I, CELSO RODRÍGUEZ PADRÓN, GENERAL SECRETARY OF THE GENERAL COUNCIL OF THE JUDICIARY, AT TODAY'S MEETING 0F THE GENERAL COUNCIL OF THE JUDICIARY, APPROVED THE REPORT ON THE DRAFT LAW AMENDING ORGANIC LAW 10/1995, OF THE 23RD OF NOVEMBER, OF THE PENAL CODE.

I

BACKGROUND

On the 20th of November, 2008, the Draft Law amending Organic Law 10/1995, of the 23rd of November, of the Penal Code, together with a Statement of Reasons, was entered in the Registry of this Council, submitted by the Ministry of Justice, for the purpose of issuing the mandatory report in accordance with the provisions of article 108 of the Organic Law 6/1985, of the 1st of July, of the Judiciary.

After appointing the Right Honourable Ms. Margarita Uría Etxebarría as deponent on the 20th of November, 2008, the Surveys and Reports Commission approved the present report during their meeting on the 18th of February, 2009, and ordered it to be forwarded to the Plenary Session of the General Council of the Judiciary.

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II

GENERAL CONSIDERATIONS REGARDING THE CONSULTATIVE FUNCTION OF THE GENERAL COUNCIL OF THE JUDICIARY

The consultative function of the General Council of the Judiciary is referred to in article 108.1 of Organic Law 6/1985, of the 1st of July, of the Judiciary (LOPJ); specifically, section f) determines that said function is concerned with the draft laws and general regulations of the State which affect wholly or in part – among other matters expressed in the mentioned legal precept – "the Penal laws and regulations of penitentiary regimes."

In the light of this legal provision, in interpretation of the scope and sense of the legal authority to report in which the General Council of the Judiciary is acknowledged, the opinion that this constitutional organ must issue about the submitted Draft Law should be limited to the substantive and procedural rules specifically indicated therein, avoiding any consideration of matters outside the judiciary or the exercise of the jurisdictional function with which it is entrusted.

III

STRUCTURE AND CONTENT

The Draft Bill consists of an Explanation of Reasons and an articulated section containing one single article, subdivided into ninety-one sections, three transitory provisions and one final provision.

Each one of the sections in which the single article is unfolded is dedicated to a specific article of the current Penal Code, both of the general part and of the special part, following the systematic exposition of the actual Code, with the object of introducing modifications, additions or suppressions, according to each case.

The three transitory provisions are dedicated, respectively, to the *legislation applicable* to crimes and offences committed until the reform enters into force; to the *review of unappealable judgements* of sentences, which are being executed or pending execution; and, thirdly, to the *rules of citing the applicable regulations in the matter of appeals* lodged against definitive sentences.

The object of the final provision is the entrance into force of the Organic Law, for which a *vacatio legis* period of six months is foreseen, as from its publication in the "Official State Gazette" [B.O.E.]

The Draft Law is not accompanied by the report on the gender impact of the measures which it establishes, nor by the economic report which contains the estimation of the cost to which it will give rise – requirements envisaged in article 22.2 of Law 50/1997, of the 27th of November, of the Government.

IV

LEGAL CONSIDERATIONS

1) PENAL LIABILITY OF LEGAL PERSONS AND MEASURES OF ARTICLE 129

1.1. Article 31-A 1, 2, and 5

Article 31-A is added, with the following wording:

«1. In the cases envisaged in this Code, legal persons will be criminally liable for the crimes committed, on account or in benefit of the same, by the individuals who hold directing powers in them, based on the conferring of these powers on their representation or on their authority, whether it be to make decisions in their name, or to control the running of the company.

In the same cases, the legal persons will also be criminally liable for the crimes committed, in the exercise of the social activities and on account and in benefit of the same, by those who, being submitted to the authority of the individuals mentioned in the previous paragraph, have been able to carry out the facts because due control was not exercised over them.

2. The criminal liability of legal persons will not exclude that of the individuals referred to in the previous section, nor will the criminal liability of those individuals exclude that of the mentioned entities. When, as a consequence of the same facts, the sentence of a fine is imposed on both, the Judges and Courts will adjust the respective amounts in such a way that the resulting sum is not out of proportion in relation to the seriousness of the facts.

3. The concurrence, in individuals who have actually carried out the acts, of circumstances of grounds for acquittal of criminal liability or of circumstances which reduce or worsen such liability will not exclude or modify the criminal liability of the legal persons, without affecting the provisions of the following section.

4. The following activities will be circumstances which reduce the criminal liability of legal persons, when they are carried out after the commission of the crime and through their legal representatives:

a) Having proceeded, before knowing that legal action would be taken against it, to confess the offence to the authorities.

b) Having collaborated in the investigation of the fact, providing evidence, at any time during the process, which may be new and decisive in declaring its responsibility.

c) Having repaired or diminished the effects of the damage caused by the offence, at any time during the process and before the holding of the trial

d) Having established, before the beginning of the trial, effective measures for preventing and uncovering those crimes which could be committed in the future by means of or under the cover of the legal person.

5. The provisions relating to the criminal liability of legal persons will be applied to associations, foundations and societies.»

The Draft Law proposes the regulation of the penal liability of legal persons in the actual Penal Code. One of the foundations of this inclusion is situated in the numerous international legal instruments (Agreements, Framework Decisions, etc.) which were analysed in detail in the previous GCJ report on the Draft Law of 2006. Even though these community instruments do not require a specifically penal response to the involvement of legal persons in the most worrying criminal spheres, such as those of corruption in the private sector and in international business transactions, child pornography and prostitution, human trafficking, money laundering, illegal immigration, etc., the truth is that not only have they been toughening the sanctioning recommendations, but also, just as the mentioned GCJ's report analysed, many European countries have provided themselves with penalizing effects which, until recently, were alien to the traditional penal liability of legal persons in the law of Anglo-Saxon courts.

In this context, article 31-A is set up in the central precept of the new regulation of penal liability of legal persons.

Even though in the Explanation of Reasons it is stated that *"it is clear that the penal liability of the legal person is independent of whether there exists, or not, penal liability of the individual",* the proposed regulation – over and above the non-transferral of the grounds for acquittal from individuals to legal persons – is based on the offences being committed by certain individuals.

Taking as the starting point, then, that the offence referred to must have been committed by an individual – i.e. that suppositions of direct penal liability of legal persons do not exist – the Draft Law does not establish, however, any specific criteria for imputation of the fact to the legal person. In short, then, the Draft Law follows a (peculiar) system of

penal liability of legal persons for the facts of another, that is, of vicarious liability.

Indeed, according to article 31-A, the criminal liability of legal persons is cumulative, that is, it does not exclude the individual criminal liability of the individuals who may have committed an offence from within the entity. This coincides with the provisions of community law which views the liability of legal persons as not affecting any legal action being taken against the individuals involved in the facts. In this sense, the criminal liability of legal persons is not designed to avoid the allocation of individual liabilities in hierarchically organised and complex structures such as companies.

The Draft Law of 2008 opts, then, for the model of double incrimination, but also for the inevitable committing of the crime of reference by certain individuals, as shown by numbers 1 and 2 of article 31-A, which does not dispense with the authorship of the corresponding individuals at any time.

However, for the allocation of liability, or, if preferred, the imputation of the fact committed by certain individuals, to the actual legal person, to not imply an objective liability for the fact of another, which is incompatible with the legal penal principle of imputation for one's own acts, it is essential to identify the concrete criteria which allow for objective and subjective imputation of the fact to the legal person.

This is so, first of all, due to the actual theory of imputation, which, in the case of individuals, demands that the fact be penally illicit (imputation of the fact as a classified and unlawful fact) and carried out by a culpable author (imputation for guilt). The general theory of the imputation of facts is equally valid in the case of legal persons. Consequently, a legal person commits a crime when a penally classified and unjustified act can be imputed to the entity as its own, and also, it can be affirmed that the culpability of the legal person entered into its realization. That means that, in the same way as happens with individuals, the problem of penal liability of legal persons constitutes a normative problem of imputation, as much at the level of unjust as culpability, and, consequently, cannot be resolved by means of the unconstitutional principle of objective penal liability.

As far as imputation for guilt is concerned – which has merited the most jurisprudential and doctrinal attention, even though it is not possible without a prior imputation of the fact – this is how the STC [Constitutional Court Sentence] 246/1991, of the 19th of December, viewed it, which understood that the principle of culpability also governs in the matter of administrative sanctioning law for legal persons, for being thus placed in article 25.1 of the Constitution, although *"that principle must necessarily be applied differently to how it is applied in the case of individuals."*

It is precisely that distinct way of imputing the culpable fact – that the Constitutional Court bases on the *"capacity [of legal persons] to infringe the regulations to which they are submitted*", and on the *"need for effective protection [of lawfulness]"*, like the modern regulatory theories of culpability, which link culpability to the preventive necessity of penalty – wherein lies the need and, at the same time, the difficulty, of defining specific criteria of imputation for legal persons, which is found to be lacking in the Draft Law.

Effectively, imputation of the fact committed by individuals in the 2008 Draft Law is based on two different suppositions: that the criminal fact had been committed by a – to simplify – director or administrator, or, on the other hand, by an employee.

This system, which we could call dualist, originates in the EU Framework Decisions, and two different sanctioning regimes can be found in it: when the fact of reference is carried out by directors of the legal person, then more serious consequences are proposed; on the other hand, when the fact is committed by employees, then only the imposition of "effective, proportionate and dissuasive measures" are proposed.

The Draft Law lays down, then, a dualist system as far as the authors of the criminal facts of reference are concerned, but, however, it does not establish consequences of varying seriousness for the legal person. This allows for a broad imputation of the facts to legal persons, as they not only answer for the crimes committed by their directors and administrators, but also by their employees, but, at the same time, imposes a uniformity of consequences not envisaged in community legal instruments. The faithful transposition of the Framework Decisions, the technique and criminal policy basis of the dualist system

advises differentiating the seriousness of the penalties for legal persons in each one of these cases.

The most relevant, however, in this dualist context, is that only in the second case – responsibility for facts of employees – does the Draft Law provide for what could be understood as a specific criterion of imputation of the fact to the legal person, which is that the employees were *"able to carry out the facts because due control was not exercised over them."*

For this requirement to be understood as a criterion for imputation to the legal person for its own acts and for its own culpability, it is essential to provide it with a structural content, that is, understand it as a reference to a social conduct of defective control or organization, and not to the individual omission of duty to control on the part of the individuals involved. However, the reduction of defective control to a simple individual responsibility is pointed out in article 31-A 3, when referring to the people who might have facilitated the crimes *"for not having exercised due control."*

Even though, as can be shown, the absence of due control can be understood as simple fraudulent or culpable omission of the duty to control which falls upon certain individuals, because it is their correlative duty to exercise such control, the fact is that this is not the consolidated interpretation in the sphere of liability of legal persons that allows for them being imputed for the fact as their own. If the defective control is understood as a simple individual omission of a duty to control, the subjective imputation does not fall, in effect, on the legal person, but rather on the individual who is in control of the activity wherein the unlawful act was committed, in the way shown by the GCJ report on the 2006 Draft Law.

Consequently, article 31-A 2 should be improved to avoid interpretations which are incompatible with the attribution of the fact as that of the legal person. For that, it is essential to include a specific reference to the effect that the imputation of the fact to the legal person in these cases is due to the absence of adequate mechanisms of control, or – even better – to an organisational defect relevant to the committing of the unlawful act.

This criterion would identify a conduct of the actual legal person, in the way in which in penal law in societies of Anglo-Saxon law is considered to be *"Unlawful Organizational Behaviour".* The imputation of the fact to the legal person is based, then, on a defective structure of operation, built, for example, on statutory rules or internal regulations which give support to illicit conduct or practices, or on accounting mechanisms, or of another nature, that allow for covering up the illicit facts, or, in short, on internal organizational processes which allow for minimizing the risk of detection of the offences or of them being penalized.

According to this, the conduct of legal persons is subject to *Standardized Operating Procedures*, that is, standard procedures of working and decision-making, and the culpability of the legal person is based precisely on the existence of practices and procedures which are inadequate because they are alien to the standard action for preventing the committing of crimes.

Of course, imputation for defective organization admits the fraudulent and culpable or imprudent forms, and is therefore compatible with article 5 of the Penal Code ("*There is no punishment without fraud or imprudence").* To these effects, it should be remembered that the idea is consolidated that the fraudulent conduct of the company refers to the fact that it has the capacity – potential knowledge, as demanded by our Constitutional Court in the area of administrative sanctioning – to know the rules, that is, the illicitness of its organizational processes and of the consequent conduct of its administrators, directors and employees, enough so that the society may not ignore that the organizational conduct imputed to it allows for illicit action. In consequence, it is a matter of fraudulent or imprudent culpability with reference to the defective organization and the bearing that such defect has on the commission of the offensive facts in question.

As can be shown, the criteria for imputation of the fact to the legal person are somewhat more complex than the simple reference to the defective control relevant for the commission of the fact to which article 31-A 2 refers according to the Draft Law. For that, as has been shown previously, it would be advisable that this – more than to the defective control and to the imputation of this defect to the conduct of certain individuals – should refer expressly to the defect of organization, which is the criterion for imputing the fact to legal persons

that is technically more equivalent to comparative law, doctrine and jurisprudence.

Despite the important corrections recently proposed, the most striking is that this criterion – defective control – is only demanded in the cases of liability of legal persons for facts committed by their employees (article 31-A 2), but not when the facts had been committed by the directors and administrators (article 31-A 1), as if in respect to these there did not exist legal and standard mechanisms of control and, therefore, possible defects of organization.

Therefore, regarding directors and administrators, the 2008 Draft Law clearly follows a model of pure *vicarious liability*[1], which is liability of the legal person for the facts of its directors or administrators. This kind of liability by transfer is based on the fact that only individuals commit the offence. Legal persons are liable because the *actus reus* and the *mens rea* are attributed to them through their agent, that is, through the superior who has the capacity to act in their name in a binding way. Therefore, the criteria for imputing the legal person with the alien fact consist, according to this system, in that the representative had acted within the framework and nature of his/her job and had acted for the benefit of the company.

As can be shown, article 31-A 1 not only regulates a vicarious liability for legal persons that may give rise to problems of constitutionality for making them responsible for the facts of others, but also, it regulates it in an incomplete way, as it does not even require – as is compulsory in this system – that the representative had acted within the scope or exercise of his/her functions.

These absences – not requiring a social defect of organization and not delimiting the conduct of individuals to the framework and exercise of their functions – cause an attribution of liability to the legal person even if it does not suffer any defect of organization, relevant to the commission of the fact, as might occur, for example, when there exists a serious and express prohibition of acting in a certain way. That is, the proposed regulation envisages criminal liability of the legal person for the mere fact that the crime had been committed by a

[1] Vicarious liability which also occurs in the case of criminal action of employees if the absence of due control refers to the superiors, and not to the social defect of organization in which context such superiors and their employees specifically act.

director or administrator in benefit of the legal person. Objective liability, then, of the legal person.

To give coherence to the two cases of liability of legal persons, it is necessary that the first – commission of the fact by directors or administrators – also includes a criterion of specific imputation to the legal person for faulty organization or control with respect to its own directors and administrators, and also, that in both cases, it is demanded that the individuals who committed the criminal facts did it within the scope or by reason of exercise of their functions.

The added requirement of them acting for the benefit of the legal person is not essential in a system of penal liability of legal persons for their own acts, so that, in the case of following the recommendations of this report, such requirement should be removed from the two first numbers of article 31-A. Leaving out this requirement would mean gaining in criminal policy coherence, since what is decisive in a system of non-vicarious liability is that the defect of organization is relevant for committing the crime, that is, the point of view of the victims and not of whoever benefits from the crime.

If, however, it is decided to maintain this original dualist system of vicarious liability, then, at least, the requirement that the author acted on account and in benefit of the legal person should be unified in both numbers, instead of establishing it as alternative in number 1 and cumulative in number 2.

1.1. Crimes that can be imputed to legal persons

Although the first subsection of article 31-A 1 lays down that penal liability can only be demanded of legal persons *"in the cases envisaged in this code*", the fact is that the corresponding rules of Book II of the Penal Code are not limited to establishing for each offence the penalties which are applicable to legal entities from among the contents in the catalogue of article 33.7, but rather, they contain extensive clauses about their criminal liability.

Effectively, the text most frequently used in Book II (articles 177-A 7, 189.8, 197.3, 264.4, 288, 310-A, 318-A, 319.4, 327, 430 and 445.2) is the following:

> *"when the crimes included in the previous chapters had been committed within the framework or on occasion of the activities of a legal person and its criminal liability is declared in accordance with what is established in article 31-A of this code, the penalty will be imposed of […]."*

However, article 31-A does not allow for the attribution of criminal liability to legal persons when certain individuals commit the crimes *"within the framework or on occasion of the activities"* of the legal person, but rather, only when they fulfil the requirements demanded in the actual article 31-A. Consequently, it would be technically correct that the penalty envisaged in Book II be exclusively in line with the procedure of declaration of criminal liability of the legal person established in article 31-A.

This technical correction is not only of a formal nature, since, as has already been pointed out above, the requirement that the individual acted within the scope of his/her competence and functions – which is not the same, incidentally, as committing the crime *"within the framework or on occasion of the activities*" – should be one of the requirements demanded in article 31-A in order to impute the fact to the legal person, and not a part of the regulations on the provision of the penalty corresponding to each crime which allow for establishing new typical suppositions of the same.

1.2. Legal persons with liability

Article 31-A 5 delimits the legal persons to which it is applicable: "*associations, foundations and companies".*

Consequently, the penal regulations are addressed to private law legal persons (associations, foundations) and of commercial law (group companies, limited partnerships, public limited companies, limited companies by shares, private limited companies), as well as public law legal persons if they are not acting in exercise of their public activities, that is, the public business entities referred to in articles 53 and

following of the Law for Organization and Running of the General Administration of the State (LOFAGE, in it's Spanish acronym.)

When the 1995 Penal Code introduced company crimes into our legal code for the first time, the legislator considered it necessary to include in article 296 a specific penal concept of company, which, although of an extensive nature, has avoided interpretive problems of corresponding typification.

The regulation, for the first time in our penal code, of the criminal liability of legal persons, would make it advisable, likewise, to include a similar clause to these effects.

As an example of the usefulness of this clause, observe that, even though the Statement of Reasons declared that *"the State, the territorial and institutional public administrations, the political parties and the trade unions"* have been excluded from this system of criminal liability, number 5 of article 31-A does not allow excluding, for example, public law public entities which have the form of foundation or association, even though community regulations exclude, without exception, from the regulation on criminal liability of legal persons of the State or other public entities which act in the exercise of state authority, in their public authority or their state prerogative, or as public authorities, as well as international public organizations (cfr. articles 1 FD [Framework Decision] 2000/383/JHA; 4.4 FD 2002/629/JHA; 1 FD 2003/568/JHA; 1.d) FD 2004/68/JHA; 1.3 FD 2004/757/JHA; 1.c) FD 2005/222/JHA).

1.3. The penalty of legal intervention

Number 7 of article 33 is introduced, with the following wording:

«7. The penalties applicable to legal persons, which are all considered to be serious, are the following:

a) Fine for quotas or proportion
b) Dissolution of the legal person. The dissolution will entail the definitive loss of its legal nature, as well as of its

capacity to act in any way in legal traffic, or carry out any kind of activity, even if it may be legal.

c) Suspension of its activities for a period which may not exceed five years.

d) Closure of its premises and establishments for a period not exceeding five years.

e) Ban on carrying out in the future the activities in which exercise the crime was committed, aided, or covered up. This ban may be temporary or permanent. If temporary, the period may not exceed fifteen years.

f) Barring from obtaining subsidies and public aid, from entering into contracts with public administrations, and from benefitting from tax incentives or from Social Security, for a period not exceeding fifteen years.

g) Legal intervention to safeguard the rights of the employees or of the creditors for the time considered necessary and not exceeding five years.

The temporary closure of premises or establishments, the suspension of social activities and legal intervention may also be ordered by the Instructing Judge as precautionary measures during the investigation of the case. »

Before commenting on article 129, we should reflect upon the penalty or measure of legal intervention of the letter g) of article 33.7. In the words of the Report on the 2006 Draft Law it was said that regarding *«its dynamic nature, sensitive to the mutations that the legal person may go through with the passing of time, it seems incompatible with the predetermination of the specific scope of the penalty at the moment of sentencing, when only its duration is determined, which may not exceed five years. On the other hand, the legal nature of the judicial intervention, rather than being that of a penalty, is a precautionary measure or an instrumental executive measure to guarantee the continuity of an operation. Being incorporated in the catalogue of penalties, it carries out a preventive purpose of averting future risks for the rights of the employees or the creditors of the legal person; moreover; […] it means that this penalty is understood as a complement to the penalty of a fine, for the hypothetical case where the execution of the fine in the specific case may place the sentenced legal person in a critical economic situation. But to meet this kind of contingency, in civil and labour trials, preventive measures may be applied (intervention or legal administration of production assets, article 727.2nd LEC), or executive measures (legal administration, articles 630 and following, LEC), which can be better adapted to the economic situation of each moment.»*

The regulation of this penalty may be significant insofar as protecting the rights of employees and creditors of the affected entity, inasmuch as the latter should not cause damage to the protected subjects as consequence of its inopportuneness due to exhaustion or inactivity of the company; however, its configuration as penalty or measure of determined duration does not allow for the flexibility that its nature as a security measure requires. As well as acting as a precautionary measure during the process of declaration, it would be technically more appropriate to regulate this legal intervention as a revisable security measure at the moment of its execution, in accordance with the proposal, explained later on, of introducing specific security measures applicable to legal persons.

Also, the expression *"as far as possible"* in article 66.3, should be eliminated, owing to lack of legal content, at the time of determining the criteria of application of the penalties to be imposed on legal persons.

1.5. Article 129

Article 129 is modified, and is now worded as follows:

> *"1. The Judge or Tribunal, prior to hearing the Public Prosecutor and the respective owners or representatives, if applicable, may impose, stating grounds, measures aimed at preventing the continuity of the criminal activity and the effects of the same, on associations, societies, organizations, and companies, being the privations and restriction of rights enumerated in article 33.7.*
>
> *2. For the imposition of the measures, it shall be an essential requirement that the object crime of the sentence was committed by the individual or individuals who control the activity of the association, society, or organization, or by members of the same when their criminal acts had been ordered, instigated or permitted by the afore-mentioned.*
>
> *3. The temporary closure of premises or establishments, the suspension of social activities and the legal intervention may also be ordered by the Instructing Judge as a precautionary*

measure during the investigation of the case, to the effects established in this article and with the limits laid down in article 33.7."

The Explanation of Reasons explains the co-existence of the same measures and penalties applicable to legal persons in the following terms:

"That advocated liability [of article 31-A] of associations, foundations and societies – with the state, the public territorial and institutional administrations, the political parties and trade unions remaining excluded from it – may only be declared in those cases where it is specifically envisaged. For the rest of the cases, the new article 192 – which used to regulate the incidental consequences – opens out the possibility that the measures of article 33.7 may be agreed upon in a preventive way for any organization, with or without legal nature, if, and only if the object crime of the sentence had been committed by those who direct or control the activity of the organization, or by members of the same when their criminal acts had been ordered, instigated, or permitted by the afore-mentioned individuals."

1.5.1. Penalties and measures for associations and societies

Once again, the content of article 129 does not correspond to what is advocated about it in the Explanation of Reasons. In fact, the reference in this to *"the rest of the cases"* clearly indicates that article 129 intends being applicable to all the other offences – a system of *numerus apertus* [open list] --, but is also applicable to other legal persons not included in article 31-A, which aspect is confirmed by the actual text of article 129 when referring to *"organizations and companies".*

However, it is possible that article 129 responds to the criminal policy plan of regulating a specific penal regime for the legal persons not included in article 31-A, but the proposed text does not allow only that interpretation.

Quite the contrary, article 129 provides that the measures laid down in it are also applicable to associations and societies, and, moreover, it is not excluded that they may be penalized through article 31-A. The conditions for the application of the penalties and measures are different and there is no rule to make them mutually exclusive. Consequently, associations and societies may be penalized when they fulfil the requirements of article 31-A and also submitted to the same consequences, but calling them measures, when they fulfil those of article 129.

It would seem logical that this dual system of penalties and measures also applied to foundations, which are specifically referred to in article 31-A, but, however, not in article 129. The systematic consequence should be, therefore, that these may only be penalized, but not submitted to the measures of article 129, even though they fulfil the other requirements demanded in it. Of course, it is always possible to conclude that, in spite of not being expressly referred to in article 129, they may, however, be submitted to its measures as organizations, which term is found in article 129 and which is so general that, naturally, foundations can be included in it. This spurious manner of avoiding systematic interpretation could (and should) be easily corrected: if the plan of the Draft Law is to include foundations in the scope of application of article 129, then the technically legitimate thing is not to forget to mention them in it, in the same way as it is done in article 31-A.

