Constitutional Court Judgment No. 235/2007, of November 7
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The Plenum of the Constitutional Court comprising the Senior Judges María Emilia Casas Baamonde, President, Guillermo Jiménez Sánchez, Vicente Conde Martín de Hijas, Javier Delgado Barrio, Elisa Pérez Vera, Roberto García-Calvo y Montiel, Eugenia Gay Montalvo, Jorge Rodríguez-Zapata Pérez, Ramón Rodríguez Arribas, Pascual Sala Sánchez, Manuel Aragón Reyes and Pablo Pérez Tremps, has ruled

IN THE NAME OF THE KING

the following

J U D G M E N T

In the question of unconstitutionality number 5152-2000 raised by Section Three of the Provincial Court of Barcelona, in respect of article 607, paragraph two of the Criminal Code. The State Attorney in official representation and the State Public Prosecutor entered an appearance in these proceedings. The opinion of the Court was expressed by Eugeni Gay Montalvo as Rapporteur

Conclusions of Law

1. The Third Section of the Provincial Court of Barcelona has raised the question of unconstitutionality with respect to paragraph two of article 607 of the Penal Code, according to which, "dissemination through any medium of ideas or theories which deny or justify the offences classified in the previous paragraph of this article, or which attempt to rehabilitate systems or institutions which harbour practices which generate such crimes shall be punished with a sentence of one to two years prison ".
The crimes referred to in the aforementioned precept are those of genocide, defined by art.

607.1 of the PC as conduct guided by the intention to destroy totally or partially a national, ethnic, racial or religious group by perpetrating any of the following acts: 1) killing any of their members; 2) sexually molesting any of its members or causing any of the injuries established in art. 149 PC; 3) subjecting the group or any of its individuals to living conditions which would endanger their lives, or seriously harm their health or cause any of the injuries established in art. 150 PC; 4) carrying out enforced displacement of the group or its members, adopting any measure which is likely to prevent its way of life or reproduction or to forcibly transfer individuals from one group to another; and 5) to cause any other harm differing from the aforementioned.

The proposing court maintains that the paragraph in question could be contrary to the right to freely express and disseminate thoughts, ideas and opinions through words, writing or any other means of reproduction [art. 20.1 a) SC]. Conversely, the State Attorney and the Public Prosecutor consider, on the basis of different arguments, that the aforementioned right does not afford protection to conduct such as those types classified as a crime in the aforementioned criminal precept, and that therefore it cannot be considered unconstitutional or harmful to the principle of minimum intervention of criminal law, as the types of conduct which it seeks to prevent are dangerous for the protected legal right

2. Before commencing an analysis of the doubts raised by the Chamber proposing this question of unconstitutionality on art. 607.2 of the Penal Code it would be appropriate to define the object of the present constitutional process. Even when the Order in the proceeding refers in its operative part to art. 607.2 as a precept of doubtful constitutionality without further specifications, nevertheless, all its legal basis is aimed at requesting a declaration from this Court exclusively in respect of the first paragraph which refers to the dissemination by any means of ideas or theories which deny or justify the crimes classified as genocide in art. 607.1 PC. In effect, the proceeding which gave rise to the present issue is an appeal against the Judgment of 16 November 1998 of Criminal Court number 3 of Barcelona. In said judgment it was declared proven that the accused was involved in the distribution, dissemination and sale of materials and publications which denied the persecution and genocide suffered by the Jewish people. The proposal for the present question, having explained its relevance, was based on the fact that the accused party's bookshop “specialised in second World War books written from the perspective of authors who defend Nazi Germany and deny the existence of the Holocaust”. Despite this fact, in a generic manner the constitutionality of all the types of conduct specified in art 607.2 OCLC is subject to the

control of this Court. 607.2 OCLC.

Reiterated theory of this Court has shown that the question of unconstitutionality is not a procedural instrument for seeking an abstract clarification of the System. In effect, it is not an action granted for the purpose of directly opposing in a general manner, the validity of regulations, but rather an instrument made available to the courts in order to reconcile the dual obligation of acting subject to the Law and the Constitution, which cannot be invalidated by a use which for it is not adapted such as for example, “using it to obtain declarations which are unnecessary or indifferent for deciding on the proceedings in which the question is raised” (for all decisions see CCJ 17/1981, of 1 June , CL 1, ; and 64/2003 , of 27 March , CL 5).

