GENERAL COUNCIL OF THE JUDICIARY

OPINION issued by the Honourable **Vice-President of the General Council of the Judiciary Mr. Fernando Salinas Molina and the Honourable Members of the Council Mr. Luis Aguiar de Luque, Mr. Juan Carlos Campo Moreno, Ms. Montserrat Comas D'Argemir i Cendra, Ms. M. Ángeles García García, Mr. Javier Martínez Lázaro and Mr. Félix Pantoja García** in accordance with the Commission of Studies and Reports of 21 June 2004. **Ms. Montserrat Comas D' Argemir i Cendra and Mr. Félix Pantoja García** issue, in addition, corresponding opinions separately on certain matters.

I

GENERAL CONSIDERATIONS CONCERNING THE LAW ON MEASURES AGAINST VIOLENCE AGAINST WOMEN

Generally speaking, the first problem raised by the bill is its purpose in regard to the benefits it confers to a determined group of citizens characterized by their being members of the female sex.

Indeed, as is well known, the Spanish Constitution establishes the principle of equality before the law in art. 14 (which both doctrine and constitutional jurisprudence have come to understand covers both equality "in" the law as well equality "before" the law), a precept that includes among the specific interdictions on discrimination those that derive from sex.

Presently, however, we find ourselves before a bill that proclaims in its very name and its art. 1 that the main object of said text is to establish in a

integral way (that is, approaching the problem from the many diverse facets that it encompasses) a series of statues of limitation which seek the reduction of the present unacceptable levels of violence suffered by a determined group among the population, that is, the one constituted by women.

On the other hand, the report approved by majority decision denies the possibility of a law in which measures against the violence currently suffered by women are adopted, denying that historically the relations of dominance within the family have been exercised by men over women. The report does not accept that a "macho or sexist" culture exists as a social problem explaining how for decades and universally men have related themselves to women in the sphere of the couple through relations characterized by dominance, possession, and inferiority. The report affirms that violence against the elderly and children is, if possible, more serious than violence against women precisely due to their absolute inability to defend themselves and formally denounce the act. Such an affirmation is to deny history itself, it is to deny that violence as a social problem is "gender violence," that is, of men against women, fruit of the relations of dominance and possession that men have historically exercised over women. Violence perpetrated against minors and the elderly or of women against men is an isolated problem that has its response in statutory law, the right to effective protection being guaranteed, and in the response of the Penal Code, and by no means would they remain unprotected with the approval of the bill that is the object of this report.

On the other hand, we the members subscribing to the present opinion believe that the now reported bill contains a set of statues of limitation that, on occasion, equip public powers with the capacity to undertake actions whose

object is the eradication a culture of dominance and superiority of men over women, unfortunately more widespread in our society than is desirable, or to alleviate the serious consequences suffered by women who have been victims of acts of violence (frequently repeated to the point that women must endure in their daily lives a constant climate of violence). On other occasions, the now analyzed bill establishes new bodies or administrative structures that will have as their purpose the adoption of administrative measures that combat or reduce the impact of this social blot. And finally, another set of precepts serves to reform some basic legal bodies of our legal system (Penal Code, Organic Law of the Judiciary, Law of Civil Procedure, Law of Criminal Procedure…) with the aim of equipping public powers in general, and the Judiciary in particular, with adequate tools for combating this form of violence directed primarily against women. Among these latest reforms are some norms that regulate directly or indirectly the exercising of basic individual rights; hence the reforms to the Penal Code, in connection with the right to individual freedom, and a series of procedural and organic-judicial reforms with immediate effect on the right to effective judicial protection.

In the light of all this, the first question from a general point of view raised by the now analyzed bill is, as indicated above, the following: Is a set of legal measures whose beneficiary is only a part of the population (women) compatible with our constitutional system (and particularly art. 14 of the Constitution) or, to the contrary, is a legislative option of this sort prohibited by the cited constitutional precept?

The answer to this question, without prejudice to the clarifications that will be made below, cannot in the least be favourable to the constitutionality of the option taken by the lawmaker.

The principle of equality in our constitutional text, and especially when exerting its normative force on the lawmaker, is not a rigid and formal axiom lacking a minimum of flexibility. Far from it, art. 14 of the Constitution must be interpreted in light of numerous other precepts that modulate its definitive reach. Thus, most significantly, art. 1 of the constitutional text ("Spain constitutes itself into a social and democratic state of law which advocates liberty, justice, equality, and political pluralism as the superior values of its legal order"), art. 9.2 ("It is the responsibility of the public powers to promote conditions so that liberty and equality of the individual and the groups he/she joins ... will be real and effective", the interdiction of arbitrariness (art. 9.3), and the extrapolation of the generic principle of equality before the law to other spheres (e.g., art. 23, 31, and 139.1).

The result is that the principle of equality established by art. 14 of the Spanish Constitution, reinterpreted in this way, when exerting its operating capacity on the work of the lawmaker, assumes a distinct dimension in as much as it loses in part the absolute significance that seems to be deducible from its literal expression. In practice, legislative work is constantly translated into a series of laws in which the lawmaker establishes different legal consequences for diverse social realities or sectors of the population that find themselves in distinct social circumstances. The same deviant social behaviour that the criminal lawmaker classifies as a crime deserves a different legal classification when committed by a minor. And the law devised by an autonomous Parliament that

confers determined rights is not applied to citizens residing in another Autonomous Community, despite the fact that art. 139.1 of the Constitution states that all Spaniards enjoy the same rights and obligations in any part of the territory of the State.

The lawmaker, therefore, is always classifying Spanish citizens in accordance with diverse factors and assigning different legal statutes according to the group to which each individual belongs.

In short, the problem of the scope of the principle of equality of art. 13 of the SC regarding the activity of the lawmaker is not whether this includes an absolute and seamless mandate of interdiction of discrimination "in" the law, but rather if the possible differences among Spanish groups that the legislator may establish in the legislative classification enjoy an objective and reasonable justification, and if such a difference in treatment is adequate and appropriate for achieving the end that justifies it.

Certainly, when the difference in treatment that the lawmaker accords to certain groups takes as criteria of difference some of the circumstances of the interdiction of the discrimination explicitly envisaged in art. 14 of the SC (e.g., sex), as is the case here, the demands for passing the test of constitutionality are particularly aggravated. But while this may be the case, it does not mean that all discrimination "in" law because of sex must be qualified as unconstitutional.

On the contrary, among the justifications that most frequently legitimize constitutionally the differences derived from the legislative classification are those

constituted by measures of positive discrimination in favour of women, which are guaranteed in our constitutional text by the previously alluded to art. 9.2 and have already been an object of favourable consideration by our Constitutional Court on numerous occasions, as we will have the opportunity to analyze below.

Indeed, our Constitutional Court, following in this point the abundance of doctrine based (i) on international resolutions of various sorts, (ii) on case law of specialized courts in matters of human rights, and (iii) on the doctrine of the Court of Luxembourg, has come to accept in now regular jurisprudence the constitutionality of both administrative and judicial resolutions as legal norms inspired by the idea of endowing with material content the principal of equality, and this even though they may seem to be infringements of the principle of equality before the law established by art 14 of the SC. These are known as "measures of positive discrimination" in relation to certain disadvantaged social groups, measures that are justified from a constitutional point of view in that they have as their object favouring full equality on legal grounds and in the exercise of the rights of such groups. Among these pronouncements, whether international or Community or of our Constitutional Court, measures of positive discrimination in favour of women deserve a privileged place, measures which on numerous occasions have already received an avowal of constitutional conformity.

In this sense, in order to understand the constitutional legitimacy of a bill that has as its object the adoption of concrete measures against violence suffered by a sector of the population characterized by being a member of the female sex and not by the totality of the population, it is necessary to begin verifying the existence of a social reality that places members of this group –

women – in a situation of material inequality regarding the enjoyment of certain benefits, positions, and rights that the legal system entitles them to. Secondly, it is necessary to examine the true legal nature of the measures with which the lawmaker intends to lessen or subvert this social situation and the legal implications of the consequences in the eyes of the law with the aim of ensuring the benefits and values involved. And in the third and final place, based on deliberation of these constitutional values and benefits, it will be necessary, to determine to what degree the measures set down by the lawmaker are adequate and appropriate to the proposed objective.

The reflections that are made immediately below have this as their purpose, before analyzing in detail and formulating some critical observations regarding the technical correctness of the concrete regulation that the articles make regarding one of these measures.

To this end, the starting point that must be acknowledged is the undeniable reality that in 2003, a total of 76,627 allegations of domestic violence were made in courts of first instance and magistrates' courts in all of Spain, of which 66,188 were processed, with a rate of 1.6 allegations processed per 1,000 inhabitants. Of the total number of victims of domestic violence (66,542), women represent 90.2%. In total, judges adopted 16,725 precautionary measures, with a degree of non-compliance or ineffectiveness of 5.4%, resulting in the sentencing of 33,936 individuals. Moreover, in 2003, the number of deaths due to domestic violence rose to 103 persons, 81 of whom were women, 65 of which died at the hands of their partner or ex-partner, and in 2004, 29 women have died at the hands of their partner or ex-partner as a consequence of this particular

form of violence, compared with 6 minors and only one man. At the same time, the statistical data provided by the General Council of the Judiciary in relation to the application of the Regulatory Law of the Order of Protection in the first five months since the act went into effect, show that of 6,004 orders of protection awarded legally, 95.7% correspond to female victims. These figures make clear that the real problem affecting Spanish society is violence against women. This is the true social blot.

