type and the protective measures for victims. Indeed, beginning with the initial formulation of the crime of intra-family violence, introduced for the first time in our Code by Organic Law 3/1989, of 21 June, in Section 425 of the Penal Code, with the aim of giving protection to members of family under a disability resulting from the systematically aggressive behaviour of other members of the same family, various penal reforms have been undertaken aimed at increasing the protection of the victims of these crimes, crimes which, up until now, have not been identified solely with women.

The first significant reform took place as a result of Organic Law 14/1999, of 9 July, whose objective was increasing protection of the victim. Protection was extended to situations where the marital bond or *more uxurio* co-habitation had disappeared at the time of the aggression; it introduced as a type of typical behaviour, along with physical violence, psychological violence, and legally defined the habitualness of this crime.

After this important reform, domestic violence has been the object of legislative attention in recent years, even months, and legal responses, some of a punitive nature, others of a procedural nature, have been made with the aim of combating this social problem most effectively. In this regard, especially significant have been the aforesaid Organic Law 11/2003, of 29 September, *concerning concrete measures regarding citizen safety, domestic violence and social integration of foreigners*, at the substantive level, completed with penal reform by Organic Law 15/2003, of 25 October; and Organic Law 27/2003, of 31 July, *regulator of the protective order for victims of domestic violence.*

The Draft Bill that culminated in Organic Law 11/2003 was assessed positively by this General Council of the Judiciary, which classified the crime of habitual domestic violence as a crime against moral integrity, coherent with the legal right protected by this crime, inasmuch as the customary perpetuation of these acts relate more clearly to human dignity and the free development of the person, as jurisprudence has increasingly been emphasizing (cfr. STS of 20 December 1996 and or 24 June 2000).

Furthermore, it was understood that it solved a procedural problem between Sections 153 and 173 of the Penal Code, systematically situated the concerned crime in the appropriate way in view of its unfair content, and more correctly expressed that it entails not only an attack on integrity or physical or psychological health as a legal right of the injurious crime.

The reform carried out by Organic Law 11/2003 does away with the misdemeanour of Article 617.2.2º and all physical violence perpetrated against passive subjects enumerated in Article 173.2, even if it is an isolated event and does not cause injury, insofar as it becomes criminal due to the multiple-offense nature of the act, classified on the basis of the reform in Section 153 of the Penal Code. This precept introduces an aggravated subcategory for when the acts are perpetrated in the presence of minors, using weapons, in the family home, in the home of the victim, or when violating any of the sentences envisaged in Article 48 or any safety measure.

Procedural measures accompanied these substantive measures. The provisional prison reform was motivated in large part by the desire to provide a solution to the problem of domestic violence. And the recent Law 27/2003, of 31 July, regulated the protective order for victims of domestic violence. The state Registry for the protection of victims envisaged by the aforesaid Law was created by RD. 355/2004, of 5 March.

In short, the integral Draft Bill appears in a context in which protection of the victim of domestic violence already has been constituting an objective principal of criminal policy; it therefore does not appear in a scenario where there is a shortage of measures, but rather where there is a plurality of legislative initiatives already in effect – particularly Law 27/2003 –, though because they have been in effect for only a short time still do not permit verification of their real effectiveness in combating the social phenomenon with which we are here concerned.

b) Innovations of the Draft Bill

The reported text contains the following criminal measures:

1st Introduction of a **new aggravating circumstance in Section 148 of the Penal Code** when the victim of the injurious crime *"was or had been the wife, or the woman who was or had been attached to the perpetrator in the form of a common law couple, even without cohabitation".*

2nd **Elevation of minor threats and coercion to the category of crime** when the passive subject was or had been the wife, or the woman who was or had been attached to the perpetrator in the form of a common law couple, and therefore they can only have been carried out by the man.

3rd **Sanctioning with a custodial sentence of freedom contravention of the sentence of Section 48 of the Penal Code –**stay away order in the broad sense **–,** or a precautionary measure when the person wronged is one of the persons referred to in Section 173.2 of the Code.

As stated in the Exposition of Motives, *"for the citizenry, for women's organisations, and especially for those made to suffer these kinds of*

aggressions, the integral Law wishes to give a firm and emphatic response and demonstrate firmness by expressing these acts in specific criminal types". In short, the Draft Bill, in regard to the current legal regime, presumes **an aggravation of the criminal responsibility of the man in the criminal order when the act has as a passive subject the woman** through the introduction of an aggravated type – with respect to the essence of the injuries –, or the conversion into a crime of minor offenses of threats and coercion.

These criminal measures must be analysed on the basis of the principles that inform criminal law, recognised in the Constitution.

c) Role of protection in criminal matters in violence against women

Aware that it is the task of the Constitutional Court to comment on the adaptation of a new rule to the Constitution, it corresponds to the General Council of the Judiciary, as stated above, to report on the adaptation to the Constitution of legislative measures that have a bearing on fundamental rights whose protection ordinarily must be exercised before judges and courts [Article 108.1 3 e) Organic Law of the Judiciary].

Before that, and in the same aforementioned sense of making a legal issue of solutions, it must be taken into consideration that nowadays it is acknowledged that the best results in controlling criminality are not obtained by increasing the rigorousness of the response to the crime (severer sentences), nor by improving the performance and effectiveness of the legal system, but rather through positive action in society that attacks the root of the problem. Criminal law should serve a secondary preventative function, that is, it should only intervene belatedly in the face of *manifestations* of the problem, wherefore it is advisable to insist, again, on the danger presented by the option in the reported text insofar as it is based fundamentally on making a legal issue of the problem of violence against women. In this sense, recommendation R 14 of the Council of Europe Committee of Ministers, of 26 March 1985, advises

alternative treatment to purely criminal measures in matters of domestic violence.

Considering that legal measures have already been adopted that have represented in general a reform of the penal system in the treatment of domestic violence, it must be determined whether the proposed aggravating criminal measures meet the needs of greater criminal rigour in the interest of securing greater protection for women. Although it is not the case of scientific studies having been carried out concerning the limits of punitive intervention of the State, it must be kept in mind that current studies have made plain **how in certain areas there exists the temptation to obtain a greater amount of safety by means of the instrument of criminal law; but occasionally this – conceived as maximum criminal law – is unable to provide the response so desperately sought for in it.**

d) Criminal classification of minor threats and coercion against women

Articles 29 and 30 of the Draft Bill, as protective measures against threats and coercion, add two new sections to Section 171 of the Penal Code –crime of threats –, a second section to Section 172 – crime of coercion – while Section 173.2 is maintained as a general classification for describing the subjective scope of domestic violence, a precept that does not discriminate in any way on the basis of gender and encompasses all who pertain to the family unit.

Therefore and in regard to threats:

- ✍✍ If it is minor and against women, its passes from being a misdemeanour to a crime in Section 171.4.
- ✍✍ If it is made against any of the other persons in Section 173.2, it is a misdemeanour in accordance with Section 620, second paragraph

- ✍✍ If the threat is with a weapon or dangerous object and refers to any of the other persons in Section 173.2 – therefore women as well – it is a misdemeanour of Section 171.5º.

As for coercion:

- ✍✍ If it is minor and against women, it ceases to be a misdemeanour of Section 620.1.1º and becomes instead a crime of Section 172.2.
- ✍✍ If it is against any of the other persons in Section 173.2, it is misdemeanour of Section 620.1.2º.

From this it can be seen that in the face of the same objective behaviour – minor threat and coercion – the man commits a crime while the woman commits a simple misdemeanour, in spite of the fact that the basic rights attacked by the illicit behaviour have the same value in the Constitution regardless of the right holder. This leads to other dysfunctional valuations as, for example, a minor threat is punished with a more severe sentence if the passive subject is the wife or ex-wife than if the threat is directed against the persons in Section 173.2 (for example, minors), even if in this case weapons or other dangerous implements have been employed.

In view of these results, **in the opinion of this Council, the proposed reform of Sections 171 and 172 presents serious constitutional problems, insofar as it defines the active and passive subjects of the crime on the basis of sex, regardless of the behaviour objectively carried out, and insofar as it insufficiently justifies the punitive treatment of minor threats and coercion against women.**

The Draft Bill turns common crimes into special crimes because of the gender of the active subject, as was the case, for example, in pre-democratic Codes concerning certain crimes against honesty whose passive subject was solely a woman (vgr. rape). This division of crimes in terms of the gender of the active subject is not only contained in Article 33 of the text – which introduces the new Article 87 ter1.1) of the Organic Law of the Judiciary – when attributing competence to the planned for courts of violence against women, but in the very type of the crimes with a male active subject, which can only be committed by the man to the exclusion of women.

Proceeding in a such a way, where the same objective behaviour is classified as a crime or misdemeanour depending on whether the active subject is a man or woman, represents a direct violation of the principle of equality of Article 14 of the Constitution which cannot be objectively justified under the protection of the doctrine of tolerable positive discrimination regarding protection in criminal matters, for it involves protecting the woman at the expense of restricting the freedom of the man, as the greater the punitive severity, the greater the restriction on freedom. We are thus faced with a situation of negative discrimination against men incompatible with the Constitution.