In this case given that, on one hand, the subject of the criminal proceedings in which the present question of unconstitutionality is raised was reduced exclusively to the dissemination of ideas and theories which deny or justify genocide, and on the other hand that all legal substance of the proposal is directed at questioning the criminal condemnation of such conduct, it is to this matter that the subject of the present question of unconstitutionality is confined (CCJ 156/2004 of 21 September , CL2).

3. In accordance with the arguments developed in the proposal of the question, the court making that proposal bases its consideration on the conduct defined as criminal in art. 607.2 of the PC cannot be framed within the concept of provocation to act criminally nor in an apology for the crime, as the literal meaning of the aforementioned provision does not require as an element thereof that they be aimed at inciting crimes of genocide, nor that they praise genocides or applaud those who perpetrate them, both elements which, in contrast, are inherent to said crimes as is clear form their definition contained in art. 18.1 PC. According to the Provincial Court nor is it appropriate to interpret the precept in question in terms of categories of incitement to commit crime or of an apology for the crime, as this would presuppose an extensive interpretation thereof, contrary to the requirements of the principle of criminal legality. The behaviour questioned, in that it is classified as criminal by art. 607.2 PC is the mere dissemination of ideas or theories which deny or justify the existence of historical facts classified as genocide. The Chamber considers that there is a clear conflict of such classification with the right enshrined in art. 20.1 SC. In respect of this right the theory established by the Court in CCJ 214/1991 of 11 November and 176/1995 of 11 December, in the sense of considering that it provides cover to subjective and interested opinions on specific historical events, however erroneous and unfounded they may be which do not presuppose a contempt for the dignity of persons or a danger for peaceful coexistence of all

citizens. Both the State Attorney and the State Public Prosecutor share the opinion of the proposing court that the conduct sanctioned by art. 607.2 of the CC consistent with disseminating ideas or theories which deny or justify the genocide cannot be interpreted as a means of apology for genocide; however both defend the constitutionality of said precept by considering that the right to freedom of expression cannot protect the aforementioned conducts. In their view, the denial or justification of genocide contains a potential danger to extremely important legal rights, and therefore, it cannot claim protection through the right to freedom of expression. Said potential danger would furthermore presuppose sufficient justification for its punishment without it supposing any conflict with the principle of minimum intervention proper to criminal law.

Both arguments also substantially concur, although using a different terminology, in respect of which legal rights in particular are affected by the conduct in question: the rights of certain religious, ethnic, or racial minorities and the constitutional system itself insofar as the democratic system would be destabilised by the growth and extension of ideas or theories which denied or justified certain historical facts which ultimately are legally defined as crimes of genocide.

Thus, the reasoning outlined by the State Attorney and the Public Prosecutor is based fundamentally on the potential danger which they consider that the dissemination of ideas denying or justifying a historically irrefutable genocide would hold, not only for persons who belong to that same religious group but for democracy overall. From the statement of that danger both deduce, contrary to position taken by the court proposing this question, the impossibility of the aforementioned conduct being protected by the right to free expression and dissemination of thoughts, ideas and opinions acknowledged in art. 20.1 SC as well as the proper justification of its criminal classification.

4. Ever since this Court has been required to declare on the constitutionally protected content of freedom of expression, we have consistently stated that "art. 20 of the Constitution, in its various sections, ensures that free public communications shall be maintained, however without detracting from the real content of other rights enshrined in the Constitution, reducing the representative institutions to empty shells and totally distorting the principle of democratic legitimacy stated in art. 1.2 of the Constitution and which is the basis of our whole legal-political system. The preservation of this free public communication without which there would be no free society, and therefore no popular sovereignty, requires the guarantee of certain fundamental rights common to all citizens, and the general prohibition on specific

actions of power“(JCC 6/1981 of 16 March, CL 3, contained in among others, JCC /1990, of 15 February; 336/1993, of 15 November; 101/2003, of 2 June; 9/2007, of 15 January). Similarly, the European Court of Human Rights from the Judgment Handyside vs. United Kingdom, of 7 December 1976, reiterates that freedom of expression constitutes one of the indispensable tenets of a democratic society and one of the crucial conditions for the progress and development of every individual (JECHR Castells vs Spain of 23 April 1992, § 42, and Fuentes Bobo vs Spain of 29 February 2000, § 43).