The social reality reflected in this data certainly encourages (and at the same time justifies) the action of the national government to promote the incorporation into our set of laws a legal text that collects the content of the bill which is now the object of the report. A bill that has as its aim the establishment of a series of measures against the violence suffered today by women in our society, acts of repeated violence that can be said to affect the personal dignity of a significant sector of the population whose majority is constituted by women, and regarding which public powers have become aware and begun to combat in recent years, in keeping with the decisions and resolutions of diverse international bodies.

With no desire to be exhaustive, we limit ourselves to note support of the governmental option Recommendation Rec 2002 (5) of the Committee of Ministers on the protection of women against violence, adopted on 30 April 2002, of the Council of Europe, whose opening words are: "*Reaffirming that violence towards women is the result of an imbalance of power between men and women and is leading to serious discrimination against the female sex...*"

International treaties, among them the Declaration of the Rights of Man of the United Nations and the European Pact on the protection of basic rights and public freedoms expressly refer to the principle of non-discrimination, but specifically numerous declarations, pacts, and resolutions in the sphere of the United Nations or of a regional character have pronounced on this phenomenon as is evident in the Exposition of Motives of the bill. Because of its importance and without prejudice to what will be stated regarding art. 1 of the bill below, it is necessary to mention resolution 803/2004/CE of the European Parliament, adopted 21 April 2004, by virtue of which a community action program is approved for preventing and combating violence perpetrated against children and women and for protecting the victims of groups at risk (Daphne II program). Among the specific objectives and actions of the annex to the resolution, alluded to are the creation of viable multidisciplinary networks, training and design of educational tools, as well development and a treatment program for both victims and aggressors, and sensitization directed at specific groups.

Article 5 of the Convention on the Elimination of all Forms of Discrimination against Women, of 18 December 1979, obligates the State parties to take all appropriate measures *"to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women."* The Convention expressly recognizes *"the need to change attitudes through the education of men and women so that they will accept the equality of rights and overcome practices and prejudices based on stereotyped roles."*

The United Nations Declaration on the Elimination of Violence against Women, adopted in December 1993 by the General Assembly, states that *"violence against women constitutes a violation of basic human rights and freedoms."* It understands violence against women as physical, sexual and psychological violence that occurs in the family, including abuse, sexual abuse of girls in the home, violence related to dowries, rape by the husband, the mutilation of female genitalia and other traditional practices injurious to women, acts of violence perpetrated by other members of the family, and violence related to exploitation.

The Beijing Declaration (1995), as a consequence of the International Conference on Women, states that violence against women refers to any act of sexist violence that has as a possible or actual result injury caused by physical, sexual or psychological violence, whether caused in public or private life, and declares that *"Violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men. In many cases, violence against women and girls occurs in the family or within the home, where violence is often tolerated and not denounced. Violence against women is a manifestation of the historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of women's full advancement. Violence against women throughout the life cycle derives essentially from cultural patterns, language or religion that perpetuate the lower status accorded to women in the family, the workplace, the community and society. The phenomenon is exacerbated by fear and the shame of denouncing certain acts."*

The resolution of the United Nations Commission on Human Rights, adopted in 1997, *"condemns all acts of gender-based violence against women and calls for the elimination of gender-based violence in the family, within the general community and emphasizes the duty of Governments to exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women and to provide access to just and effective remedies and specialized assistance to victims."* It exhorts States *to "condemn violence against women and not invoke custom, tradition or practices in the name of religion to avoid their obligations to eliminate such violence;" "to take action to eradicate violence in the family and in the community," "to enact and/or reinforce penal, civil, labour and administrative sanctions in domestic legislation to punish and redress the wrongs done to women and girls subjected to any form of violence;" "to improve training programmes for judicial, legal, medical, social, educational and police and immigration personnel, in order to avoid the abuse of power leading to violence against women and sensitize such personnel to the nature of gender-based acts and threats of violence so that fair treatment of female victims can be ensured;" "to amend penal codes where necessary, to ensure effective protection against rape, sexual harassment and all other forms of sexual violence against women;"* and, lastly, among many other considerations, it *"reminds Governments that their obligations under the Convention must be fully implemented with regard to violence against women."* Spain ratified the Convention in 1983).

The report of July 1997 of the European Parliament that resulted in the "zero tolerance" campaign against gender violence, which was carried out in the European Union in 1999, considers that *"in accordance with the Universal*

Declaration of Human Rights, States Parties that do not apply an effective policy to prevent and prosecute violence against women will fail to comply with its obligations in due form of this Declaration."

Meanwhile, in our country, in Law 27/2003, of 31 July, regulatory mechanism of the order of protection of victims of domestic violence, the lawmaker, for the first time, expressly refers to gender violence when declaring: *"Violence within the family and, in particular, gender violence, constitutes a serious problem for our society, one that demands a complete and coordinated response by all public powers. The circumstances that give rise to these forms of violence transcend the merely domestic sphere and become a blot that affects and involves the entire citizenry."* Said law even alludes to the sub-commission created in the Committee on Employment and Social Affairs with aim of *"...formulating legislative measures that provide an integral response to gender violence..."* This demonstrates that violence against women is a social reality that is easy to confirm and that it imposes upon domestic violence.

In the same sense, the Observatory created as a consequence of the signing, on 26 September of 2002, of an agreement between the General Council of the Judiciary and the Ministries of Justice and of Labour and Social Affairs is called the Observatory against domestic and gender Violence. The Observatory, as an analytical tool, has gathered statistical data, always within the sphere of its authority, carrying out social-legal analyses as is put forward below when commenting on art. 25.

From the preceding statements, we can clearly gather that the legal right protected through measures established by this bill is, as made clear in the plenary agreement of 21 March 2001 of this Council, human dignity: the superior value of co-existence as our constitutional text explicitly states in art. 10.1, although other rights in need of protection such as life and physical and moral integrity often appear closely connected to this one and are deduced in this way among other Supreme Court rulings of 24 June and 7 September 2000.

The majority of studies of the phenomenon of violence against women coincides in affirming that this is a social phenomenon of multiple and diverse dimensions, an expression of a social order based on inequality as a consequence of the assignation of different roles to men and women according to sex and with distinct and superior recognition accorded to the male sex. It is a manifestation of gender inequality, of the state of inequality in which many women still live, and of the formula to which many men turn to dominate women and maintain male privileges within the family, having dire effects directly upon women themselves but also for children as the invisible victims of domestic violence.

Thus, it its not arbitrary but easily understandable that the lawmaker has opted for a law of integral measures against violence against women, which does not imply in any way that other passive subjects that suffer some form of domestic violence will remain unprotected, since, as will be examined below, they receive adequate protection from existing precepts of the Penal Code, such as articles 153 and 173.2

From all that is set out above, it can been inferred that violence is perpetrated against women or on account of women due to their being a member of the female sex, even if its consequences extend to other spheres; therefore the bill has opted for the designation "against violence perpetrated against women," a designation that enjoys broad support in international pacts and agreements ratified by Spain.

The integral law thus systematizes coordinated measures among the different professionals that treat the victims, ensuring improved flexibility and unification in the adoption of civil and criminal measures, including those of a preventative nature, avoiding disparity of criteria. At the same time, educational measures are adopted that promote sexual equality, the fight against all forms of discrimination, and the elimination of established social roles, without neglecting to establish measures that guarantee the appropriate and effective application of the integral law, creating the necessary infrastructures and providing the necessary funds for it.

As stated above, education founded on equality is an important starting point in the prevention of the abuse of women. Such education must not stop with children but continue with adults, and therefore the development of training plans is required according to the different levels of intervention of the staff that will combat this social problem in a coordinated way, insisting on appropriate training of members of the various State police, health care workers, technical assistance teams, but also on the specific training of those members of the judicial system that will specialize in the matter given the difficulty of understanding all the personal and social aspects underlying this problem, and

always proceeding from the notion that judges and courts, by definition, assume the protection of rights and liberties and become their guarantors, having absolutely accepted the principle of equality and non-discrimination, given their connection, as a public power, to the Constitution and the rest of the legal system, in accordance with what is envisaged in article 9 of the Spanish Constitution and article 5 of the organic law of the Judiciary.

Education and training must lead to a social conscientiousness that involves all spheres, that is, economic, political and social life, for women are present in all fields and in all it is possible to find gender-based discrimination. At the same time, there must be an indefatigable struggle for general education in the values and principles of a democratic society such as that of Spain, one that recognizes as superior values of its legal system liberty, justice, equality, and political pluralism, and that expressly affirms in article 10 of the Spanish Constitution that "the dignity of the person, the inviolable rights which are inherent, the free development of the personality, respect for the law and the rights of others, are the foundation of political order and social peace," promoting peaceful forms for the resolution of all conflicts and eliminating the aggressiveness latent in many social spheres. In this sense, measures of sensitization in the sphere of publicity and in the media are viewed positively, with the necessity guarding against content that is harmful to and dangerous for sexual equality and for respecting rights and human dignity in all matters.