Indeed, in defence of fundamental rights that are established in protected legal rights in the crimes and misdemeanours of threats and coercion, the woman does not start from a disadvantageous situation that has to be remedied through recourse to greater protection in criminal matters through the legal technique of seeking general protective effectiveness via more severe sentences. Freedom is already protected in the Code in the same way whether the right holder is a woman or a man. There is no discrimination whatsoever nor a situation of inferiority in this area.

But, in addition, the conversion of these behaviours of minor threats and coercion into a crime when the active subject is man entails a direct contradiction of constitutional principles of criminal law, in all the hypotheses imaginable in which the lawmaker could find a defence, and this for the following reasons:

1st If the aggravation responds to the fact that statistically the woman is the passive subject of behaviours of this kind and that normally the active subject is a man, then it would aggravate the responsibility in the concrete case due to alien acts, in violation of the principle of guilt, inasmuch as the specific man on trial would see his responsibility aggravated by the acts of others in accordance with the doctrine of the accumulation of behaviours.

2nd If the aggravation has its foundation in the fact that the threat or coercion is carried out in the spirit of discrimination or domination of the man over the woman (placing these precepts in relation to Article 1.2 of the Draft Bill), one would be proceeding from the presumption that when the man threatens or coerces his spouse or his ex-spouse he always does it prevailing himself of a situation of superiority or with the aim of maintaining his desire for domination. This legal presumption would entail converting what in the ordinary regime is envisaged as a generic aggravating circumstance from being a misdemeanour into a crime, recognising in the motivations of the perpetrator an ultra-classification disproportionate to the objective gravity of the act.

The Criminal Code envisages abuse of superiority as an aggravating circumstance in Section of 22.2 when it produces an imbalance of strength between the assailant and the aggrieved, whereupon the possibilities of self-defence of the victim are dramatically limited; an imbalance which must be exploited by the perpetrator in committing the crime. This greater

reprehensibility, which results in an aggravation of responsibility, does not depend on the sex of the active subject and the sex of the passive subject, but rather on the objective fact of domination.

Gender-based discrimination is envisaged as an aggravating circumstance in Section 22.4, and the aggravation finds its basis in the greater reprehensibility of the behaviour in view of the motive that drives one to commit the crime.

But these two circumstances are not presumed, for they must be understood in each concrete case, nor are they considered by law as being particularly qualified in terms of determining criminal magnitude. To the extent that the Draft Bill contains certain criminal measures based on the presumption of the superiority of men over women, and recognises superiority or gender-based discrimination as an effective ambition of the sentence, or the conversion of mere misdemeanours into a crime, it leads to disproportionate consequences from the point of view of responsibility for the act.

> 3rd If the aggravation was based on the dangerousness of the perpetrator that commits these crimes, then it would be to combat a mere personal quality of the man with recourse to the sentence, which in addition is legally presumed, and consequently also violates the principle of responsibility of the committed act.

To the above we add that the criminal measure consisting in the classification of acts of minor threats and coercion as a crime when the active subject is a man is not founded on reasons connected to a greater degree of injustice or guilt, but respond solely to subjective reasons related to the status of the man and his presumed superiority over the woman.

Such a conception goes deeply into a criminal law of perpetrator, into "jurisprudence of sentiment", with predominance not so much of the normative as of what has been called "the sound sentiment of the people". These conceptions of the Kiel School obviously are not compatible with the Constitution, and this is not something put forward by the Council but rather the Constitutional Court has recognised that the Constitution proceeds from the principle of guilt and that a criminal consequence which in the concrete case is not felt to be appropriate to the gravity of the guilt is not in agreement with the justice value established categorically by the Constitution.

Thus, the Constitutional Court, citing, among others, SsTCs 65/1986 and 14/1988, **has declared in Decision 150/1991 (Speaker López Guerra) that** ***"the Constitution establishes, without the slightest doubt, the principle of guilt as the basic structural principle of criminal law, in such a way that a criminal law of perpetrator that determined sentences in view of the selfhood of the accused and not according to the guilt of the accused in the commission of the acts would not be constitutionally legitimate"***.

Therefore, where something distinct from the objective act is included in the assumptions of the criminal order, and this something is associated with the status of the perpetrator, that is, to his being a man, we come up against a system in which the sentence is directed at the perpetrator as such. The perpetrator can only be punished for the committed act and in terms of its gravity, and it is clear that the same act is not graver by the circumstance of the perpetrator being a man and the victim being a woman. Proceeding in this manner entails a frontal attack on the principle of guilt.

Yet the fact of the matter is, in addition to the aforesaid constitutional reasons, two additional objections can be raised to the projected regulation. On the one hand, from a systematic point of view it is not clear that the crime of

minor threat leads to a precept – Section 171 – that classifies threat as a crime when the threat consists in causing a wrong that does not constitute a crime, for the minor threat may also consist in the threat of wrongdoing that constitutes a crime, so long as, as far as the circumstances in which it occurs are concerned, the intensity of the threat that constitutes the crime in Section 169 is not present.

Moreover, aggravation of the sentence for the threat when it is carried out by a person who has violated one of the sentences envisaged in Section 48, or a precautionary or safety measure of the same nature, may result in a violation of the principle of *non bis in idem*, if it is taken into consideration that contravention of the sentence or of the measure is punishable in itself; and moreover the Draft Bill introduces a modification of Section 468 consisting precisely in imposing, at any rate, a prison sentence in the event that these sentences or measures have been violated, which entails creating an aggravated crime of contravention of sentence.

e) Aggravation of injurious crimes

The Draft Bill reforms Section 148 with introduction of an aggravated classification of injuries: *"4th If the victim was or had been the wife, or the woman who was or had been attached to the perpetrator in the form of a common law couple, even without cohabitation."*

In Section 148, aggravation of the injurious crime for reasons related to the condition of the victim is applied to the case in the event that *"the victim was less than twelve years old or a person lacking legal capacity"* The aggravation has its foundation in the greater vulnerability of these persons and the circumstances of defencelessness in which they find themselves due to conditions of age or incapacity, notwithstanding that the type operates in

objective terms, presuming *ex lege* the inferiority of the victims and the abuse of superiority incurred by the aggressor.

To the degree that the Draft Bill aggravates the injurious crime if the victim "*was or had been the wife, or the woman who was or had been attached to the perpetrator in the form of a common law couple, even without cohabitation",* **it is also presumed *ex lege* that the woman is injured in a situation of weakness.** In this way, the generic aggravation of abuse of superiority, which hypothetically must be considered if it coincides in the concrete case, with the projected rule is presumed to coincide as long as the victim is the wife or ex-wife of the aggressor, without regarding in this relation a greater degree of injustice or reprehensibility in the behaviour of the assailant in relation to the injurious crime, without affecting the application, where appropriate, of the circumstance of mixed kinship of Section 11 which applies in cases of attacks on personal rights as an aggravating circumstance.

In contrast to minors and persons lacking legal capacity, who objectively can be viewed as especially vulnerable, it cannot be said at any rate that the woman who suffers an attack at the hands of her partner finds herself in a situation of particular vulnerability or defencelessness. If this is due to a situation of prior violence, the overall injustice is evaluated in view of the crime against moral integrity of Section 173.2 which, as is known, does not prevent joinder of crimes sanctioning of injurious crimes which may have been carried out in the context of domination.

Therefore, **neither from the point of view of injustice nor that of guilt has the aggravated classification of injuries any foundation. It is only necessary to view the precept on the basis of a legal presumption of inferiority of the woman, which is unacceptable as a legal presumption.** Alternatively, if it is based on a real situation of dominance, then, either by means of the type in Section 173.2, or through the generic circumstances of

abuse of superiority, gender-based discrimination and mixed kinship, the injustice carried out by the assailant can be sufficiently compensated for through the sentence.

In any event, greater protection of the woman would not be justified here either, and not in other real situations or spheres of domination – such as injuries to parents and grandparents, for example – where, occasionally, this situation of inferiority or greater vulnerability is more verifiable than that involving a woman.

Moreover, again, on the basis of the so-called positive discrimination, the woman is in a favourable position by virtue of an aggravation of the criminal responsibility of the man – the sole active subject of the aggravated type –, and as such the criticism set forth above may be repeated here.

2. On the creation of Courts of Violence against Women

The Exposition of Motives states that *"in accordance with the Spanish legal tradition, a specialisation of examining magistrates has been opted for within the criminal jurisdiction, creating Courts of Violence against Women and excluding the possibility of the creation of a new jurisdictional order or the assumption of criminal competence by civil judges".*

On the basis of this premise, these courts will hear the trial and, where appropriate, the appeal of criminal suits dealing with violence against women, as well as related civil suits. The aim here is for some and others to be in the first instance the object of procedural treatment before the same body, so that what is integral lies in the greatest, most immediate and effective protection of the victim, as well as the resources so that recurrences of the aggression or an escalation of the violence can be avoided.