The alternative, that is, leaving them out of article 129, even though all the other possible organizational forms are maintained in it, is arbitrary.

Independently of the above, the 2008 Draft Law establishes a dual system of legal consequences for societies and associations, in such a way that some of them – the penalties – are derived from the criminal acts of their directors, administrators and employees in the conditions described in article 31-A, and others, however, -- the measures – are derived from the crimes committed by those who *“direct, or control the activity of the association, society [organization] or by members of the same when their criminal acts had been ordered, instigated, or permitted by the afore-mentioned.”*

This dual system for associations and societies is unknown in the doctrine and lacks criminal policy sense and point of comparison in comparative law. If the Draft Law takes the step of including the criminal liability of legal persons in the Penal Code, it should include there all the cases that make associations and societies liable of penal consequences, especially if – as is the case – the penalties and measures are identical. The contrary implies an arbitrary broadening of the source of their liability by means of a simple fraud of labelling: penalties in some cases and the same penalties, but calling them measures, in others.

Also, since article 129 does not have any reference whatsoever to a *numerus clausus* [closed number] of crimes, the conclusion should be that societies and associations are penally liable for the specific crimes committed by their directors, administrators and employees that are expressly envisaged in the law – article 31-A – and, also, they can be subjected to measures for all the other crimes committed by those who direct or control the society or association, or order, instigate or permit the commission of the crimes.

The critical conclusion is, then in short, that the provision of a *numerus clausus* of crimes in article 31-A is artificial and symbolic, and lacks content, since article 129 permits the application of the same penalties, but called measures, in all the other crimes and with more lax requirements than those of article 31-A as far as the acts of the individuals are concerned, which are the basis of the imposition of measures on legal persons.

It should be noted that, as has already been pointed out, article 129 does not provide any restriction for the kind of crime that can give rise to the imposition of a measure on a legal person. However, a basic restriction must be deduced from the aim of the measures, which, according to article 129.1, is the prevention of the "continuation of the criminal activity and the effects of the same". It seems clear, therefore, that the crimes committed by individuals that can give rise to the imposition of measures on associations and societies must, at least, bear relation to their activities or the effects of such activities.

From all the above-mentioned it can be deduced that – as has been previously concluded – associations and societies should disappear from article 129, as is regulated in the Draft Law, and be submitted exclusively to the regime of criminal liability of article 31-A.

However, the criminal policy claim is shared that some consequences, similar to those of article 33.7, may be applicable to these legal persons in a preventive way (article 129.3). For this, it would be sufficient to provide the specific preventive measures in the actual article 31-A, although with different duration and regime of application from the corresponding penalties, as to impose in a preventive way the same penalty which corresponds to the crime would be to anticipate the fulfilment of the sentence, with the consequent injury to the fundamental right of presumption of innocence (24.2 EC). It would be a matter, in such case, of submitting these preventive measures of restriction of rights to the same requirements as for the (circumstantial) imputation of criminal liability to these legal entities, instead of demanding certain suppositions regarding the conduct of the legal entities – those of article 129 – for the imposition of the preventive measures, and others – those of article 31-A – for that of the penalties.

However, it should be placed on record that the Penal Code is not the appropriate legal body for regulating preventive measures to impose on legal entities, but rather, it should be the Law of Criminal Indictment.

If – as is being proposed – societies and associations [and foundations] are expressly excluded from article 129, that is, the legal entities submitted to the regime of criminal liability of article 31-A, and the regime of preventive measures applicable to them where provided in this same article, or, better still, in the Law of Criminal Indictment, the authentic base of the coexistence of articles 31-A and 129 in the Penal Code would be defined technically and in terms of criminal policy: Then, article 129 would be about submitting the legal entities, not included in the scope of application of article 31-A, to a regime of measures, not of penalties (that is, organizations and companies[2], and also, do it without numerus clausus of crimes, even though these must bear some relation with the activities of such legal entities.

1.5.2. Organizations and companies

The Explanation of Reasons explains that *"the State, the territorial and institutional public administrations, the political parties and the trade unions"* are excluded from the scope of application of

[2] At least, in those cases where a company is not, at the same time, a society.

article 31-A. Consequently, none of these legal entities effectively fit into the concepts of “associations, societies and foundations” referred to in article 31-A.

It seems clear, therefore, that the inclusion of *“organizations”* in the objective scope of application of article 129 not only allows for its application to irregular entities and without legal personality, in the way provided in the 2006 Draft Law regarding these last-mentioned, and indicated in the GCJ report on the 2006 Draft Law, but also allows that the political parties, the trade unions and, also, the territorial and institutional entities be submitted to the regime of measures provided in that article, but not, however, to the derived penalties of article 31 bis. An additional problem regarding organizations without legal personality is to do with the way they have to act in a trial, since, being compulsory that they are heard through «*the respective owners or representatives if applicable»,* this formula is limited to stating the problem of representation that may arise if the entity does not have legal personality, but it does not offer a solution. To these effects, it is suggested that this hypothesis is provided for in penal procedural law, as it is for the civil trial in article 7 of the LEC [Civil Procedure Act].

The subsidiary and fragmentary nature of penal law and the constitutional principle of legality of penalties and measures would advise an express restriction of the objective scope of application of article 129, in the dual sense of expressly excluding territorial and institutional public entities, which should continue to be submitted to exclusively non-criminal legislation in this respect, and of establishing a *numerus clausus* of crimes committed by individuals which may bring about the application of article 129 by means of a reference that the measures will only be applicable to the cases expressly laid down in the Penal Code, in the way provided in the current article 129. In this respect, the 2006 Draft Law was preferable where section 1 envisaged the application of article 129 only *“in the cases set down in this code”.*

In this respect, the existing contradiction between the pretension of generality or *numerus apertus* of article 129, in accordance with the Explanation of Reasons of the Draft Law, and the occasional provision in articles of the actual text (cf. articles 288 and 302.2) of the adoption of this measure, should be overcome, which could give way to the reasonable interpretation that the measure could only be applied when it is expressly provided for in the types of the special part.

Finally, and independently of the fact that the previous clarifications must be in keeping with the context maintained here below about the nature of the measures referred to in article 129, the advisability of these organizations being submitted as well to a system of specific preventive measures should be placed on record, as has been maintained with regard to associations and societies, but the appropriate legal body for this is the Criminal Indictment Act and not the Penal Code.

1.5.3. The nature of the measures referred to in article 129 and the advisability of regulating a specific system of security measures for legal persons.

The above clarifications do not, however, resolve the principal technical problem and that of constitutionality presented in article 129, the solution for which would be the suppression of this article and its substitution, in that case, by a specific system of security measures applicable to legal persons.

In effect, the 2008 Draft Law introduces a *tertium genus* in article 129 in the system of legal consequences of the crime, just as the 1995 Penal Code did when it introduced this same article into the peculiar and harshly criticized concept of *"incidental consequences*", together with confiscation. With these incidental consequences having disappeared from article 129, the concept of *"measure*" has, however, been introduced into it, that is, a consequence to apply to legal persons which pretends to be neither a penalty nor a security measure.

Not having the legal nature of penalties, these measures would not be submitted to the principles or criteria of objective and subjective imputation of the fact to the legal entities; and, at the same time, not being security measures, they do not conflict with the regulation of these in Title IV of Book I of the Penal Code.

However, the so-called difference from the penalties is purely nominal, since the measures of article 129 are, by express reference from this*, "the deprivation and restriction of rights listed in article 33.7".* This is an article which specifically regulates *"the penalties applicable to legal entities".*

The interdiction of arbitrariness of public authorities prevents that a fine, the dissolution of a public entity, the suspension of its activities, the closure of its premises, etcetera, can no longer be penalties due to the simple fact that, as well as carrying on being so, they are also called something else. What is decisive, in this respect, is not the name, but rather the actual content of the legal consequence and its regime of application. The claim, therefore, to avoid the whole theory of criminal imputation – and, consequently, the assumptions of criminal liability of legal entities regulated in article 31-A – by means of a simple change of nomenclature, lacks theoretical and constitutional cover.

Faced with this, it cannot be contradicted that some penalties also coincide nominally with certain security measures in the current Penal Code. It is true that some non-deprivation of liberty security measures of article 96 coincide in our Penal Code with the *nomen iuris* of some deprivation of rights penalties of article 33, as occurs with the deprivation of the right to drive motor vehicles and motorcycles, the deprivation of the right to possess and carry arms, the deprivation of the right to reside in certain places and to go to certain places, the prohibition of approaching the victim, etcetera. However, in these cases the coincidence is purely nominal, as their duration and application are radically different, in accordance with their – just as radical – differences of nature and foundation. That is why article 96 is not limited to referring to certain penalties of article 33, as, however, article 129 does with respect to 33.7, but rather, in the former, the security measures are listed, in accordance with legal principle, but also, in the actual Title IV, their assumptions, bases, duration and regime of application are regulated, and all of it in a completely different way from the penalties with which some of the security measures nominally coincide with.

Consequently, the 2008 Draft Law could have developed an authentic system of security measures applicable to legal entities, along the lines of Chapter III of Title IV of Book I of the Penal Code, rather than an artificial and unconstitutional *tertium genus* concerning legal consequences of the crime. This system of security measures should not only regulate the content, duration and fulfilment regime – in accordance with what is laid down in articles 1, 2 and 3 of the Penal Code --, which should be different from the penalties, but also the estimation of dangerousness of the legal entity that would justify the imposition of the security measures to be imposed on legal entities, or, at least, on “organizations”.

2) PROBATION

Since the rules referring to probation in the 2008 Draft Law are various, which are appropriate to analyze together, they are shown here below with the aim of reaching a greater understanding of the analysis of the reforms proposed.

The letter j) is added to section 2 and letter l) is added to section 3 of article 33:

"2. Severe penalties:
j) Probation for a time period exceeding five years.

3. Less severe penalties:
l) Probation for one to five years."

Article 39. The letter k) is added:

"They are penalties of deprivation of rights:
k) Probation."

The current section 5 of article 40 becomes section 6, and section 5 remains worded as follows:

"5*. The penalty of probation shall have a duration of one to twenty years."*

Article 49-A is added, with the following wording:

"1. The penalty of probation shall always have the nature of an accessory penalty. This penalty shall consist of submitting the condemned person to judicial supervision for the time set out in the sentence, through the fulfilment on his or her part of certain obligations indicated in the following section, which the judge responsible for the execution of sentences will determine at the

phase of execution. The calculation of this penalty will begin as from the fulfilment of the custodial sentence.

2. The penalty of probation carries with it all or some of the following obligations:

a) that of always being localizable.
b) periodic presentation in an established place.
c) that of immediate communication of change of residence or place or kind of work.
d) the prohibition of leaving the place of residence without the authorization of the judge or tribunal.
e) that of not approaching the victim, or those of his/her family or other persons who the Judge or Tribunal determines.
f) that of not communicating with the persons mentioned in the previous letter.
g) that of not going to certain places or establishments.
h) that of not residing in certain places.
i) that of not carrying out certain activities that may be used to commit punishable acts of a similar nature.
j) that of participating in formative, work, cultural, sexual education programs or others of a similar nature.
k) that of following external medical treatment.

3. To guarantee the effective fulfilment of this sentence, the Judge or Tribunal may order the use of electronic means which permit the permanent localization and following of the convicted offender.

4. During the phase of execution the Judge responsible for the execution of sentences, after having heard the Prosecutor, will specify the obligations of the convicted offender, with the possibility of modifying them in the running in accordance with the development of the convicted offender, and will control its fulfilment, requiring the periodic reports from the appropriate public Administrations that the Judge deems necessary. The other circumstances of execution of this sentence will be established by regulation.

5. The Judge responsible for the execution of sentences, after having heard the Prosecution and the interested party, may at any moment

reduce the duration of the probation or leave it without effect if, due to the positive prognosis of rehabilitation, the Judge deems the continuation of the imposed obligations to be unnecessary.

6. In the case of failure to comply with one or various of the obligations, the Judge responsible for the execution of sentences, in view of the concurring circumstances and after hearing the prosecution, may modify the obligations, or reopen the investigation to proceed in accordance with what is established in article 468."

Article 57-A is added, with the following wording:

"1. Without affecting what is laid down in the previous articles of this chapter, the accessory penalty of probation will be imposed by the Judge or Tribunal together with the principal custodial sentence in the following cases:

a) When the offender has been condemned for one or more crimes of Title VIII of Book II of this Code.
b) When the offender has been condemned for a crime of terrorism of the second section of Chapter V of Title XXII of this Code, to a custodial sentence equal to or greater than ten years, or for two or more crimes of terrorism of the cited section, appreciating the aggravating factor of reoffending in any of them.

2. In the case of the crime being serious the probation will have a duration of between ten and twenty years, and of the crime being less serious, of between one and ten years. In the cases of reoffending, being a habitual offender, plurality of offences or extreme seriousness, the Judge or Tribunal will impose the penalty in its upper half. When the afore-mentioned circumstances do not concur then the Judge or Tribunal will impose the penalty in the extension deemed adequate in view of the personal circumstances of the offender and the nature of the offence."

Section 2 of article 468 is modified, and remains worded as follows:

"2. The penalty of six months to one year in prison will be imposed in all cases of breach of a penalty laid down in article 48 of this Code or a preventive or security measure of the same nature imposed in criminal trials where the victim is one of the persons referred to in article 173.2, as well as in those cases of breach of probation."

2.1. Comparative law as the foundation of the necessity to introduce probation into our legal system.

Comparative law knows different forms of probation after the fulfilment of the sentence, although they are usually regulated as security measures aimed at counteracting a state of danger deduced from the commission of certain crimes.

The GCJ's report on the 2006 Draft Law contains a detailed analysis of paragraphs 68 and following concordant with the German Penal Code, which regulate the imposition of the measure of standard supervision probation on those who are condemned to a prison sentence of at least six months for committing a crime for which the law specifically envisages this measure. The measure is based on the prognosis of the danger that these persons will commit crimes after fulfilment of the sentence.

As analyzed in the mentioned GCJ report, standard supervision probation is a form of probation which requires the legal designation of establishment of probation and a probation officer or agent, whose function is to supervise the conduct of the condemned person and the fulfilment of the obligations that have been imposed on him or her.

These obligations or instructions to the offender have a very similar content to those provided in article 49-A, introduced by the 2008 Draft Law, with, however, a much shorter duration of this measure – from two to five years – than that set out in the Draft Law.

The German Penal Code provides the imposition of this measure for certain sexual crimes (§181 b), injury (§228), crimes against

individual freedom (§239), theft and extortion (§256), laundering and receiving stolen goods (§262) and crimes against collective security (§321).

Probation measures for sexual offenders are provided in most of the States of the United States of America. The *"Community Protection Act"*, approved for the first time in the State of Washington, introduced, as well as registers for sexual offenders, a measure called *"civil commitment"* or *"involuntary commitment*". Actually, it is not a probation, but rather a civil internment after the fulfilment of the sentence due to the danger to the community, the duration of which may be indefinite, since its conclusion depends on whether the person stops representing a danger to society. Nowadays the *"Sexual Violent Predators-Laws"* model has become generalized in the United States of America.

The equivalent of our probation in the USA is the *"lifetime supervision"*, which consists of subjection to control after the fulfilment of the prison sentence. This measure may be permanent. The control consists of giving explanations for changes of profession, residence and other activities to a civil servant *("parole officer"),* who may refuse certain movements. Complementary measures are usually ordered together with *"lifetime supervision",* with the supervised person being obliged to comply: prohibition of possessing pornography, of consuming alcohol, submission to certain programs, etc.

In the United Kingdom there are two forms similar to probation. According to the *Criminal Justice Act* of 2003, the perpetration of two sexual crimes, together with the risk of future repetition, justifies an *"extended sentence"*, or an *"indeterminate sentence"*. The first consists of the submission of the subject to a period of security after fulfilment of the sentence. The second, provided for more serious cases, may consist of a *"sentence for public protection*", with a minimum duration of no less than ten years of prison or, plainly and simply, in the imposition of a sentence of life imprisonment, *("life sentence").*

In Australia, the *Dangerous Sexual Offenders Act* of 2006 provides indeterminate prison or probation, if after the prison sentence the prognosis of danger persists.

In Canada, the sentence may declare the convicted offender a *"criminal to be controlled"*, in which case the offender will be submitted to a period of community surveillance of a maximum of ten years after fulfilment of a prison sentence of at least ten years (article 753.1 of the Canadian Penal Code). The sentence may also declare the convicted offender a *"dangerous criminal",* in which case he or she may remain imprisoned indefinitely, or after effective fulfilment in prison for no less than seven years, that is, without parole, he or she may be submitted to permanent surveillance.

In France, the Law of the 17th of June, 1998, regarding the prevention and repression of sexual offences, provides the so-called socio-judicial surveillance, which may or may not be accompanied by the imposition of treatment. This measure may be ordered at sentencing, or after fulfilment of a prison sentence, by the judge responsible for the implementation of penalties. Nowadays, the Law 2007/1198, of the 10th of August, imposes compulsory limits of fulfilment in the case of reoffending.

To summarize, comparative law in our area provides measures for the control of the convicted offender for committing certain crimes – usually sexual – after the fulfilment of the prison sentence.

2.2 Probation already exists in Spain in juvenile penal law

As noted in the GCJ's report on the 2006 Draft Law, probation is expressly regulated in article 7.1, h) of the current LO 5/2000, of the 12th of January, which regulates the criminal liability of minors.

This measure of active intervention in the education and re-socialization of the minor may consist of monitoring his/her activities, such as attendance at school, professional training centre, or work place, endeavouring to help the submitted individual overcome the factors which determined the committed offence. This measure also binds the subjected individual to follow the socio-educational guidelines set out by the public entity or professional responsible for the monitoring, in accordance with the intervention program drawn up to that effect and approved by the Minors' Judge.

The person subjected to the measure is also bound to maintain the meetings with the said professional, established in the program, and to fulfil, if applicable, the rules of conduct imposed by the judge, which may be one or some of the following: obligation to attend with regularity the relevant educational centre, to partake in programs such as formative, cultural, educational, work-related, sexual education, road education or other similar, prohibition on going to certain places, establishments or shows, prohibition on leaving place of residence without prior legal authorization, obligation to reside in a certain place, obligation to appear in person before the Juvenile Court or appointed professional to inform about and justify activities carried out, or any other obligations that the judge – court-appointed or at the request of the Public Prosecutor – deems appropriate for the reintegration of the sentenced person into society, provided that they do not infringe their dignity as people.

2.3 Relation between the penalty of probation and other accessory penalties of possible consecutive fulfilment with the prison sentence.

Article 39 of the Penal Code provides among the penalties of deprivation of rights *"the deprivation of the right to reside in certain places or to go to them"* [letter f)], *"the prohibition on approaching the victim or those of his/her family members or other persons determined by the judge or court"* [letter g)], and *"the prohibition on communicating with the victim or those of his/her family members or other persons determined by the judge or court"* [letter h)], with the content that is provided later on by article 48. These accessory penalties coincide with a part of the "obligations" that the penalty of probation carries with it in the wording of the letters e), f), g) and h) of section 2 of article 49-A.

For its part, article 57, placed in the section dedicated to accessory penalties, provides the following:

> « 1. *Judges or courts, in the crimes […] against […] liberty and sexual indemnity […] in consideration of the seriousness of the facts or of the danger that the offender represents, may order in their sentences the imposition of one or various of the prohibitions laid down in article 48, for a time not exceeding ten years if the offence were serious or five if it were less serious.*

Notwithstanding the previous, if the offender were sentenced to prison and the judge or court ordered the imposition of one or various of the said prohibitions, it would be for a time greater than between one and ten years than that of the penalty of prison imposed in the sentence, if the crime were serious, and between one and five years, if it were less serious. In this case, the penalty of prison and the afore-mentioned prohibitions would be necessarily fulfilled in a simultaneous manner by the offender.

2. In the cases of the crimes mentioned in the first paragraph of section 1 of this article committed against whomsoever or the spouse, or against the person who is or has been attached to the offender by a similar relationship of affectivity even without cohabitation, or against the descendants, ascendant relatives, brothers or sisters, whether natural, adopted, or by affinity, of his/her own or of the spouse or cohabiter, or against any minor or person without legal capacity with whom he/she cohabits or who happens to be under the legal authority, guardianship, tutelage, foster-care, or de facto guardianship of the spouse or cohabiter, or against any other person protected in whatever other way by means of which finds themselves integrated in the nucleus of his/her family cohabitation, as well as against the persons who, due to their special vulnerability, find themselves subjected to his/her custody or care in public or private centres, the application of the penalty provided in section 2 of article 48 shall be ordered in all cases (prohibition on approaching the victim, or those of his/her family members, or other persons determined by the judge or court) *for a time not exceeding ten years for serious crimes, or five if the crime were less serious, without affecting the provisions of the second paragraph of the previous section.*

[…] »

The introduction into the Penal Code of article 57-A which the Draft Law proposes implies that the crimes against indemnity and sexual freedom could be penalized with the accessory penalties of article 57 and with the new penalty of probation.

The regime of application for both types of penalty is, however, very different. In the first place, because the accessory penalties to article 57 have to be fulfilled, at least in part, simultaneously with the prison sentence, whereas probation always has to be fulfilled after the prison sentence; and, in the second place, because the accessory penalties to article 57 are not submitted to the regime of determination

of their content, and possible revision of their duration or cancellation by the Judge responsible for the execution of sentences, which is, however, provided by article 49-A 5 for the penalty of probation.

Owing to the constitutional prohibition of *bis in idem*, it is indisputable that, given the identity of the foundation, both types of accessory penalty may not be imposed at the same time to the same person for the same crime.

This is what article 57-A refers to when it provides that the penalty of probation shall be imposed "without prejudice to the provisions in the previous articles of this chapter", that is, to the effects of this report, without prejudice to the provisions in article 57. The judge will have, therefore, the reasonable option of submitting the crimes against indemnity and sexual freedom to the more inflexible, but shorter and simultaneous fulfilment regime of article 57, or to the probation of article 57-A.

Nevertheless, to avoid interpretative doubts it would be advisable that article 57-A expressed more clearly the possible option of one of the two systems of accessory penalties.

2.4. The progressive system of fulfilment of prison sentences and the need for rules which ensure their compatibility with the subsequent fulfilment of the penalty of probation.

The fact that the accessory penalty of probation must be fulfilled, according to the 2008 Draft Law, after the progressive fulfilment of the penalty of prison provided in the General Prison Organic Law and in its Regulation, demands an analysis of this new penalty in that legal context.

Although article 49-A 4 according to the 2008 Draft Law provides that the circumstances on the execution of this penalty, beyond those listed in the actual article, will be developed by regulation, the technical analysis of the same shows essential inadequacies if, as is the case, the penal reform is not accompanied by specific and simultaneous reglamentary reforms (or in the actual Penal Code) on the fulfilment of this penalty.

Consequently, the report cannot disregard referring to the basic requirements of the execution of this penalty, in spite of the reference contained in the 2008 Draft Law to a future regulatory rule. Article 49-A 4 is, then, the first object of critical analysis, precisely because it is not accompanied by these essential rules for the analysis of the penalty of probation and also does not provide essential aspects of the execution of this penalty in the actual Draft Law.

In effect, in the 2008 Draft Law, probation is configured as a penalty which is imposed in the sentence as accessory to the deprivation of freedom, the duration of which may last twenty years, the fulfilment of which is subsequent to the prison penalty, and the content of which has to be determined by the Judge responsible for the execution of sentences after the fulfilment of the prison sentence.

In accordance with our prison legislation, probation is, then, called into execution after the phase of parole to be fulfilled with the prison sentence, or after a prison sentence fulfilled in an exceptional manner without access to parole, but subjected, in all cases, to the system of progression in the degree as far as the fulfilment regime is concerned. This progression, according to prison legislation, depends basically on the evolution of the effects of the individualized prison treatment which is periodically revised by the prison Administration.

Taking this into consideration, it would be incompatible with the progressive prison regime, which is based on the constitutional model laid down in article 25.1 of the Constitution, that the probation could imply an obligation for the Judge responsible for the execution of sentences to impose on the offender a backward step in respect of the regime of fulfilment of the prison sentence on parole, in the case that the offender had gained access to it – that is, a move back to a more restrictive regime than parole, or even more restrictive than the prison third degree.

In short, probation must be applied in a compatible manner, regarding the obligations imposed on the offender, with the progressive system of fulfilment of prison sentences.

Therefore, wherever the individual progress of the subject has made him/her worthy of parole or prison third degree, then probation should not be allowed to be more burdensome than these, unless new

elements of judgement requiring a more restrictive regime concur, due to a judgement of danger that was non-existent in the phases prior to the fulfilment of the prison sentence.

This requires paying special attention to the so-called obligations which may be part of the probation, as well as to the systems for guaranteeing their fulfilment.