As opposed to the not-so-antiquated idea that acts of violence against women that occur in the context of daily cohabitation, in the private sphere, should remain private, avoiding all types of intrusion or intervention on the part of

state institutions, today it is clear that there is a social interest in protecting victims of this form of violence, for society cannot remain passive in the face of such serious attacks on the life, physical and psychic integrity, freedom, and, indeed, the dignity of a human being. In fact, the international agreements ratified by Spain such as the E.C and the rest of the legal system recognize these individual rights regardless of sex and, in addition, impose upon public powers the responsibility to promote conditions so that the liberty and equality of individuals and of the groups to which they belong will be real and effective, removing all obstacles that prevent or restrict their fulfilment and facilitating the participation of all citizens in political, economic, cultural and social life (art. 9 E.C.).

One may think that with this, and especially with what refers to penal protection and judicial protection, but also in the other forms of protection covered in the bill, some form of discrimination is being introduced, for example, when envisaging specific crimes or aggravated forms of these offenses in which the passive subject is solely the woman. However, this form of discrimination must be understood as a "positive action" or "positive discrimination," recognized expressly in the Community legal system. Thus, the Directives 76/207/CEE of the Council, adopted 9 February 1976, and 2002/73/CEE of the Council, adopted 23 September 2002, have recognized that the principle of equal treatment between men and women *"will not be an obstacle to the measures directed at promoting equal opportunities for men and women, in particular to compensate for inequalities that affect opportunities for women ...".* The ruling of the CJEC, of 19 March 2002 (Lommers case), states: *"As far as that question is concerned, it is settled case law that Article 2(4) is specifically and exclusively designed to*

authorise measures which, although discriminatory in appearance, are in fact intended to eliminate or reduce actual instances of inequality which may exist in the reality of social life. It authorises national measures relating to access to employment, including promotion, which give a specific advantage to women with a view to improving their ability to compete on the labour market and to pursue a career on an equal footing with men (Kalanke, paragraphs 18 and 19, Marschall, paragraphs 26 and 27, and Case C-158/97 Badeck and Others [2000] ECR I-1875, paragraph 19). Similarly, the ruling of 6 July 2000 (Abrahamsson, Anderson and Fogelqvist case) sets forth that**:** **"***According to the third recital in the preamble to Council Recommendation 84/635/EEC of 13 December 1984 on the promotion of positive action for women (OJ 1984 L 331, p. 34), existing legal provisions on equal treatment, which are designed to afford rights to individuals, are inadequate for the elimination of all existing inequalities unless parallel action is taken by governments, both sides of industry and other bodies concerned, to counteract the prejudicial effects on women in employment which arise from social attitudes, behaviour and structures."*

Our Constitutional Court has also made several pronouncements in this regard, basing positive action on art. 9.2 of the Spanish Constitution. Thus, ruling 109/1993, of 25 March, states that: "It thus cannot be generically understood that any legal advantage granted to women will always be discriminatory towards men by the mere fact that men do not share the same advantage (as quite the opposite it could be for a woman if she were deprived of something solely due to gender). And on the contrary, the justification of such difference could be found in a disadvantageous situation of a woman for which compensation is being sought; in this case, because it takes place regarding

work relations; and without impairing the capacity of the lawmaker to extend the benefit to males or even restrict it without being opposed to the invoked constitutional precepts. It cannot be forgotten, as previously stated and as this Court has affirmed repeatedly, that because women are a members of a disadvantaged group, the interdiction of discrimination implies as well the adoption of measures that seek to ensure effective equal treatment and opportunities for men and women (SSTC128/1987 and 19/1989), which justifies constitutionally such precepts as the one in question, aimed at removing obstacles that prevent true equality in the workplace "and to the extent that those obstacles can be removed through advantages and measures of support which ensure the true equality of opportunities and cannot in fact operate in detriment of women" (STC 229/1992, f. j. 2).

Moreover, ruling 229/1992, of 14 December, by the same Constitutional Court, states: "In spite of the bidirectional nature of the norm of equality between the sexes, it must be recognized that women have been a victim group of discriminatory treatment, and therefore the interdiction of discrimination also implies, in connection in addition with art. 9.2 SC, the possibility of measures that seek to ensure effective equality of opportunities and of treatment for men and women. The attainment of the objective of equality for men and women permits the establishment of an "unequal equitable right", that is, the adoption of measures for redressing pre-existing instances of social discrimination in order to achieve substantial and effective harmonisation between women, socially disadvantaged, and men, in order to ensure the effective enjoyment of the right of equality by women (SSTC 128/1987 and 19/1989). Thus, measures in favour of women aimed at removing obstacles that prevent the attainment of equal

opportunities for men and women in the workplace are constitutionally justified, and to the extent that those obstacles can be effectively removed through advantages or measures of support for women that ensure the true equality of opportunities and cannot in fact operate in detriment of women." Along the same lines, ruling 28/1992, of 9 March, quoting ruling 216/1991, states: "'They cannot be reputed as discriminatory or constitutionally prohibited –rather far from it– the preferential actions, even if temporary, that public powers undertake in benefit of certain groups, historically unprotected and marginalized, so that through special and more favourable treatment the position of inequality of said groups will be eased or compensated for' (f. j. 5th)".

It is therefore in the context of the adoption of a set of integral measures in the face of this social blot that is violence against women where the provisions of the bill find their explanation and justification. A set of measures that undoubtedly may be qualified as positive discrimination in favour of women and that, consequently, transcend the literalness of the expressions of art. 14 SC, but enjoy constitutional legitimacy within the framework of a social situation in which too frequently the dignity of women is seriously questioned; measures of positive discrimination in favour of women that have the support of numerous international resolutions, that have received on occasion the backing of the Constitutional Court, and that are adequate and appropriate to the purpose that justifies them.

In this respect, the signers of this report consider that the object and purpose of the bill be in keeping with the attainment of the values established by the Spanish Constitution. At the same time, it is considered that an integral law

was necessary that encompassed all the aspects of violence against women referred to above, including measures of sensitization, rights and assistance to victims, and institutional, penal and judicial protection. Therefore, the General Council of the Judiciary considers the legislative initiative significant, especially for its innovativeness and for introducing for the first time into the legal system an integral law that can serve to open a wide social debate on the subject, without prejudice to the remarks made below.

That the bill accompanies the economic report containing an estimate of the costs for effectively confronting the serious problem of violence against women is viewed as positive, considering satisfactory that the precautionary plans regarding the Courts of Violence against Women, as well as the adaptation of already existing ones, the cost of free legal aid, and the creation of integral forensic evaluation units, although in accordance with what is set out below it should also foresee the creation of psycho-social or multidisciplinary teams.

II

CONCERNING THE IMPORTANCE OF THE DEFINITION OF VIOLENCE AGAINST WOMEN ESTABLISHED BY THE PRELIMINARY TITLE OF THE BILL

It is now understood, at last, by the lawmaker that violence against women is certainly multidisciplinary in scope and that to deal with it, it is necessary to apply preventive measures, measures of welfare assistance and social

intervention in favour of the victim, incentive measures regarding investigation, and also legislative measures directed towards suppressing these crimes. But while the legislative initiative of the previous Government, specifically in the Organic Law of Concrete Measures regarding the Safety of Citizens, DOMESTIC VIOLENCE, was content with the mere allusion to measures of assistance and social intervention in the Exposition of Motives and with the increase in prison sentences, the bill of the Integral Measure against Violence against women includes a battery of economic rights, of integral social assistance, of institutional protection, etc., for abused women, and for this reason the organic law is deserving of applause, notwithstanding certain technical defects, which certainly can be mitigated in the legislative iter. An attempt has been made, however, to transmit a false, simplistic and ill-intentioned message: the creation of a criminal law for men and of courts for women and an unusual mishmash of civil and criminal procedures.

Art. 1.2 of the bill: "With this law, violence perpetrated against women will be understood as violence used as a instrument for maintaining discrimination, inequality, and power relations of men over women. It includes physical and psychological violence, including assaults on sexual freedom, threats, coercion, and arbitrary deprivation of freedom in both public and private life when the primary factor of risk is constituted by the fact of being a woman."

The wording of the precept is unfortunate, and thus wording shaped precisely to the sphere of application of the law is necessary. This law is not conceived for women but for the protection of women who are victims –it should include girls too– of a form of violence that is scornful of the human being and

that involves the reduction of a person to the condition of an object, of a bundle, of a mere thing, her cancellation as a free individual, the absolute denial of her personal dignity, for the suppression of conduct and the protection of the victims of a notion of women as property or without rights, emanating from a biblical, tribal or feudal history that persists in present times and that increases with migratory flows. In short, what this law seeks is, on the one hand, the vigorous condemnation not of all men but of those who engage in the typical conduct that prevents women from enjoying the share of freedom and dignity that corresponds to a human being – some along the way lose even their lives – and, on the other, providing the necessary attention to the victims so that they can freely develop their personality.