In the report approved on 21 March 2001, the plenum of the General Council of the Judiciary already considered as necessary the existence of specialised Courts and the streamlining of the rules of distribution with the aim of improving the performance of the judicial system in the face of the phenomenon of abuse. It should be recalled that R 13 (85) of the European Union Committee of Ministers on Domestic Violence recommends studying the possibility of entrusting matters of domestic violence exclusively to expert members of the judicial authority and examining magistrates' courts, or also to decision-making courts.

This means that since a concrete organisational model is neither binding nor preceptive, it is always fitting that resorting to the method of Article 98 of the Organic Law of the Judiciary and Chapter I of Title 11 (Articles 16 and ss.) of Regulation 5/1995, of 7 June, regarding Incidental Aspects of Judicial Proceedings, the hearing of cases of domestic violence can be attributed to concrete bodies to the exclusion of others in its territorial scope.

For this reason, the Council takes a positive view to turning to the idea of **specialisation but functional;** that said, **another matter is, first, the creation of specific bodies beyond purely functional specialisation; and, secondly, and in light of what has been stated up to now, the establishment of a kind of special jurisdiction on the basis of the sex of one of the parties, something typical of the ancien règime and, fortunately, superseded over the course of the 19th century.**

In short, it must be taken into account that various jurisdictional orders exist, distributing hearing of matters pertaining to the different jurisdictional orders of each one of these jurisdictions. It is Article 9 of the Organic Law of the Judiciary, not subject to reform by the Draft Bill, that distributes matters among the different jurisdictional orders, the hearing of criminal suits and trials corresponding to the criminal jurisdiction, and to the civil jurisdiction, the matters

corresponding to it. And while civil jurisdictional proceedings include all matters not attributed to another jurisdiction – residual jurisdiction –, the preference of the criminal jurisdictional order determines that, in accordance with Organic Law of the Judiciary Article 10, this jurisdiction can only hear matters typical of another jurisdiction in a pre-judicial sense. In any case, the jurisdiction cannot be extended.

In accordance with this, the judge of the criminal jurisdictional order only hears criminal matters and only the matters pertaining to another jurisdictional order that have a bearing on the criminal process as a pre-judicial matter. The Draft Bill, however, goes further in attributing to the criminal body called Court of Violence against Women matters belonging to the civil jurisdictional order, not in the pre-judicial sense but principally. **We are thus faced with a kind of conmixtion of jurisdictions, which produces a special jurisdiction, the jurisdiction of violence against women, a hybrid that combines criminal and civil aspects – and these of a diverse nature- and without losing sight of the work-related legal consequences of its decisions (cf. Article 18).**

It must be kept in mind that the existence of the traditional model of mixed courts, of, that is, first instance civil and criminal courts, does not imply confusion of jurisdictions. The judge only acts as a first instance judge in civil matters and a magistrate in criminal matters, yet with clear separation between jurisdictional orders and without any mixture whatsoever.

Thus, from the point of view of organic judicial design, it may be stated that the rationale of the judicial organisational design demands that judicial bodies be formed attending to the branches of the legal system, according to procedural instances and degrees or the need for functional specialisation regarding a specific matter.

In regard to the notion of functional specialisation, the creation of these courts may be similar to such already existing courts as Family, Juvenile and Parole Courts. That said, the criterion for specialisation currently employed is not the criterion of a branch of the system or matter, but rather a specialisation is created within the criminal order that obeys a political objective – combating violence against women –, taking as its foundation the gender of the victim and the aim or intention of the assailant.

Moreover, the Draft Bill prevision along with the economic report is triple insofar as it admits three possible solutions:

- that a total of 21 new courts of violence with new staff be created in those cities or towns whose work load warrants it and that are dedicated exclusively to this matter
- that pre-existing courts be transformed also with exclusive dedication into Courts of Violence against Women, which will occur when the creation of new staff is not necessary
- that pre-existing courts of first instance or Magistrates' courts be combined.

It must be stressed that the reported initiative is not accompanied by a statistical study that would provide an idea of what this will entail for judicial organisation. It is unclear how many bodies with a new staff really need to be created, nor is it clear what bearing it will have on Magistrates' courts and, above all, on pre-existing Family Courts, and, in this case, if it will give rise to a stripping of competence through massive or limited transfer of matters. In turn, it has not been explained if with this law, criminal proceedings will be encouraged to have a "called effect" in consideration of family lawsuits, or through work-related and public administration effects it will have more than a "called effect" a "multiplying effect".

In other words, it is worth considering whether the criminalisation of civil suits, public administration and work-related effects that entail promoting a suit for which these bodies have competence plus the procedural specialities in the reported text; it is worth considering, in our opinion, whether all of this as a whole is not going to produce a massive convolution in the planning of judicial staff.

In this sense, it must be remembered that the logic of the system is that substantive rule (whether civil or criminal) comes first, since the proceedings are configured depending on this – thence adjective law- and on the basis of these two premises rests the organisation of courts and tribunals.

However, in this case, the reform is based above all on an idea of integral judicial handling of suits in which the victim is a woman who has been the object of violence. On this basis, the instrument – the courts – is thought of first; in order to provide it with content the rules of competence and specialisation are altered, all of which, in the end, will achieve the substantive aspect of the rules applicable in domestic suits. As a result of the formation of these bodies as a speciality within the criminal jurisdiction – as stated in the Exposition of Motives –, the nature of all civil matters for which these bodies have competence is hazy and unclear.

The creation of these courts, moreover, has indirect consequences lacking plausibility. The appearance of impartiality that a judicial body must have is compromised, for a body whose exclusive function is protection of the woman may raise doubts regarding impartiality for the man, insofar as it appears that these bodies have not been created to be applied with judicial impartiality but rather for combating a specific social pathology concerning male-female relations, resulting in the intention of the assailant specified in Article 1.2 whose concurrence may end up being simply presumed. This is important because if the assailant does not attack the woman with the intent of discriminating

against her or of maintaining the power relation he exercises over her but rather with the intention of revenge or in a fit or spurred by jealousy, these same acts will be judged by other judges or if by the same judge, always in accordance with other proceedings.

To bring this section to a close, it must be pointed out that while the aforementioned Law 27/2003 already attributes to magistrates the possibility of adopting measures of a civil nature (cf. new Section 544 ter 5 and 7 of the Law of Civil Procedure), such a prevision is made in conformity with the following criteria:

- Competence is not that of newly designed bodies but of pre-existing ones
- Temporal limitation exists with regard to civil measures that can be adopted and to the type of measures
- The entire regime refers to domestic violence, without discriminating against the sex of the victim and without regard to the intent of the assailant.

Per contra, the reported text is characterised by the following:

- It will create a regime parallel to the already existing one, with the risk of overlap.
- It is based on a new type of judicial body separate from, in principle, examining magistrates.
- It refers only to the female (woman) victim of violence and in the circumstances of Article 1.2.
- It is applied to more crimes and generalises the assumption of civil competence of the new judges, measures that do not have to be temporary.

In short, and as stated above, the reported text, far from evaluating the experience of the application of Law 27/2003 and adopting regulatory decisions on the basis of said law, opts instead for, on the one hand, exceeding it (new judges, extended competence, generalisation of civil competence) while at the same time restricting the scope (only for women), thereby creating a disorienting panorama of procedural and competence confusion. For these reasons, greater reflection and reconsideration of the reported imitative is advisable.

4. On rules of distribution of competence

a) Attribution of criminal competence

Article 33 of the Draft Bill incorporates a new Article 87 ter into the Organic Law of the Judiciary for attributing competence to the so-called Courts of Violence against Women. Correlatively, Article 86 of the aforementioned Organic Law and Article 14 of the Law of Criminal Procedure are reformed with the aim of retracting competence from examining magistrates for hearing suits that will be heard by the competent Courts of Violence against Women.

The guiding principle of this attribution of competence consists in attributing the power to hear certain crimes – homicide, abortion, injuries, injury to the foetus, crimes against freedom, torture and other crimes against integrity, sexual freedom and indemnity or any other crime committed with violence or intimidation – in terms of their *"having been perpetrated against the person who is or has been the wife, or the woman who is or has been attached to the perpetrator in the form of a common law couple, even without cohabitation".* But only in those cases where there are *"acts of violence against women in the terms of Article 1 of the Organic Law, Integral Measures of Violence against Women"* as established by Section 5 of Article 14 of the Law of Criminal

Procedure. **In other words, the Courts of Violence against Women are granted competence under the following circumstances:**

1st That the active subject is the man and the passive subject is the woman in the established cases.

2nd That the enumerated crimes be carried out with the aim of "perpetuating discrimination, inequality and power relations of men over women".

The Court of Violence against Women assumes competence for hearing these crimes, retracting it from the judge ordinary, the examining magistrate, and for the hearing and appeal of certain misdemeanours. This leads us to reflect, in the first place, on the objective scope of competence and, in the second place, on whether reasons exist for attributing hearing of these crimes to a new judicial body, one distinct from traditional magistrates' courts.

The first observation is that the objective attribution **is not made in terms of the matter but in terms of the sex of the active and passive subjects, for the matter, the type of crimes attributed to being heard by the judge of violence against women, is the same as the type that current law attributes to the examining magistrate, which produces unreasonable effects insofar as, for example, the hearing of a crime of homicide is identical regardless of who the victim of this crime is.** The appearance of objective impartiality transmitted by the magistrates' court, which gets its name from a phase of the criminal action, vanishes if the hearing of a crime of homicide is attributed to a court that does not receive its name for functional reasons but rather for the personal status of the active and passive subjects of the crime.