Electronic surveillance, for example, is provided in article 86.4 of Prison Regulations as an ideal instrument for the fulfilment of the prison sentence in the prison third degree, in that it depends on the consent of the convict in semi-liberty and functions as a substitute for overnight stays, that is, of a more restrictive measure than liberty. The extension of these control mechanisms to a convict who is enjoying parole, for example, has to be justified by new elements of judgement which show the need for a vitally more restrictive regime. The same should be envisaged in respect of those who are condemned to the penalty of probation, since this implies a step backward with regard to the fulfilment regime of the prison sentence, when this, as is normal, has been progressive and has allowed access to the prison third degree and to parole.

It would, then, be technically necessary that the regulated simultaneous development of the execution of the penalty of probation, or this same article, included specific rules on the fulfilment of the penalty of probation which avoided antinomies and penitentiary regression with respect to the fulfilment regimes of prison sentences.

The following, then, should be considered as essential conditions for the execution of the penalty of probation: in the first place, that the convict had not already completed the corresponding part of the prison sentence in the regime of parole, for not having fulfilled the corresponding requirements, except when there exists a prognosis of subsequent danger, and non-existent in this prior phase to the fulfilment of the prison sentence, and, in the second place, with the same foundation and the same proviso, that the possibility of executing this sentence through obligations or control systems which imply a more restrictive living regime than that of prison third degree – in the case of the convict having gained access to it – be excluded.

Both conditions are in the field of organic law, because they refer directly to the development of fundamental rights which are affected by the restriction of rights implied by the penalty of probation, and they are in keeping with the criminal policy foundation of probation.

Lastly, it must be pointed out that the general regime of prescription of accessory penalties may be inadequate for the penalty of probation. The reform does not contemplate any specific provision in this respect, and therefore the stipulated periods of ten years for the *remaining serious penalties* and of five years for less serious penalties will be applied. Consequently, where a penalty of 10 to 12 years had been imposed for a crime, like, for example, rape (article 179), owing to the beginning of the calculation of expiry being when the sentence was declared as binding, the penalty of probation would have expired at the time of beginning its execution. For this reason, an exception to the rule should be contemplated, whereby the calculation of the prescription of accessory penalties is in line with that of the main penalty. With a discretionary judgement of danger – more appropriate to a safety measure than to a penalty – being the root of this new penalty, the formula provided in article 135.3 could be adopted, according to which «*if the fulfilment of a security measure were subsequent to that of a penalty, the time period will be calculated as from the termination of the latter».* Consequently, if a prognosis of danger exists in the convict, which determines the need for the penalty of probation, then the *dies a quo* of the prescription period of this penalty should be the moment when its execution can begin, that is, after the fulfilment of the penalty of deprivation of freedom, or in the case of default, after its prescription.

2.5 The need to envisage the figure of officer or agent of execution of probation in the actual Draft Law, and to explain his/her statutes and functions in the standard regulations on the fulfilment of the penalty of probation, as well as to regulate in the Draft Law the need for certain reports in this respect.

The proposed regulation gives the Judge (responsible for the execution of sentences) competence over the execution of this new penalty, but that jurisdictional function is of impossible rational fulfilment if the judge cannot count upon means of personnel to facilitate him/her with the necessary reports.

Article 49-A 4) should envisage, therefore, in the first place, the obligation of the prison Administration to send to the Judge, responsible for the execution of sentences, a specific report prior to the commencement of the execution of the penalty of probation, in the manner in which it is provided in prison legislation for access to parole. The Prison Administration can surely put forward a rational prognosis of the danger of the convict based on his/her record during the fulfilment of the custodial sentence. Together with this first specific report – forgotten in the Draft Law – regulations should also be introduced to ensure the making of appropriate reports during the fulfilment of the penalty of probation, since article 49-A) 4, according to the Draft Law, envisages the corresponding periodic reports, but is limited to referring to them being carried out by *"the appropriate public administrations",* without fixing the periodicity of the same, or envisaging the specialized personnel means for their elaboration.

To avoid arbitrariness and legal insecurity, it is a constitutionally essential condition to fix the periodicity of the compulsory revision of the reports and, therefore, the revision and duration of the probation.

But also, in order for the Judge responsible for the execution of sentences to adequately fulfil his/her function of controlling the fulfilment of the penalty of probation, it is, likewise, essential to have a simultaneous regulated provision – which could be in the actual article 49-A 4 – of the administrative agents of control of the execution of this penalty, similar to the agent responsible for the *Fuhrungsaufsicht* referred to in the German Penal Code, who should be responsible before the Judge with special duties in the execution of sentences.

These agents not only have to carry out the functions of controlling the convict and informing the Judge responsible for the execution of sentences, but it is also they who are called upon to orientate the judge, specifically, about the changing content of the particular execution of the penalty of probation, in accordance with the aims of assurance for the social collective and of reintegration into society.

2.6. Breach of the penalty probation

Article 468 in terms of the 2008 Draft Law establishes that the penalty of breach of sentence shall be imposed (prison for six months to one year) *"upon those who infringe the penalty of probation".*

This regulation is contradictory with the content in article 49-A) 6, since this latter does not envisage the penalty for breach of sentence as the sole effect in the case of non-fulfilment of the obligations of probation, but also provides the modification of the convict's obligations.

This incoherence happens, specifically, because the breach of the penalty of probation can only occur through failure to comply with the corresponding obligations. Thus, inasmuch as article 468 forces the imposition of the penalty of prison for breach of the penalty of probation in the case of failure to comply with the obligations of the probation, article 49-A) 6, however, also offers the possibility that the obligations simply be modified in these cases.

This contradiction also shows the need, from the point of view of legal security and, therefore, of the principle of penal legality, to regulate in greater detail the effects of failure to comply with the obligations of probation, in accordance with the very different nature of many of them and of the extraordinary duration that they may have, as well as the requirements for such failure to comply to be considered criminal.

For some obligations, the only thing that should demonstrate a breach of sentence is repetition, as happens, for example, with those of attending programs such as formative, cultural, work-related, of sexual education, or similar. The criterion of repetition is, then, capable of providing aggravated seriousness to the failure to comply with certain obligations and, thereby, convert them into crimes.

Also, the infringement of different obligations – failure to attend formative activities, change of city of residence without permission and approaching the victim, for example – could serve as criteria for committing the crime of breach of sentence, as the real concurrence of various crimes of breach of sentence in such cases is not technically possible, since the subject would be in breach of the same sentence, even though the latter imposes different obligations on him/her and,

also, even if it were possible, it could give way to disproportionate, and, therefore, unconstitutional penalties. Therefore, attention should be called to the need to envisage the effect of infringement of different obligations.

From the point of view of legal security, it would, likewise, be necessary to regulate the regime of fulfilment of the penalty for breach of probation with respect to the actual penalty of probation. The Draft Law does not provide whether in such cases, the fulfilment of the penalty of probation should be interrupted or suspended in order to fulfil the prison penalty of article 468, or whether, on the contrary, the duration of the penalty of probation should be newly calculated, after the completion of the prison penalty for breach of sentence, where that had not been completed.

The root of the problem is that it is a penalty in which, owing to its possible extraordinary duration, a multitude of incidents may take place, which, if they happened during the fulfilment of a prison sentence, would frequently give way to less serious legal consequences than a breach of sentence, and which, even if they took place during the execution of a suspended prison sentence, would be handled with greater flexibility, in accordance with article 84 of the Penal Code.

Effectively, this article provides the following consequences for failure to comply with the obligations or duties of the suspension of the execution of prison sentences:

"1. If the subject commits an offence during the fixed time of suspension, the Judge or Court shall revoke the suspension of the execution of the sentence.

2. If the subject infringed the obligations or duties imposed during the period of suspension, the Judge or Court may, having heard the parties, depending on the cases:

a) Substitute the imposed rule of conduct for another, different one.

b) Extend the period of suspension, without it exceeding five years in any case.

c) Revoke the suspension of the execution of sentence, if the failure to comply was repeated.

3. In the case that the suspended sentence was for prison for the committing of crimes related to gender violence, the convict's failure to comply with the obligations or duties in rules 1, 2 and 5 of section 1 of article 83 shall determine the revocation of the suspension of the execution of the sentence."

The regime of the suspension of the execution of the prison sentence is probably a good model for the needed specific regulation of the effects of failure to comply with the obligations of probation.

2.7. The presumption of dangerousness

The regulation of the probation establishes a *rebuttable presumption [iuris tantum]* of dangerousness.

The system of probation of the 2008 Draft Law starts with the presumption that the dangerousness of persons at the time of being condemned for certain crimes will persist after the fulfilment of the prison sentence, but this presumption has to be confirmed, or be disproved when, subsequently, the execution of the penalty of probation is initiated, and also later, during its running.

This is the reason why the 2008 Draft Law provides that the Judge responsible for the execution of sentences may not only change the obligations of the offender during the execution of the penalty of probation, in accordance with that changing prognosis of dangerousness, but also reduce the duration of the penalty of probation imposed at sentencing or even make it ineffective at any time during its running – that is, even at the moment of initiation of its execution (article 49-A 5).

The proposed model, then, starts with a presumption of future dangerousness – that is, to be confirmed, where applicable, after the fulfilment of the prison sentence; prison sentence which, given the crimes to which it may apply, can be extended from one to forty years of effective fulfilment.

This judgement of future dangerousness is deduced, then, from the actual nature of the crimes committed: some of terrorism and those which infringe sexual freedom and indemnity, and imply the possible re-socializing ineffectiveness of the prison sentence in these cases and, therefore, the presumption of the persistence of the special-preventive necessity, and, consequently, of the need to carry on ensuring the society faced with these persons when they gain access to freedom.

The link between the presumption of future dangerousness of the person condemned to a prison sentence and the presumption of the re-socializing failure of fulfilling the prison sentence is assumed, not only from article 49-A 5, but rather, above all, from this being the priority aim of fulfilling sentences of deprivation of freedom, according to penitentiary legislation and constitutional jurisprudence. That is why a positive prognosis of reintegration at any time during the execution of the penalty of probation should not only allow the Judge responsible for the execution of sentences to reduce it or make it ineffective, as envisaged by the Draft Law, but should also oblige the judge to necessarily make it ineffective. Absence of danger and, therefore, absence of the need to assure the social collective, may, in effect, affirm those who have a positive judgement of reintegration. Consequently, only through this obligation to make the execution of the penalty of probation ineffective in these cases would the possible unconstitutionality of a judgement of future dangerousness be avoided which, in the manner of copyright criminal law, would accompany the person condemned to prison sentences for certain crimes, independently of their reintegration.

However, as it is hoped that during the period of duration of the penalty fixed at sentencing that judgement of dangerousness could give a positive result at a later time, the Judge responsible for the execution of sentences could be authorized to reintroduce the fulfilment of the sentence if the declaration of severance is of a temporary or provisional nature and for a determined time; such a possibility would be similar to the provisional suspension of execution of a prison sentence and could be contemplated together with definitive termination of the penalty of probation.

2.8. The obligation to undergo medical treatment

The security measures for persons unfit to plead or with diminished responsibility, among which is found the submission to medical treatment (articles 96.2.11th of the Penal Code) start with two basic assumptions:

a) The complete incapacity or diminished responsibility at the time of committing the fact.

b) The incapacity or diminished capacity, or, if preferred, the persistence of the states of complete incapacity or diminished responsibility at the time of fulfilment of the measure.

Full incapacity or diminished capacity at the time of fulfilment of the measure implies that the subject submitted to the treatment cannot exercise, or cannot fully exercise an autonomous decision over the acceptance or refusal of medical treatment. In consequence, that decision may be made by another person instead – something similar to what happens in the involuntary hospitalization due to psychic disorders, provided in article 763 of the Civil Indictment Act. The combination of committing the fact and legitimate criminal dangerousness, then, corresponds to the State to adopt that decision.

However, this same logic cannot be applied in the area of penalties. Not only because the subject was imputable at the time of committing the offence, but, above all, because at the time of implementation of the measure, was fully capable.

In ordinary civil legislation, matters relating to the right to allow or refuse medical treatment are collected together in the Law 41/2002, regulatory of the autonomy of the patient. In it is found a development of the right to personal self-determination, with one of its basic implications being the consent regime, which submits, in a general manner, the medical treatment to the will of the subject. The fundamental corollary of this is the patient's right to refuse the treatment, which prevents coercive medical treatment of competent people.

To convert the medical treatment into one of the obligations of the penalty of probation may imply, according to this, an attack on human dignity, and, therefore, a violation of the fundamental right acknowledged in article 10.1 of the Constitution -- a violation which

may also imply that the exercise of the right to refuse a medical treatment may constitute a crime breach of probation. To avoid these consequences, the submission to medical treatment can only be an option that criminal law offers to the fully competent convict, as a condition for more favourable punitive situations, without the possibility of its rejection ever constituting a crime of breach sentence.

If it were not like this, we would find ourselves before a penal model which is incompatible with respect to human dignity, where it would be possible to think that the State assumes the power to submit competent people to coercive chemical, surgical, or psychiatric medical treatments.

It does not seem, in all other respects, that the relationship of special attachment with the prison Administration and its specific duty to protect the life of the inmates – which justifies, in the jurisprudence of the Constitutional Court, the forced feeding of prisoners on hunger strike when they are in a situation of grave mortal danger – can serve as a foundation for the submission to compulsory medical treatment for convicts on probation, since the actual Constitutional Court has declared that the relationship of special attachment does not allow, in itself, a disregard for the principle of proportionality of the penalties and sanctions (STC, 234/1991, of the 10th of December) and, moreover, the actual extreme conditions imposed by the Constitutional Court for the coercive intervention in those cases are evidence that they cannot be applied to the very different cases of probation, in which not only is there no grave mortal danger to anybody, but also, the State counts on many other possibilities of coercive intervention which are less damaging to the fundamental rights of the convicts.

The non-coercive promotional model that is proposed is the one that is applied in other countries, like Germany, where, for certain types of crimes and active subjects, a dual channel is established: probation of a certain duration if the subject agrees to medical treatment, or of a longer duration if the medical treatment is refused. It must be pointed out that the second option is not a sanction for refusing the medical treatment.

3) CONFISCATION

The 2008 Draft Law introduces two basic reforms: Confiscation for crimes of imprudence and a broadening of its content.

Before beginning to analyze these matters, it should be noted that the maintenance of a unified regulation of all the forms of confiscation entails problems, especially when it is a matter of broadening its scope of application, as is the case of the proposed reform.

In effect, it is customary to differentiate confiscation of profits from the confiscation of instruments. That of profits seeks to eliminate the incentive to commit crimes. Its basic function is general-preventive: neutralizing the stimulus of the pursued profit, a criminological factor of the first order is eliminated. This confiscation aspires, above all, to display effects with regard to the future and to the generality of persons, discouraging future crimes. That of instruments seeks, on the contrary, to first and foremost eliminate the individual dangerousness of the specific offender to which it is applied, depriving him or her of the means to commit new crimes. Its function is, then, fundamentally specific-preventive.

The problems arise when it is attempted to broaden the scope of application of both types, but only the bases of one of them is followed, as is analyzed here below.

3.1. Confiscation in crimes of imprudence.

The 2008 Draft Law refers to confiscation in crimes of imprudence in the Explanation of Reasons and in article 127.2, in the following terms:

> Explanation of reasons: *"Thus, in accordance with the afore-mentioned Framework Decision, judges and courts are empowered to order confiscation in matters of crimes of imprudence which entail in the law the imposition of a deprivation of freedom penalty greater than one year".*
>
> Article 127.2. *In the cases for which the law provides the imposition of a penalty of deprivation of freedom greater than one year for committing a crime of imprudence, the Judge or Court*

may order the loss of the effects which originate from the same, and of the goods, means or instruments used for the preparation or execution, as well as the profits derived from the crime, whatever transformations they may have gone through".

Thus, the Explanation of Reasons states that the expressed broadening of confiscation in crimes of imprudence is bound by the Framework Decision 2005/212/JHA. However, the fact is that the mentioned Framework Decision, in its 2nd article, only says the following:

"Each Member State shall adopt the necessary measures to enable proceeding to the total or partial confiscation of the instruments and products of criminal offences which entail penalties of deprivation of freedom of duration greater than one year, or of goods of similar value to those products".

Given that Spanish law only provides, at present, confiscation for fraudulent crimes (article 127.1 of the Penal Code), it seems that the Draft Law has understood that the Framework Decision obliges a broadening to include crimes of imprudence which have penalties of deprivation of liberty greater than one year.

However, the way in which the actual Framework Decision defines the concepts *"product" ("economic benefit derived from a criminal offence")* and *"instrument" ("asset used or destined to be used (…) for the committing of one or various criminal offences")* does not indicate that it is aimed at crimes of imprudence. On the contrary, it seems made to measure for fraudulent offences and, also, if the cancellation of the economic benefit has the general-preventive function of eliminating a motivating stimulus of the crime, it seems clear that its function is aimed at fraudulent offences. And, as for the instruments, even though it is possible to speak of material elements with which imprudent crimes may be committed (for example, a car in relation to imprudent injury due to running over) – nevertheless, the term instrument would seem to also point to a certain intentionality.

On the other hand, in relation to the limited imprudent penal types of the current Penal Code, the only real problem raised is the confiscation of the vehicle in traffic accidents resulting in injury or death. However, within the scope of road traffic, the question has already been raised with regard to grievous offences like driving under

the effects of alcohol, dangerous driving, etcetera, and the interpretation has always been – even though confiscation is compulsory in grievous offences – that the clause of prohibition of disproportion prevents the confiscation of the vehicle in this type of offence.

In these cases of offences of abstract danger it is possible, however, to compensate for its minor seriousness by imposing the accessory consequence of confiscation of the vehicle, with reiteration or repetition, in which case the principle of proportionality would not be violated.

Even though the true special-preventive effect does not reside in the confiscation of the vehicle driven when the offence was committed, but rather in the deprivation of the right to drive motorized vehicles, since without this sanction, in spite of the confiscation of the vehicle used, the offender may continue driving other vehicles of his or her own, or vehicles belonging to others, to commit criminal offences, the truth is that imprudent crimes resulting in death or injury are more serious than offences of mere activity and, therefore, the criminal policy interest justifies that in those the confiscation of the vehicle is envisaged. In these cases the principle of proportionality is not violated, due to the fact that the confiscation of the vehicle is in addition to the penalty provided, precisely because of the greater seriousness of the consequences of the imprudence.

3.2. Broadened confiscation.

The 2008 Draft Law proposes the following text:

> Article 127.1, 2nd paragraph: *"The Judge or Court may broaden the confiscation to the effects, assets, instruments and profits deriving from a criminal activity committed within the framework of a criminal organization. To these effects it shall be understood that the assets are derived from criminal activity when their value is out of proportion to the legal income of the persons condemned for any crime committed from within said criminal organization".*

The proposal is in the accordance with the criminal policy advisability of depriving whoever commits crimes from within a criminal organization of the profits derived from criminal activities prior to them having been manifested, not due to said origin being shown in any firm sentence, but rather due to the unjustified increase of the subject's assets. As shall be seen, even without debating this criminal policy advisability – given the difficulty of proving the origin of the assets in these cases, especially when dealing with transnational organizations and when, as is frequent, the lucrative criminal activity is varied – the proposal presents important problems from the point of view of legal security.

The starting point of the analysis of the proposed text: *"(…) may broaden the confiscation to the effects, assets, instruments and profits deriving from a criminal activity committed within the framework of a criminal organization"* is that the object of the confiscation in these cases are effects, assets, instruments or profits from a different criminal activity, i.e. other than that which motivated the broadening of the confiscation, since, if it were not thus, the precept would not talk of *"broadening",* but simply of confiscating all the economic benefits which, in the actual sentence, are considered as originating from that specific criminal activity which is the object of the indictment. For this, the new regulation, with the intention of broadening the confiscation to gains which are beyond those which correspond to the specific criminal conduct which is the object of the indictment, would not be necessary.

This is, then, the only real criminal policy sense of this regulation, since – as has already been pointed out – within the scope of organized crime, it has only been possible to prove the involvement of the parties in some specific crime and their continued belonging to the organization, but it is rarely possible to prove their specific involvement in other previous crimes. Previous criminal activity which, however, seems evident, sometimes, precisely in view of the unjustified assets of those involved.

This is what inspired the idea of the broadened confiscation proposed by the Framework Decision 2005/212/JHA: To consider as sufficient the proof of those two extremes in order to proceed to the confiscation of the effects of a criminal career in an organized group, without the necessity of also proving the specific involvement of the offender in previous lucrative crimes linked to the organized criminal activity.

This criminal policy objective should be borne in mind when analyzing the proposed reform, as it is imposed by the above-mentioned Framework Decision.

Actually, the 2008 Draft Law envisages a reversal of the burden of proof on the origin of the enrichment of these individuals – that is, a presumption which, in order to be constitutionally valid, can only be a rebuttable presumption *(iuris tantum)* of enrichment originating from the committing of crimes *("from the criminal activity",* in the proposed terminology).

The inversion of the burden of proof for confiscation in relation to organized crime is one of the three possible options put forward by the Framework Decision 2005/212 to national legislators in order to fix the broadening of the confiscation, in the following terms:

"Article 3.2. *Each Member State shall take the steps necessary in order to proceed to the confiscation under the protection of the present article as a minimum when:*

a) a national jurisdictional organ, based on specific facts, is fully convinced that the assets in question originate from criminal activities carried out by the condemned person during a period prior to the sentence for the offence referred to in section 1, which the jurisdictional organ considers reasonable in view of the circumstances of the specific case, or

b) a national jurisdictional organ, based on specific facts, is fully convinced that the assets in question originate from SIMILAR criminal activities carried out by the condemned person during a period prior to the sentence for the offence referred to in section 1 of the present article, which the jurisdictional organ considers reasonable in view of the circumstances of the specific case, or

c) there is proof that the value of the property is out of proportion with respect to the legal income of the condemned person and national jurisdictional organ, based on specific facts, is fully convinced that the assets in question originate in the criminal activity of the condemned person."

As can be verified, the Draft Law seems to have opted for the model of presumption of epigraph c) of the Framework Decision. It is a matter of, as previously put forward, establishing a *rebuttable presumption* of criminal illicitness of the assets, which, consequently, may be disproved by means of proof of the lawful origin, or unlawful, but not criminal, of the specific assets in question.

Models of inversion of burden of proof regarding unjustified increase of assets have existed for many years in the international legal instruments for fighting organized crime in our vicinity. Similar proposals are already contained in, for example, the 1988 Vienna Convention relating to money laundering and drug trafficking crimes, and in the legislation of some states in our vicinity, like, for example, the 1986 United Kingdom Law on drug trafficking crimes and Portuguese Law 5/2002 of the 11th of January against organized crime. The Italian antimafia law of the 13th of November, 1982 ("Rognoni-La Torre Law") went even further, permitting the confiscation of the assets of those under investigation, but not yet condemned, but it was declared unconstitutional by the Law 50/1994, which limited its application to those condemned for mafia crimes.

The consideration of confiscation as a non-punitive accessory consequence seems to eliminate the problems that this presumption would raise, at the purely formal level, if it were a matter of applying a penalty. It should be remembered, in fact, that confiscation used to be a penalty in the Spanish Penal Code before the Organic Law 15/2003, reforming the Penal Code, but that, since then, it is only an *"accessory consequence",* euphemism which serves formally to the effect of avoiding that presumption in the matter of confiscation implies an unconstitutional presumption of guilt, since this latter – guilt for the criminal fact – is the basis, that cannot be waived, of any sentence.

In any case, the 2008 Draft Law presumes that any disproportionate property, the origin of which cannot be shown to be legal, originates from criminal activity, but it is always related to the criminal activity of the organization for which the subject is condemned. This link between property of presumably illegal origin and criminal activity from within an organization disallows that the simply illicit, but not criminal, origin of the property is sufficient grounds for broadened confiscation of the assets. This specification is of great importance to

define the broadened confiscation of assets, since broadened confiscation cannot be extended – and even less so by means of presumption – to any illicit assets of the subject, but only to those which are presumed, unless proved otherwise, to be directly or indirectly linked to the criminal activity of the organization for which the subject is condemned.

In short, then, to define the specific scope of broadened confiscation in accordance with the principle of legality, and in accordance with article 6 of the afore-mentioned Framework Decision, which establishes that: *"The present Decision shall not have the effect of modifying the obligation to respect fundamental rights and principles, including specifically the presumption of innocence, established in article 6 of the Treaty on European Union")* – as well as for it to be coherent with the criminal policy claim that justifies this presumption and the consequent inversion of the burden proof, it would be advisable that the proposed text clearly states that, by the effects of the broadened confiscation, it is understood, unless proved to the contrary, that the property of value which is disproportionate with respect to the legal income of the persons condemned for any crime committed from within an organization originates from the criminal activity carried out within the framework of said criminal organization.

4) LIMITATION PERIOD

The third paragraph of section 1, and section 4, of article 131, are modified, and are now worded as follows:

"1. Crimes have a limitation period:
[…]

3. Of ten years, when the maximum penalty laid down by the Law is prison or disqualification for more than five years and not exceeding ten, as well as the crimes contemplated in articles 305 to 309 of this code.