The rejection of art. 1 and the intention to include it in the Exposition of Motives is not to understand that art. 1 marks the purpose of the law and serves to lay the foundations for measures of assistance, the sphere of competence of the Courts of Violence against Women, but delimits the criminal classes to those that, very clumsily, are referred to in the last subsection of section 2 of art. 1. Nor is it misguided to establish the sphere of competence "when the main factor of risk is constituted by the fact of being a woman." The social reality demonstrates that there exists a traditional archetype of woman caught in a spider web spun carefully by tradition, by religion (regardless of what religion) imbued with an idea of service to the other so that the spousal relationship and mother-child relationship is, for women, practically all there is. Feminist organizations and strong voices for the dignification of women combat this archetype. A tension results between both influences; on the one hand, women rebel, thirst for rights, and call the law to their aid; on the other, is the sense of guilt brought on by

forgiveness. Men reprimand women who rebel in the manner they deem appropriate, even if the rebellion is mild: they assault them physically and sexually, they insult them and dispose of them as they see fit and even kill them. This is the risk of being a women alluded to by the law.

From all of the preceding, the raison d'être of art. 1 and the necessity not to suppress it but simply improve its wording can be easily gathered.

Criticism of the improper introduction of the intentional element in the definition, both in the report and in the opinion, attracts attention, stating that "proof of intentionality will give rise to problems in the specific case," that "if is presumed that every aggression against a woman is presided over by the normative presumption that attacks are made with these purposes or because of the objectives, it is creating a criminal law of the perpetrator and in the organic law a return is being made to a system of special jurisdictions"(sic). In all the language of the report, from page 39 to 54, not only is what was set out above ignored, but the conditions of helplessness are not presumed but must be proven, whether to fulfil the criminal classification that takes them into account or whether to appreciate the aggravating circumstance. Also forgotten is that the intention of the individual that carries out the typical behaviour is not something that has to be established in oral proceedings –as is nonsensically affirmed. Of course, this is what must be done to pass a condemnatory sentence in accord with the criminal classification that demands it. But this intention must make allowances for this at the beginning of investigations in order to determine what proceedings to follow: committal proceedings, abbreviated proceeding, jury court proceeding, etc. and which is the body of prosecution: Jury Court, County Court

or Criminal Court, National Criminal Court, and up to the International Criminal Court, etc. The attack on this point is disconcerting when the Penal Code that we all know, or should know, is rife with crimes in which the intention or the purpose enters within the classification, and depending on whether the intention or the purpose is one or the other, the criminal class changes as does the sentence. Ad exemplum, without being exhaustive, the following:

a).- Art. 607.1 (crimes of genocide) "those who WITH THE INTENTION of destroying totally or partially a national, ethnic, racial or religious group, perpetrate one of the following acts: 1st.- ...with a prison sentence of 15 to 20 years if they kill one of its members; 2nd.- with a prison sentence of 15 to 20 years if they sexually assault one of its members or cause them injuries envisaged in art. 149; 3rd.- with a prison sentence of 8 to 15 years if they subject the group or any of its individuals to conditions of existence that place their lives in jeopardy or gravely affect their health, or if they cause any of the injuries envisaged in art. 150; 4th.- with the same sentence if they carry out forced displacements of the group or its members, adopt any measure that prevents their way of life or reproduction, or if they forcefully move individuals of a group to another; 5th.- with a prison sentence of 4 to 8 years if they cause any other injury distinct from those indicated in numbers 2 and 3 of this section.

Notice that the intention defines the criminal class, increases the sentences significantly (compare with the sentences envisaged for homicide, injuries, etc. without this purpose), and the competence of the examining magistrate and the prosecutorial body, and can correspond to the sphere of competence of the International Criminal Court.

b) Art. 598, "those who WITHOUT THE INTENTION of accommodating a foreign power procure, reveal, falsify or misuse legally reserved or secret information related to national security or national defence." If the intent existed the sentence would be much more serious and the prosecutorial body distinct.

c) Art. 584, "the Spaniard that WITH THE INTENTION of accommodating a foreign power, association or international organization procures, falsifies, misuses or reveals information classified as reserved or secret, susceptible of jeopardizing national security or national defence, will be punished as a traitor with a prison sentence of 6 to 12 years." Notice that this is for a Spaniard, as the sentence corresponding to a foreigner is of lesser degree.

d) Art. 571, "those that belonging to, acting in the service of, or collaborating with armed factions, organizations or groups WHOSE PURPOSE is to undermine the constitutional system or seriously alter the public peace and commit crimes of havoc or of fire classified in arts. 346 and 351 will be punished with a prison sentence of 15 to 20 years..." The aggravation of the sentence because of the purpose of the crimes of havoc and fire is evident.

e) Art. 557, "they will be punished with a prison sentence of 6 months to 3 years those that acting as a group and with the PURPOSE of assaulting the public peace, alter the public order by causing injuries to individuals, causing damage to property, blocking public passages or access to them... etc. The purpose increases the sentence and allows us to define the street brawls on the wild nights of our young people of the *Kale BorroKa*; the same objective fact can be instructive for a Central Court and prosecuted by the criminal court of the

National Criminal Court or by the corresponding judicial bodies of the place where the events have taken place. We insist, again, the purpose, the intention must be judged circumstantially in a value judgment, which may become erroneous at the beginning of the proceedings.

Finally, there is no room for doubt that certain qualities of the passive subject and certain purposes of the active subject of the crime define the criminal classifications of arts. 510 and ss. of the Penal Code under the significant heading "Crimes concerning the exercise of basic rights and public freedoms."

To all of the preceding must be added the 4th aggravating circumstance of art. 22 in which committing a crime FOR REASONS of racism, anti-Semitism, or any other class of discrimination concerning the ideology, religion or beliefs of the VICTIM... GENDER… are alluded to.

In conclusion, and not to be long-winded, we mention arts. 485 and 486 which dramatically increase the sentence when the victim of homicide, assassination or injury is the King or any of his ancestors or descendants, the Queen, the spouse of the Queen, the Regent, any member of the Regency.

III

ANALYSIS OF THE BILL

1.- Concerning the Exposition of Motives

As is well known, the Exposition of Motives of a law is important for understanding the scope of the law, but also for facilitating the interpretation of the legal norm, given that according to section 3 of the civil code, norms are interpreted in the sense of the words, in relation to the context, the historical and legislative antecedents, the social reality, and the time in which they have to applied, attending fundamentally to the spirit and purpose of the laws. Thus, a cursory analysis of the Exposition of Motives of the bill submitted for consideration by this Council is necessary, particularly that which refers to sections I and II of the Exposition as well as the last part of section III.

Though it is true that considerable effort has been made to justify the necessity of the reform, the lack of expository clarity of some its paragraphs attracts attention, with a repetition and mix of concepts that make reading difficult; at the same time, there is scant reference made to constitutional norms and the rest of the legal code that ultimately justify the promulgation of a law of such importance, taking into account that quoting constitutional precepts and principles constitutes the legitimate basis of the law itself and contributes to guiding its interpretation when applied.

There is nothing to object to in part III concerning the summary of the content of the law. However, regarding the statement *"in accordance with the Spanish legal tradition, a formula of specialization has been opted for within the criminal order of examining magistrates, creating Courts of Violence against Women and excluding the possibility of the creation of a new jurisdictional order*

or the assumption of criminal competency by civil judges," the choice of the lawmaker is not so strange, for in the Spanish legal tradition the figure of the examining magistrate has always been present, until recent decades, frequently alone in many legal districts, and with civil competency as a judge of first instance and criminal competency as a magistrate.

The last paragraph of the Exposition of Motives is justified by the inclusion of final provision for the transposition of Directive 2002/73/EC of the European Parliament and of the Council concerning equal treatment of men and women in the workplace, with the aim of dealing comprehensively with the matter of protection in the face of sexual harassment, understanding that although it would be susceptible to being included within the generic concept of violence against women, its large breadth, as defined by Community Directives, recommends specific treatment. There would be nothing objectionable in this observation, although the Directives themselves establish the period of time of the transposition, obligatory for member States, without prejudice to, in this case, the Kingdom of Spain being able to choose to shorten said time; still, as the binding force of the provision would be very arguable, thus, in any event, it only imposes an obligation on the lawmaker him- or herself. Given that the thirteenth final provision does not actually establish a time period for the transposition of the Directive but a period "of six months beginning with the entrance into effect of the present organic law" for drawing up a bill for the transposition of the Directive, if the period of *vacatio legis* of the organic law we are concerned with here is six months (sixteenth final provision), naturally beginning with its publication in the Official Gazette of the Spanish State (BOE), the time period for producing the transposition of the bill is one year beginning with the publication of the organic

law in the BOE, which is not to say that the Directive is effectively transposed in the period of one year, when the Directive itself in article 2.1 obligates all member States to carry out the transposition no later 5 October 2005, and for this reason the suitability of the introduction of the final provision might be reconsidered, for the Directive itself requires Spain to have elaborated the law of transposition by this date, a date that probably will have been reached before the expiration of the plans of the final provision given the necessary parliamentary processing of the law.

2-. Measures of sensitization

The signing members share the measures of sensitization introduced by the law and view them positively, and, although lacking the authority to report on them, the firm desire to collaborate with other constitutional bodies obliges making some contribution to improving the text in regard to its effective applicability and impact on procedures.