The legal prevision could be justified by resorting to the Juvenile Courts: while the homicide committed by a minor is always the same, this comparative term disappears if it is taken into consideration that the reason Juvenile Courts

exist lies in ex Article 235 of the Constitution, that is, in the necessity of seeking the recoverability of the minor – a person still in a developmental stage –, thence the series of criminological, treatment and reeducation specialities. In the reported case, apart from the aggravation or not of the sentences, these as such are the same. In short, all is made to depend on the sex of the victim, yet, to repeat, there is no basis for justifying a judicial organisation for that reason, just as there is no justification on the basis of race or ideology or beliefs or, for that matter, on any of the standards of equality in Article 14 of the Constitution.

As for objective scope, some crimes are included whose inclusion in the content of the crimes referred to in Article 1 of the Draft Bill, the source of so many interpretative problems, is difficult to imagine. For example, it is difficult and even convoluted to think that a homicide or an abortion is carried out *"in order to perpetuate discrimination, inequality and power relations of men over women".* Thus, **in the criminological reality that special motive, which even when it concurred would always be difficult to prove in a trial, does not tend to be present in certain concepts of crime such as those indicated, which can lead in practice to the uselessness of these courts, especially in the event of the death of the woman, in which case the law is undermined, becoming inapplicable insofar as now there is, unfortunately, no violence whatsoever to prevent (Article 1.1 of the reported on text). In this case, which is the competent judge?**

But aside from the fact that this intentionality is not present in the majority of quotidian cases, even it was, it is well known that the subjective elements of a crime only can be proved in the proceedings by circumstantial evidence, after logical-deductive reasoning on the part the sentencing judge following analysis of the evidence. From this point of view, **to the degree that the competence of the judge of violence against women depends on prior verification of that special motive of the active subject, and that this will only be evident after a trial, it would be impossible in practice to attribute competence to**

the judge of violence for hearing the matter; or in other words: until sentence has been passed it is not known if the trial has taken place before the competent judge, without accepting that the concurrence of this intention is presumed at any rate. And the fact is the problem lies in attributing competence not by objective criteria but in terms of the intention of the perpetrator.

Furthermore, and analysing specifically the objective scope, it does not make sense to include crimes of torture in this relation when the torture, technically, is a crime carried out by *"the authorities or public administration employees, in abuse of their position and with the aim of obtaining a confession or information"*, without affecting the fact that other crimes against moral integrity referred to in Title VII of Book II of the Penal Code are included, and as long as they occur within the scope of the application of the law.

Nor does it make sense to include all the crimes involving violence or intimidation against women, for it is not clear what relation any of these crimes (e.g., arbitrary execution of the law, theft with violence or intimidation, extortion, etc.) has to the purpose of this law.

At the same time, it is equally reprehensible to include within the scope of the competence of these courts, the hearing of any crime committed against family members if it is based on the fact that the victim is only the woman, for – as is well known – Title XIII includes crimes of illegal matrimony, falsifying a birth, alterations of paternity, status or condition of a minor, violation of custody duties, inducing minors to abandon the home, and the abandonment of the family, minors, or persons lacking legal capacity.

In short, the crimes to be heard by Courts of Violence against Women are ordinary crimes and not any more special in nature as regards their investigation than those attributed to the ordinary examining magistrate. And

from the point of view of the adoption of precautionary measures, the examining magistrate has full powers for their adoption within constitutional limits.

b) Force of attraction attribution of civil competence to the judge of Violence against women

That in matters of violence the criminal judge assumes civil functions is not new, as, in particular, this is the model initiated by Law 27/2003. Still, what is being made now is a qualitative leap. The new model – as stated above – generalises this possibility while, in addition, the hearing of matters of a civil nature, aside from being more extensive, is not purely temporary or precautionary.

In this way, matters of the civil jurisdictional order attributed to Courts of Violence are of the most varied nature, the expression “they will be” being moreover reprehensible insofar as it may seem that it is in the power of these courts to hear or not to hear these matters. In any case, from the notion of violence against women, and from the purpose of the Draft Bill (cf. Article 1), it is not easy to understand the attribution of matters such as filiation, maternity and paternity, recognition of the civil effectiveness of ecclesiastical resolutions and decisions regarding matrimony, parental-filial relations in general, those that have as an object the adoption or modification of measures of domestic significance, when they are not completely related in the law itself nor is the necessary modification of the Law of Civil Procedure carried out, and this even in the case of the simultaneous existence of the requirements referred to in Section 3º of Article 87 ter.

In any event, what is missed or what can only be intuited are the counterproductive consequences resulting from the lack of reference to other matters which, without being affected by the purpose of the law, have special

significance, such as primary residential custody of juvenile sons and daughters or alimony trials.

It must be kept in mind, on the other hand, that the precept, in addition, abandons without having resolved beforehand important issues concerning the commencement and loss of civil competence by the judge of violence against women. The right to the natural judge is predetermined by law and is one of the basic principles of the Spanish legal system (Article 24.2 of the Constitution), and as such if it demanded only so that the judge of violence can assume powers for hearing any crimes or pass judgment on any of the civil matters referred to in Article 87 ter, which *"has commenced"* criminal proceedings for a crime or misdemeanour as a consequence of an act of violence against a woman, or has adopted a protective order, **it may be the case that, in some way, the selection of the competent judge is at the mercy of the parties, in this case the victim, given that the mere commencement of a criminal trial responds to the sole fact of lodging a complaint,** while the reported text fails to foresee the possibility that almost immediately the file will be closed on the criminal proceedings or, later, the proceedings will be dismissed, even provisionally.

In these cases, what will happen with civil proceedings being heard by the judge in the event of one of these situations? Theoretically, the judge of violence would cease hearing all civil suits in the absence of the de facto assumption of the new Article 87. ter. 3. c) , whereupon we might be faced with the inadvisable transfer of civil matters from, say, the Family Court judge to the judge of Violence and from the latter, again, back to Family Court. That such specialisation is not necessary becomes clear when the judge that hears these suits is a first instance civil and criminal judge that also assumes the tasks of the judge of Violence: the transfer of matters will be "with himself".

Furthermore, one has to wonder up to what point is it sufficient that the judge remits the proceedings to the judicial body considered competent when the judge sees that *"in an obvious way"* the facts do not constitute an expression of violence against the woman, for apart from the lack of definition of the expression it is also not clear if the remission can be made at any moment in which that lack of relation of the facts to the subject matter of this law is verified, especially given the vagueness of Article 1 of the Draft Bill.

c) On the sudden loss of objective competence: right to the judge ordinary.

Article 38 regulates the *"loss of objective competence in the event of acts of violence against the woman"*, adding a new Article 49 bis to the Law of Civil Procedure. Regarding this, the Council envisions the possible collision of the measure with the right to the judge ordinary predetermined by law. Thus, it must be taken into consideration that the Constitutional Court has declared, since STC 47/1983, that the constitutional right to the judge ordinary predetermined by law recognised in Article 24.2 of the Constitution requires the previous creation of the judicial body by the legal norm, that this has been invested with jurisdiction and competence prior to the motivating act of the proceedings or judicial process, and that its organic and procedural regime does not permit qualifying it as a special or exceptional body. **Thus, if an action subsequent to the attribution of competence deprives the judge of the matter that she is already hearing, the right to the judge ordinary would be violated.**

The reasons for this are the following:

In the first place, where there is legal disqualification of one body in favour of another it is more proper if it is done in favour of the judge that was first hearing the matter, for otherwise it would be sufficient to bring a new action

subsequently with the same object before another judicial body to achieve the removal of the first. Thus, for example, Article 79 of the Law of Civil Procedure states that the newer proceedings will accrue to the older ones, oldness being determined by the date of the presentation of the lawsuit. The reason that newer matters are the ones that accrue is clear: the contrary would permit the parties to have the powers of the judicial body at their disposal.

The Draft Bill (Article 38) adds the new Article 49 bis to the Law of Civil Procedure, according to which *"when a judge or court that is hearing civil proceedings learns of the commission of an act of violence against a woman in the terms of Article 1 of the Organic Law, Integral Measures on Violence against Women, which has resulted in the commencement of criminal proceedings or a protective order, after verifying the concurrence of the requirements envisaged in Article 87 ter, paragraph 3 of the Organic Law of the Judiciary, this judge or court must disqualify himself, remitting the writs in the state in which they are found to the Judge of Violence against Women, now competent in this matter".* That is, it stipulates the disqualification of the judge already hearing the case with anteriority **on account of a new act** in favour of the newer judge, altering the ordinary solution to these problems of concurrence of proceedings.