4. Crimes against humanity and of the genocide and crimes committed against protected persons and property in the case of armed conflict, except for those punished under article 614, shall not have a limitation period in any case.

Nor shall crimes of terrorism have a limitation period, if they had caused the death of a person, injuries of those envisaged in article 149, or when they had consisted of the kidnapping of a person."

Section 2 of article 132 is modified, and is now worded as follows:

2. The limitation period shall be interrupted, without affecting the time elapsed, when the procedure is directed against a determined person who appears circumstantially to be criminally liable, with the limitation period starting to run again when the procedure is stopped or ended without conviction. The procedure shall be understood to be directed against the person referred to at the moment that substantial actual proceedings are produced by the Instructing Judge, or when the latter orders the Criminal Police to proceed to arrest the person.

The filing of a complaint or petition before a court and against a determined person will suspend the computation of the limitation period, with the same beginning to run again as from the day of filing if the court decides not to allow it to proceed."

Section 2 of article 133 is modified, and remains worded as follows:

"2. The penalties imposed for crimes against humanity and genocide and for crimes against protected persons and properties in the case of armed conflict, except for those punishable under article 614, do not, in any case, have a limitation period.

Nor shall crimes of terrorism have a limitation period, if they had caused the death of a person, injuries of those envisaged under article 149, or when they had consisted of the kidnapping of a person."

For what this report refers to, the reform affects fundamentally the following matters:

1st) The limitation period for crimes against the Treasury and against Social Security.

2nd) The new regime of interruption of the limitation period of criminal offences.

3rd) The introduction of the suspension of computation of the limitation period.

4th) The broadening to crimes of terrorism of the cases of no limitation period for crimes and penalties.

For what is coincidental, the analysis and certain conclusions will be followed from the *Report on the Draft Organic Law modifying the Organic Law 10/1995, of the 23rd of November, on the Penal Code,* which was approved by the GCJ at their meeting on the third of November of the year two thousand and six.

4.1 Limitation period for crimes against the Treasury and against Social Security.

The modification consists of the increase to ten years of the limitation period for the crimes typified under articles 305 to 309, which in the current Penal Code is five years. The reform affects almost all of the penal types of Title XIV of Book II, since only those types of article 310 (tax accounting offence) are excluded.

The institution of an *ad hoc* limitation period dissociates the crimes against the Treasury and against Social Security from the general system, which deals with the seriousness of the penalties and envisages a limitation period of 10 years for crimes which have the *"maximum penalty foreseen by the Law as being prison or disqualification for more than five years and not exceeding ten".* It should be remembered that the crimes against the Treasury and Social Security are punished with prison from one to four years – in their upper half for types with an aggravating factor – and a proportional fine.

Regarding this, the following is stated in the Explanation of Reasons:

«The limitation period has been raised for crimes against the Treasury and against social security, to ten years, with the aim of avoiding that they remain unpunished, in certain cases, due to the technical impossibility of their detection and verification within the time periods envisaged up to now.»

On this matter, the fact is highlighted that, once the functional dissociation of the limitation period of five years for fiscal crimes with respect to that of four years for tax offences is established in the jurisprudence of the High Court *(see* Supreme Court Sentences of the 26th of July, 1999, the 6th of November, 2000, the 10th of October, 2001, the 30th of October, 2001, the 15th of July, 2002, the 5th of December, 2002, and the 3rd of April, 2003, among others), based on the fact that the intrinsic greater seriousness of the crime justifies the extension of its limitation period, the reform increases the distance between the penal regulation and the administration for reasons of practical nature related to the inherent difficulties of discovery and investigation of this type of crime due to its complexity. It is a definitive matter of a decision which manifests an interest in protecting the public coffers, but which puts forward doubts of criminal policy coherence and from the point of view of the prohibition on arbitrariness of public authorities, since there are many other crimes which also affect collective interests and present similar difficulties of investigation, but which, however, are not excepted from the general regime of the limitation period (as examples can be quoted the crime of abuse of privileged information of article 285.1; the crime against the territorial regulation of article 319; the crime against natural resources and the environment typified in article 325; and the types of crimes against public health, of articles 359, 362, 363 and 364). The Draft Law, then, dispenses with any technical foundation of the system of proportionality between the seriousness of the crime, i.e., of the corresponding penalty and the limitation period, since it resorts to the general provisions for crimes of greater seriousness.

4.2. New regime of interruption of the limitation period of criminal offences

The regulation of the reasons for the interruption of the limitation period in section 2 of article 132 is of special relevance.

It should be borne in mind that the current text, which establishes that *«the limitation period shall be interrupted, without affecting the time elapsed, when the procedure is directed against the person imputed to be criminally liable, with the limitation period starting to run again when the procedure is stopped or ended without conviction»*, has generated an abundant – frequently contradictory – jurisprudence with the passing of time, the ups and downs of which have been largely motivated by the imprecision and consequent difficulty of determining the proceedings which allow confirmation that the procedure is directed against the guilty party.

From the point of view of comparative law, our penal code has always been situated amongst the countries which resolve the problem of the identification of the reasons for interrupting the limitation period by means of the use of a general clause, instead of the much safer system of a closed list.

In fact, on the one hand are the countries in which the determination of the acts for the interruption of the limitation period which are genuinely efficient has been fully undertaken by the legislator, who has provided the interpreter with a closed list of relevant procedural acts in this respect. This is the case of the penal codes which are closest to our legal culture, like the Italian Penal Code, (article 160), the Swiss Penal Code (article 72.2), the German Penal Code (§ 78 c) and the Portuguese Penal Code (article 121). According to the experts in the History of Law, it is a matter of a tendency which derives from a legal tradition rooted in the 19th century which goes back to the § 227 of the Austrian Penal Code of 1852.

The other system, which also goes back to the 19th century, solves the matter by means of the establishment of a general clause which leaves it in the hands of the interpreter to determine the specific acts to which interruptive effectiveness will be conceded, which in the final term means relegating its final determination to jurisprudence. This is the case of the 1930 Danish Penal Code (§ 94.4), which refers to *«all legal measures referring to the accused for the fact»*, the Slovene Penal Code of 1994 (article 112), the French Code of Penal Procedure (article 7), which refers to all acts *«of investigation or pursuit»,* or the Belgian Code of Criminal Investigation (article 22).

The Draft Law is shown to be conservative in this matter, since it does not decide to introduce the closed list system, as has been recommended on occasions by the Supreme Court, to reinforce legal security *(see* STS of the 20th of May, 1994), but rather maintains a general reference to what will have to be understood as the moment at which the procedure is understood to be directed against whoever appears to be circumstantially liable, situated as the moment when the investigating judge produces *"substantial actual proceedings."*

However, the precept includes a specific case of actual imputation: the court order for taking steps towards arresting the person circumstantially indicated to be liable. This mixture of a general clause and a specific case, characteristic of a listed system, is technically arguable since, in fact, the specific case is superfluous as it is included in the general provision, except if an arrest warrant is not understood to constitute *"substantial actual proceedings".* The maintenance in the text of the Draft Law of this mention of the arrest warrant may be due to the inertia by effect of the 2006 Draft Law and subsequent Bill, which granted the interrupting effect to the arrest warrant ordered, as well as by the Investigating Judge, by the Public Prosecutor, whose activity, obviously, remains outside the notion of *«substantial actual proceedings by the Investigating Judge»,* that is, of the legal imputation.

The general regulatory clause on the interruption of the limitation period does not specify the quality or the degree of the link between the procedural action and the person indicatively liable to which the STC (Plenary) nº 69/2001, of the 17th of March (FJ32) refers. This legislative technique constitutionally legitimates a wide margin of legal interpretation, but it does not allow significant progress at the level of the legal security with respect to the – likewise – imprecise current text.

Regarding the determination of the initial act of the proceedings that would serve to interrupt, for the first time, the limitation period for the offence, the High Court moved away, historically, from the strictest doctrinal positions, which have demanded a formal act of imputation such as, for example, a prosecution order or a personal summons to the accused to give evidence, barring all previous procedural dealings to the effect of the interruption. In effect, until very recently, jurisprudence maintained a flexible interpretation, by virtue of which the legal requirements of the culpability-procedure connection were considered to be fulfilled with the mere judicial decision to open the proceedings with the aim of investigating the crime and clarifying its

authorship. For the High Court the connection would be achieved by allowing a lawsuit or formal complaint to proceed, wherein those presumably liable for the facts are duly identified – then, according to this interpretation, the legal admission of the initiating documents of the party constitute a genuine procedural act. This interpretative tendency, which does not require a strict formalization of the imputation in a separate resolution, was very significant in jurisprudence, as is shown, for example, in the SSTS [Supreme Court Sentences] of the 3rd of February, 1984, the 21st of January, 1993, the 26th of February, 1993, the 30th of September, 1994, the 31st of May, 1997, the 28th of October, 1992, the 16th of October, 1997, the 25th of January, 1999, the 29th of September, 1999, and the 25th of January 2000.

This jurisprudential criterion coexisted with another, more open, line, which ended up becoming established, by considering that the action of the party, such as the actual formal complaint report which gave rise to the initiation of a penal procedure, is integrated in the same, and consequently generates the effect of interruption, even before the legal act of admission takes place, in such a way that if in the mentioned initiating documents there are sufficient data to identify those presumably guilty of the corresponding offence, then, as from that very moment, the procedure is considered to be directed against the offender. This second tendency became consolidated, and is held, for example, in the Supreme Court Sentences of the 3rd of February, 1995, the 6th of November, 1995, the 15th of March, 1996, the 11th of February, 1997, the 4th and 13th of June, 1997, the 30th of September, 1997, the 30th of December, 1997, the 25th of April, 1998, the 29th of July, 1998, the 23rd of April, 1999, the 10th and 26th of July, 1999, the 6th of November, 2000, the 30th of October, 2001, 147/2003, of the 5th of February, 162/2003, of the 4th of February, 298/2003, of the 14th of March, 28th of November, 2003, 71/2004, of the 2nd of February, 774/2005, of the 2nd of June, and 331/2006, of the 24th of March, among others.

The Draft Law now being reported on follows the doctrine fixed in the Constitutional Court sentences nº 63/2005, of the 14th of March, and 29/2008, of the 20th of February, which, as is known, call into question the interpretative line of article 132.2 promoted by the jurisprudence of the Supreme Court in favour of the acknowledgement of the interrupting effect of the initiating documents of the procedure. The Constitutional Court considers that interpretation incompatible with the constitutional requirement of reinforced motivation which is demanded of judicial decisions dealing with limitation period claims, which, according to the arguments of Constitutional Court, inasmuch as

they affect fundamental rights of freedom (article 17 EC) and penal legality (article 25.1 EC), require an axiological interpretation, in accordance with the *ratio legis* of the limitation period or end of the protection of the rule. Regarding this, the latter of the mentioned sentences stated the following:

> *«Therefore the constitutional jurisdiction cannot avoid the declaration of unconstitutionality in those cases in which the interpretation of the penal regulation – in the case of this procedure, the regulation of the institution of the limitation period, -- even though it cannot be called unreasonable or arbitrary, entails, by going beyond its most direct grammatical meaning, an extensive or analogical application to the detriment of the accused. And that is also why the expression "[the] limitation period shall be interrupted as from when the procedure is directed against the culprit" – whatsoever may be the inappropriateness with which this term has been used - , may not be other than the penal procedure or, what is the same thing, the opening or initiation by whoever has the authority to exercise the ius puniendi of the state under present legislation; that is, the Judge» (FJ 10).*

> *«In effect, by fixing as the moment of interruption of the limitation period, not the public and formal one relating to the judicial decision of initiation of a jurisdictional procedure, but rather the one of mere reception by the court of the notitia criminis, has attended to a circumstance which is not surrounded by the minimum publicity or cognizability and is therefore inappropriate as support for a constitutionally admissible interpretation to define an institution which specifically serves legal certainty in relation to freedom. […]*

> *It is precisely the uncertainty of fixing what should be maximum permissible delay that contributes to introducing the maximum of insecurity in this matter. […]*

> *Therefore; if the foundation of the limitation period is the impossibility of exercising the ius puniendi of the State as a consequence of the relinquishment of the same, it is evident that it can only be interrupted in the criminal area when procedures are carried out (naturally, by whoever has the authority to*

exercise the ius puniendi in that area, that, in the present state of our legislation, can only be the judge) wherein can be deduced the intention of not abandoning the pursuit and punishment of the illicitness» (FJ 11).

Experts in the doctrine are of the opinion that the confrontation between the Constitutional Court and the Supreme Court on the matter of the limitation period – which repeatedly maintains its full jurisdiction in the matter of ordinary law *ex* article 123 EC (*cf.* Plenary non-jurisdictional Agreements of the Second Division of the 12th of May, 2005, the 25th of April, 2006 and the 26th of February, 2008, which was expressed in Sentence nº 430/2008, of the 25th of June), -- has brought to the surface an immanent deficiency in the actual criminal code, where its establishments could not meet the constitutional requirements of *lex certa* inherent to the principle of legality laid down in article 9.3 EC. It has to be acknowledged that the system of open clause entails its dangers in that it hinders the *ex ante* knowledge of the legal effects that will be tied to certain cases of fact with regard to the provisional pursuance of criminal illegality and the effectiveness of procedural acts in this sense.

In this context, the legislative initiative places a double condition on the validity of the initiating or driving acts of the procedure: their judicial authorship – they must be acts of the Investigating Judge – and the strict precision of the subjective aspect of the imputation, which must refer to a person who is indicatively liable.

In accordance with these requirements, the documents of the initiating part of the procedure – a formal report or complaint – lack, according to the Draft Law, the effect of interruption in that the appropriate resolution of admission is not ordered by the investigating judge (without prejudice to the effect of suspension, analyzed under the next epigraph of this report), and the same thing applies if, in the same, the subject or subjects against whom it is directed do not appear named or identified.

It is appropriate to dwell upon the two relevant expressions regarding this, used in the Draft Law. In the first place, the requirement that the procedure *«is directed against a determined person»* leaves it clear that even though the individualized name of the accused is not specified, if it were necessary, without exception, those circumstantial

elements which would make it determinable could be made to appear, from which, also, is derived another consequence, that is, that the interruption which affects a determined person could not simultaneously be extended in prejudice of others who were not initially in that situation.

In the second place, the expression *«substantial actual proceedings»* (of imputation, it is understood), used in the precept to the effect of determining via rules what has to be understood as a procedure directed *"against a determined person who appears circumstantially as criminally liable»* could be the source of interpretative problems. The first to be observed is that the adjectives *"actual"* and *"substantial"* do not both qualify the noun *"proceedings"*, since, as well as not being united by a copulative conjunction, this would assume a redundant doubling of adjectives which, in their first meaning, have the same sense. On the other hand, the adjective *"actual",* as opposed to *"formal",* qualifies *"proceedings",* while the adjective *"substantial"* refers to *"actual proceedings",* but not in its primary meaning of substantial, but rather in the sense of greater importance. Therefore, the problem facing the interpreter will be double: on the one hand, to determine when he or she is before resolutions which are actually of imputation, even though they are not channelled through a formal resolution of this nature (as, *e.g.,* the orders for admission of a lawsuit, trial, provisional prison, and, in general, all those acts drawn from article 118 LECrim); and, on the other hand, the problem a value judgement the entity of imputation which would classify it as *"substantial"*, which has an indirect relation to the *"axiological line of argument"* referred to in the STC [Constitutional Court Sentence] 63/2005, of the 14th of March (FJ3), which has to be respectful of the aims pursued by the institution of the penal limitation period.

Also, in those cases, where the process has been initiated and suffers paralysation, the new legal configuration of the general clause, based upon the criteria of judicial factors and the establishment of guilt, entails a drastic reduction of the procedural acts with interrupting capacity on the limitation period, at least from the perspective defended up to now by the jurisprudence.

The new regulation denies all interrupting effect to the initiated process insofar as the investigation of the criminal fact has not progressed sufficiently to determine the identity of the subject or subjects to whom circumstantial participation in the criminal fact is

attributed. The identity of the same must be shown in an express resolution or, at least, in a duly documented and dated act by the investigating judge. That entails that the entire procedure – as from the judicial resolution to initiate or reactivate the process until the resolution in which, for the first time, the proceedings are directed towards investigating and elucidating the authorship or criminal participation of a specific culprit or culprits – is inert to the effect of interrupting the limitation period.

Although in the procedures where the aim is the clarification of criminal facts of simple actual execution, the supplementary rigour which the regulation fosters may not produce especially visible effects, being a matter of complex procedures with the aim of pursuing criminal plots, the strict requirement of determination of the imputation may go as far as extraordinarily facilitating the impunity of those who integrate or direct them.

The jurisprudential doctrine has made an effort to specify the procedural acts with capacity to interrupt the limitation period, distinguishing those which, by being merely proposals, cannot be considered as integrating the effective impulse of the criminal proceedings, from those others which imply real progress in the criminal proceedings. The Supreme Court Sentences of the 25th of January of 1999, 794/1997, of the 30th of September, 1181/1997, of the 3rd of October, 1364/1997, of the 11th of November, supported by the sentences of the 14th of April, 1997, the 25th of January of 1994, 104/95, of the 3rd of February, and 279/1995, of the 1st of March, among others, demand that in the procedural investigation some determined persons appear nominated as the supposed perpetrators of the crime or crimes which are the object of the procedure, but consider comparable with this hypothesis those cases in which the investigation is directed against persons who, even when they are not identified by name, they appear clearly defined – doctrine which is also fundamentally received in the orders issued in the Special Lawsuit nº 880/1991 *(Filesa case)* of the 20th of December and the 19th of July, 1997, and in the sentences of the 30th of September and the 3rd of October, 1997.

The STS [Supreme Court Sentence] of the 25th of January, 1994, *Ruano case,* stated that the apparently undetermined or general nature of the report and corresponding investigation opened, due to the death of a detainee with respect to the authors of the crime, was not an obstacle for the interruption of the limitation period in respect to the

same, as a closed circle of people had been pointed out from the beginning who, even though not identified as the authors of any crime, could have intervened in the facts, without ignoring, in this respect, the frequently existing difficulties for the parties to name the eventual culprits.

The STS nº 2/1998, of the 29th of July, the *Marey case,* reiterated in the Sentence nº 1559/2003, on the 19th of November, stated that in the crimes attributed to an organized and hierarchical group of subjects, with some members – the lowest on the ladder – being the ones who carry out the actual acts of execution of the crime, and therefore more easily identifiable and easily condemned, and others – the leaders or intermediary commanders of the group – who act in the shadow directing, planning and giving orders to the inferiors, it has to be understood that the procedure is directed against the culprit when the lawsuit or formal complaint allowed to proceed or the officially initiated procedure, is directed against that group, even when nominal designation is absent, as well as individual identification of those liable, and therefore interrupting the limitation period of all the participants; this criterion of simultaneous interruption for all the participants in one same criminal act, indicted together, is also accepted in comparative law.

This interpretation was confirmed by the European Court of Human Rights, in the Decision of the 2nd of May, 2007, *the matter of Francisco Saiz Oceja, Julio Hierro Moset and Miguel Planchuela Herrera Sánchez against Spain,* which regarded as inadmissible the claim based on the violation of the right to penal legality acknowledged in article 7 ECHR:

> *«In this case the Court declares that, in its sentence of the 27th* (sic, the correct date is the 29th) *of July, 1998, the Supreme Court declared that the limitation period of ten years fixed by article 113 of the Penal Code, in effect at the time of the facts, was interrupted due to the opening of a penal procedure, and that the disputed crime having been committed by a "group", the limitation period was interrupted by the presentation and admission to proceed of the criminal charges against […] (police officers), as well as "any other person capable of having participated in the activities of the terrorist organization known as Antiterrorist Liberation groups (GAL, in its Spanish acronym)".*

This sentence points out that the Supreme Court made reference to the lines of jurisprudence already in existence in its heart, but considered this matter to be different from the cases already decided, due to the fact that the object of the proceedings in the cases of crimes committed by a group is, among others, to specifically find out who the individuals are who comprise said criminal group.

The Court points out that, therefore, it is not a matter of an abrupt change in the jurisprudence of the Supreme Court regarding the interpretation of the limitation period, but rather of the application of the existing jurisprudence to the new concept of group which had not yet been identified in the preceding jurisprudence. Consequently, the Supreme Court considered that, in a case such as the present, the process was directed against the culprit when the charges allowed to proceed or the official initiating proceedings, were directed against the group, despite there being no nominative or individual designation of liability for the crime. This interpretation is not contrary to the preceding jurisprudence, but rather it is limited to responding in a precise way to a specific situation, different from those for which it was established.

In the opinion of the Constitutional Court, this decision was not arbitrary, but rather, well reasoned, in that the Criminal Chamber of the Supreme Court had justified, in the decision resorted to, the rejection of the limitation period due to the fact that the process was directed against persons who, a posteriori, were declared guilty. Therefore, the connection, required by article 114 of the Penal Code – in force at the time of the facts – between the process and the condemned person, existed, in order to consider the limitation period as interrupted.

This interpretation of the "dies a quo" of the limitation period of the crimes at stake in this case had, certainly, the effect of allowing prosecution and subsequent conviction of the claimants, and therefore, it was unfavourable for them, frustrating their hopes. The said situation does not assume, on the other hand, a violation of the rights guaranteed under article 7, since the Supreme Court has jurisdiction in the last resort regarding the interpretation of ordinary legality.

The Court stated that the claimants were legally condemned for acts for which the criminal action had not expired due to the limitation period. »

For its part, the Supreme Court Sentence nº 867/2002, of the 29th of July, insists that *«we have to maintain a specific stance when we find ourselves before crimes attributed to a group of persons or when the existence of an organization or network is observed, with a diversity of roles in the criminal action, thereby avoiding that the higher rungs or the individuals shaded in the heart of a business organization, which has to be unravelled by means of a complex and difficult investigation, may take shelter in these circumstances to enjoy the same limitation periods as the individual offenders»*

In short, our Supreme Court has been acknowledging the validity of the resolutions *«which offer a substantial content proper to the initiation and pursuit of the procedure, revealing that the investigation progresses and broadens, that is, that the procedure perseveres through its successive stages»* (STS nº 1132/2000, of the 30th of June, citing numerous precedents), even though the final subject of the investigation is not found to be completely specified, the action is understood to be directed against the culprit when the latter is objectively identifiable even though not appearing named in the lawsuit.

The new requirement, projected in the text being reported on, that the person who appears circumstantially as criminally liable be *"determined"* restricts beyond what is reasonable the validity regarding the limitation period of multiple procedural acts which imply an effective impulse of the penal process.

To demand that the process be directed against a *"determined"* person will specifically benefit the complex criminal structures and those who integrate their high command, whose full identification is riddled with difficulties and usually only occurs in the latest stages of the investigation. As the Supreme Court points out, if we were to allow an equal treatment of the cases of individual delinquency and those of organized crime with regard to the limitation period, «*we would be conceding an unacceptable benefit to the modern forms of crime, as much in its aspect of crimes of terrorism or of drug trafficking, as in the*

cases of financial crime, committed in the heart of corporate legal entities or by using them» (STS of the 29th of July, 2002).

From the criminal policy perspective, it is advisable, therefore, that the regulation provides a specific legal regime for crimes committed in the heart of associations or organizations, in which the demand for the determination of the persons against whom the procedure is directed is relativized, either due to dealing with a closed circle of individuals who may have intervened in the facts, or due to the procedure being directed against the members of a determined association or organization, or due to nameless persons having direct connection with the facts under investigation.

4.3 Suspension of the calculation of the limitation period

The suspension of the limitation period is not an unknown institution in comparative penal law. In German Law, the § 78 b stPO provides some limited cases which refer to the legal state of being a minor (underage) or to special vulnerability of the victim in crimes of sexual abuse until they reach sufficient capacity to exercise their right to press charges, to the existence of conditions or obstacles in the pursuance (*e.g*. legal impossibility of initiating or continuing the prosecution, or in the case of the prosecution of a federal Member of Parliament or of a federated state), or to a lis pendens. In the Italian Penal Code, article 159 provides cases of suspension relating to authorizations to proceed, in matters deferred to another trial or, finally, when the suspension is imposed by legal regulation.

The Draft Law presently being reported on follows other courses. It adds a new second paragraph to section 2 of article 132, which has the Draft Law of 2006 as precedent.