The effort made to introduce into the educational system specific training for the peaceful resolution of conflicts and the elimination of obstacles that obstruct complete equality of the sexes is viewed as positive, as well as training regarding respect for basic rights and freedoms and in the practice of tolerance and freedom within the democratic principles of co-existence. The eradication of violence against women requires the adoption of educational measures promoting equality of the sexes and eliminating established social roles. Social sensitization and the strengthening of the importance of the role of women in

quotidian life is fundamental for establishing women's true image, requiring the elimination of a sexist culture imbued with the notion of superiority of men over women, the latter being defined by such qualities as docility and subjugation to men, especially within the institution of marriage or cohabitation of couples. The key to change that must be applied to this problem is a firm and decided commitment to the full effectiveness of educational measures.

It is therefore curious that, seeking the protection of the dignity of women, recognized in art. 10 of the Constitution and in international texts, the only media held responsible for enforcing the protection and safeguarding of equality between the sexes, avoiding all illicit discrimination between them, are public media. It is true that the precept may seem superfluous since all private and public powers are obligated to do so and to safeguard rights and freedoms as established in the Constitution and the rest of the legal system. Yet, if an article such as the one (article 9) referred to above is introduced, it is not clear why the protection and safeguarding of equality between men and women cannot be demanded of all media in general, independent of the fact that discriminatory conduct is already prosecutable with existing legal remedies.

In the public health sector and without prejudice to what is established in art. 27 concerning plans of collaboration, it could be advisable to strengthen the application of the already existing standardized health protocols approved by the National Advisory Council for Healthcare, in which healthcare professionals leave a clear and precise record of early detection of violence against women, protocols that are extraordinarily important when it comes to facilitating formal

complaints for victims and an evaluation of these first confirming signs of abuse for jurisdictional bodies and collaborating teams.

3.- Rights of women who are victims of violence

Article 12 of the bill contains a mere declaration of principles without any normative content, despite the fact that its title is "*guarantee of the rights of victims.*" We thus propose its inclusion in the Exposition of Motives.

Regarding the right to information recognized in article 13, and valuing the precept positively, it could be advisable to place it in relation to art. 15 regarding legal aid, with the aim of expressly guaranteeing adequate information and legal advice prior to the commencement of procedural actions, advice which would be provided by lawyers from specialized legal aid services in matters of domestic violence or violence against women and through the shifts that are established according to signed agreements or that can be signed with different bar associations, guaranteeing in addition this information 24 hours a day.

Article 14 establishes special legitimation of such social services as work assistance, emergency, support, and integral recovery for women so that urgent measures deemed necessary can be requested of the judge. On the one hand, there is lack of precision as to what the structure of these social services will be, the composition and inclusion within the government administration, which is fundamental for its legitimacy. On the other hand, its capacity is in theory unlimited since the concrete measures that can be requested of the judge are not specified, although there is no room for doubt that in general the planning is

relevant given the social importance that violence against women has and the necessity that the judge be made aware of such situations of violence so that appropriate measures will be adopted.

Article 15 concerns legal aid, a precept that must be placed in relation to both art. 119 of the Spanish Constitution and Law 1/1996, of 10 January, concerning free legal aid and rules of development pronounced in the state and autonomous sphere. Nevertheless, it would be advisable for maintaining the unity and coherence of the set of laws to proceed to the reform of the abovementioned law 1/1996, incorporating article 15 referred to above. It represents a significant step forward that the victim of violence against women has the right to free defence and representation, still not being preceptive, and as long as the victim lacks resources, in all the proceedings in which the victim is a party and administrative procedures, as well that the same legal direction takes on the defence of the victim in all the processes and reclamations that have a direct or an indirect relation to the violence suffered. Still, it would be advisable, in accordance with what was pointed out in the commentary on art. 13, that free legal aid be extended to the information prior to any procedural action, through the agreements from professional legal bodies and autonomous governments. Moreover, the precept should include a reference to art. 21 of the law of free legal aid since, concretely speaking, in these cases of violence against women the judicial body is most justified in ensuring immediate rights to defence and representation not only of the accused but also of the victim, and therefore given the circumstances and urgency of the case must pronounce a judgment requiring of professional legal bodies the provisional naming of a lawyer and legal

representative, processing afterward the request, according to what is envisaged in the law.

The concession of rights in the workplace and social security for female workers and government employees who are the victims of violence covered in sections 16 and 21 of the bill is positive, being justified that which accredits the concurrence of the circumstances that result in the recognition of such rights with the order of protection in favour of the victim or, in its failure, by the report of the Attorney General's Office that indicates the existence of signs that the plaintiff is the victim of violence against women, for according to its organic statute the Attorney General's Office is responsible for defence of lawfulness and of the rights of citizens and must ensure the procedural protection of victims, promoting the envisaged mechanisms so that they receive effective help and assistance. It must be understood that the adoption of the measures, the immediate consequence of the recognition of rights, must be adopted as rapidly as possible if they are to be effective, and thus, generally speaking, it is not advisable to have to wait for a judicial pronouncement in this regard, as may be the procedural order or the opening of the trial, without the simple initiation of the procedure by itself indicating the existence of signs of violence against women. However, there may be cases in which urgency is not justified, in which case there should be no difficulty whatsoever so that the judicial resolution constitutes the element of accreditation of the concurrence of the circumstances that result in the acknowledgment of the recognized rights, given that the judge cannot issue reports of any kind, especially if they involve prejudgment.

Assessment should be made of the articulation of formulas for the solution of conflicts that may arise in the lack of agreement between the parties, the concession of a certain margin of judicial arbitration for modulating or broadening the rights of female workers who continue to endure a situation of violence beyond the initially envisaged limits, the possible clarification as improper dismissal with the obligation of the company to employ the affected employee to prevent the victimized female worker from exercising the rights recognized in the integral law, as well as reflecting on possible systems for protecting the rights of victims that demonstrate their status as self-employed female workers.

Lastly, there is a typographical error in article 21 where reference is made to article 17 when reference should be made to article 18.

4.- Institutional protection

Institutional protection through the creation of a government delegation against violence against women and a National Observatory is assessed positively, as well as the measures envisaged for the creation of specialized units in the various State police and for collaboration with local police.

Regarding article 25, we are compelled to 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 the treatment of domestic and gender violence in the sphere of the

Justice Administration. It was created with the aim of granting effectiveness to the actions that each of the three institutions was developing in the matter, broadening their composition the autonomous communities with competency regarding the law and of the Public Prosecutor's Office, complying in this way with the constitutional principle of administrative coordination in defence, guarantee and protection of the basic rights of citizens. Since its creation, the Observatory has carried out important work.

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

1) Investigative work concerning the monitoring of the pronouncements and resolutions issued by judges, with the aim of knowing how the laws approved by the legislative chambers are applied and for evaluating the effectiveness of legislative reforms. 2) Creation of a Central Register for the protection of the victims of domestic violence, included in Law 217/2003, of 31 July, regulator of the order of protection and approved by Royal Decree 355/2004. 3) Meetings of the Observatory with relevant groups and associations. 4) Efforts at disseminating information, especially among judges, prosecutors, lawyers, solicitors, public administrations, universities, associations, ombudsman, social services, etc. 5) Creation of the Committee for Monitoring the Order of Protection made up of representatives of the General Council of the Judiciary, the Ministry of Justice, the Ministry of Labour and Social Affairs, Public Prosecutor's Office, autonomous communities with judicial powers, representatives of professional bodies in the sphere of the law and the Local Government Association, with competency for drafting protocols of a general scope for the implementation of

the order of protection and of adequate instruments for coordination between judges and courts and public administrations. 6) Training of judges and magistrates, having celebrated in 2003 one conference and three courses and in 2004 one seminar.

The signing members consider appropriate the persistence of the already existing Observatory, given that the spheres of action do not have to overlap, for the already created one does not evaluate violence against women in the spheres of education, work, and government, limiting itself to the sphere of the Justice Administration, concerning itself with the collection of information related to judicial activity, producing statistics, and focusing on the specific training of judges and magistrates, without prejudice to the establishment of formulas of cooperation 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.

Regarding article 26, it is evident that cooperation is necessary between the distinct administrations and most especially with the various police forces, taking into account that through the Monitoring Committee for the implementation of the order of protection of victims of domestic violence, a protocol of action for the various police forces and for coordination with judicial bodies for the protection of victims of domestic and gender violence has been drawn up, a protocol which was approved by the Monitoring Committee in the session of 10 June 2004 and which will enter into effect within the period of one month of its approval.

The same can be said of article 27, for there is no room for doubt that the fight against violence against women must be integral and affect all administrations and groups, and thus will only be effective if plans of collaboration are established.