The rights guaranteed in art. 20.1 SC are, therefore, not simply an expression of basic individual freedom but they are also configured as elements shaping our democratic political system. Thus “art. 20 of the basic Regulation as well as confirming the right to freedom of expression and to freely communicate or receive truthful information, guarantees a constitutional interest namely, the formation and existence of a free public opinion, a guarantee which is imbued with special significance as since it is a prior and necessary condition for the exercise of other rights inherent in the operation of a democratic system, it becomes in turn one of the pillars of a free and democratic society. In order to enable citizens to freely form their opinions and to participate in a responsible manner in public issues, they should also be widely informed in such a way that diverse and opposing opinions may be weighted” (JCC 159/1986, of 16 December, CL 6).

A direct consequence of the institutional content of free dissemination of ideas and opinions is that, as we have reiterated, freedom of expression includes freedom to criticise, "even when this is unbridled and may disturb, concern or displease whomsoever it is directed at, since it is required in the interests of pluralism, tolerance and a spirit of openness, without which a "democratic society" would not exist (for all decisions, see JCC 174/2006 of 5 June, CL 4). Therefore we have decisively affirmed that “it is clear that freedom of opinion is safeguarded to all, however mistaken or dangerous their views may appear to the reader, even those which attack the democratic system itself. The Constitution – it has been said – also protects those who deny it”. (JCC 176/1995, of 11 December CL2). That is, freedom of expression is valid not only for information or ideas which are favourably viewed or considered inoffensive or indifferent, but also for those which contravene, conflict or concern the Sate or any part of the population (JECHR De Haes and Gijsels vs. Belgium, of 24 February 1997, § 49

As a result of historic circumstances bound up with its origins, our constitutional system is based on the broadest assurance of fundamental rights, which cannot be restricted on the grounds that they may be used for anti-constitutional purposes. As is known, in our system –

which differs to others in similar circumstances - there is no room for a model of “militant democracy” that is, a model which imposes, not respect, but positive adherence to the system and, first and foremost, to the Constitution (JCC 48/2003, of 12 March, CL 7). This perception is indisputably manifested with particular intensity in the constitutional regime of ideological freedoms, of participation of expression and information (JCC 48/2003, of 12 March, CL 10) as it implies a need to clearly differentiate between activities contrary to the Constitution and thus deprived of its protection, and the mere dissemination of ideas and ideologies. The value of pluralism and the need for a free exchange of ideas as the underpinning of the representative democratic system prevent any activity by public powers which would control, select or seriously determine the mere public circulation of ideas or doctrines.

In this way, the constitutionally protected framework of freedom of expression cannot be restricted by the fact that it is used for the dissemination of ideas or opinions contrary to the essence of the Constitution – and certainly those which were circulated in the issue which gave rise to the present question of unconstitutionality are repulsive from the perspective of constitutionally guaranteed human dignity – unless these effectively harm rights of constitutional relevance. For the civil morals of an open and democratic society, indubitably not every idea expressed will simply be worthy of respect. Even when tolerance constitutes one of the “democratic principles of coexistence" referred to in art. 27.2 CE said value cannot simply be identified with indulgence in the light of speeches which repel anyone who is aware of the atrocities perpetrated by the totalitarian movements of our times. The problem which we need to take into consideration is whether the denial of facts which could be considered barbaric acts or their justification have their scope of expression in the free social debate guaranteed by art. 20 SC or if, conversely, such opinions may be the object of punishable state sanction since they affect constitutionally protected rights.

On previous occasions we have concluded that the “statements, queries and opinions of Nazi activity with respect to Jews and concentration camps, however reprehensible or distorted they may be – and in reality they are, as they deny the evidence of history – are protected by the right to freedom of expression (art. 20.1 CE) in relation to the right to ideological freedom (art. 16 CE), as, irrespective of any assessment that may be made, and again this is not the task of this Court either, they may only be considered as what they are: subjective and interested opinions on historical events” (JCC 214/1991, of 11 November, CL 8). This same perspective has led the European Court of Human Rights, on several occasions in which

doubts were raised over collaboration with Nazi atrocities during the second world war, to indicate that the search for historical truth is an integral part of freedom of expression and it considered that it was not the Court's task to arbitrate in the basic historical question (Judgments Chauvy and others vs France, of 23 June 2004, § 69; Monnat vs. Suiza, of 21 September 2006, § 57).