It deals with one sole case of suspension of the limitation period, worded in the following terms:

> *«The presentation of a lawsuit or criminal charges before a judicial body and against a determined person, shall suspend the calculation of the limitation period, with the same continuing*

to run again as from the day of presentation if the relevant judicial body does not allow it to proceed. »

The Explanation of Reason's justifies this new change in the following terms:

«It is considered necessary to address the problem of the effects on the interruption of the limitation period that the presentation of lawsuits or criminal charges may have, and, for that, it is chosen to make suspension effective due to such presentation if it is before a judicial body and against a determined person. If the judicial body does not allow it to proceed, then the calculation of the limitation period will continue to run as from the date of presentation. »

As is well-known, interruption is an obstructive act to the limitation period, which re-activates the subjective right (in penal law, the *ius puniendi* – the sanctioning facility of the State) and which not only impedes the running of the limitation period, but also renders the time gone by as useless in the calculation of such period. On the other hand, suspension of the limitation period paralyzes it, and stops it running, but does not render the time already gone by as useless; thus, when the cause of the suspension disappears, the calculation of the limitation period carries on running, and does not begin again from the very beginning, as happens with interruption.

In the Draft Law, suspension is subject to the fulfilment of three requirements: in the first place, the *notitia criminis* must be formalized by means of a formal complaint – understood in the strict sense, given the exceptional nature of suspension – or lawsuit; in the second place, the specific determination of the alleged subject is required; and, finally, it must be presented before a judicial body, whether it has the authority, or not, for the clarification of the facts.

Regarding its effects, this will depend upon whether the complaint or lawsuit is allowed to proceed, resulting in two possibilities:

In the first place, it is specifically provided that if there is no judicial pronouncement of allowing it to proceed, the calculation of the

limitation period will be resumed *("it will continue")* as from the day of presentation of the complaint or lawsuit. That is, in this case, the suspension will not have any effect whatsoever on the calculation of the limitation period, which shall be resumed as from the moment of presentation.

It must be pointed out here that the use of the expression *«does not allow it to proceed»* is misleading, as it appears to refer to a formal resolution of inadmission being pronounced. Therefore, the case in which the judge does not pronounce on the inadmission, within a reasonable time period, is not provided for, leading to an unacceptable situation of suspension *sine die* of the suspension period (since neither is the calculation of the limitation period resumed due to inadmission, nor is interruption of the limitation period produced, because it is not before the admission to proceed), *«making the legally established limitation period an illusion, and producing a flagrant legal uncertainty for the affected citizen»* (Constitutional Court Sentence 79/2008, of the 14th of July, which rejects the inoperability of the limitation period when the paralysation is due to structural reasons which are not ascribable to the judicial body).

In the second place, confronted with silence of the regulation and following a *contrario sensu* interpretation, it has to be understood that if admission to proceed is granted – in terms adjusted to the complaint or lawsuit, it is implied – then the suspension will have full effectiveness, and therefore, the time of suspension transpired between the presentation and the admission will not be computed to the effects of the limitation period. This being so, the limitation period of the offence will not be produced if the admission, as a formal interruption of the limitation period, takes place within the limitation period as increased by the suspension. Another interpretation, understanding the suspension time as inoperable, would render the reform useless in the cases of admission.

This modification seems to be an attempt to reconcile the clashing views held by the Supreme Court and the Constitutional Court, previously referred to, as on the one hand, it assumes the arguments invoked by the jurisprudence of the Supreme Court, to take back the moment of imputation to the presentation of the complaint or lawsuit, whilst, on the other hand, it establishes a legal event which would avoid interpretative excess – prohibited by the Constitutional Court – in what must be understood by «procedure directed against the culprit».

The novelty introduced deserves a few brief comments, in addition to those expressed regarding the cases in which there is no resolution of admission or inadmission:

1st) The case of suspension constitutes an exception to the regime on computation of the limitation period and its interruption inasmuch as it adds *de iure* the time of suspension to the limitation period in the cases of admission of the complaint or lawsuit. That is, it will be possible that from the *dies a quo* of the computation of the limitation period until the date of the judicial resolution of admission, the legal term could have gone by without having interrupted the computation in accordance with the first paragraph of section 2 of the same article, although it will not produce extinguishing effects on the criminal liability when the time of the suspension is deducted. In other words, this suspension, by not being provisionally limited by the determination of a *dies ad quem,* allows the prolongation of the legal term of the limitation period for the duration of the added and undetermined term of suspension, with effects on the legal security and possible conflict with what has been stated by the Constitutional Court in the so often cited Sentence nº 63/2005.

2nd) The requirement, for the operation of suspension, that the person charged is determined, reproduces the problems already pointed out regarding criminal manifestations where this prior determination is not possible, at least with respect to those who occupy the higher positions in the structure of the criminal organization. Consequently, the anomalous situation could be produced in which the crime does not expire for some of those who are liable (those who are determined in the complaint or lawsuit), to whom the time of suspension will have a negative effect, whilst it will expire for others who are liable for the same criminal phenomenon, but who were initially unknown or insufficiently determined.

4.4 The broadening of the cases of imprescriptibility of crimes and penalties to crimes of terrorism.

The Explanation of Reasons justifies the reform of articles 131.4 and 133.4 in the following terms:

> *«The modifications in the matter of the limitation period of the crime are completed with the declaration of the imprescriptibility of the crimes of terrorism which had caused the death of a person or injuries which could be classified in terms of article 149, or when they had consisted of the kidnapping of a person. The foundation of the institution of the limitation period is closely linked to the absence of the need to apply the penalty after a certain time period has gone by. The present reform is based on the non-applicability before criminal conduct which presents the characteristics of the types mentioned. »*

It is a matter, in the first place, of a legitimate option of criminal policy, acknowledged thus by the Constitutional Court when pronouncing on the legal configuration of the institution of the limitation period:

> «*In effect, in our Plenary Sentence 63/2001, of the 17th of March, we stated that, over and above "a criminal legal system which establishes absolute imprescriptibility of crimes and offences would be constitutionally questionable" (STC 157/1990, of the 18th of October, FJ 3), is "it is up to the legislator to determine, with full liberty, in accordance with the principle of legal security (STEDH of the 22nd of June, 2000, the Coëme against Belgium case, § 146), as well as the criteria of criminal policy considered suitable and worthy of consideration in each specific case, the legal regime, the meaning and the scope of the limitation period of the offences. And it is in this sense, in relation to the legislator, that it can be affirmed, without risk of confusion, that the regulation of the limitation period is a matter of free legal configuration, that is, that it remains deferred to the will of the legislator without material conditioning deriving from the Constitution. Its establishment does not reduce the right of action of the prosecuting counsel (STEDH of the 22nd of October, 1996, the Stubbings against United Kingdom case, § 46 and following), nor do the special characteristics of the legal regime that the legislator decides to adopt (crimes to which it can be applied, limitation period, initial moment of the computation or reasons for interruption) affect, within themselves, any fundamental rights of the accused»* (STC nº 29/2008, of the 20th of February, FJ 7, which reiterates what is stated in the STC nº 63/2005, of the 14th of March, FJ 2)

On the other hand, the following cases may be considered as the broadening of the imprescriptibility for technical-legal reasons:

1st) In relation to the conducts and penalties of article 572.1. 2nd affected by imprescriptibility, the reference to the injuries of article 150 (injuries consisting of the loss, or rendering useless, of an organ or non-principal part, or deformity), have been excluded from articles 131.4 and 133.2, and are punished in the mentioned article 572.1.2nd with the same penalty as the injuries as the article 149 and the kidnapping of persons, which means that these types in the area of crimes of terrorism have identical seriousness, independently of the fact that, taken out of this context, the penal types of articles 149 and 164, on the one hand, and 150, on the other, are of unequal seriousness.

This same reason, which deals with the seriousness of the crime, would also be a determining factor for including the types of terrorism of article 571 (crimes of devastation or arson, classified in articles 346 and 351), punished with the same prison penalty of fifteen to twenty years as those of the cited article 572.1. 2nd.

2nd) Regarding attempted homicide or murder where a higher degree of enforcement is applicable, although it is true that in fulfilling the latter, the penalty would undergo reduction of one degree, it would seem paradoxical that the attempts at homicide or murder resulting in injuries of article 149 should have a limitation period, whereas, with the identical result, but with the action classified as an injury crime – the legal right of which is of a lower rank than that of crimes of homicide or murder – in appreciating intent to harm and not to cause death, the crime and the penalty should be imprescriptible.

5) HARASSMENT AT THE WORKPLACE

5.1. The need for penal classification

The 2008 Draft Law adds a second paragraph to section 1 of article 173, with the following wording:

> *«With the same penalty will be punished those who, within the framework of any work activity, repeatedly carry out acts of serious psychological harassment or hostility against another person, which naturally generate feelings of humiliation in the victim, and those who, within the framework of any other contractual relationship, provoke situations which are seriously offensive to the moral dignity of the other party, through the noticeable alteration of the enjoyment of the rights derived from the same.»*

There is no Framework Decision to transpose in this matter, but there are two relevant European documents, as pointed out in the GCJ's Report on the 2006 Draft Law:

The European Parliament Resolution on harassment at the workplace (2001/2339 (INI)), published by Act of the 20th of September, 2001, made a series of appeals to businessmen, to the commission and the council, to the Member States, and to the community institutions in general, in view of the growing social alarm being generated by the situation of psychological harassment at the workplace, highlighting the pernicious consequences that such a situation generates on health, frequently resulting in stress-related illnesses.

On its part, the European Commission's study group on violence at the workplace[3] defined *mobbing* as *"a negative form of behaviour, between colleagues or between hierarchical superiors and subordinates, whereby the person concerned is repeatedly humiliated or attacked directly or indirectly by one or more persons for the purpose and with the effect of alienating him or her".*

In accordance with this, violence at the workplace constitutes a risk factor which the employer has a duty to assess and prevent or reduce, by means of specific measures, with reference to article 6 of the Framework Directive 89/391/EEC.

[3] Ruling adopted on the 29th of November, 2001 – Doc. 1564/2/01 ES-

Mobbing or harassment at the workplace has become characterized in social jurisprudence as a justified reason for the unilateral extinguishment of a work contract at the instance of the worker, provided in article 50 of the Workers' Statute, either due to consideration, in some cases, of substantial modifications in the working conditions which have a bearing on damaging the dignity of the worker, or due to a serious non-fulfilment of obligations on the part of the employer.

Starting from these premises, the GCJ's report on the 2006 Draft Law considered that the affinity of *mobbing* with the type classification already included in article 173.1 of the Penal Code was obvious, which would allow for the majority of these conducts to be convened, without the need for any legal reform. However, it considered that the specific classification of this form of degrading treatment could have a singular pedagogical value.

The idea that the categorization of harassment at the workplace is included in the current article 173.1 of the Penal Code constitutes the majority of learned doctrine. However, this idea starts from the much criticized existence of a penal type which is so generalized and indefinite and, therefore, very far from the principle of establishment of penal types, like that of the recently mentioned article 173.1[4]. The debate about the need to introduce a specific penal classification for harassment at the workplace should take into consideration, then, that the existence of non-specific, open and indefinite types has never prevented the existence of special penal types, nor have they adequately resolved the technical problems of type-classification of conducts, and, of course, nor have they served the purpose of general prevention of prohibitive penal rules.

However, if, for these reasons, it is deemed appropriate, both technically and in terms of criminal policy, to introduce a specific crime of harassment at the workplace, the option of the Draft Law that it should carry the same seriousness as the current general attack on

[4] Cf. STS, 2nd, nº 489/2003, of the 2nd of April, 2003: *"The impugnment made requires us to give content to the penal type of article 173 of the Penal Code, which is a precept that, according to generalized opinion in the doctrine, suffers from serious defects in its wording by declaring as typical action that of inflicting degrading treatment on a person which seriously damages his or her moral integrity".* In the same sense, STS, 2nd, nº 2101/2001, of the 14th of November: *"As is known, during the parliamentary debate, experts considered this penal type as superfluous and pointed out the imprecision of its content. It is evident that the fact that article 15 EC guarantees the prohibition of degrading treatment, does not in itself constitute a justification of a specific penal type, given that the acknowledgement of a fundamental right is not considered as a constitutional mandate of penal protection, per se".*

moral integrity, requires that both crimes have their own sphere of type-classification, that is, that they complement each other.

In accordance with this, the justification of the second paragraph of article 173.1 requires that, at least insofar as referring to the type of harassment at the workplace, a situation of harassment in the work activity is described which is not contemplated in the first paragraph as degrading treatment.

In spite of being arguable, and under discussion, the crime mentioned in the current article 173.1 may be constituted by one single act, provided that it entails a serious detrimental effect on moral integrity, whereas harassment at the workplace always involves repetition of the acts. It is, precisely, such repetition that gives penal relevance to each one of the acts of harassment, the separate seriousness of which, although being an express requirement in the Draft Law, cannot constitute degrading treatment, since, in that case, the conduct would enter into the classification sphere of the current article 173.1.

Therefore, there are degrading treatments in the current article 173.1 which, due to being unique and criminal within themselves, cannot be integrated into the new penal type of harassment at the workplace. Both types describe equally serious forms of damaging the “moral integrity” legal right.

The fact that there hardly exist any convictions for serious conduct constituting harassment at the workplace is significant, which corroborates this differentiating argument. What is more, repeated penal sentences have demanded this new type, and many sentences consider that *mobbing* cannot be classified within article 173.1.

The fact, then, of the existence of some penal sentences which have included serious conduct of harassment at the workplace in the current type of article 173.1 does not invalidate the need for classification, or this differentiating argument, since the absence of a specific penal type of harassment at the workplace and the existence, on the other hand, of an absolutely indeterminate type of attack on moral integrity, has forced the interpretation of the current provision.

It is worth remembering that the vagueness of the terms used in the type of degrading treatment of article 173.1 has already generated contrasting opinions regarding conducts of harassment in the family environment. Thus, the Supreme Court Sentence 489/2003, of the 2nd of April, 2003, rejected interpreting conducts of habitual violence in the family environment as degrading treatment because *"they lacked the element of degradation and humiliation which correspond to the penal typification of article 173".* On the other hand, the circular 1/1998 of the State Public Prosecutor, about the intervention of the Public Prosecutor in the pursuance of maltreatment in the domestic and family environment, acknowledged that the crime of degrading treatment was sufficient to regulate habitual psychic domestic violence.

The problem, then, does not lie in the introduction of a new type classification of harassment at the workplace into the Penal Code – which would, by the way, put us into line with other European legal codes, and resolve a very confused technical situation – but rather, in the existence in our own code of a type which is so open and indeterminate, and so barely respectful of the principle of determination of penal types, as is the current article 173.1, a typification which consists exclusively of vague concepts: *"degrading treatment", "seriously damaging", "moral integrity".*

This typical vagueness of the current article 173.1 is, precisely and fully, the best justification of the need for a new type specification of harassment at the workplace, which would allow for reducing the residual scope of application of the current article, which is more than questionably compatible with the principle of legality.

5.2. Harassment at the workplace of civil servants

The expression *"work activity"* (the previous Draft Law referred to *"employment relationship")* is introduced to include civil servants, as acknowledged in the actual explanation of reasons, although it allows for any applicable interpretation.

The GCJ's report on the 2006 Draft Law criticized the fact that a type description of the cases of psychological harassment, that civil

servants or statutory personnel could be victim to in their places of work, had not been incorporated, claiming that the repercussion of moral harassment in the area of the civil service is no less intense than in the area of working for somebody else.

Harassment at work in the sphere of the civil service has also become widely accepted in the area of patrimonial responsibility of Public Administrations, for morally damaging treatment of their employees, or in connection with the disciplinary regime. Therefore, the GCJ recommended in its report that the workers' protective regime also be extended to civil servants, of the penal order.

However, due to the special characteristics of the work relationship in the civil service, it is advisable that the penal type contains different elements from that of harassment at the workplace outside of Public Administrations.

In effect, this type of behaviour in the sphere of the civil service is not easily subsumed under the legal penal concept of harassment at the workplace, as the requirement of repetition of the hostile conduct becomes notably blurred, because the acts of harassment may occur in one single administrative act, with permanent effects. Therefore, it is suggested that the element of repetition be substituted in the sphere of the civil service by *"the permanence of its effects"*, which should reveal a process of serious harassment, even in the face of condoned administrative resolutions or prescribed non-penal offences.

5.3. Penal frameworks of work and sexual harassment

Sexual harassment is yet another strategy of harassment at the workplace (in fact, in some sentences, the application of the crime of sexual harassment is solicited, and, as collateral action, the crime of article 173.1). Both crimes of harassment share the essential characteristics of moral harassment, since they are a kind of harassment which provoke a seriously intimidating, hostile and humiliating environment.

However, the penalty envisaged for the realization of the type of article 173.2 converts sexual harassment into a special type of harassment in the workplace. On the other hand, in the area of labour and administration, the sanctioning regulation equates the seriousness of the conducts of sexual harassment with the other forms of harassment, since they are all very serious offences. That is how they are envisaged, in effect, in sections 13 and 13-A of article 8 of the Royal Legislative Decree 5/2000, of the 4th of August, approving the revised text of the Law on Offences and Sanctions of the Social Order, and in sections b) and o) of article 95.2 of the Basic Statute of Public Employment.

The sexual component does not sufficiently explain the privileged treatment. The idea of exploitation or humiliation of the worker is equally significant.

However, since the type of sexual harassment of article 184 can be completed with one single request, certain justification can be found for the notably inferior penalty to that of harassment at the workplace. Nevertheless, it should be noted that the legislative technique in considering sexual harassment as one single act is contrary to the semantic correctness of the term, which is characterized by repetition.

Some thought should be given, then, to the faulty legislative technique of the crime of sexual harassment, not only in relation to harassment at the workplace, but also in relation to the offence of conditional threats of harm which do not constitute a crime, which is what the sexual harassment conduct normally consists of, but to which corresponds, however, a much greater penalty.

On the other hand, the penological dysfunction between both types of harassment dissolves in sexual harassment with prevalence. By reducing the penalty corresponding to harassment at the workplace without prevalence, and envisaging the afore-mentioned as an aggravated type, with the penalty provided in the 2008 Draft Law for any crime of harassment at the workplace, the dysfunction of the very notably different penal frameworks for the crime of sexual harassment would be avoided, and the seriousness of the penalties would be adapted to the differing seriousness of both categories of harassment at the workplace: the horizontal as the basic type, and that of with prevalence as the aggravated type.

5.4. The type classification of attack on moral dignity in contractual relations

The second subsection of article 173.2 regulates harassment *"within the framework of any other contractual relation".* In this penal type, however, the conduct is not expressly limited to psychological harassment, but rather with the sufficiency of *"provoking situations which are seriously offensive to the moral dignity of the other party, through the noticeable alteration of the enjoyment of the rights derived from the same".* Their typical differences are, then, very notable.

Except for the so-called *real-estate mobbing,* the existing criminal policy reasoning for the inclusion in the Penal Code of this particular form of harassment, referring to the existence of contractual relations that remain outside the type of harassment at the workplace, like those of self-employed workers, to whom the GCJ's report on the 2006 Draft Law referred, have largely ceased to be relevant, since the text now proposed avoids the strict area of labour relations, which are substituted by work activities.

However, there may be cases worthy of specific penal attention, such as forms of harassment which are very different from harassment at the workplace. This does not justify an extensive type-classification of any serious abuse in civil contractual relations, but rather, the specific classification of these particular cases is advisable, in the same way that is now done with harassment at the workplace, and was previously done with sexual and domestic harassment. The principle of legality expressed in article 25 of the Constitution and article 1 of the Penal Code (the principle of legal security) is not fulfilled solely by the prior incrimination of the conduct, but rather by a precise description of the same.

This would be the case of the so-called real estate *mobbing,* a term which applies to situations in which a person, or group of persons, carries out a series of conducts characterized by a psychological violence, systematically applied, over a period of time, against another person with whom an urban tenancy agreement is maintained, in order to force the person to alter the contract or to relinquish it.

In English, this criminal phenomenon is known as *blockbusting (“revientacasas”* in Spanish). A very suitable approximation to a form of *blockbusting* can be found in the American law called *“The Fair Housing Act”,* which refers to the use of marginal groups to drive out the inhabitants of an area.

Without greater clarification, the proposed penal type does not add anything to those of coercion, threats, or humiliation of a minor nature. It should not be forgotten that crimes of coercion or threats are punished by a higher penalty than that of article 173.2, which would be borne, therefore, as a privileged type of the afore-mentioned. This effect is contrary to the apparent intention of the Draft Law.

6) THE CRIME OF TRADING IN HUMAN BEINGS

The inclusion of article 177-A puts the Spanish Penal Code in line with the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially women and children, of Annex II of the United Nations Convention against Transnational Organized Crime, approved on the 15th of December, 2000. Spain ratified this protocol on the 21st of February, 2002 (BOE [Official State Gazette], of the 11th of December, 2003).

Also, the introduction of article 177-A is in compliance with the EU Council’s Framework Decision of the 19th of July, 2002, relating to the fight against human trafficking (DOCE number L 203/2002, of the 1st of August, 2002).

Article 177.1-A lists a series of conducts – *“recruitment, transportation, transfer, harbouring or receipt”* – by means of the use of violence, intimidation, fraud, or other forms of abuse (of superiority, of the need or vulnerability of the victim) for certain purposes: for sexual or labour exploitation, or the removal of organs.

It is striking that the *«giving or receiving of payments to obtain the consent of the victim»* is not included as a determined means of

commission, despite it being included in both the UN Protocol[5] and the Framework Decision of 2002[6].

On the other hand, as set out in the Explanation of Reasons, and also deduced from the actual wording of the new precept, it is indifferent that the victims are nationals or foreigners, or that the acts of human trafficking are related to organized crime or not, since in this case, an aggravated type is envisaged.

6.1. On the penalty envisaged

The penal framework for the basic type of human trafficking amply surpasses that of the conducts of sexual exploitation of the basic types under article 188.1 (prison for two to four years and a fine) and of labour exploitation, where this is understood to be classified under articles 311, and following, of the Penal code, as is habitual.

Bearing in mind the high penal framework corresponding to the basic type of human trafficking – five to eight years imprisonment – and given that the basic type refers to acts not carried out by a criminal organization, as well as the other typical conducts of varying levels of seriousness -- think, for example, of harbouring, as opposed to transportation --, the introduction of a clause in article 177 of an optional reduction of the penalty would conform to the principle of proportionality of penalties, in the way in which the current article 318-A 6 provides, referring to crimes against the rights of foreign citizens:

> *"The courts, taking into consideration the seriousness of the fact and its circumstances, the conditions of the guilty party and the purpose pursued by the same, may impose the penalty reduced by one degree to that respectively indicated."*

[5] Art. 3 of the UN Protocol: « *"Human trafficking is understood to be the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs»*

[6] The Framework Decision of 2002, in its art. 1. d), mentions: *«The giving or receiving of payments or benefits to achieve the consent of a person having control over another person (...) ».*

The high penal framework envisaged in the aggravated subtypes [article 177-A) 4.5 and 6] should also be noted, with respect to what is provided in the council's Framework Decision of 2002, which, in its article 3.2 lays down that:

«Each Member State shall take the necessary measures to ensure that an offence referred to in article 1 is punishable by terms of imprisonment with a maximum penalty that is not less than eight years where it has been committed in any of the following circumstances:

a) the offence has deliberately or by gross negligence endangered the life of the victim;

b) The offence has been committed against a victim who was particularly vulnerable. A victim shall be considered to have been particularly vulnerable at least when the victim was under the age of sexual majority under national law and the offence has been committed for the purpose of the exploitation of the prostitution of others or other forms of sexual exploitation, including pornography;

c) the offence has been committed by use of serious violence or has caused particularly serious harm to the victim;

d) the offence has been committed within the framework of a criminal organisation as defined in Joint Action 98/733/JHA, apart from the penalty level referred to therein. »

As can be shown, the Framework Decision opts for a maximum penalty of not less than eight years, whereas the Draft Law opts for situating the minimum limit of the prison penalty corresponding to the aggravated types at eight years.

6.2. Typification of conducts and delimitation with other crimes

In order to justify the greater seriousness of the crime of trading in human beings, it is advisable to reinforce the necessary links of the typical conducts of this type with human trafficking, since it is the afore-mentioned that attributes a judgement of disvalue very specifically to the conducts. If these conducts did not have a fraudulent connection

with human trafficking, they would necessarily have to be much less serious, in accordance with the principle of proportionality of penalties.

Even though the actual concept of trading included in the penal type implies trafficking, according to the dictionary of the Royal Academy of the Spanish Language, most of the typical conducts do not conceptually imply human trafficking. This is the case of taking in, receipt and harbouring, but it could also apply to recruitment, under certain circumstances. Therefore, it seems necessary that the penal type should reinforce the fraudulent connection of all the conducts with human trafficking, in such a way that the main weight of the typical conduct does not fall upon the actions of recruitment, harbouring, receiving, or taking in, but rather, specifically, upon that of human trafficking. The recruitment, transport, transfer, taking in, receipt, or harbouring, to which the 2008 Draft Law refers, should be described, therefore, as specific forms of human trafficking.[7]

In the case of this proposal not being accepted, it will be very difficult to distinguish the crime of trading in human beings from the previously referred to crime of prostitution of article 188.1, when, for example, a person is recruited for prostitution, since this requires the same means of commission envisaged in the crime of human trading, but the conduct is, however, punishable by a much lesser penalty (two to four years of prison and a fine of twelve to twenty-four months). Likewise, if the typical conducts are not expressly linked to human trafficking, the wording of the Draft Law would present problems of delimitation between the conducts of favouring, inducing, promoting, etcetera, the prostitution of minors (187.1 PC) and the crime of trading minors (177.2-A).