The sphere established in art. 28 (arts. 148.4, 171.4 and 172.2 in the Penal Code) is too limited and should be extended to what is established in art. 1.2

A fundamental element of this Observatory is the Public Prosecutor's Office. The omission of the Attorney General's Office by the Government produces such nonsensical situations as the signing of an agreement by the Ministers of Social Affairs and Justice and the General Council of the Judiciary for the creation of an Observatory of Domestic Violence for monitoring the pronouncements made in this area, with the Attorney General's Office participating merely as an observer, despite the fact that the institution that it directs knows, or should know, all the pronouncements made in all territories, as it is notified of all of them not so that it "observes" them but so that it has recourse to them, correcting any judicial deviation, correction that the General Council is prohibited from making in virtue of the principle of judicial independence. Furthermore, the Public Prosecutor's Office, after examining through specialized prosecutors the vast amount of material, is in optimal condition for knowing the weak points of criminal prosecution in this matter and for demanding of specialized prosecutors and others, in virtue of the principle of hierarchy and dependence, that they exercise the criminal action with force, that

they have recourse to the pronouncements where necessary, the maximum conscientiousness in the investigation and in the request for cautionary measures, and remedy incompliance with decisions that have been pronounced or half-hearted compliance with them

Once again, the lawmaker has forgotten that the Attorney General's Office is fundamental to criminal policy, attributing to it in the law we are concerned with here an insufficient procedural role and scant means.

Taking into account the political desire to overturn the law of criminal prosecution by attributing to the Attorney General's Office management of the criminal investigation, the Integral Law against Domestic Violence should use this opportunity to initiate the announced change, attributing to the Attorney General's Office investigative powers in the limited sphere of this law, as was done with the law concerning minors.

5.- Criminal Protection

On this point it would be desirable that as closure to the system of punishment of conduct against women, the special purpose sought by the perpetrator was incorporated. Let us not forget that it is the true point of inflection and what surpasses the criticism that when carried out by a man it is a crime and when carried out by a woman it is considered a misdemeanour. This is not so – the crime will be when threat and coercion are carried out with the purpose of favouring...

Possible wording

Article 29.- Protection against threats. Two paragraphs are added, numbered 4 and 5, to article 171 of the Penal Code, to be worded as follows:

4. **The individual who with the purpose of FAVOURING discrimination, inequality and power relations of men over women**, slightly threatens the person who is or has been his wife, or the woman that is or has been united to him in an analogous emotional relationship, even in the absence of cohabitation, will be punished with a prison sentence of six months to one year or with thirty-one to eighty days of community service and, in any event, the deprivation of the right to possess and carry arms for one year and one day to three years; as well as, when the judge or court deems it in the interest of minors or persons lacking legal capacity, special disqualification for exercising guardianship, custodianship, tutorship, custody or care of minors for up to five years. Despite what is envisaged in the previous paragraph, the judge or the court in deciding upon the sentence and taking into consideration the individual circumstances of the perpetrator or the attendant circumstances in the commission of the crime, can impose a lighter sentence.

5. **The individual who with the purpose of FAVOURING discrimination, inequality and power relations of men over women** slightly threatens with arms or other dangerous implements the individuals referred to in article 173.2, except those considered in the previous section of this article, will be punished with a prison sentence of three months to one year or thirty-one to eighty days of community service and, in any event, deprivation of the right to possess and carry arms for one to three years; as well as, when the judge or

court deems it in the interest of minors or persons lacking legal capacity, special disqualification for exercising guardianship, custodianship, tutorship, custody, or care of minors for a period of six months to one year. The sentences will be in imposed with the full weight of the law when the crime is perpetrated in the presence of minors or takes place in the shared home or in the home of the victim, or is committed breaking one of the sentences covered in article 48 of this Code or a preventative or security measure of the same nature.

Article 30.- Protection against coercion. The present content of article 172 of the Penal Code remains numbered as section 1, while a section 2 of said article is added with wording as follows: "2. **The individual who with the purpose of FAVOURING discrimination, inequality and power relations of men over women** slightly coerces the person who is or has been is his wife, or the woman who is or has been united to him in an analogous emotional relationship, even in the absence of cohabitation, will be punished with a prison sentence of six months to a year or thirty-one to eighty days of community service and, in any event, deprivation of the right to possess and carry arms for one year and one day to three years; as well as, when the judge or court deems it in the interest of minors or persons lacking legal capacity, special disqualification for exercising guardianship, custodianship, tutorship, custody or care of minors for up to five years. Despite what is envisaged in the previous paragraph, the judge or the court in deciding upon the sentence and taking into consideration the individual circumstances of the perpetrator or the attendant circumstances in the commission of the crime, can impose a lighter sentence."

Tenth Final Provision.- Modification of the Penal Code. One. Article 148 of the Penal Code has been modified and is now worded as follows: "The injuries envisaged in section 1 of the previous article may be punished with a prison sentence of two to five years, taking into consideration the consequences caused or risk produced: 1st: If in the attack, weapons, implements, objects, means, methods or any manner that poses a risk to the life or physical and psychic health of the injured was used in the attack. 2nd: If cruelty was involved. 3rd: If the victim was less than twelve years of age or lacking legal capacity. **4th: If the injuries were caused with the purpose of favouring discrimination, inequality, and power relations of men over women,** and the victim was or had been his wife, or was or had been united to the perpetrator by an analogous emotional relationship, even in the absence of cohabitation."

6.- Judicial protection

Respecting the severely criticized point in the report concerning the creation of Courts of Violence against Women, the alarming cause set out in folios 52 and 59 whose content is as protracted as it is misguided, the argumentation is mendacious and, naturally, has not been mentioned on other occasions, affirming that the judge of the criminal jurisdictional order only hears criminal matters and only matters of other jurisdictional orders that have a bearing on criminal proceedings as a prejudicial question, and harshly criticises the bill "because it goes further when attributing to the criminal body called the Court of Violence against Women matters belonging to the civil jurisdictional order, not prejudicially but as a matter of principal," which it describes as

melange of jurisdictions; this statement is, if possible, even more disturbing than those previously indicated. In criminal procedure there exists since the 19th century, a heterogeneous accumulation of actions - civil and criminal - as a concession to more effective protection of the victim. This heterogeneous accumulation of actions is produced *ope legis*, art. 122 of the law of criminal procedure stating that "having exercised only the penal action, the civil action will also be understood as having been utilized, as long as the injured or aggrieved party does not renounce it or reserve it expressly for exercising after the termination of the criminal trial, if in fact one takes place"; article 110 of the legal text permits "those aggrieved by a crime or misdemeanour to be a party to the trial and exercise the civil and criminal actions that proceed, if advisable." It does not appear, on the other hand, that if, as a concession to the protection of the victim, the lawmaker added to the criminal proceedings other civil actions, this would be deserving of special reproach, taking into consideration 19th century precedents which, carefully, have been hidden in the report.

Whoever drafted this does not know, on the occasion of the report of the Council, if the Insolvency Law, regarding which we will humorously use the term “melange of jurisdictions,” has been debated; or if debate has taken place, it is not reflected in the report, since the correctness of the legislative initiative is noteworthy. Organic Law 8/2003, of 9 July, modifies the Organic Law of the Judiciary and in the matter with which are concerned here in article 86 ter. It confers to mercantile courts competency for "hearing social actions that have as their object the discharge, modification or collective suspension of work contracts in which the insolvent is the employer, as well as the suspension or discharge of contracts of senior management, without prejudice to the fact that when these

measures suppose modifying the conditions established in the collective agreement applicable to these contracts, the agreement of workers' representatives will be required. In the trial of these matters, and without prejudice to the application of the specific norms of Insolvency Law, the inspiring principles of the normative statutory order and the labour process must be taken into consideration." The melange continues in art. 197.7 of the Insolvency Law of 9 July 23, which states that "against the decision that resolves incidents of insolvency related to social actions whose hearing corresponds to the insolvency judge, there will be room for recourse to supplication and other recourses envisaged in procedural labour law, without any of them having effects of suspension on the processing of the insolvency nor any of its pieces." On the other hand, continuing with the confluence of jurisdictions, the 15th Final Provision of the mentioned insolvency law reforms the rewritten text of procedural labour law, approved by legislative Royal Decree 2/95, of 7 April, in section 1 of art. 188, which is worded as follows: "the Social Courts of the higher courts of justice will be hear recourses of petition that are interposed against the resolutions pronounced by the Social Courts of their district, as well as against interlocutory judgments and judicial decisions which may be pronounced by judges of the Mercantile Court in their district and that affect labour law, adding a paragraph 5 to art. 189 with the following wording: "the interlocutory judgments and judicial decisions pronounced by Mercantile Courts in insolvency proceedings and that resolve labour related questions.

Title V of the law contains a set of statutes of limitations, the majority procedural orders, which changing the traditional criteria referring to the competency of the "natural judge" alter them with the aim of counteracting

difficulties of a social and cultural nature which, with a view to the exercise of the basic right to effective judicial protection, women that have been victims of violent conduct frequently suffer.

To this purpose, the mentioned law introduces four principle modifications:

- Creation of a special "jurisdiction" governed by its own rules of competency (art. 33).
- Alteration of the rules of objective authority conferred to this new "special jurisdiction*" a vis atractiva* for civil procedures in relation to those that are produced by a determined connection (art. 38).
- Alteration of traditional rules of territorial authority (art. 39).
- Establishment of a set of judicial measures of protection and of security of victims (art. 41/49).