It is true that the jurisdiction and competence of the Court of Violence against Women is determined with anteriority to the motivating act of the judicial action or proceedings, but with regard to a court of first instance, the sudden loss of powers by a subsequent act is equivalent to indecisiveness on the part of the judge that, all things considered, is going to the hear the matter; and from this point of view, **the right to the judge ordinary predetermined by law is contradicted, for it would be predetermined only provisionally or conditionally as civil competence would be subject to the absence of a condition of resolution – the carrying out of acts of violence –, which ultimately depends on the intention of the perpetrator.**

Under these conditions, the reform envisioned in Article 38 of the Draft Bill clearly violates the right to the judge ordinary predetermined by law (Article 24.1 of the Constitution).

And in the second place, keep in mind that Article 49 bis entails the **loss of competence,** which also affects **judicial unremovability**. Removing the judge in order to deprive her from hearing the matter amounts to the same thing as, without removing the judge, depriving her of hearing it by depriving her of initial competence. For example, a husband dissatisfied with the evolution of judicial separation proceedings can, by carrying out any act of violence against his wife, remove the judge from hearing the matter. And inversely, the woman can take a civil matter to the jurisdiction of the judge of Violence by merely lodging a complaint or requesting a protective order.

Lastly, one wonders what happens to civil suits that would be heard by a judge of violence but that are already in second instance when the same judge begins proceedings. In principle, it would not be appropriate for the judge of violence to require the disqualification of any judge of first instance on the grounds that the judge of first instance lacks functional powers. Even though new Article 49 bis 1 and 2 of the Law of Civil Procedure refers to the "judge or court" in this way, later the reference to the "court" would appear to indicate that a provincial court – an appellate body – may be required to be disqualified, having to disqualify itself in favour of the judge of Violence; as shocking as it may be, might such a thing be possible? And if so, does it mean that the judge of violence will be able to revise the flaw in the civil first instance? Such extremes need clarification.

d) Speedy trial, duty service judges and judges of violence

As stated above, the reported model gives rise to obvious dysfunctions. Indeed, it is true that the Sixth Additional Provision envisages that, in a period of

six months from the entrance into effect of the reported Draft Bill, the General Council of the Judiciary will issue rules for adapting duty services to the existence of new courts of Violence against Women. Well then, at least two problems arise that must be solved by the lawmaker without waiting for the regulatory elaboration of this Council.

In the first place, the proceedings of so-called speedy trials (Title III of Book IV of the Law of Criminal Procedure) are applicable for the hearing and judging of *"injurious crimes, coercion, threats or habitual physical or psychological violence committed against the persons referred to in Section 173.2 of the Penal Code* [Article 795.1.2ª, a) Law of Criminal Procedure]; moreover, Article 14.3 of the Law of Criminal Procedure establishes that the duty service judge of the place where the crime was committed passes a sentence of consent, in the terms of Article 801 of the Law of Criminal Procedure. On the other hand, Article 962.1 of the same text provides for the immediate trial for the offenses included in Section 620 of the Penal Code as long as in this latter case the victim is one of the persons referred to in Section 173.2 of the same Code. And, finally, it must not be forgotten that the proceedings of the aforementioned speedy trials for a crime or misdemeanour are carried out by the duty service magistrate (Article 797 and ss Law of Criminal Procedure and Article 50.1 of General Council of the Judiciary Regulations 5/95 regarding Incidental Aspects of Judicial Proceedings).

In the second place, the lawmaker must keep in mind that the system of the protective order envisaged in Law 27/2003 rests mainly on the urgent action of the duty service magistrate, which is directly related to the necessity of providing an expeditious and speedy response to the victim. This verification necessarily will have consequences throughout the organisation of Courts of Violence, without resolution of this problem by what is established in Article 42 of the Draft Bill, nor by new Article 81.1 e) Organic Law of the Judiciary, which

the same Draft Bill introduces through Section 3 of the Eighth Additional Provision.

All of this means that a significant part of the proceedings in the ambit where judges of violence would have competence in reality will be processed through the channels of speedy criminal and misdemeanour trials and therefore by duty service magistrates, which may turn out to be incompatible with the regulations of the Courts of Violence against Women envisaged by the Draft Bill. **It must then be concluded that typical cases of domestic violence will be heard by the duty service judge of the place of commission through those urgent proceedings.**

Keeping in mind the principles of orality, concentration and immediacy that govern civil proceedings today, the judge hearing the case cannot disqualify herself in favour of the judge of Violence, for once the trial proceedings are underway she is the only one vested with the power to pass sentence, unless the entire proceedings become ineffective, with the consequent improper delay. And, what is certain, is that it is not established that the judge of violence will assume permanent duty service regardless of the degree of adaptation that must be carried out in accordance with the Sixth Additional Provision; therefore, – unless a policy of unlimited creation of these new bodies is opted for – what purpose do the specialities of the law in these cases serve if competence is not going to be attributed to the judge of violence?

Also problematic is the appearance in court established in section 2º of new Article 49 bis (Draft Bill Article 38) in which the judge is converted into a mere spectator and, at any rate, a guarantor of certain procedural formalities, without having to adopt any decision about the matter. If, as has been stated, the aim is to grant within the framework of the judicial reform greater powers to the Attorney General's office, it seems more reasonable that appearance in court be celebrated directly before it so that, in the reasonably established time

periods, in any case brief, the decision is adopted in order to report acts of violence or request the protective order.

Moreover, this new Article 49 bis2 of the Law of Civil Procedure states that the civil judge that hears a case of violence against a woman, deducible from the matters before him, will make the public prosecutor aware of it, *"after which the public prosecutor immediately must decide to proceed in the next 24 hours to report acts of violence against the woman or to request a protective order before the Court of Violence against Women that has competence in the matter".* If it is "immediate" – without time to think –, what sense does it have to tell the public prosecutor that he must immediately decide what he is going to do in the next 24 hours?

The same precept abolishes the general regime of the issues of competence between judges and courts of civil jurisdiction, specifically to avoid hearing the parties and the Attorney General's office, which might produce situations of defencelessness contrary to Article 24.1 of the Constitution, independent of the fact that, for reasons of urgency, it can be understood that in certain matters within the scope of the law it is necessary to assume competence punctually, while in this case making possible the corresponding appeal or obligating the judge to a subsequent ratification of the measure, prior to hearing the parties.

e) Criminal territorial competence in terms of the domicile of the victim

A significant alteration of the criteria of attribution of competence in criminal matters results. As is well known, **the preferred jurisdiction, according to Article 14 of the Law of Criminal Procedure, is that of the place of commission of the crime,** as it is understood that the rupture in social coexistence has occurred there and it is therefore easier to prosecute the criminal act. **It is true that Article 15 mentions other alternative jurisdictions, but not that of the place of domicile of the victim,** an

absolutely new criterion of competence introduced in Article 39 of the Draft Bill with the addition of a new Article 15 bis to the Law of Criminal Procedure.

It must be taken into consideration that the establishment of territorial competence relative to the place of commission of the crime has a clear doctrinal explanation, and only in its absence may other subsidiary jurisdictions be introduced. The principle of territoriality determines the spatial scope of the application of criminal rules. It is universally recognised that the State within whose sovereign space the crime has been committed possesses punitive power, and the principle of territoriality is not argued. Thus, even within the State itself, the territorial criterion of commission of the crime is the preferred criterion for the attribution of competence.

It is clear that prior to determining internal jurisdiction, the crime must have been committed in Spain. And once the punitive power of the State is determined, the rules of internal distribution of competence may combine diverse factors. Until now the Law of Criminal Procedure has utilised as preferred jurisdiction that of the place of commission of the crime *(forum delicti comissi)* on the basis of the fact that it is in the place where the act was committed where there is the greatest proximity between the act and the proceedings, thus facilitating the investigation insofar as it will be in that place where the sources of evidence will most easily be found. Investigation at a distance is more complicated (gathering traces of the act, statements of local witnesses, etc). And what may entail a favouring of the victim, may entail an excessive amount of work for third parties, such as, for example, witnesses with domicile in the place of the act who must travel to the legal district of the domicile of the victim to offer testimony.

Furthermore, the place of commission is inalterable regardless of the will of the parties. Indeed, the act is committed where it takes place. On the contrary, determining competence in terms of the domicile of the victim is alterable, being

subject to the victim's will. And if initially the aim is favouring the proximity of the victim to the legal body, this is done at the cost of the distance between the legal body and the act. Moreover, a mere change of domicile of the victim would thwart the objective of the rule.

f) On competence by connection

Article 40 of the Draft Bill adds a new Article 17 bis to the Law of Criminal Procedure for extending the competence of the Courts of Violence against Women to connected crimes and misdemeanours as long as the connection has its origin in one of the assumptions envisaged in Numbers 3 and 4 of Article 17, that is, acts committed as a means of perpetrating other offenses or facilitating their execution and those committed to provoke impunity for other crimes.

With this prevision, on the one hand, some related crimes which undoubtedly can occur within the sphere of the special law can end up outside the competence of the Courts of Violence against Women while, on the other hand, leaving the assumptions of Num. 5 of the same Article 17 markedly out of shape.

g) Protocols elaborated by the Protective Order Monitoring Committee

As is well known, as a result of Law 27/2003 (Second Additional Provision), a Protective Order Monitoring Committee was established this past 22 July of 2003, an act in which this Council participated along with the Attorney General's office, the affected Ministries, Autonomous Communities, the Federation of Municipalities and Provinces, solicitors and attorneys.