Apart from anything else, the purpose or typical subjective element of the trade in human beings consisting of *"exploiting their labour or services",* referred to in article 177-A 1 a), is not limited to that of *"forced services, slavery or practices similar to slavery or servitude",* since these last mentioned are merely specific forms of exploitation of labour or of services in the Draft Law, but they are not the only ones.

[7] The type could be worded as follows: "*He or she will be punished with the penalty of 5 to 8 years of prison as a convict of human trading, whomsoever that, whether in or from Spanish territory, in transit or with Spain as the destination, using violence, intimidation or deceit, or abusing a situation of superiority or of need or vulnerability of the victim, trafficks with human beings, by means of their recruitment, transport, transfer, taking in, receipt or harbouring, for any of the following purposes...»*

In view of the of the very severe penal framework proposed for trading human beings for the purpose of an exploitation of labour which does not constitute forced labour or services, slavery, or similar practices, and the existence in our Penal Code of less serious crimes against workers' rights, which include the exploitation of labour, it seems that the conducts of trading human beings for the purpose of exploitation of labour, which does not constitute forced services, slavery, or similar practices, should remain outside of the type, and be transferred to those of imposition of working conditions which are contrary to legally acknowledged rights.

It would, therefore, be advisable to qualify the exploitation of labour or services to which the type of trading human beings refers as a subjective element, so that article 177-A 1 a) would be limited to the purposes of imposing forced labour or services, slavery, or similar practices.

7) CRIMES AGAINST SEXUAL FREEDOM AND INDEMNITY, PROSTITUTION, AND CORRUPTION OF MINORS

7.1. Aggravation of the penalty of the crime of sexual aggression without carnal access.

An aggravation of the penalty corresponding to the crime of sexual aggression without carnal access is envisaged for article 178. The penal framework, which was one to four years, now becomes one to five years.

This is due to a requirement of the Framework Decision 2004/68/JHA, of the 22nd of December, 2003. This Decision, in its article 5.2, establishes a penalty of deprivation of freedom for a maximum duration of at least five years for the practice of sexual activities with minors by means of the use of the use of coercion, force or threats. Since for this Decision, "minor" means any person of less than 18 years of age, and the new article 183 establishes a more severe regime where the victims are less than 13 years of age, the

proposed modification of the penal framework of article 178 is essential.

7.2. Penal types when the victim is less than 13 years of age: article 183

Article 183 is modified, and is now worded as follows:

"1. Whoever carries out acts which are an attack on the sexual indemnity of a minor of less than 13 years of age will be punished as liable of sexual abuse of a minor with a prison sentence of three to six years.

2. When the attack takes place with violence or intimidation, the person liable will be punished for the crime of sexual aggression towards a minor with the penalty of five to ten years in prison.

3. When the attack consists of vaginal, anal, or oral carnal access, or of the introduction of body parts or objects into either of the two first-mentioned tracts, the offender shall be punished with a prison sentence of between eight and twelve years in the case of section 1 and of twelve to fifteen years in case of section 2.

4. The conducts envisaged in the three previous numbers shall be punished with the corresponding prison sentence in its upper half when any of the following circumstances concur:

a) When the limited intellectual or physical development of the victim had put him or her into a situation of total defencelessness, and in all cases when the minor was less than 4 years of age.

b) When the facts were carried out jointly by two or more persons.

c) When the violence or intimidation exercised are of a particularly degrading or humiliating nature.

d) When, for the execution of the crime, the offender had taken advantage of a relationship of superiority or kinship, through parenthood or by being a natural or adopted sibling, or similar, to the victim.

e) When the author had deliberately put the life of the minor at risk.

f) When the offence had been committed within the framework of a criminal organization, including that of a temporary nature, which is dedicated to the realization of such activities."

The new article 183 lists all the conducts in which the victim is less than 13 years of age. The proposed regulation brings to mind the following reflections.

The text refers to minors of *"less than 13 years of age".* In order to include boys and girls of 13 years of age into the type, leaving no room for doubt, as seems reasonable, the type should say: *"of thirteen years of age or less".* A similar specification should also be made in article 182, which regulates sexual abuse with *"a person older than 13 years and less than 16".* If here it is wished to include persons of 16 years of age, it should say: *"persons older than 13 years and of 16 years or less".* This is simply a suggestion, with no intention of substituting the prelegislator's criminal policy option.

On the other hand, article 183.1 lists acts which *"are an attack on the sexual indemnity of a minor of less than 13 years of age".* However, section 2 includes a more serious type in the case of intimidation. Intimidation reveals a remnant of freedom in the minor. Therefore, article 183.1 should be subjected to a specification which includes a reference to the legal right to the sexual freedom -- and not only indemnity -- of minors of less than thirteen years.

Article 183.4 regulates specific aggravating circumstances. The following deserve special consideration:

"b) When the facts were carried out jointly by two or more persons".

In the catalogue of circumstances of the current article 180, which is not modified, *"the joint action of two or more persons"* (180.1.2nd) is included. If, as it would appear, what is intended is an extension to article 183 of the rule of article 180, then, in order to not present new interpretative problems, the same terms should be used in the two articles, that is: *"joint action of two or more persons".*

"e) When the author had deliberately put the life of the minor at risk".

This aggravated type refers to the creation of a situation of specific danger for the minor's life without intent of homicide, since if the cases of concurrence of intent of homicide were to be included here, the penological confusion would be complete.

If this starting point is accepted, then the expression *"deliberately"* should be excluded, since it is inappropriate for expressing the unintentional nuance with respect to the resulting death. The alternative could be: *"when the author had consciously put the life of the minor at risk".* The type would thus indicate the requirement of intent of specific danger, or of negligence of danger, and would facilitate considerably the interpretation of remaining outside of the penal type where the conducts realized are with intent to kill the minor.

Indeed, given that the doctrinal debate on the relation between intent of specific danger and intent with respect to result puts to discussion the difference between the two, the debate could be clarified by reaffirming the perseverance of the general rules on the overlapping of regulations and offences, using, for example, the following expression: *"When the author had consciously put the life of the minor at risk, except in the case of consummated homicide or intent."*

"f) When the offence had been committed within the framework of a criminal organization, including that of a temporary nature, which is dedicated to the realization of such activities".

This aggravating circumstance corresponds to those of the current articles 187.3 and 189.3. e), and to that included in the new article 188. 4. b): *"When the offender belongs to an organization or association, including that of a temporary nature, which is dedicated to the realization of such activities".*

In spite of this systematic relationship among the three regulations, the expression which the Draft Law uses in article 183.4 f) is: *"within the framework of a criminal organization […]".* The difference from the aggravated type of the crimes relating to the prostitution and

corruption of minors is that, in this one it is not therefore necessary that the offender belongs to an organization.

The mentioned Framework Decision uses the expression *"within the framework of […]"* for crimes related to the prostitution or participation of children in pornographic performances. These are, however, the cases in which the current Penal Code demands the factor of belonging to an organization for the application of the aggravating circumstance.

On its part, the Joint Action 98/733/JHA defines the concept of a criminal organization and establishes rules for the punishment of non-executive conducts[8], but it does not contain the expression *"within the framework of […]".*

[8] "Article 1: *Within the meaning of this joint action, a "criminal organization" shall mean a structured association, established over a period of time, of more than two persons, acting in concert with a view to committing offences which are punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty, whether such offences are an end in themselves or a means of obtaining material benefits and, where appropriate, of improperly influencing the operation of public authorities. The offences referred to in the first subparagraph include those mentioned in article 2 of the EUROPOL Convention and in the Annex thereto and carrying a sentence at least equivalent to that provided for in the first subparagraph.*

Article 2: 1. To assist the fight against criminal organizations, each Member State shall undertake, in accordance with the procedure laid down in Article 6, to ensure that one or both of the types of conduct described below are punishable by effective, proportionate and dissuasive criminal penalties:

a) conduct by any person who, with intent and with knowledge of either the aim and general criminal activity of the organization or the intention of the organization to commit the offences in question, actively takes part in:

- the organization's criminal activities falling within Article 1, even where that person does not take part in the actual execution of the offences concerned and, subject to the general principles of the criminal law of the Member State concerned, even where the offences concerned are not actually committed,

- the organization's other activities in the further knowledge that his participation will contribute to the achievement of the organization's criminal activities falling within Article 1;

Thus, in the area of crimes against sexual liberty and indemnity, the use of the expression *"within the framework of a criminal organization"* in the Framework Decision does not necessarily lead to the incorporation of those who do not belong to the organization, within the scope of application of specific aggravating circumstances. This incorporation is a criminal policy decision made in the 2008 Draft Law.

Given that there is no reasoning which explains the difference between the penal types which refer to abuse and sexual aggression toward minors, which are aggravated in the 2008 Draft Law for having been committed *"within the framework of a criminal organization",* and those which refer to corruption and child pornography, which are aggravated due to *"belonging to an organization",* and since the legal instruments of the European Union do not allow for explaining this difference, it is advisable that the expressions used in the diverse crimes should coincide. The aggravating factor *"when the offender belongs (…)"*, is less indeterminate and, therefore, preferable from the point of view of specification, but if the intention of the 2008 Draft Law is that this aggravating circumstance should also apply to those who intervene as authors or participants in the criminal fact, without belonging to the organization, it could opt for the expression used in the Framework Decision. In such case, in order to avoid arbitrary antinomies, it would be advisable to reform articles 187.3 and 189.3 e) of the current Penal Code in the same way.

7.3. Penal frameworks and the principle of proportionality

The principal penal frameworks envisaged in the 2008 Draft Law for sexual aggression and abuse, in the context of the current legislation, are the following:

A) General (thirteen years of age or more; it should be "of more than thirteen years", according to the present report):

Sexual aggression: 1-5 years of prison (article 178)
Rape: 6-12 years of prison (article 179)

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b) conduct by any person consisting in an agreement with one or more persons that an activity should be pursued which, if carried out, would amount to the commission of offences falling within Article I, even if that person does not take part in the actual execution of the activity."

Sexual aggression with one aggravating circumstance: 5-10 years of prison (article 180)
Sexual aggression with two or more aggravating circumstances: 7.5-10 years of prison (article 180)
Rape with one aggravating circumstance: 12-15 years of prison (article 180)
Rape with two or more aggravating circumstances: 13.5-15 years of prison (article 180)
Sexual abuse with carnal access: 4-10 years of prison (article 181)
Sexual abuse with aggravated carnal access: 7-10 years of prison (article 181)

B) Minors of less than 13 years (article 183) (it should be "of thirteen years or less", according to this report):

Sexual aggression: 5-10 years of prison
Sexual aggression with one aggravating circumstance: 7.5-10 years of prison
Rape (without express mention of the term): 12-15 years of prison
Rape with one aggravating circumstance: 13.5-15 years of prison
Sexual abuse with carnal access: 8-12 years of prison
Sexual abuse with aggravated carnal abuse: 10-12 years of prison

Two things should be considered regarding these penal frameworks:

1st) They continue to present problems of proportionality with regard to homicide. Thus, for example: Rape of a minor of less than 13 years: 12-15 years of prison; homicide of a minor of less than 13 years: 10-15 years of prison.

2nd) Since article 183 does not incorporate the penological effect of two or more aggravating circumstances, which are, however, provided for in the current article 180, the penal frameworks of general sexual aggression with two or more aggravating circumstances (7.5-10 years of prison) and of sexual aggression towards a minor of less than 13 years with one or more aggravating circumstances (7.5-10 years of prison) become comparable. The same thing occurs in the cases of general rape with two or more aggravating circumstances (13.5-15

years of prison) and rape of a minor of less than 13 years with two or more aggravating circumstances (13.5-15 years of prison).

This dilutes the claim of greater punitive rigour in the 2008 Draft Law when the victim is less than 13 years of age, which could be corrected by providing in article 183.4 the imposition of a superior penalty in degree when two or more aggravating circumstances concur, since the penalty in its upper half is already provided in article 183.4 for cases where one single aggravating factor concurs.

However, in the light of the high penal frameworks envisaged for these crimes in the 2008 Draft Law, this solution could be conflictive from the point of view of proportionality of penalties. This reflection leads to the advisability of a general revision of the penal frameworks of article 183.

7.4. The penal types of article 187.1

Article 187.1 incorporates those who *"solicit, accept or obtain, in exchange for remuneration or a promise, a sexual relationship with a person who is a minor in age or who is incapacitated"* into the type.

Article 2 of the Framework Decision 2004/68/JHA, of the 22nd of December, 2003, establishes that:

> *"Each Member State shall take the necessary measures to ensure that the following intentional conduct is punishable: […]*
> *c) engaging in sexual activities with a child, using any of the following means: […] ii) money or other forms of remuneration or consideration is given as payment for the child engaging in sexual activities".*

With the current type-classification of article 187.1, the conducts of those who engage in sexual relations with minors in exchange for money are classified, as has been confirmed by jurisprudence, but only

if they determine the entry into, or the maintenance of the minor in prostitution.[9]

Therefore, the new wording of article 187.1 should be understood, in accordance with the requirements of the mentioned Framework Decision, as an extension of the type to the conducts of exercising prostitution without the need for greater qualitative distinctions. It is a matter of punishing whoever takes advantage of an already existing situation of prostitution in order to practice, as the single purpose, sexual activities with the minor.

For this purpose, the type includes the conducts of soliciting, acceptance or obtainment of the sexual relationship. It should be remembered that the current article 187 includes an element of tendency – the entry into or the maintenance of the minor or incapacitated person into prostitution as a potential derivative of the sexual relationship – which is not necessary in the new type. Therefore, it is advisable that the scope of the type is limited to the conducts of consummation, which have to be understood as coincidental with the commencement of the sexual activity, leaving the mere soliciting and acceptance to the regulation of attempt, which has to be less punishable than the accomplished crime. The alternative wording could be: *"The same penalty shall be imposed on those who obtain, in exchange for remuneration or consideration, a sexual relationship with a person who is a minor or incapacitated".* This wording does not compromise the requirement of the Framework Decision, which speaks in any case of *"engaging"* in sexual activities with a child.

7.5. Intervention of legal persons

Article 189.8 includes new wording in the following terms:

[9] Thus, for example, the Supreme Court Sentence, STS, 2nd, 1207/1998, of the 7th of April: *"(...) it should be examined in each case (with attention to reiteration and circumstances of the acts and the greater or lesser age of the minor), whether the conduct of the "clients" induced or favoured the maintenance of the minor in the situation of prostitution. In this sense, in the cases of child prostitution (a minor of 15 years of age or less), the sexual relationship by means of payment has to be ordinarily considered as an act of inducement or favouring subsumable under article 187.1st. especially when it is a matter of reiterated relations, independently of whether the minor had already previously practised prostitution, since at such a young age the offer of money by an adult may be considered as sufficiently influential on the minor's volition to make him or her decide to carry out the solicited act of prostitution, encouraging the minor's involvement to take root in the said activity".*

"When the crimes set out in this chapter had been committed in the framework or on occasion of the activities of a legal person and its criminal liability is declared in accordance with what is established in article 31 of this Code, the penalty of temporary closure of its premises and establishments shall be imposed for two to five years".

As has already been pointed out in the section relating to the criminal liability of legal persons, it is not necessary to make any reference to *"framework"* or *"occasion",* expressions which, due to their indeterminacy, generate interpretative problems and, therefore, legal uncertainty. To avoid this, the reference: *"When a legal person is declared liable for any crime referred to in this chapter…"* would suffice.

7.6. The definitive deprivation of parental rights

Lastly, a brief reference to the modification to article 192.2 should be made. The definitive deprivation of parental rights is included here, which requires the following reflection.

The Draft law incorporates the penalty of deprivation of parental rights into the list of article 39, in a new letter j): *"Penalties of deprivation of rights: (…) j) The deprivation of parental rights".* No reference is made here to the definitive nature of this deprivation, that is, to the impossibility of the restoration of the parental rights. Due to a fundamental requirement of systematic coherence and congruence, penalties for crimes in Book II should be avoided when they are not envisaged as such in the general catalogue of penalties in Book I.

Consequently, article 192.2 should omit the reference to the definitive nature of the loss of parental rights.

Added to the previous reasoning is that the loss of parental rights implies the loss of the legal right to the same, according to what is expressly provided in the new wording of article 46, but this does not imply a prohibition on regaining it. On the contrary, the general rule for these cases is the opposite, as provided by article 170 of the Civil Code:

"The father or the mother may be totally or partially deprived of their rights by sentence based on the non-fulfilment of the duties inherent to the same or pronounced in criminal or matrimonial cases. The Courts may, in benefit and in the interest of the child, agree to the recovery of the parental rights when the reason that caused the deprivation has ceased."

In accordance with the previous, the reference to the definitive nature of the loss of parental rights in article 192.2 should be suppressed, in accordance with the principle of unity in juridical order.

8) TECHNOLOGICAL CRIMES

A new section 3 is introduced into article 197, and section 8 is added, in the following terms:

Article 197:

"3. Whomsoever, by whatever means or procedures, and damaging the security measures established to prevent it, gains access without authorization to data or computerised programs contained in a computerised system or part of the same, shall be punished by the penalty of imprisonment for six months or two years.

If the crime had been committed within the framework or taking advantage of the activities of a legal person, and penal liability is declared in accordance with what is provided in article 31-A of the Code, the penalty of a fine shall be imposed on him or her of double the value of the damage caused.
(…)

8. If the facts described in the previous sections were committed from within a criminal organization, the highest degree of the penalties shall be respectively applied."

The penal types of article 197.3 and 8 are in line with the harmonizing order contained in article 2 of the 2005/222/JHA Framework Decision, of the 24th of February, 2005, relating to attacks on information systems, which requires that the Member States of the European Union adopt the necessary measures so that intentional access without authorization to all or part of an information system be sanctioned as a criminal offence.

Illegal access to an information system which is protected by security mechanisms is classified in a similar way in article 615 ter) of the Italian Penal Code, and in paragraph 202 a) of the German Penal Code.

The GCJ's report on the 2006 Draft Law questioned the need for this reform, noting that the attack on the privacy of information systems:

> *"(…) is found to be formally sanctioned, with even more severe penalties, in section 2 of the same article 197 PC, with its final section providing the joint imposition of the penalties of imprisonment for one or two years and a fine of between twelve and twenty-four months to those who, without having authorization, gain access, by whatever means, to computerised, electronic, or digitalized files or catalogues, without even requiring that, in order to carry it out, the security measures, laid down to prevent such interference, were damaged or neutralized."*

However, the type of section 3 is not redundant, because there is no such overlapping with the current article 197.2. This article protects personal data registered in files, whereas the conduct of article 197.3, in terms of the Draft Law, affects data which are not necessarily personal, nor are they necessarily registered in files. In the second place, the incorporation of this number 3 of article 197 endeavours to criminally protect, in accordance with the mandate of the mentioned Framework Decision, the information systems protected by security measures, but the penal type does not demand that any attack on privacy is produced as a result of that attack on the information systems. What is typified is the mere intrusion into technological systems, characterized by infringing the security measures. This offence does not require the specific subjective element of violating privacy, although discovering secrets is implicit in it, since these only require that the data are protected by some security measure which demonstrates the wish that they not be accessible to others.

In accordance, then, with the typical elements, the protected legal right is not privacy, but rather the integrity and indemnity of the actual system which protects the data. As has been proposed by the doctrine, the typical conduct affects the collective security of technological traffic.

The orientation of the Framework Decision is quite clear in this respect, as its expositive section establishes that its objective is to reinforce cooperation between judicial and other competent authorities, including the police and the other competent authorities, including the police and the other specialized law enforcement services of the Member States, through approximating rules on criminal law in the area of attacks against information systems, especially taking into consideration the possibility of terrorist attacks, or of organized crime, against systems which form part of the critical infrastructure of the Member States, which could seriously compromise a society of secure information.

In accordance with this, the Framework Decision states that to respond with efficacy to these threats it is necessary to have a global plan for security of networks and information in the way that it was set out in the *e-Europe Plan of Action,* in the Commission's communiqué entitled *"security of information networks: Proposal for a European political perspective",* and in the Council's Resolution of the 28th of January, 2002, regarding a common objective and specific action in the matter of network and information security. The European Parliament's Resolution of the 5th of September, 2001, should also be borne in mind, which emphasizes the need to sensitize the public more about the problems related to information security, as well as giving practical assistance.

With regard to the aggravated type of article 197.8, it should be borne in mind that the Framework Decision, in its initial considerations, calls for a greater sanction for those who commit the conduct through criminal organizations, in the following terms:

> *"it is advisable to establish more severe sanctions when an attack on an information system is committed within the framework of a criminal organization, as it is defined in the Joint Action 98/733/JHA, of the 21st of December, 1998, regarding the penal classification of the participation in a criminal organization in the Member States of the European Union".*

This prevision is later defined in article 7 of the Framework Decision, which clearly imposes the obligation on the Member States to provide a determined penal sanction:

"Each Member State shall take the necessary measures to ensure that the offences referred to in the articles, section 2, 3 and 4 are punishable by criminal penalties of a maximum of at least between two and five years of imprisonment when committed within the framework of a criminal organization as defined in Joint Action 98/733/JHA, apart from the penalty level referred to therein."

In order to fulfil this mandate, the Draft Law has incorporated a new section 8 to article 197, which provides the higher degree of penalties in these cases.

9) FRAUDULENT CAPTURE OF INVESTORS AND FRAUDULENT OBTENTION OF CREDIT

The Draft Law incorporates a new article 282-A, with the following text:

"Those who, as executive or title-holding administrators of a company which quotes on the Stock Market, falsify the information that the company has to publish and diffuse in accordance with the Stock Market legislation in such a way as to produce deception and, in that way, capture investors or obtain credits or loans, shall be punished with the penalty of imprisonment for between one and four years, without affecting what is laid down in article 308 of this Code."

The falsification of *"the annual accounts or other documents which should reflect the legal or economic situation"* of a company *"in such a way as to cause economic damage to the same, or to any of its associates, or to a third party"* is classified as a corporate crime in the first paragraph of article 290 and punished with imprisonment for one to three years and a fine for six to twelve months. The second paragraph of this article provides that if economic damage does, in fact, occur, then the penalties must be imposed in their upper half.

Consequently, the Draft Law aims to introduce into the Penal Code a special aggravated type with respect to those of article 290, due to dealing with companies and the author having captured investors or obtained credit.

However, the crime is not regulated as a form of fraud, or as a corporate crime, but rather as a crime against the market and consumers, although only against the stock market and consumers of investment and credits or loans in that area.

The reason why the Draft Law takes the much needed step of classifying investment and credit fraud, but, however, limits them to the stock market, mixes investment with credit facilities, segregates these crimes from fraud, which ends up being ignored even as far the penal frameworks are concerned, and does not deal with their relation to the afore-mentioned corporate crime of article 290 either, is incomprehensible.

If the criminal policy intention is to specifically deal with these criminal practices in the particular area of the stock market, the technique used should be the aggravation of these forms of corporate crime or, if preferred, of fraud in the area of quoted companies, but not the exclusion of other markets and possibly those who could be worst hit. Or, in other words: the need for introducing independent penal types for investment and credit fraud into our Penal Code is not objectionable, but the mixture of the two, the absence of a system, and the exclusive attention given to the stock market and to certain products make the Draft Law's proposal very objectionable.

In effect, the regulation of credit fraud is a lacuna which is constantly shown by the doctrine and by jurisprudence. Its non-existence forces the extensive interpretation of the type of fraud, when, as occurs in credit fraud, the corresponding payment by one of the contracting parties is deferred in time. To consider that, in these cases, the economic damage, for whoever concedes the credit occurs when the credit or loan is conceded through relevant deception -- even though the debtor had not breached the payment obligation at that time -- gives rise to a confusion between the typical objective elements of the act of disposition and damage to property, and provokes confusion between civil false pretences understood as wilful contractual misconduct (article 1,269 of the Civil Code) and criminal intent. The

above has, however, always been understood as an ambush on the patrimony, that is as an intent to cause harm, which goes much further than the mere volition to achieve the contract and, therefore, the act of disposition, by means of deceit. Naturally, doctrine and jurisprudence have elaborated interpretations which allow for filling up the impunity of credit fraud and, thereby, including it in the type of accomplished fraud, but at the cost of very reasonable criticism from the point of view of the principle of legality, which, in other countries, led to expressly classifying credit fraud as an independent type of fraud, instead of following the short-cut of the extensive and *contra legem* interpretation.

It is, therefore, very appropriate that the Draft Law takes advantage of the opportunity to introduce credit fraud into our legal penal code, and thus avoid the interpretative short-cut methods, which are of more than dubious compatibility with the principle of legality. But, thereupon, it is incomprehensible that the Draft Law limits this fraud to the objective area of credit in the stock market, as if this circumstance were the only one to justify the incrimination of credit, instead of constituting a possible aggravated type of it.