Given that this set of measures represents, as stated above, an alteration of the traditional criteria regarding the exercise of a basic right, the right to effective judicial protection, it would be to wise to carry out prior analysis of the degree to which such normative precautions represent discrimination prohibited by art. 14 of the Constitution, or, on the contrary, are in perfect accordance with the Constitution. In this regard, we already have had the opportunity to mention how, being undeniable that what is intended is to combat an unequal social reality and protect more effectively the dignity of women by having recourse to mechanisms that better guarantee effective judicial protection on the basis that initial inequalities exist, the modifications we have made reference to are, in accordance with the already cited constitutional doctrine, justified.

The lawmaker proceeds from the idea of creating specialized courts for violence against women, in the same manner as there are already ones for the family, minors, or penitentiary surveillance. It does not involve the creation of a new jurisdictional order or a branch of statutory law, having opted for the inclusion within the criminal order of a specialization that obeys a special social necessity and that attracts civil powers. Independent of the name, according to what is envisaged in the cited international agreements and in the information available through judicial statistics obtained and analyzed by the Observatory on domestic and gender violence, the creation of these bodies is deemed necessary at least where the number of matters advises it, and without prejudice to reconverting any magistrates' court or the assumption of powers of the new bodies by already existing courts, harmonizing them with the same, a distribution that should be done after the fact, in accordance with the information available to them, having included already in the Economic Report that accompanies the bill the provision for 21 new courts as well as endowments for the adaptation of already existing ones in which it would be necessary to create a multidisciplinary team composed by a psychologist and social worker, the number of judicial districts in need of adaptation being 396.

If what is intended is greater specialization of the jurisdictional bodies and at the same time that experts regarding violence against women carry out a complete monitoring of the problem in which each woman finds herself immersed, and indeed the family or those that live with her, it might be advisable to consider the specialization or at least the assumption of powers in the matter by determined Criminal Courts, for all things considered a large number of matters will be judged by them.

In article 33, art. 87 ter is added to the organic law of the Judiciary in order to attribute criminal and civil competency to the courts of violence against women, and without prejudice to recalling again the observations made regarding art. 1 of the bill regarding the need to be more specific. The first of these refers to the inclusion in the sphere of competence of some crimes, such as torture, that technically do not fit very well in the list of crimes included in the precept, with the understanding that the bill wants to refer in the strict sense to crimes against moral integrity alone and not to all of those referred to by Title VII of Book II of the Penal Code. Neither do they fit all those committed with violence and intimidation, for doubt arises considering what relation crimes in which there is violence or intimidation may have with the purpose of the law, as do those of crimes against foreign citizens, arbitrary execution of the law itself, robbery with violence or intimidation, extortion, illegal detentions, crimes against freedom of conscience, religious feelings, and respect for the dead.

It may be advisable to include among the powers of the judges of violence against women, instruction of the procedures in order to demand criminal responsibility for crimes committed against children of the victim, whether directly or indirectly, and the extent to which they are connected to the situation of the mother, for there is no room for doubt that children are used with frequency as an instrument of violence against women, without prejudice to psychological abuse which, in any case, they suffer, as this form of violence will condition the subsequent development of the woman and that of her children, capable of sometimes being the cause of the perpetuation of violence within the family.

Likewise, among the powers of the judge of violence against women should also be included that of instruction in all kinds of crimes, within the sphere itself defined in article 1 of the bill, and regardless of the observation made regarding the intentional element it introduces, and in accordance with the provision set out in the Exposition of Motives, and also those produced in public life and not just private life, as could be thought in a strict interpretation of article 87 ter. 1)a Organic Law of the Judiciary which is introduced in article 33 of the bill.

Improvement should be made to the legislative technique in the 2nd section of art. 87 ter of the Organic Law of the Judiciary in which the expression "they will be able to hear in the civil order" is used, for it does not seem so but leaves to the judges and courts the decision of the real and effective knowledge of the matters enumerated below. Careful reflection should made regarding whether all the enumerated matters, of evident civil content, must always be in the jurisdiction of the courts of violence against women, for while in some it is easy to think violent conduct has special importance, as may occur in cases of separation or divorce or in disputes regarding the exercise of guardianship and custody of children, others remain very removed and have nothing to do with violence. Therefore, one may question, in general, the assumption of competency in matters of filiation, maternity and paternity, acknowledgment of the civil effectiveness of the ecclesiastical resolutions and decisions in matrimonial matters, and those that deal with the need of consent in adoption of letters b), d) and h) of article 87 ter. 2, and moreover the reference in letter f) to "measures of familial importance" is considered extremely imprecise.

In the 3rd section of art. 87, the requirements that must come together so that the judge of violence against women assumes competency in the civil order are established. The precept, however, is considered incomplete in that no precaution is established concerning what would occur if processing the report or complaint is refused, or if a decision of dismissal is pronounced, or if the proceedings are terminated in some other manner.

Finally, the 4th section anticipates that the judge will not accept the claim, remitting it to the competent judicial body when the acts "obviously" do not constitute an expression of violence against the woman, in a formula so extremely generic and ethereal that, if placed in relation to art. 1 of the bill, it becomes difficult to determine the rules of competence, for many times it will not be easy to determine up to what point violence is employed as an instrument for maintaining discrimination, inequality and power relations of men over women, or if the principal factor of risk is constituted by the fact of being a woman.

Regarding articles 34 and 35, respecting resources, it must be understood that in those provincial courts in which there exists a single mixed section, this will be competent in any case for hearing appeals.

There has already been occasion to comment on the general consideration regarding the opportunity of the organic bill, the importance of specific training in equality and non-discrimination, which undoubtedly is already being carried out for judges and magistrates through programmes of the Judicial School or those of Continuing Education, being foreseen that obligatory continuing education plans have as their object better training of judges that

specialize in this matter and the study of the new laws that are enacted, all without prejudice to the complete training judges, magistrates and members of the Attorney General's Office have always received regarding protection of human rights and basic liberties, and their having adopted the principles that inspire our Constitution and existing relevant international texts.

Article 38 of the bill introduces a new article 49-bis into the law of civil procedure for establishing the criteria for objective competence in cases of violence against women. The precept presents some deficiencies that it would be advisable to improve in the definitive text. Among other considerations we must recall that the Law of Civil Procedure has changed radically in the new Law 1/200 of Civil Procedure, being in force the principles of orality, concentration, and immediacy. This makes it difficult, independent of the concrete regulation of questions of competence, to articulate a coherent procedural system, and thus the required judge should disqualify him- or herself in favour of the judge of violence against women, "remitting the decisions in the state in which they are found," for if the oral phase of the trial has already begun, the previously cited principles impose that the same judge trying the case must also pass judgement, and therefore a temporal limit should be established for this obligation of remission of the decisions.

The second section of the same article foresees the celebration of an appearance in court before the judge or court that is hearing the civil procedure with the aim that the Ministry of Justice becomes aware of the relevant information regarding violent acts, a court appearance in which the involvement of the judge is limited to convening it and directing it, without at the end of the

appearance having to adopt any decision at all, and therefore the possibility that the appearance is celebrated directly before the Attorney General's Office may be advisable so that it can decide whether the corresponding report must be presented or not, independent of whether the decision is immediate or a period of reflection and study of 24 hours for lodging it is allowed for as the bill indicates, an appearance which would be celebrated on the basis of the testimony of the proceedings presided over by the judge that heard the civil procedure. In any event, the involvement of the Attorney General's Office should not be an obstacle preventing victims of violent conduct from a lodging the corresponding formal complaint or the assigned judge from deducing the appropriate testimony.

Regarding the third section, it is necessary to reiterate the observation made before regarding the holding of the trial.

Section four may give rise to some problems, as while it is true that from one point of view it is advisable not to delay the remission of the decisions when establishing court proceedings for the parties and the Attorney General's Office, on the other hand, logically there will always exist the right to argue objective competence when appealing the definitive decision that is passed; and for the alleged incompetence to be considered, it would be necessary to begin again the proceedings with an even greater delay in the process. Thus, the possibility should be studied of leaving in effect, also in these cases, article 48.3 of the law of civil procedure, or simply reducing the common time of ten days for allegations or hear the parties in a court appearance to be celebrated immediately.

It may also be advisable that in cases, otherwise frequent, in which there are crossed formal complaints, that is, the spouse or he who is united to the woman by an analogous emotional relationship, with cohabitation or without it, lodges a formal complaint against the woman and subsequently the woman lodges a formal complaint against the man, the judge of violence against women always assumes competence, any other judge that was hearing the matter recusing him- or herself, where appropriate.

In any event, the advisability of proceeding to a study and, where appropriate, modification of the drafting of articles 5 of the Penal Code and 40 of the law of civil procedure concerning prejudiciality should be analyzed with the aim of adapting them to the new regulations and avoiding dysfunctions.

Added to article 39 is a new article 15-bis in the law of criminal procedure, attributing territorial competency for these special crimes and misdemeanours to the judge of the place of domicile of the victim, without prejudice to the adoption of the order of protection and urgent measures of article 13 of the same law, which may be adopted by the judge of the place of the commission of the act. This last part of the precept could be completed by *adding "acting for reasons of protection and without prejudice to the remission of the proceedings of the judge of violence against women."* But the principal observation of the *forum delicti comisii* in favour of the jurisdiction of the place of domicile of the victim, what in theory benefits notably the victim and permits the monitoring of all the problems of violence by a close judge. However, problems may arise when relating this precept to the new article 17-bis of the Law of Criminal Procedures introduced by article 40 of the bill and that makes reference to competence by connection.