As a result of its work, numerous protocols have been elaborated, and the possibility of incorporating the content of some of those legal tools as well as

other ideas and suggestions into the Draft Bill should be considered, for it would give them a regulatory value that would make them more effective. But, at any rate, and as has been insisted upon, another new regime is superimposed on the new regime established by Law 27/2003 in a very short space of time, with clear risk of overlapping, procedural confusion, and overlapping competence, if the activity of this Committee is compared to the functions of the new Observatory (cf. Article 25.1 of the reported text).

h) Degrading advertising and competence of the judge of violence

Within the integral vocation of the reported text, modification is made to the General Advertising Law. In Section VII of this Report, an analysis will be made of these matters and especially anything related to the unexpected attribution of competence to judges of violence – it must not be forgotten that they are a speciality of the criminal jurisdiction – for hearing as well proceedings having to do with cessation of degrading advertising, with a clear civil connotation and little relation to violence against women.

5. On the procedural legitimacy of the Government Delegation on Violence against Women

In regard to this body, the only thing worth mentioning is Article 24.2 insofar as it establishes that *"it will be recognised as lawful before judicial bodies for intervening in defence of the rights and interests protected by this Law".*

It is evident that the aforesaid Delegation is a body of the Central Administration of the State, is not configured as a public organisation with its own legal personality, and as such it is not fitting that it has any procedural legitimacy whatsoever insofar as it lacks procedural capacity. Therefore, for it to

be legitimate it must be created expressly as a public organisation, otherwise what will be legitimate will be the Central Administration itself.

Such legitimisation will be returned to in epigraph VII of this report, as well as that of social services in accordance with Article 14.

6. On the functions of the Attorney General's office

The Draft Bill creates the Public Prosecutor of Violence against Women, charged with supervision and coordination of the Attorney General's office in this matter, as well as through the creation of an equivalent section in each public prosecutor's office of the Higher Courts of Justice and the Provincial Courts, to which will be assigned Public Prosecutors with specialisation in the matter. Public Prosecutors will intervene in criminal proceedings for acts constituting crimes or misdemeanours whose competence is attributed to Courts of Violence against Women, in addition to intervening in civil proceedings of annulment, separation or divorce, or ones that deal with primary residential custody of juvenile children in which there is alleged abuse of the spouse or the children.

As a precedent, it is necessary to cite Circular 1/ 1998 *on Intervention of the Attorney General's office in the prosecution of abuse in the domestic and family sphere*, as a result of which the Family Violence Service was created in each public prosecutor's office, monitoring and attending to lawsuits of this kind.

As noted above, the role attributed to the Attorney General's office is not in itself particularly novel or new, for aside from being maintained in its entirety in Article 1.2, this Council considers that before creating a new category of individual bodies, the weight of integral judicial protection should be placed on the previous existence of authorities that can and must assume a coordinator function. Such is the case of the Attorney General's office. **It is shocking that**

having announced the future central role of the Attorney General's office in the reform of the Judiciary, in the economic Report it is established that the expense for this Ministry will be nil, and therefore its entire activity will be based on an appointed Public Prosecutor and the creation of a section in pre-existing public prosecutors' offices. In fact, it will be the judicial organisation that will grow in such a way that, as already stated, all will depend once again on the judges.

In short, the Attorney General's office must be empowered even more as a monitoring tool of the different civil and criminal suits in a single domestic area. In this sense, it is contradictory that Article 50 of the Draft Bill envisages the Attorney General's office of the State naming, as a representative, a Public Prosecutor of violence against women and that this appointed representative will intervene not in all criminal suits but only *"in those criminal proceedings of particular significance in the view of the Attorney General's office of the State"* [Article 18 quater 1 a) of the Organic Statute of the Attorney General's office]; meanwhile in civil suits - theoretically subordinate to criminal ones – the Public Prosecutor will always intervene [Article 18 quarter 1 b) of the Statute].

In the second place, and if the empowerment of the Public Prosecutor does not produce positive results, there should be a commitment not so much to the creation of new bodies as, as stated above, to the functional specialisation of pre-existing bodies, and after gathering experience regarding the impact of the law and, above all, regarding the impact of the procedural reforms, deciding in the medium-term if it is advisable to create a new kind of court or not. What cannot done is create a body first which, presumably, is going to strengthen litigiousness.

VI

NATIONAL OBSERVATORY ON VIOLENCE AGAINST WOMEN AND TRAINING OF JUDGES AND MAGISTRATES

1. National Observatory on Violence against Women

Article 25 envisages, within institutional protection, the creation of the National Observatory on Violence against Women. In this regard, we must call attention to the existence of the Observatory against Domestic and Gender Violence, created as a consequence of the Agreement signed on 26 September 2002 by the General Council of the Judiciary and the Ministries of Justice and of Labour and Social Affairs, for dealing with domestic and gender violence in the ambit of the Justice Administration.

This Observatory was created with the objective of granting effectiveness to the actions that each of the three institutions develop separately in regard to the matter, broadening the composition of Autonomous Communities with competence in legal matters and the Attorney General's office of the State, thereby complying with the constitutional principle of administrative coordination in defence, guarantee and protection of the fundamental rights of citizens. Since its creation, the Observatory has carried out significant work.

The most important activities elaborated by the Observatory are, among others, the following:

1st Investigative work concerning monitoring the sentences and judicial resolutions pronounced by judges, with the aim of learning how the laws passed by the legislative chambers are being applied and evaluating the efficiency of legal reforms.

2nd Creation of a Central Registry for the protection of victims of domestic violence, included in Law 27/2003, of 31 July, regulator of the Protective Order and passed by Royal Decree 355/2004.

3rd Meetings of the Observatory with groups and associations involved in the matter.

4th Efforts to spread information especially among judges, public prosecutors, lawyers, solicitors, public administrations, universities, groups, ombudsman, social services, etc.

5th Creation of the Protective Order Monitoring Committee, made up of representatives of the General Council of the Judiciary, the Ministry of Justice, the Ministry of Labour and Social Affairs, the Attorney General's office of the State, Autonomous Communities with competence in legal matters, representatives of legal professional associations, and the Federation of Municipalities and Provinces, with the powers to elaborate protocols of general reach for the implementation of the Protective Order and equipped with adequate tools for ensuring coordination among judges and courts and public administrations.

6th Training of judges and magistrates, a conference and three courses having been celebrated in 2003 and a seminar in 2004.

This Council considers appropriate the survival of the already existing Observatory, given that the areas of action do not have to necessarily overlap, for the already existing one does not evaluate violence against women in the educational, labour or administrative spheres, limiting itself to the Justice Department, concerning itself with gathering information related to legal activity, elaborating statistics, and occupying itself with the special

training of judges and magistrates, without affecting the establishment of cooperative formulas between both.

Confusion could arise with the use of the same name, but what is certain is that in the Autonomous Community of Madrid, another Observatory on Domestic Violence already exists without, so far, any conflict or overlapping of functions.

Consequently, it is advisable that Article 25 be transferred to Additional Provisions with content that makes reference to the already existing Observatory and the appropriate coordination measures deemed relevant.

2. Training of judges and magistrates

Article 36 introduces an inappropriate prevision for the reported text in that the training of judges and magistrates, insofar as it affects their professional statute, is a matter that must be reserved for the Organic Law of the Judiciary, in particular Articles 307 and 433 bis.

But, in addition, it is inappropriate to envisage that this Council as well as the Government and Autonomous Communities (it is assumed that both instances refer to staff in the service of the Justice Administration and Forensics, albeit nothing is said in reference to legal secretaries) must ensure that judges and magistrates receive special training relative to equality and gender non-discrimination, that is, educational training regarding Article 14 of the Constitution. It is sufficient to familiarise oneself with the competitive examination programme for entering upon a legal career, with the Law School educational programme approved unanimously by this Council, and with the diverse continuing education courses – also

unanimously approved – in order to see that this has been going on for years.

Consequently, it is more advisable that Article 36, at least in the bearing it has on judges and magistrates, be transferred to Additional Provisions with the content that the General Council of the Judiciary, in accordance with the aforesaid Articles of the Organic Law of the Judiciary, continues promoting through educational training plans and organisation of activities concerning domestic violence in general and violence against women in particular, as well as those concerning equality.

VII

BRIEF ANALYSIS OF OTHER PROPOSED MEASURES

Dealt with below are other issues affecting the legal authority of the report of the Council that refer to *"procedural regulations or that affect constitutional legal matters of protection before ordinary courts concerning the exercise of fundamental rights"* [Article 1081. e) Organic Law of the Judiciary].

1. Sensitization measures: advertising and the media

The Draft Bill modifies General Advertising Law 34/1998, of 11 November, with the aim of introducing greater respect for the dignity of women and equality between men and women and women's right to non-stereotypical and non-discriminatory images, whether exhibited in the public or private media, as noted in the Exposition of Motives of the Draft Bill. It also involves the legal cessation or rectification of advertising by institutions and associations working in favour of equality.