For its part, investment fraud is usually analysed in the way envisaged in paragraph 264 a) of the German Penal Code, that is, as a crime of abstract danger for the indeterminate collective of possible investors, in any of its forms, that is, it endeavours to directly protect the market of hypothetical investors from determined deception. The difference with credit fraud, in which the criminal policy focus centres on the protection of the assets of those who concede credit, that is, in which the typical result is, specifically, the concession of a credit or loan due to deception suffered, is that in investment fraud, the penal attention focuses on the investment market in general, and not on any specific investor. This, naturally, does not prevent the specific assets of the investors from also being the object of penal protection, which can be done through the joinder of crimes of abstract danger – investment fraud – and the crime of intent or accomplished fraud, or through the aggravated types of investment fraud due to the production of patrimonial damage or due to the simple certain capture of a specific investment.

In spite of the above being a point in common in the doctrine and in comparative law, the Draft Law proposes a penal type that is not of abstract danger, but rather of result, consisting of the effective capture of investments. This penal type is comparable with that of credit fraud,

where its accomplishment is produced through the realization of an act of patrimonial disposition.

Given this typical structure, it will be inevitable to apply the first paragraph of article 290 when the fraudulent conduct had not achieved the capture of investment, but had only generated an abstract economic danger for the possible investors. It should be supposed, in effect, that the Draft Law does not intend leaving without punishment the investment frauds which are most consolidated in comparative law, which are specifically, those which protect the investors before they actually carry out their investments. There is no other way to interpret the new penal classification – i.e. that it does not exclude the application of the crime of abstract danger of the first paragraph of article 290.

Being so, this should enter into the joinder of crimes with the new penal type, when specific investments have been captured. This will generate problems of typified delimitation with the second paragraph of article 290, which envisages other legal consequences when economic damage has been produced, which is, in this case, the effective fraudulent capture of an investor.

All of these reasons point to, then, the advisability of investment fraud being regulated as a specific and aggravated form of the crime of article 290.

However, given that the second paragraph of article 290 has been unanimously criticized for having established a penal framework which shows arbitrary privilege with respect to fraud or to the concurrence of falsification of documents and fraud and, especially, because it does not take into account the aggravated types of fraud, it would be indispensable that the Draft Law contained, at least in investment fraud, a specific reference mark regarding the application of the penalties of the aggravated types of fraud when damages – read, the certain capture of investments – are produced, which are especially serious, or which take advantage of professional or business credibility, or both circumstances simultaneously.

In short, then, it would be advisable to separate the regulations of investment fraud and credit fraud, and regulate the latter as a form of fraud which is not limited to the objective sphere of the stock market,

and the former as aggravated investment fraud together with the crime mentioned in article 290.

10) CORRUPTION IN THE PRIVATE SECTOR

Article 286-A is integrated as a single article of the Fourth Section of Chapter XI of Title XIII of Book II, worded as follows:

"1.Whoever, directly or through an intermediary promises, offers or concedes to directors, employees or collaborators of a business enterprise, or a society, association, foundation or organization, an undue benefit or advantage of any kind, in order that they favour him or her or a third party before others, in breach of that person's duties in the purchase or sale of goods or in the contracting of professional services, shall be punished with the penalty of imprisonment for six months to four years, disqualification from carrying on this particular or comparable business activity for a period of one to six years and a fine of triple the value of the benefit or advantage.

2. With the same penalties shall be punished the director, employee or collaborator of a business enterprise, or of a society, association, foundation or organization who, directly or through an intermediary, receives, requests or accepts an undue benefit or advantage of any kind, in breach of that person's duties in the purchase or sale of goods or in the contracting of professional services.

3. Judges and Courts, depending on the amount of the benefit or on the value of the advantage, and on the significance of the offender's functions, may, at their prudent discretion, impose the penalty of a lower degree and reduce the fine."

10.1. Objective scope of application

The 2008 Draft Law's Explanation of Reasons states that the new crime of corruption in the private sector:

"[…] excludes from its scope public companies or private companies which perform public services, which should be submitted to the penal discipline for bribery due to, in legal terms, the formal condition of civil service which at least one of the parties must have."

However, article 286-A does not mention any of this, and does not contain any exclusion in this respect. No mention is made of this matter either in the regulation concerning bribery.

Therefore, in spite of what is indicated in the Explanation of Reasons, private companies which perform public services shall also be submitted to this new crime, and not to the bribery discipline.

This seems reasonable, given that the lack of civil servant status of the involved subjects and the impossibility of breaching the specific non-penal duty corresponding to those, justifies that private companies are dealt with in a specialized manner, as happens, for example, with appropriation of goods in these private companies which perform public services, where those responsible are sanctioned through the channel of ordinary property crimes and not by means of the crime of embezzlement of public funds, except for certain exceptional cases which are expressly classified as improper embezzlement.

It is not clear either in the proposed wording what will happen in those cases of fraudulent contracting agreements when the contracting company is publicly owned, even though it takes the mercantile form of private law. In these cases, the crime of fraudulent procurement (article 436) could be applicable, which incriminates the civil servants and authorities who act in concert with the interested parties (private individuals), in any act of public procurement or in the settlement of public assets or effects, in order to defraud any public entity. In this crime the private individuals are treated as necessary co-operators, to whom corresponds the same penalty as to civil servants (one to three years of prison), but with the possible lowering in degree established in article 65.3 for *extranei* [outsiders]. Therefore, if the fraudulent concert in these cases are remitted to the crime mentioned in article 436, not only may the civil servants emerge as privileged, since the penalty of the crime of private corruption is of six months to four years imprisonment, but also, in the intervening private individuals would also be privileged.

This conclusion is lacking in the sense of criminal policy. The crime mentioned in article 436 should imply additional seriousness with respect to the same conduct carried out by the private individuals, since these do not damage legal rights relative to the running of public administrations.

If, however, it is wished to maintain the penal framework of six months to four years, imprisonment for the crime of private corruption with the possible reduction in degree laid down in nº 3 of article 286-A, it would be necessary to envisage the penalty in its upper half and without the possibility of reduction in degree for those who intervene in the crime of private corruption as representatives or as directors or employees of private law companies, but which are publicly owned.

10.2. Compulsory subjects

The reference to the directors and employees have been directly taken from the Framework Decision 2003/568/JHA of the Council of Europe, of the 22nd of July, 2003, relating to combating corruption in the private sector, which refers, in the first place, to *"persons who in any capacity direct or work for a private sector entity"* and later, to the *"employees",* and from which the complete type-classification has been practically reproduced in article 286-A. However, the actual Framework Decision defines the directors as those persons who exercise the power of representation of the legal person, or as those who have the authority to take decisions on its behalf or exercise control within it.

In our mercantile and labour legal system, however, the concept of director does not include the administrators, and therefore the transposition of the directive requires a transposition of the actual concept of director, or the express inclusion into the type-classification of the administrators -- and, by the way, fully fledged -- since, in our legal system, these are neither directors, nor employees or collaborators.

In the second place, the Framework Decision does not refer to *"collaborators",* since such indeterminacy does not respect the European legal standard, or, therefore, the Spanish. The Draft Law does not offer any clue for the clarification of this concept, which is, therefore, incompatible with the principle of determination of the penal

type-classifications and therefore, with the principle of legality. It is, then, necessary to omit the collaborators as possible compulsory subjects. Probably the least complicated method would be to refer, as the Framework Decision does, to persons who perform any work function for the company, society, association, foundation or organization.

10.3. Breach of duty

The core of the deprecation of the typical conduct resides in the infringement of the obligations which the directors, employees and collaborators have in the contracting of goods or services.

Logic, which -- as is well known – does not exempt the necessity to determine penal type-classification, seems to indicate that the type refers to the obligations that such subjects have toward the entity of which they are directors, employees or collaborators. But it often happens that whoever is offering the advantage for the securing of a contract is doing it for the benefit of the actual entity and to the detriment of the competitors, in such a way that no obligation is being infringed as far as the entity is concerned, and no obligation towards the competitors which lost out could be infringed, since these were non-existent.

To avoid purely econometric or patrimonial interpretations in this criminal area, the Framework Decision 2003/568/JHA indicates that the breach of duties should be understood in accordance with the national legislation of each Member State, and should cover, as a minimum, *"all disloyal behaviour constituting a breach of a statutory duty or a breach of professional regulations".* It seems, then, appropriate, to specify the breach of these kinds of duties, adding, perhaps, those that arise from the actual contracts, as is demanded, for example, in the crimes of abuse and revealing company secrets (article 279).

11) MONEY LAUNDERING

The first paragraph of section 1 of article 301 is modified, and now reads as follows:

«1. Whoever acquires, possesses, uses, converts, or transfers assets, knowing that these originate from a crime, committed by that person or by third persons, or carries out any other act to conceal or disguise their illicit origin, or aids and abets the person who participated in the crime, or crimes, to evade the legal consequences of his or her acts, shall be punished with the penalty of imprisonment for six months to six years and a fine to the value of triple the amount of the assets. In these cases, the judges or courts, depending on the seriousness of the facts and the personal circumstances of the offender, may also impose on the offender the penalty of being temporarily prohibited from exercising his or her profession or industry for a period of one to three years, and order the measure of temporary or permanent closure of the establishment or premises. If the closure were temporary, its duration may not exceed five years. »

Section 2 of article 302 is modified, and is now worded as follows:

«In such cases, the judges and courts shall impose, in addition to the penalties already laid down, that of prohibiting the offender from exercising his or her profession or industry for a period of three to six years, and shall also impose upon the organization, either as penalties if its criminal liability is declared in accordance with what is provided in article 31-A of this Code, or as measures, in the cases envisaged in article 129, in addition to the prohibition of entering into a contract with the public sector for the time period of the duration of the greatest deprivation of liberty imposed, one of the following:

a) Dissolution of the organization and permanent closure of its premises or establishments open to the public.

b) Suspension of the organization's activities and closure of its premises or establishments open to the public for a period of two to five years.

c) Prohibition on the organization from carrying on those activities, mercantile operations or business wherein the crime was facilitated or disguised, for a period of two to five years

d) Loss of the possibility of obtaining public subsidy or aid, and of the right to enjoy tax benefits or incentives or of Social Security, for the time period of the duration of the greatest of the deprivation of freedom penalties imposed.»

The wording given to article 301.1 includes as a new form of

action the possession of assets by someone who knows that they originate from a crime, even if the crime had been committed by the actual subject who possesses them.

It is noteworthy that the traditional modes of action have in common the characteristic that all of them tend to conceal the illicit origin of the assets, or, if preferred, to give the appearance of lawfulness to the product or benefit from the crime. Thus, the concealment, disguise, conversion, transfer, and acquisition involves an apparent change of ownership which places the assets within the personal property of another person who had nothing to do with committing the crime, with the aim of incorporating those assets into legal economic traffic.

However, when the 2008 Draft Law pretends to sanction whoever simply possesses or uses the assets knowing their criminal origin (or even through serious imprudence), it is not incriminating conducts that result exactly from money laundering, since the conducts of possessing or using do not necessarily mean acts of concealment of the origin of the assets, because they do not even involve a change of real or apparent ownership, as could occur in the mode of acquisition. And, in any case, if it is considered that the possession or utilization of the assets by third persons, who had nothing to do with the crime from which they originated, are conducts that contribute to conceal or disguise their illicit origin, then the futility of the new modes of classification of typical action is obvious, since article 301.1 expressly incriminates the realization of *"any other act to conceal or disguise their illicit origin».*[10]

The problem with the modes of possession and utilization derives from a misunderstanding, or more precisely, of an extensive application of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, commonly known as the 1988 Vienna Convention. According to this, article 3, relating to *«Crimes and Sanctions»,* -- remember, of drug trafficking --, envisages that the signing Parties are obliged to adopt the necessary legislative measures to incriminate, in their penal codes, a series of conducts which the precept classifies in three groups, under the letters a), b) and c). The conducts of interest – possession and utilization – are found

[10] Even though the concept of money laundering laid down in article 1.2 of Law 19/1993, of the 28th of December and in the Royal Decree 925/95, of the 9th of June, includes utilization among the conducts to which they refer *(«the acquisition, utilization, conversion or transfer of assets which originate in any of the criminal activities... to conceal or disguise their origin...».)* It is considered as a money laundering conduct when it is carried out to conceal or disguise the illicit origin of the assets. Therefore, being already incriminated in article 301.1.I CP *«any other act to conceal or disguise their illicit origin»,* the specific mention of utilization lacks sense and could induce confusion about conducts of null penal damage.

included in the third group of article 3.1, under the letter c), section i)[11]. But, note that the incrimination of these refers exclusively, in the 1988 Vienna Convention, to assets that proceed from crimes of drug trafficking, and not from any crime whatsoever, as, however, is proposed in the 2008 Draft Law.

Also, it is necessary to point out that the conducts which are included in the convention, in the third group under the letter c), are not of compulsory classification by the Party States, unlike the conducts of the two first groups under letters a) (crimes of drug trafficking) and b) (crime of money laundering through conversion, transfer, or through concealment or disguise). Therefore, the type classification of the third group – the conducts included under the letter c), amongst which are found the acquisition, possession, and utilization of assets proceeding from drug trafficking – contains an important provision, since the actual precept envisages that the signing parties may incriminate those conducts "(…) *according to the provisions of their constitutional principles and of the fundamental concepts of their legal code."* This provision, it should be insisted, is only contained in relation to the conducts of this third group.

In application of the provisions in this article 3.1 of the 1988 Vienna Convention, the Organic Law 8/1992, of the 23rd of December, included in the 1973 Penal Code the letter i) in article 344-A, which incriminated the conducts of possession and utilization of the assets proceeding from the committing of crimes related to drug trafficking, since in the prior punitive text these were limited to money laundering.

However, with the arrival of the 1995 Penal Code, with money laundering being removed from the area of drug trafficking crimes and being extended to the committing of any crime whatsoever (at that time, still serious), the legislator opted, with good criteria, to eliminate the conducts of possession and utilization which were restricted by the Vienna Convention – although with reservations – to assets proceeding solely from drug trafficking crimes. Added to this important reason was that the conducts of money laundering of assets proceeding from drug trafficking crimes were aggravated and sanctioned with very severe penalties – from three years and three months to six years imprisonment --, penalties which, in the light of everything, seemed excessive for the less serious conducts of the third group, included in

[11] Article 3.1 letter c), section i) of the 1988 Vienna Convention refers to: *«the acquisition, possession, or utilization of assets, knowing, at the moment of receiving them, that such assets proceed from one or some of the crimes classified according to subsection a) of the present precept or from an act of participation in such crime or crimes. »* For its part, the letter a) refers to the conducts of drug trafficking, coincidental with those classified in our article 368 PC.

letter c) of article 3.1 of the Vienna Convention, i.e. possession and utilization (along with acquisition).

In this way, the pretence of the 2006 Draft Law, resumed again now, of reviving the conducts of possession and utilization, which the Vienna Convention referred only – although with serious reservations – to drug trafficking crimes, shows an evident excess with respect to the contents of international legal instruments.

Added to the above are the following drawbacks:

The possession of assets proceeding from property crimes or socio-economic offences is already classified under article 298.1 as the crime of receiving of stolen goods – offence which refers to whoever *"acquires"* or, simply, *"receives"* the property (with a profit motive in mind) – and in article 451.1st as the crime of concealment (when the holder does not have a profit motive in mind). But, in both cases the type-classification is limited to those who had not intervened as authors or accomplices in the crime from which the *"received"* property proceeded.

An exclusion which does not take place, however, in the type-classifications of money laundering, for which the only possibility of avoiding that the author or accomplice of a property or socio-economic crime be punished, as well, as a money launderer due to possession of the property – object of his/her property crime – will be constitutional prohibition of *bis in idem.* This argument is only valid, however, for possession, since this forms part of the accomplished fact of these crimes, but not for the utilization of the assets, which, consequently, will provoke an overlapping of the property or socio-economic crimes with that of money laundering, with the consequent disproportion of the penalty. It is, then, very necessary to add a clause which excludes from the type-classification, at least those who had intervened as authors or participants in the property or socio-economic crime.

It should not be ignored that this clause should also be extended to crimes which are not found under Title XIII of Book II of the Penal Code, like, for example, tax fraud, or others of broad economic content, like those related to corruption, urban planning, etcetera.

Consequently, correct legislative technique would make the suppression of these two forms of typification more advisable than adding a clause of exclusion of a typification of such a broad spectrum.

Another aspect is, according to the Draft Law's proposals, the fact of possessing or utilizing the assets without having taken part in committing the crime from which they proceed, could end up being more seriously penalized (article 301.1 envisages penalties of six months to six years imprisonment and a fine of triple the value) than if the offender had actually committed the crime of theft, fraud, misappropriation, etcetera, from which the assets proceed. This conclusion lacks all logical and criminal policy justification and exceeds by far the constitutional principle of proportionality of penalties.

It is essential, then, if, in spite of everything, these two forms of type-classification are maintained, a clause is included, similar to that of articles 298.3 and 452 (referring to receiving and concealment, respectively):

> *"In no case may the penalty of deprivation of liberty be imposed which exceeds that of the concealed crime."*

12) TAX FRAUD

Explanation of Reasons:

> *"The limitation period has been raised, for crimes against the Treasury and against social security, to ten years, with the aim of avoiding that they go unpunished, in certain cases, due to the technical impossibility of their detection and proof within the time limits envisaged up to now. Also, the purpose of the reform in this matter is that the criminal report of fiscal crime does not paralyse the procedure of liquidation and collection by the Tax Office when there are sufficient elements for it, as appears to be the general tendency in comparative law. After the reform of the Penal Code, the necessary adjustments will have to be made to article 180, to the 10th additional stipulation, and other regulations concordant with the General Tax Law. Finally, the tax administration will favour the effective exaction of the amount of the fine that has been penally imposed at sentencing."*

Section 5 is added to article 305, worded as follows:

«5. In the procedures for the crime contemplated in this article, the penalty of a fine and the civil liability, which will consist of the amount of the tax debt that the tax administration was not able to liquidate, due to the prescription or other legal cause, in the terms envisaged in the General Tax Law, including the interest due to the delay, will be demanded through the administrative procedure of a liability order in the terms established in the cited law.»

12.1. Article 303.5

There is a clear lack of tuning between what is stated in the declaration of intentions in the Explanation of Reasons and the specific content of article 305.5, since the former states that the objective of the reform is that the investigation of the penal process due to tax offences does not paralyse the ongoing process of the administrative procedure, whereas the latter regulates aspects which apparently have nothing to do with a supposed exception to the principle of penal prejudgement, and confronts other, different aspects, such as the inclusion in civil liability of the prescribed tax debt and the pertinence of the liability order.

In effect, when the content of article 305.5 is examined, it is observed that no reference is made therein to the duality or the compatibility of the administrative and penal procedures, or even to any exception to the principle of prejudiciality, which would imply a legal change of constitutional significance. On the contrary, the only reference to the precept of the possible compatibility of processes could be found in the last sentence of the proposed text, which indicates that the defrauded debt and the interest due to the delay which integrate the civil liability will be demanded by the administration through a liability order. It could be thought that this last proposition of the precept would enable the Tax Administration to demand the debt through the liability order in the appropriate administrative procedure, at the same time as carrying out the penal investigation process.

However, this is not a conclusion that is clearly extracted from the wording of the proposed precept, nor is it a plausible option.

In the first place, because the *ex delicto* civil liability, as its actual name indicates, derives from the actual criminal fact (article 116.1), so that *«whoever has not been tried and criminally condemned cannot be declared civilly liable for a fact for which their presumed innocence has not yet been eliminated»* (STS, 2nd, of the 28th of November, 2003), without being able to gain *«a condemnation for civil liability without a prior declaration of penal liability, ignoring the regulatory stipulations that the civil liability is associated with the prior penal sentencing»* (STS, of the 17th of May, 2000), and therefore, in short, *«the civil liability derived from the crime…logically requires the existence of a prior penal sentence»* (STS, 2nd, of the 29th of December, 1996). Definitively, as indicated by the STC of the 11th of June, 2001, the *ex delicto* civil action is conditioned by the existence of penal liability.

Therefore, it cannot be pretended to demand the civil liability derived from the crime in an administrative procedure of a liability order during the penal investigation of a case due to a presumed fiscal offence.

In the second place, because the precept also authorizes the payment collection through a liability order for the fine which corresponds to the offence, which indicates that a condemning sentence must have been pronounced which fixes the fine, which is the penalty corresponding to the offence. It is not possible to resort to the procedure of a liability order to collect the payment of the fine if the penal procedure is open. What's more, the condemning sentence must be an unappealable judgment, since to demand, through the procedure of a liability order, the fine set at an appealable resolution would be to anticipate the fulfilment of the sentence, with the consequent damaging of the fundamental right to presumption of innocence (24.2 EC). The patrimonial character of the fine does not eliminate its legal nature of authentic penalty. Put in other terms: a provisional execution of pecuniary penalties is not possible in penal law, without affecting that the investigating court may demand a deposit from the accused to cover the possible civil liability in the event of going to trial for a fiscal offence (article 783.2 LE crim.)

In the third place, because the desire to reconcile the administrative and judicial penal processes presents practical problems of difficult solution. It is evident that the tax debt that the Tax Administration could liquidate on their own account cannot be binding on the judicial organ, not even as far as the civil liability derived from the crime is concerned. This opens the door to a possible duality of debts for different amounts decided by different State organs, against

the constitutional doctrine which affirms that the same facts cannot exist and cease to exist at the same time for different State organs without infringement of the right to effective judicial protection which is deduced from the principles of legal security and the prohibition on arbitrariness by public authorities (Constitutional Court Sentences 62/1984, of the 21st of May; 158/1985, of the 26th of November; and 30/1996, of the 22nd of February). Futile contradiction, in all other respects, because in the end, it has to be resolved in favour of the jurisdictional action as opposed to the administrative, as was consolidated very early on in the Constitutional Court Sentence 77/1983, of the 3rd of October.

Although the penal regulations, which, as they are, raise serious interpretative doubts from the outset, should be corrected before coming into force, precisely to avoid difficulties in their application, nevertheless an interpretative effort can be made which avoids the afore-mentioned drawbacks, to the effect that the defrauded tax debt may be claimed through the administrative channel by the procedure of the liability order, but only once an unappealable condemning sentence has been pronounced in the penal order. So that, in spite of the duality of the administrative and penal procedures, it could be interpreted that article 305.5 refers to the administrative claim on the fiscal debt after finalizing the penal process. According to this possible interpretation, once the penal jurisdiction has established the sentence comprising the penalty of a fine, as well as the defrauded quota and the amount of civil liability derived from the fiscal offence, the penal jurisdiction would be discharged of the task of simply collecting the sums, which would be carried out through the administrative collecting procedure of the liability order on the part of the Tax Administration.

This interpretation would avoid the problems of culpability and of presumption of innocence referred to above, which would derive from the temporal compatibility of both procedural channels. But, on the other hand, it would present other drawbacks of difficult solution.

From the technical and practical point of view, the possible resource of the administrative procedure of the liability order, to collect the tax debt which integrates the civil liability derived from the offence, with the interest due to the delay and even the penalty fine, is lacking in sense, since the firm sentence pronounced by the penal jurisdiction constitutes an executive title which is equally executable in summary form in the corresponding procedure of execution of sentence, with the same or greater swiftness as the administrative procedure of the liability order.

In the second place, to attribute the faculty of collecting the fine imposed in the penal sentence would be contrary to the competence to judge and compel execution of sentence, which is exclusively attributed to Courts and Tribunals in articles 990 of the LECrim and 117.3 of the Constitution.

Consequently, the prevision of article 305.5 is in all cases confused, since it does not allow clarification of whether it pretends a duality of the administrative and penal procedures during the penal investigation, with the serious problems that this would generate, or the reserve of the administrative procedure of the liability order after finalizing the penal procedure, in which case other serious problems of difficult solution are raised.

Therefore, the proposed reform works out to be unsustainable. It would be advisable to eliminate the sentence *«will be demanded through the administrative procedure of a liability order in the terms established in the cited law»*

In this way, there would only remain in article 305.5 the mention that the civil liability derived from the offence shall be comprised of the amount of the tax debt, plus interest due to delay – something which, for the rest, is already stipulated by the 10th.1 Additional Stipulation of the general Tax Law.

13) CRIMES AGAINST TERRITORIAL ORGANIZATION

«*1. Prison sentences from one year and six months to four years, a fine from twelve to twenty-four months and special prohibition on profession or trade for the time period of six months to three years shall be imposed upon promoters, constructors or technical directors who carry out unauthorized urbanization, construction or building on land which is destined for roads, green areas, goods of public dominion, places which are legally or administratively renowned for their landscape, or ecological, artistic, historical or cultural value, or for the same reasons had been considered as having special protection.*

2. Prison sentences from one to two years, a fine from twelve to

twenty-four months and special prohibition on profession or trade for a time period of six months to three years shall be imposed upon promoters, constructors, or technical directors who carry out unauthorized urbanization, construction or building on non-urbanizable land.