Consider the commission of a crime of violence against a woman who has changed domicile as a consequence of the execution of a judgment passed by the judge of violence against women in prior criminal or civil proceedings. In these cases, and attending to the spirit and intent of the law, it seems reasonable that the same judge who is familiar with the overall problem will be the one that conducts the proceedings for the new crime, and nevertheless we are not in the presence of any of the suppositions envisaged in numbers 3 and 4 of the current article 17 of the Law of Criminal Procedure, and the only possibility of resorting to the connection is understanding as applicable the fifth point of the same article 17, although always in a somewhat forced manner.

As for judicial measures of protection and the security of victims, it may be advisable for the unity and integrity of the legislation to proceed to the modification of the procedural laws in which should be included all the new measures envisaged in articles 13 and 544-bis of the Law of Criminal Procedure of the Penal Code. Article 42 would need to be better developed and must always be understood in accordance with what is stated in article 1 of the bill.

Larger problems are presented by article 43. Assuming that as much as possible the privacy of victims must be protected, especially their personal information, their issue, and any other person that is under their guardianship or custody, the general rule must be that hearings are carried out with publicity, unless the assigned judge or court of first instance decides beforehand to hold them behind closed doors, and this independent of the fact that the same are civil or criminal, and without prejudice to the victim-witness's being able to seek

protection in law 19-1994 of witness protection, and this in order to be in full compliance with what is established in article 120 of the Constitution.

The measures envisaged in the following articles are considered positive. The necessity that they always be adopted through a decision respecting their proportion and need but also specifically in those envisaged in articles 45 and 46 must insist that attention be paid to the interest of minors. Indeed, these precepts refer, succinctly, to measures of suspension of guardianship and custody of minors and suspension of visitation rights. And this following measures of leaving the domicile, separation or suspension of communication (art.44) and before the measure of suspension of the right to posses, carry, and use a firearm, and this is deserving of review because the protection of victims in and of itself never can be the determining factor in the suspension or deprivation of guardianship of children, and this even if the conflicts in this regard are conducive to crime and present a risk for the woman, indeed, even if children are used as a throwing weapon. All of this without prejudice to the adoption of all the measures necessary so that the parents can exercise their rights without the existence of risk for the victimized woman. Competing here are the rights of the parent, the child, and the woman who is the victim of violence without those of the woman prevailing. The United Nations Convention on the Rights of the Child requires States Parties, of which Spain is one, “to ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.” Such determination made be necessary in particular cases, for example, in cases in which the child is the object of abuse or neglect by the parents or when

the parents live separately and a decision must be made regarding the place of residence of the child" (art. 9.1). Art. 3 section 2 states that "States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures." The same precept states that "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." "States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests."

It is important not to forget the case law of the European Court of Human Rights and its interpretation of art. 8 of the European Pact concerning the protection of human rights and basic freedoms, the rulings of 23-9-94, 11-7-2000, 17-12-2002, 14-1-2003 being of particular importance, along with many others decisive for the protection of the right to visitation of parents.

Regarding art. 45 it may be advisable to allow, exceptionally and for reasons of urgency, the judge to adopt some of the unprecedented envisaged measures when reasons of urgency recommend it, without prejudice to their being subsequently ratified, guaranteeing the principles of contradiction, hearing and defence, or that they may be appealed.

In general, the introduction of article 18c in the Organic Statute of the Attorney General's Office which aims at equipping this body with more effective means of combating this form of violence is considered positive.

7.- Mutilation of female genitalia

Mutilation of female genitalia is yet another manifestation of violence of superiority, of disrespect for the human being, which reduces a person the condition of an object, a bundle, a mere thing, her cancelation as a free individual, the negation, indeed, of her personal dignity.

This execrable practice, once carried out (and which continues to be carried out) in other countries, has penetrated our borders as a consequence of migratory flows, and it is imperative to combat it with measures of prevention, assistance and social intervention in favour of the victims, with effective regulations concerning investigation, with new and precise legislation, with education and information programmes that present to the affected communities the consequences that these actions have on the physical and psychic health of the victims and the afflictive effect they can have on the perpetrators of these atrocious acts.

Criminal prosecution is an ideal instrument but has had little effect in our country; no criminal condemnatory sentence is known of despite the existence of a criminal classification (art. 149 PC) which since the 19th century has covered such behaviour, making the new paragraph introduced by Law 11/2003 of the

reform of the Penal Code creating a specific classification therefore unessential. Nonetheless, the reform is welcome.

Certainly there are difficulties regarding investigation and proof, given that the mutilations are performed by practitioners of folk medicine of the same community or who come from abroad, and are governed by the terrible law of silence. Still, it should never be forgotten that one only finds out what he or she investigates, and the success of the investigations is thus proportional to the zeal with which they are carried out.

On the other hand, prosecution in Spain of mutilations perpetrated abroad on “travel vacations” present technical difficulties in virtue of the principle of territoriality of criminal law, though Spanish courts are considered competent when it is demonstrated that determined acts of gestation, promotion or favouring of a crime have taken place in Spain. Contradictory opinions generate impunity, and it is necessary to fill lagoons and consolidate the principle of legal security, and towards this end it is necessary to make up for the neglect of the lawmaker with a reform to article 23 of the organic law of the Judiciary by including genital mutilation in the list of crimes that, according to the principle of universality, can be prosecuted by Spanish courts independent of the nationality of the perpetrators or the country in which the crime was committed.

8.- Additional provisions

The first of the additional provisions is entitled “widow´s/widower´s pension,” when in fact the second section does not refer to widow´s/widower´s pension in the strict sense but rather to the assistance envisaged in Law 35/1995, of 11 December, concerning aid and assistance to victims of violent crimes and crimes against sexual freedom. As the precept alludes to the convicted person, it is does not specify whether the sentence must be firm, necessarily taking into account the principle of the presumption of innocence. At the same time, it is advisable to evaluate to what degree the person convicted of an injurious crime should be deprived of the widow´s/widower´s pension, for the loss of the pension is a sanction and may break the principle of proportion if we take into account that currently any injury regardless of how slight is in the sphere of this law a crime. Furthermore, mechanisms should be articulated so that the right of the imputed or accused to obtain the widow´s/widower´s pension be suspended during trial proceedings and until judgment is passed. If this is a verdict of not guilty, the pension should be paid out with the corresponding delays to the party that has not received it. Otherwise, it might be the case that the widow´s/widower´s pension is requested and obtained, being received monthly until condemnatory judgment is passed, giving rise then to the difficult problem of whether the pension obtained has already been consolidated, since it is understood as being received from the moment of the action, or if, to the contrary, the effectiveness of the firm sentence as the cause of the loss of the pension retroacts its effects to the moment of the actions, and in this case Social Security would have the right to urge a process of withdrawal of the improper assistance. The possible repercussions that, where appropriate, not paying the pension may have on the children of the beneficiary must be taken into account. In this regard, resolution 2, adopted in December of 1998, of the Directorate-

General for the Regulation of Social Security must be kept in mind concerning the possibility of recognizing in minors the condition of full orphans when the surviving parent has been declared guilty of the death of the deceased and has lost the right to a widow´s/widower´s pension.

Regarding the second additional provision, it would be advisable to make plans for the organization of psychological-social and multidisciplinary services; and regarding the third, we remit to the observation made regarding article 31.

To maintain the internal coherence of the procedural laws, proceeding to the reform of the same in all those precepts in which it is necessary to refer to the judges of violence against women is necessary, instead of the precaution contained in the fifth additional provision. Finally, it should be understood that the remission that the seventh additional provision makes to article 13 of the bill should be made to article 14.

9.- Temporary provisions

Sharing the criteria established in the first and second temporary provisions, noted is the lack of precautionary planning in that which concerns the civil and criminal proceedings being carried out.

10.- Final provisions

In the eighth final provision and in view of what was stated regarding article 32, the possibility should be considered of including in the organic law of

the Judiciary reference to Criminal Courts specializing in violence against women, if the creation of these with exclusive competence is deemed necessary or, where appropriate, attributing to one of the already existing courts of this nature competence regarding violence against women.

In the modification to art. 14 of the law of criminal procedure, according to what is envisaged in the eleventh final provision, it does not seem appropriate to attribute to justices of the peace competence for hearing misdemeanour trials for the conduct classified in article 620.1 and 2 of the Penal Code, given that we find ourselves, in any event, in the presence of misdemeanours perpetrated against individuals and particularly regarding those misdemeanours that refer to section one that have special importance in that they affect the right to integrity and freedom. Regarding section two of the same tenth final provision, it would be preferable to proceed to the reform of the first and third sections of article 544 ter of the law of criminal procedure in order to avoid confusion and unify the legal system.

Madrid, 24 June 2004

Signed – **Fernando Salinas Molina**

Signed – **Fco. Javier Martinez Lázaro**

Signed – **Félix Pantoja García**

Signed – **M. Angeles García García**

Signed – **Luis Aguiar de Luque**

Signed – **Monserrat Comas D'Argemir i Cendra**

Signed – **Juan Carlos Campo Moreno**