Article 7 of the Draft Bill considers as illicit the use of the image of a woman as an object of advertising in a degrading or discriminatory manner. In this regard, it must be stated that the current Article 3 of the General Advertising Law, in letter a), already deems illicit *"advertising that infringes upon personal dignity or violates the values and rights recognised in the Constitution, especially with regard to children, youths, and women"*. **Therefore, the sensitization measure envisaged in the aforementioned precept already existed in our legal system, and not only for the general protection of the dignity of any person, considering illicit advertising that infringes on the dignity of any person, but also in a special manner in its allusion to women. Thus, in theory this precept contributes nothing special to the special** protection already extended to women concerning advertising.

Still, the **Fourth Final Provision, One**, expressly modifies Article 3 letter a) of the General Advertising Law, adapting it to the content of Article 7 of the Draft Bill. The difference is that now there exists a special reference to the values and rights recognised in Articles 18 and 20.4 of the Spanish Constitution. This reinforces the rights of Article 18, which is not to say that advertising that infringes on the remaining constitutionally recognised values and rights does not continue to be considered illicit, and while mention of Article 20.4 is important, it very well could be dispensed with inasmuch as being a constitutional rule it is at the pinnacle of the legal system, linking public and private powers, and the constitutional jurisprudence referring to the same is reiterated when establishing the limit of the freedoms recognised in Article 20.

In the same General Advertising Law Article 3, letter a), a second paragraph is introduced which, by way of explanation, considers included in the previous prevision *"advertisements that present in a particular and direct*

way the body of woman in a degrading manner or associates the image of a woman with stereotypical behaviours that imply discrimination". From the vantage point of legal logic, and in accordance with a *secundum constitutionem* interpretation of the abovementioned precepts, this second paragraph may be superfluous, for the use of the body or image of a woman in a degrading manner always infringes on her dignity. Still, it may contribute to clarifying the precept particularly when a woman's body or image appears associated with stereotyped behaviour that implies discrimination. However, and in light of previous drafting of the rule, it is reprehensible that the express protection conceded in regard to advertising has excluded children and youths.

Article 8 of the Draft Bill recognises active legitimisation for requesting the cessation and rectification of illicit advertising for the use of the image of a woman in a degrading or discriminatory manner in the following bodies: the Government Delegation on Violence against Women; the Institute for Women; Consumer and User Associations; and associations that have as their sole purpose defending the interests of women. In regard to the Government Delegation, we refer to what was stated above, which confirms in view of the express legitimisation of the Institute for Women that it is indeed an autonomous body.

The precept concludes with what is established in the **Fourth Additional Provision**, **Two**, whereby the General Advertising Law is modified and a new section 1 bis) is added in Article 25 of the General Advertising Law. Aside from not being clear why it is necessary that in the text of a law, a certain form of active legitimisation is anticipated when later modification is actually going to be made to the rule in which this form of legitimisation is regulated, the precept does not merit more commentary insofar as it answers to what is established in the General Advertising Law in relation to the Community Directives concerning cessation actions and which gave rise

to the promulgation of Law 39/2002, of 28 October, concerning transposition to the Spanish Legal System of diverse Community Directives regarding Consumer and User Protection in modification of Articles 25 and 26 and with the addition of a new Article 29 to Law 34/1988.

Actually these precepts already allowed for active legitimisation for requesting of the advertiser cessation or rectification of advertising deemed illicit, not only in terms of the natural or legal persons affected, but in general those with a subjective right or legitimate interest; so that when illicit advertising affects collective or diffuse interests, the National Consumer Institute and bodies of the Autonomous Communities and Local Corporations, Consumer and User Associations, legally constituted, Entities of other member states of the European Community that comply with the requirements of Article 29 of the Law, and, in general, holders of a right or legitimate interest may request cessation or rectification. However, due to the procedural importance of absolute determination of active legitimisation, it may be advisable to include in the precept, for cases where advertising is illicit insofar as it affects the image of women, the bodies and entities previously referred to, although systematically it would be more correct not to introduce a new Section 1bis), but number the precept number 3, changing the current number 3 to 4.

In the Fourth Final Provision, Three, an Additional Provision is added to the General Advertising Law, the first paragraph of which becomes superfluous the moment it limits itself to saying that the cessation action will be executed in the form envisaged in Articles 26 and 29 of the General Advertising Law except in regard to legitimisation of persons and institutions referred to in Article 25.1bis), introduced by the Draft Bill, since this obvious and is already contained in the corresponding precepts.

Of greater significance is the second paragraph, which attributes competence for hearing cessation actions to judges of violence, an attribution of competence that does not make much sense given the particular matter they will be obligated to hear and that has no relation to the idea that the same judges hear in full the civil and criminal issue that might be raised in relation to violence against the same woman and in the same sphere. In short, advertising that is derogatory towards women will always be denigrating in a general sense and not in reference to a specific woman nor the victim of specific acts of violence, the object of protection in these cases always being diffuse: precisely for this reason, the groups referred to above are actively legitimised for exercising the aforesaid actions. In addition, as these courts are a speciality of the criminal jurisdictional order, the notion that with these previsions this advertising is also criminalised, and only for women, touches on previously examined issues regarding improper conception of positive discrimination and the fact of having a special jurisdiction on the basis of sex.

Article 9 of the Draft Bill establishes that publicly-owned media will ensure the protection and safeguarding of equality between men and women, avoiding any illicit discrimination between them. If we proceed from the principle that what is intended is integral protection of women, defending their dignity and equality to the fullest and prohibiting all forms of discrimination, as recognised in our Constitution and international agreements ratified by Spain, and moreover that constitutional precepts and the rest of the system bind all citizens and public powers, **not only publicly-owned media but also privately-owned media must ensure the protection and safeguarding of equality between men and women.**

It is certain that, for example, the Radio and Television Statute approved by Law 4/1980, of 10 January, obligates State social media to respect the

honour, reputation, and private life of individuals and all the rights and freedoms recognised by the Constitution and to respect the values of equality included in Article 14 of the Constitution; and the Exposition of Motives of the Law itself when referring to broadcasting and television as an essential public service, whose ownership corresponds to the State, considers them a fundamental means for contributing to the goal that freedom and equality be real and effective with special attention to the protection of marginalised persons and non-discrimination against women. Article 5 of Law 46/1983, of 26 December, regulator of the Third Television Channel in each Autonomous Community, expresses itself in similar terms. Moreover, Law 25/1994, of 12 July, incorporates Directive 89/552/CEE into the Spanish Legal System with respect to coordination of legal, regulatory and administrative provisions concerning the exercise of television broadcasting activities, and in its Article 9 considers illicit advertising that infringes on the due respect for human dignity or discriminates for any reason, included sex.

2. On public assistance and free legal aid

a) Criminal legitimisation of certain social services

Article 14 envisages **special legitimization of social services of assistance, emergency, support and integral recovery for women to request of the judge the urgent measures deemed necessary.**

One must not confuse the possibility that social services make the judge aware of the detected situation and the necessity of adopting urgent measures with legitimisation, in the procedural sense, for requesting the measures. Again we have here bodies and not organisations and entities lacking personality and, therefore, procedural capacity. Law 27/2003, 31 July, had stated in Article 2.2 that the protective order will be granted by the

court-appointed judge or magistrate of the victim or person attached to that judge in any of the ways indicated in the previous section, or of the Attorney General's office. And without affecting the general duty of reporting envisaged in Article 262 of the Law of Criminal Procedure, the service entities or organisations, public or private, that had knowledge of any of the acts mentioned in the previous section will bring them immediately to the attention of the duty judge or the Attorney General's office with the aim of initiating or urging proceedings for the adoption of the protective order.

Furthermore, the participation of social services already envisaged in the aforesaid law seems sufficient. This law recognises the possibility that the protective order may be requested from the social services or assistance institutions dependent on public administrations, as well as that the social services and institutions referred to above provide victims of domestic violence whom they had to assist with the request for the protective order, thereby placing at their disposal information, forms and, when necessary, telematic channels of communication with the Justice Administration and the Attorney General's office.

In short, the request corresponds to the victim or the persons for whom the protective measures are intended, without detriment to the collaboration of social services.

For example, Article 21 of Canary Island Law 16/03, of 8 April, concerning integral prevention and protection of women against gender violence, more appropriately attributes to social services the function of reporting to the competent authorities situations of violence of which they have knowledge, with the previous consent of the victim and collaboration with the competent authorities in the adoption of assistance measures that have as their object protection of the victim from future situations of gender

violence, or the contribution of probative means related to the commission of acts of violence.

b) Free legal aid

Article 15 must be placed in relation to Law 1/96, of 10 January, concerning Free Legal Aid and development Regulations announced in the state and autonomous spheres. Nevertheless, proceeding to reform of the aforesaid Law 1/96 would be wise in order to maintain the unity and coherence of the legal system, incorporating Article 15 insofar as it is not advisable that “integral” will be predicated on the reported law at the expense of other laws that regulate matters also regulated in the reported text losing their integral character.