3. In any case, Judges and Tribunals, in a reasoned manner, may order, to be carried out by the author of the fact, the demolition of the work, without affecting the compensation due to third parties of good faith.

4. In the cases envisaged in this article, when the crime had been committed in the framework or taking advantage of the activities of a legal person and its penal liability is declared in accordance with what is established in article 31-A of this code, the penalty of a fine for double the amount of the damage caused shall be imposed. A prohibition on carrying on in the future similar activities to those wherein the crime was committed for a period of one to three years may also be imposed. »

13.1. The broadening of the classified conducts

The proposed text of article 319 not only corrects with good criteria the existing asymmetry in the current text, between the first two numbers, which refer, respectively, to unauthorized constructions and buildings, but also, broadens the area of the corresponding classified conducts, which now consist in the realization of the building, construction or urbanization works. The broadening of the classification is, therefore, twofold: on the one hand, because the realization of the work is sufficient for consummation, and, on the other hand, because that of urbanization is included.

However, one of the basic problems which jurisprudence has been confronted with, referring to the current classifications, is to determine which constructions or buildings are, effectively, typical. Some of the first resolutions in this matter sanctioned, as illegal constructions, the building of small sheds or huts for farm implements, for which the classified sanction appears, in all ways, disproportionate. For that, doctrine and jurisprudence were settled with the idea that to talk of construction or building type-classified to the effects of article 319, the constructions or buildings must have the capacity to damage

the “territorial organization” legal right, which requires a minimum of volume and durability.

This interpretative problem takes on a special importance in the Draft Law text, due to the previously mentioned broadening of the area of classified conduct. The demand of a determined level of damage in the type of conducts classified is converted, in effect, into a basic demand for the classification of the conducts when the accomplishment of the crime takes place through the mere realization of the works which, also, may not even be of a construction or building.

Consequently, it would be advisable that jurisprudential doctrine expressly featured in the new legal text, so that the type-classification was conditioned to the works being of sufficient volume and durability.

13.2. Fine by daily quota

It is helpful that in the area of legal persons, article 319.4 envisages a proportional fine. Even though its amount is not very high (*“the sum of double the damage caused”*), it can be compensated by the preceptive loss of the offensive benefit through the demolition of the illegal construction or building or its confiscation, as shown here in continuation.

Precisely because of this it seems somewhat incomprehensible that the fine envisaged for natural persons is still fixed by the daily quota system, with a maximum of 288,000 euros, which is an insignificant amount compared to the huge benefits which this type of crime tends to produce. It is difficult to explain why a system of a fine that is proportional to the benefit gained by the crime is not applied here. Only in this way could the penal legislator be coherent with the basic principle in the matter of sanctions, shown in article 62 of the Urbanistic Discipline Regulation (RDU in its Spanish acronym): *“In no case may the urbanistic infringement imply an economic benefit for the offender. When the sum of the sanction imposed plus the cost of the procedure of reinstatement of goods and situations to their original state delivers an amount which is inferior to the said benefit, the amount of the fine shall be increased until reaching the total amount of the same.”*

It should be noted, by the way, that the same incoherence is detected in the crimes of articles 325 or 328, also subjected to reform in the Draft Law.

The fine by daily quota is meaningless faced with criminal purposes which operate by usurping goods of common ownership, as occurs in urbanistic crime, or externalizing their business costs (damaging the environment as a means of obtaining their business profit.) In these cases it is essential to provide the proportional fine. The fine by daily quota is perfectly compensable as a cost of illegal exploitation, which the system of proportional fine tends to avoid.

13.3. Demolition or confiscation

With the urbanistic crimes being more serious than the corresponding administrative urbanistic offences, it is not comprehensible that demolition is compulsory in the administrative area, but optional in the penal. It is well-known that the compulsory nature of the demolition in the administrative area is often shunned in the execution phase due to the material or legal impossibility of executing the sentence (article 125 LJCA) and due to a more permissive jurisprudence than is advisable. However, the Penal Code leaves the possibility absolutely open that the judge does not condemn the illegal construction to demolition, but establishes demolition as a mere option and does not fix any kind of criteria to determine when this should be imposed.

In this sense, the penal regulation should be coordinated with the administrative, providing that when the judge does not order demolition, then confiscation of the construction should be ordered, in order to thus comply with the mentioned principle of article 62 of the RDU: “in no case may the urbanistic infringement imply an economic benefit for the offender”. If for whatever reason the construction cannot or should not be demolished, the benefit derived from it may not, under any circumstances, remain in the hands of the offender, if it is not wished to continue generating the already well-known criminological effects of an incorrect system of consequences from the crime.

13.4. The omission of the duty to inform

Section 1 of article 320 is modified, and shall now have the following text:

«*1. The authority or public servant that, knowing of its injustice, has given favourable reports to projects of urbanization, construction or building, or conceded licences contrary to the current regulations of territorial or Urbanistic organization, or for inspection purposes had silenced the infringement of the said regulations, shall be punished by the penalty established in article 404 of this code and, also, with imprisonment for one to three years or a fine of twelve or twenty-four months.* »

The typical conduct of an unduly favourable report is broadened to the cases of *construction and urbanization,* correcting the current asymmetry between articles 319 and 320.

The classification of the conduct of silencing infringements of Urbanistic regulations includes an omissive type which requires special attention.

The typical situation is the context of the inspection. The omitter is the subject who is affected by the prohibition on silencing (i.e.: the duty to communicate or report on) during the inspections. By virtue of the reference *"for inspection purposes"*, not only is the inspector, in the strictest sense, covered, but also are all civil servants who collaborate, or ought to collaborate, in the inspection.

The mentioned reference *"for inspection purposes"* is technically problematic, since it allows the civil servant who pretends to silence the infringements to evade the penalty by not complying with his/her duty to inspect. With that, the infringing civil servant would not be silencing the infringement *"for inspection purposes",* since these would not have taken place, and would become liable for *"wilful blindness"* or voluntary blindness before the facts which would absolve him or her of the penalty. Therefore, the reference to *"purposes"* should be substituted or complemented by another term which embraces the infringement of the duty to inspect.

14) CRIMINAL ORGANIZATIONS

Title XVII-A is added to Book II, under *"Regarding criminal organizations".*

A sole article 385 is introduced under this Title, which reads as follows:

«1. Those associated in a temporary manner to commit crimes will be punished with a one to three years prison sentence. The sentence will be in the upper half if the crimes committed were against people's lives or integrity, their freedom, sexual freedom or indemnity, National Treasury and Social Security assets.

2. The above precept will be enforced unless a greater sentence is applicable in keeping with another precept of this Code. In any case, the sentences envisaged in this article will be imposed, without detriment to the corresponding ones for the crimes actually committed.

3. The judges or Tribunals, upon reasoning the sentence, may impose a lower sentence in one or two degrees, providing that the subject has voluntarily abandoned his criminal activities and has actively collaborated with the authorities or their officers, either to prevent the commitment of the crime, or to obtain decisive evidence leading to the identification and capture of others responsible, or to prevent the actions or the development of the associations to which he/she used to belong."

14.1. The absence of a protected legal asset.

It is noticeable, initially, the systematic placing of the article 385-A following the crimes against trade security, and before the forgery of money and bills of exchange, when it doesn't have the slightest systematic proximity with either.

To place this crime next to that of illegal association would have been, however, arguable, for it cannot be considered that temporary association in order to commit a crime infringes the right of free association recognised in article 22 of the Constitution.

The actual peculiarity of the new crime makes it certainly difficult to place it systematically, to the point that in the initialling of the newly created Title the Draft Law has not even managed to approach the protected legal asset. In this sense, the confusion is so enormous that it was opted for an extravagant systematic placing, probably indicating that those crimes infringe collective security. In this case, the lack of definition of the legal asset would be incompatible with the principal of determination of penal types, because it would not be confined to the affected specific area of collective security (traffic, public health, and so on).

This systematic difficulty is not only of formal transcendence, but also physical, i.e. it is a clear symptom of the difficulty to identify a physical element essential to the crime, affecting a legally protected asset or right, even searching for it among collective and diffused interests.

Hence, the criminological phenomenon of the so-called *"temporary associations"* to which article 513 of the Penal Code of 1973 refers, has been historically linked in our criminal law to the perpetration of certain crimes, as for example theft, thus permitting to clearly identify the threatened legal asset by such conduct, but, above all, allowing to remit it via an extensive clause to the types of illegal association, or else to build a simple aggravated type of the corresponding crime.

There is no doubt at all that if this was so, the appropriate legal technique would be the specific incrimination of criminal associations in the corresponding chapters or titles, as crimes of mere activity or abstract danger for the respective legal assets. This technique, which was the one followed in the 1973 Penal Code, would require, however, a legal annotation of the legal assets about which it is considered necessary the incrimination of temporary criminal associations, and that would be incompatible with the general aim of the Draft Law. According to this, it is a matter of a crime of indeterminate abstract danger, up to

now an unknown criminal category, whose incompatibility with the injury principle or endangering legal assets, and, therefore, with the principle of legality, is very well founded.

14.2. The penalties

The identical prison sentence of one to three years envisaged both for the basic type of temporary criminal association, as for the members of non-terrorist illegal associations (article 517.2), causes criminogenic effects, since with the exception of a fine penalty, the seriousness of stable associations is equated to that of temporary ones, which in the area of an intimidating generally preventive message creates a tendency towards the stability of associations, and therefore towards an increasing abstract risk for legal assets. Therefore, if in spite of everything the temporary criminal association crime is preserved, the penalty for their perpetrators should be inferior to the corresponding one for the members of a non-terrorist illegal association.

For similar reasons, an aggravated type should be envisaged for temporary associations aimed at perpetrating crimes of terrorism, as the illegal terrorist association crimes already are. The existence of temporary terrorist associations – i.e. without a permanent vocation, or a hierarchical structure – far from being a hypothesis is a proven reality in the so-called jihad terrorism.

14.3. The mitigating factor of collaboration

If it is considered appropriate from a criminal policy point of view to envisage collaboration as a mitigating factor in the area of temporary associations, it would seem reasonable to introduce the same clause in the crimes of illegal association.

15) BRIBERY

Article 419 is modified, and it will read as follows:

"The public officer or civil servant who, for his own benefit or that of a third party, receives or requests, personally or through an intermediary, a gift, a favour or any kind of reward, or accepts the offer or the promise to carry out an act in the exercise of his/her duties contrary to those inherent to his/her position, will be liable to a prison sentence of three to six years, a twelve to twenty-four months fine, and a special ban from a public position or employment for a period of seven to twelve years, without detriment to the penalty corresponding to the act carried out as a result of the reward or the promise, if it constitutes a crime."

Article 420 is modified, and it will read as follows:

"The public officer or civil servant who, for his own benefit or that of a third party, receives or requests, personally or through an intermediary, a gift, a favour or any kind of reward, or accepts the offer or the promise to carry out, fail to carry out or delay without justification an act in the exercise of his/her duties, will be liable to a prison sentence of two to four years, a twelve to twenty-four months fine, and a special ban from a public position or employment for a period of three to seven years, without detriment to the penalty corresponding to the act carried out if applicable if the omission of the act or its delay constitutes a crime."

15.1. Omission conduct by a public officer in the types of own bribery

The 2008 Draft Law maintains a very different system of the current types of own bribery, where the subject is a public officer. The new system is not built on the criminal nature, illicit but not criminal, or in accordance with the right or omission of the action to be carried out, but according to the nature, contrary or otherwise to the position's duties. The act's nature – criminal or otherwise – certainly influences the corresponding penalty, but only through the concurrence of crimes.

In this systematic context, the Draft Law considers less serious the omission conduct, consisting in not carrying out or unjustifiably delaying an act of duty, than the active conduct, for omissions are in any case typified in article 420 which envisages lower penalties than article 419.

That is to say: The omission conduct is not treated in the Draft Law as the performance of an act contrary to the position's duties (article 419), which would imply a heavier penalty, but equal, as far as its seriousness is concerned, to the performance of an act of duty.

As a result of the new systematic structure, this value difference between actions and omissions, that could perhaps be defended when the omissions do not go as far as being criminal, is also preserved when the performance of an act of duty, or its unjustified delay, constitutes a crime (e.g. corruption), for in these cases there would be a concurrence of crimes, but the penalty corresponding to the crime of bribery would always be lighter than if the same conduct had been carried out actively (article 419).

This privileged treatment of omission conduct – compared with an active conduct – is also present, although only partially, in the current Penal Code, that in article 421 envisages only the penalty of a fine, when the purpose of the gift is for the officer to abstain from performing an act of duty. However, if such abstention constitutes a crime, the current article 419 replaces the type of article 421, envisaging then a prison sentence of two to six years for the crime of bribery. This effect is possible because the current article 419 refers specifically to both actions and omissions constituting a crime.

The report from the General Council of the Judiciary about the 2006 Draft Law also detected this valuation inconsistency, expressed as follows:

"(…) the Council must highlight the valuation inconsistency in which the projected text also incurs when undervaluing, with lesser intensity, the omission conduct within the position's duties that could be relevant as a crime – e.g. in the cases of corruption by omission, or of malicious delay in the administration of justice – and that nevertheless would be included in the typical description of article 420 PC [Penal Code], and not in article 419 PC, with a considerable decrease of the applicable penalty.

Indeed, the configuration pretended of article 419 PC in the draft law considers exclusively an active conduct in act of duty as the

subject of instigation or corrupt behaviour – 'to carry out in the act of duty an action contrary to its proper duties' – consigning the omissions contrary to the prescriptions of the rules and regulations of public officers to article 420 PC – 'to avoid doing, or delaying without justification, what should be done' – meaning that either applying a grammatical criterion for the interpretation of both precepts, or a systematic and finalist criterion, the non-legal abstentions of the public officer or civil servant, whether they constitute or not a crime, are included in any case in article 420 PC, and penalised with a prison sentence of two to four years, a twelve to twenty-four months fine, and a special ban from public office or employment for a period of three to seven years. This conclusion is reinforced by the fact that the article finishes with a subsection identical to that of article 419 PC, which overcomes the concurrence of crimes stating that this penal framework is established 'without detriment to the eventual applicable penalty if the act's abstention or delay constituted a crime', proving that the legislator definitely and explicitly opts for degrading the penal response to the corrupt instigation of a crime, when this is of omission nature (…)"

This shared criticism led the former General Council of the Judiciary to conclude that the current system was preferable, i.e. to grade the levels of seriousness of bribery as per the criminal nature, or otherwise, of the actions or omissions to be carried out by the public officer.

However, the incorrect penal treatment of criminal omissions in the 2008 Draft Law does not need to lead to this conclusion. It is perfectly possible to correct this aspect by preserving the assessment system of the Draft Law, which seems technically correct, for it is consistent with the nature of these crimes, the main failure of which is based on the existence or otherwise of several infringements of the civil servant's duties at the time of acting (or omitting).

In other words, there is an infringement of duty common to all types of bribery, that lies in the existence of a gift, but this infringement of duty, being common to all types, may not assign a value difference of some vis-à-vis others. Before addressing the criminal nature, or otherwise, of the act to be carried out by the civil servant, there is another infringement of duty by the civil servant that may establish the elementary value differences among penal types, which is whether the act to be performed is or is not contrary to the position's duties. This is,

therefore, the basic criterion to systematize the penal types according to their greater or lesser seriousness. The criminal nature or otherwise of actions or omissions may only be deduced from the acts contrary to the position's duties, and therefore only be addressed for value purposes in these cases, and, ultimately, as in the Draft Law, when referring in this sense to the norms of the concurrence of crimes.

Therefore, to correct the valuation inconsistency regarding criminal omissions, preserving nevertheless the systematic structure of the bribery types from the Draft Law, it would be necessary to transfer to article 419 the conduct consisting in not carrying out or delaying without justification an act to be performed by the civil servant, which would therefore be removed from article 420. As a result of removing this omissive conduct from article 420, the final reference in this article to the concurrence of crimes, if the omissions constitute a crime, should also be erased.

In this way we would manage to consider an omissive conduct, consisting in not carrying out a certain act or delaying it without justification, in any case contrary to the position's duties – which is indisputable – and at the same time that the criminal nature, or otherwise, of such omission allowed the imposition of a greater or lesser penalty via the concurrence of crimes.

15.2. Article 426

The exemption of penalty of article 426 is regulated in a very similar way to that of the current article 427, hence still carrying the criminal policy flaw of a brief ten day period after the event in which to file an official report, as well as the uselessness in this context of the report having to be filed *'before the opening of the corresponding proceedings'.*

Regarding the former, the criminal policy interest of the exemption of the penalty for the crime of bribery lies in its usefulness to favour formal reports of corruption. This interest is founded on the hidden amount of non-pursued corruption, precisely because the formal report that would permit its pursuance entails the recognition of a crime of bribery having been perpetrated by the actual party filing the report.

It is unquestionable that penal law, as public law, must not yield to exclusive criteria of opportunity in the pursuance of crimes, but it is also true that our Penal Code has long contained certain norms that, based on criteria of opportunity, reduce considerably the penalty in cases of collaboration for the discovery of crimes as serious as terrorism (article 579.3) and drug trafficking (article 376), for instance.

However, the criminal policy effect of the exemption of the penalty corresponding to the crime of bribery is frankly neutralised if the period to report the bribery is limited to only ten days as from the date of the event, as shown by the very punctual application of article 427 since its introduction in the Penal Code of 1995. On the other hand, the requirement to report the bribery before the opening of the corresponding proceedings would only make sense in the context of a longer period, for there is ample evidence showing that it is most infrequent for proceedings to open in a ten day period since the occurrence of the fact, unless it is as a result of a formal report, precisely by one of the participants in the bribery. If, on the other hand, the period to benefit from the exemption of a penalty was longer, it would make perfect sense from a criminal policy point of view to require that the formal report should be filed before the opening of the proceedings.

Criminal policy does not support either that the exemption should be simply conditioned to the filing of a formal report, as opposed to what happens with the other penal norms whose aim is to encourage collaboration in the persecution of crimes. The requirement of a simple formal report in article 427 is even more shocking from a criminal policy point of view, if we bear in mind that the effect of a simple formal report is not a reduction of the penalty, but the exemption from criminal responsibility.

Furthermore, to make the exemption of the penalty dependant on a simple formal report, forces us to interpret these circumstantial grounds for acquittal as something closer to a reward for repentance, than an efficient collaboration for the discovery and the persecution of the crime.

What would be coherent, therefore, from a criminal policy point of view, would be for the exemption to depend on an active collaboration supplying evidence for the efficient persecution of the crime and of its

perpetrators, as required in the aforementioned articles 376 and 579.3 of the current Penal Code.

Together with the extension of the period to file a formal report for the exemption of the penalty – or preserving the same period if its extension is deemed inappropriate – consideration should be given, from a criminal policy point of view, to the additional introduction in the area of corruption of a one or two degrees reduction in the penalty, upon filing a formal report and providing evidence, as is the case in the aforementioned crimes of terrorism and drug trafficking. This reduction of the penalty would allow to confer relevance to acts of collaboration – although relevant – of lower intensity, and to acts of collaboration more distant in time from the perpetration of the bribery. The exclusively exempting effect of criminal responsibility compels an inflexible appreciation of the requirements, not always consistent with the criminal policy aim of the norm.

16) PROVISION OR COLLECTION OF FUNDS FOR FINANCING TERRORISM

Article 576-A is added, with the following wording:

"Whoever, by whatever means, directly or indirectly, illicitly and deliberately, provides or collects funds with the intention that they will be used, or knowing that they will be used, wholly or partially, to commit any of the crimes of terrorism classified in this code, or to finance terrorism, terrorist acts, armed gangs, or terrorist organizations or groups, shall be punished with imprisonment from five to ten years and a fine of eighteen to twenty-four months."

This typification could be considered as an attempt to increase the precision of a precept, like the typification of collaboration with an armed gang, of article 576, the problems of which, from the point of view of the constitutional mandate of certainty, were already highlighted by the Constitutional Court Sentence 136/1999, of the 20th of July. However, this statement should be qualified.

Article 576-A cannot be understood as an attempt to provide certainty to the entire sphere of typification of economic aid, since even

though all the possible conducts of the proposed article 576-A are included in the mention of economic aid in the current article 576, the inverse does not occur (there are numerous possibilities of economic aid which are different from the provision or collection of funds.)

Therefore, it seems that it is more of an attempt to increase the precision of a part of the typified sphere of "economic aid". From the legislative technical point of view, the formula that should be used would be that of a clause of authentic interpretation, like the following:

> *"In any case, it shall be considered as economic aid the conduct of whoever, by whatever means, provides or collects funds…"*

The appropriate situation for this precept would be a second paragraph of the current article 576.2. In this way, absurd competitive problems, which could arise from the actual wording for the case of someone providing economic aid in two ways (one, envisaged in article 576-A, and the other, only in article 576), would be avoided.

The conduct, in its objective aspect, is characterized by *"illicitly providing or collecting funds by whatever means, directly or indirectly".*

The terms *"provision or collection"* do not seem problematic from the point of view of the principle of determination. The structuring of both verbs as an alternative mixed type allows for the consummation to be understood from the effective provision as well as from the mere collection.

With regard to the seriousness of the conduct, the STC 136/1999, of the 20th of July, established that the typified penalty called for the exclusion from the classified sphere of insignificant cases or those of very slight seriousness. In this sense, conducts of the lowermost objective seriousness like the acquisition of lottery tickets or similar instruments remain outside of the scope of typification of this precept, inasmuch as its typical penalty contemplates imprisonment for five to ten years.

From the point of view of the subjective type, it is a matter of a

type of fraud which contains three specific subjective elements of different nature.

The deliberated nature of the conduct as a specific subjective element is frequently referred to in this reform. This is a strange reference in our penal law, which is only found in very specific regulations like vicious cruelty. Therefore, it should be understood that it means to refer to something other than mere fraud, traditionally alluded to by means of the terms “intent”, “knowingly” or even – although much less precise and highly disputed, “consciously” and “willingly”.

In this respect it should be taken into account that *deliberate* signifies, according to the Royal Academy of the Spanish Language dictionary, *“to consider attentively and cautiously the pros and contras of a decision”,* and also *“to resolve something with premeditation”.* Without doubt, terminologically the fraud alludes to a deliberated wilfulness, but, to penal effects, neither the deliberation nor the premeditation form part of fraud.

That a conduct is typical when it is carried out in a deliberated manner, but not when it is the result of an undeliberated decision is a possible option, but alien to our current system of subjective elements. In any case, its applicability to such crimes is dubious. It does not seem reasonable that the conduct of whoever opts, in a deliberated manner, to raise funds for an armed gang, i.e. after cautiously considering the pros and cons and overcoming the fear of the penalty, should be typical, whereas the conduct of the fanatic who, on seeing the occasion, decides to raise funds for the gang without a moment’s doubt, should not be typical.

> *“With the intention that they will be used, wholly or partially, to commit any of the terrorist crimes classified in this Code, or to finance terrorism, terrorist acts, armed gangs, or terrorist organizations or groups.”*

The detailed wording of this subjective element is excessive. The typical purpose is that of financing terrorist crimes, terrorism, terrorist acts or armed gangs, or terrorist organizations or groups.

Various subjective elements are redundant, since, surely *"terrorist acts"* are *"crimes of terrorism".* Therefore, only one of these should be maintained – preferably the first, as it is more precise.

However, the specific inclusion of armed gangs and terrorist organizations or groups may be reasonable, since it is possible to finance the structure of a gang without supporting any of its specific acts. However, it is not easy to understand what it means to finance *"terrorism"* without financing terrorist acts or crimes or its gangs.

Terrorism is not a juridical penal concept. In any case, this mention does not appear to exceed the constitutional threshold of precision: if the prelegislator knows which specific conducts are being referred to with this financing of *"terrorism",* he or she should comply with the constitutional standards of precision when deciding on the wording.

17) SECOND TRANSITIONAL PROVISION. REVISION OF SENTENCES

The second transitional provision envisages the following:

> *"The General Council of the Judiciary, within the scope of the competence attributed to it in article 98 of the Organic Law of the Judiciary, may assign to one or various of the Criminal Courts or sections of the Provincial Courts specialized in the exclusive regime of the execution of penal sentences, the revision of the firm sentences pronounced before this law came into force."*

In this respect it should be pointed out that in order to put into practice any problems concerning favourable retroaction, the revision of sentences by the actual sentencing organs or the assigning of the matters to determined Courts or Chambers, in accordance with this transitional provision, may make it exceptionally necessary for this Council to adopt specific measures of support or reinforcement, which should be reflected in the Economic Report which accompanies the Draft Law.

That is all that the Surveys and Reports Commission has to report to the Plenary of the General Council of the Judiciary.

And so that this may be officially recorded, I issue and sign the present document in Madrid, on the twenty-sixth of February of the year two thousand and nine.