At any rate, the reported text entails an important step even though it would be advisable for free legal aid to be extended as well to information prior to any procedural action, through the agreements with professional colleges and Autonomous Administrations. Likewise, the precept should be completed with a reference to Article 21 of Law 1/96, as it is specifically in these cases of violence against women where it is more justified that the judicial body immediately ensure the rights to defence and representation not only of the accused but of the victim, and, therefore, considering the circumstances and urgency of the case, a ruling stating grounds must be pronounced requiring the provisional naming by professional associations of a lawyer and a solicitor, with subsequent processing of the request, according to what is envisaged in the law.

3. Labour rights and Social Security benefits

Article 16 of the Draft Bill enumerates a series of labour and social security rights that include modification of the Workers' Statute and the General Social Security Law in the Fifth and Sixth Final Provisions. Without affecting the comments to be made below respecting these Final Provisions, Article 16.3 considers as justified absences from work caused by the physical or psychological condition resulting from violence against women, when social services determines that this is the case. This precept must be placed in relation to Article 54.2 a) of the same Workers' Statute concerning disciplinary dismissal and with Article 5 concerning the basic duties of workers.

Apropos of these extremes, Article 18 permits accrediting the situation of violence against female workers – as envisaged in the chapter concerning labour rights and social security benefits –, contributing the protective order or, in its absence, the report of the Attorney General's office indicating the existence of signs that the plaintiff is the victim of violence against women. This order, as has been seen, can be issued by the judge of violence or by the duty service magistrate, and in this regard it is necessary to point out, as noted before, that if the reported text contains risks of exploiting criminal proceedings with a view to civil litigation, with these previsions it must also be understood that this risk extends to, in addition, the sphere of labour relations. Insofar as these previsions are restricted to the female worker, we refer to what is set forth regarding the scope of the application of the law. At any rate, it could be alleged that this possibility already exists with Law 27/2003; thus it has been advised not to create more procedural confusion with the reported text – which accentuates those risks – and to carry out a greater and more detailed assessment of the regime of the protective order before extending it.

Moreover, the Fifth Final Provision modifies some Articles of the Law of Workers' Statutes in order to make effective the aforementioned labour and social security rights, and for this reason the content of Sections 1 and 2 of Article 16 of the Draft Bill make very little sense.

While these measures may contribute to effectively protecting victims of this form of violence, it is still wise to specify that the cause of the termination of the work contract now introduced in letter m) of Section 1º of Article 49 of the Workers' Statute does not cease to be a form of termination by will of the worker, with the speciality that, in view of what is established in letter d), there exists here a case of force majeure and furthermore the notice indicated by collective agreements or the customs of the place are not necessary.

In the Sixth Final Provision, the General Social Security Law is modified so that the period of discontinuation of the work contract with preservation of the position will have the consideration of the annuity accumulation period for the corresponding social security benefits. And it must be understood – thanks to the modification of letter e) of Section 1.1 and the modification of Section 1.2 of Article 208 of the General Social Security Law – that those workers affected by a situation of violence will be in a legal situation of unemployment to all intents and purposes, receiving the corresponding benefits, without affecting what may result from the specific action programme that, in the framework of the Employment Plan of the Kingdom of Spain, is envisaged in Article 17 of the Draft Bill.

4. Rights of public administration employees who are the object of violence

The rights of transfer, voluntary extended leave of absence and work timetable adaptation are facilitated for public administration employees affected by violence against their person. The rules contained in Articles 19 and 21 are completed with the Final Seventh Provision that modifies Law 30/84, regarding Measures for the Reform of the Civil Service.

In this regard, we must only call attention to the fact that the third point of the aforesaid Final Disposition adds a new letter e) in Article 29.3 of Law 30/84, in order to grant voluntary extended leave of absence for a special interest to public administration employees who are victims of violence against women, when perhaps, and from a systematic point of view, it was more appropriate to regulate it as a distinct number, given the special characteristics of this form of voluntary extended leave of absence that is not subject to a permanent period and that during the first six months grants the right to preservation of the work position, in the same manner that voluntary extended leave of absence for caring for children is regulated in a distinct number, number 4 of Article 29.

As for the rest, and regarding the consequences of the criminal resolution pronounced under the protection of the reported law and that the beneficiary of these possibilities is solely the female public administrative employee, one needs only refer to what was previously set forth in the above section.

VII

CONCLUSIONS

In accordance with what was set forth above, the main conclusions reached by the General Council of the Judiciary are the following:

1st The gravity of the phenomenon of domestic violence in general, particularly intense in the case of women, merits that the reaction of the Rule of Law be as energetic and effective as possible; thus another initiative, such as the reported one, must be welcome if in fact it helps to legally improve that reaction. However, there exists

considerable doubt whether it is going to contribute more rationality and effectiveness to the system.

2nd The reported text forms part of a series of legal initiatives elaborated in recent years – especially in the previous legislature – , both at the state and autonomous level, in whose sphere already exist integral laws and more specifically rules of protection such as the protective order created by Law 27/2003 (§ IV. 1).

3rd It appears in a context in which the protection of the victim of domestic violence is one of the main objectives of criminal policy, and therefore does not appear in a scenario where there is a shortage of measures but rather a plurality of legislative initiatives already in effect, but which due to the brief amount of time they have been in effect do not yet permit evaluation of their actual effectiveness in combating the social phenomenon of domestic violence [§ V. 2. a)].

4th Particularly worrisome is that while the implementation of the protective order regime (Law 27/2003) is still very recent, a parallel regime is now added that may generate overlapping, procedural confusion and competence interference. Before undertaking a initiative such as the reported one, it makes sense to wait until a more detailed evaluation of the regime of Law 27/2003 can be made.

5th Despite its integral nature, faced with a social problem of the first magnitude, one diverse in its causes and manifestations, it opts for making the solutions a markedly legal matter (§ IV. 1).

6th It is considered unwise that it regulates only violence against women: an integral law should include all the spheres in which domestic violence appears (§ IV. 2).

7th The woman does not obtain more protection by the virtue of the fact that the law protects her alone, excluding from its scope minors, the elderly, or, even, the man [§ IV. 2. c)].

8th The so-called positive discrimination carried to the criminal and civil sphere leads to reprehensible negative discrimination. In these spheres, situations of equality are assumed: the fact of excluding men from the protection of the Courts of Violence against Women adds nothing to the judicial protection of the woman (§ IV. 3).

9th A conception of violence against women – on which depends the entire application of the law – based on the intent of the aggressor is unacceptable (§ V. 1).

10th That minor threats and coercion become a crime only when the plaintiff is a woman is constitutionally objectionable.

11th That those crimes are based only the aggressor's being a man and presuming his intent in the law leads to a criminal law of perpetrator that is incompatible with the Constitution.

12th The aggravated type of injuries is based on the presumption of the inferiority of the woman, without this regulation applying to children, the elderly, or the disabled, all of whom are also susceptible to being victims of domestic violence (§ V. 3).

13th Greater specialisation in judicial bodies is constructive as long as its object is knowing about the entire phenomenon of domestic violence.

14th Creating a new category of courts only for women, which leads to a kind of special jurisdiction based on the intent of the assailant and the sex of the victim, is not justified. If judicial bodies cannot be created for reasons of race, ideology and beliefs, they cannot be creating for reasons of sex (§ V.3).

15th Before creating Courts of Violence against Women, functional specialisation of pre-existing courts should be procured, as well as taking advantage of coordination by strengthening the Attorney General's office and pre-existing procedural tools (§ V. 3 and 6).

16th The insertion of Courts of Violence against Women in the criminal order leads to "criminalising" the civil lawsuits attributed to them, as well as increasing the risk of their being exploited. If this is already detected in the current Law 27/2003, it would be more prudent to further evaluate the application of this law before creating a new parallel system which increases this risk (§ V. 4).

17th It does not make procedural sense to attribute competence to those bodies inserted in the criminal order for hearing civil proceedings against degrading advertising, this aspect being alien to violence against women (§ V. 4. h)].

18th The rules of competence cannot be based on the sex of the victim nor on the intent of the assailant. If so, it would lead to absurd situations in which the same act, with the same subjects, could fall within the competence of different bodies because that intent is

always considered at the end and not at the beginning of the proceedings (§ V. 4).

19th The constitutional right to the judge ordinary predetermined by law is compromised from the moment the selection of the competent judge is at the mercy of the woman insofar as recourse is made to protective measures offered her by the reported text (§ V. 4. c)].

20th Speedy trials and the protective order have been established in order to allow a breath of fresh air into duty service magistrate courts. The majority of the crimes against women fall within the competence of these courts and are dealt with through this kind of trial, not by the Courts of Violence against Women, whereupon the intended specialisation is questionable [§ V. 4. d)].

21st Incorporating into the reported text some of the protocols and initiatives of the Monitoring Committee for Implementation of the Protective Order should be considered. Likewise the current Observatory against Domestic and Gender-based Violence, created in 2002 by the General Council of the Judiciary and the Ministries of Justice and of Labour and Social Affairs, should be maintained before creating via the reported law a new Observatory that overlaps with the already existing one [§ V. 4. g) and VI].

In witness whereof, I hereby issue and sign the present in Madrid, on 24 June 2004.