5. The foregoing comments do not imply that the free transmission of ideas, in their various manifestations, is an absolute right. Generically, the dissemination of abusive or offensive phrases and expressions is outside the scope of protection of that right, without any relation to the ideas or opinions which it is wished to promote, and therefore, unnecessary to the interests of this case ((JCC 204/1997, 25 November; 11/2000, 17 January, CL 7; 49/2001, 26 February, CL 5; 160/2003, 15 September, CL 4). In particular, in respect of statements, expressions or campaigns of a racist or xenophobic nature we have concluded that art. 20.1 SC does not guarantee "the right to express and disseminate a specific understanding of history or perception of the world with the deliberate aim of deriding and discriminating when formulating such ideas against persons or groups of any condition or personal, ethnic, or social circumstances, as this would be tantamount to admitting that for the mere fact of being made in the course of a more or less historic discourse, the Constitution permits violation of one of the paramount values of the legal system, namely equality (art. 1.1. SC) and one of the bases for political order and social peace: the dignity of persons (art. 10.1 CE)" (JCC 214/1991, 11 November, CL 8).

In this way, constitutional recognition of human dignity provides the framework within which fundamental rights are to be exercised and in virtue of which the executioner's apology is stripped of constitutional cover, glorifying its image and justifying its actions, when in fact they were instrumental in humiliating their victims (JCC 176/1995, 11 December, CL 5). In addition, we have recognised that this uncompromising core of essential values of our constitutional system has also been assailed by offensive judgments against the Jewish people which, issued along the lines of opinions denying the evidence of the Nazi perpetrated genocide, may be assumed to be racist incitement (JCC 214/1991, 11 November, CL 8; 13/2001, 29 January, CL 7). These limits essentially coincide with those recognised by the European Court of Human rights in application of section two of art. 10 of the European Convention of Human Rights (ECHR). In particular, it has considered (for all, see Judgment Ergogdu and Ince vs. Turkey of 8 July 1999) that freedom of expression cannot provide protection to "discourse of hatred" that is, to any discourse which involves direct incitement

to violence against citizens in general or against particular races or beliefs. On this point a interpretative reference of the Convention may be found in Recommendation number R (97) 20 of the Committee of Ministers of the Council of Europe of 30 October 1997 condemning all forms of expression which incite racial hatred, xenophobia, anti-Semitism and all forms of intolerance, (JECHR Gündüz vs. Turkey of 4 December 2003, § 41; Erbakan vs. Turkey, 6 July 2006).

Alongside this, the general rule of freedom of expression ensured in art. 10 ECHR may be subject to exceptions through the application of art. 17 ECHR which has no equivalent in our constitutional system. In virtue of that precept, the European Court of Human Rights considered that the denial of the Holocaust cannot be considered to be protected by freedom of expression in that it implied a proposal of racial defamation of Jews and incitement to hatred towards them (Decision Garaudy vs. Francia, of 24 June 2003). In particular, on that occasion the question concerned various articles which contested the reality of the Holocaust with the declared intention of attacking the state of Israel and the Jewish people overall, so that the Court decisively took into account the intention to accuse the victims themselves of falsification of history, attacking the rights of others. Subsequently, it pointed out, obiter dicta, the difference between the continuing debate between historians on aspects relating to acts of genocide committed by the Nazi regime covered by art. 10 of the Convention and the mere denial of “clearly established historical facts” which the States may remove from protection thereof in application of art. 17 ECHR (JCHR Lehideux e Isorni vs. Francia, 23 September 1998; Chauvy and others vs. France of 23 June 2004, § 69).

On this point it would be appropriate to point out that, pursuant to reiterated case law of the European Court of Human Rights, in order to invoke the exception to the guarantee of rights contained in art. 17 EHRC it is not sufficient to provide evidence of damage, but it is also essential to corroborate the express wish of those who attempt to use freedom of expression as a cover in order to use the rights conferred in that precept to destroy freedoms and pluralism, or to attack the freedoms recognised in the Convention (JECHR Refah Partisi and others vs Turkey 13 February 2003, § 98; Judgment Fdanoka vs. Letonia, of 17 June 2004, § 79). Only in such cases, in the opinion of the European Court, may States within their margin of appreciation, permit in their domestic law the restriction of freedom of expression of those who deny clearly established historic facts, on the clear understanding that the Convention only establishes a common European minimum which cannot be interpreted in the sense of restricting fundamental freedoms recognised by internal constitutional systems (Art. 53

ECHR).

In this way, the broad margin provided in art. 20.1 CE for the dissemination of ideas, increased as a result of the value of plural dialogue for creating a collective historic awareness, when referring to historic facts (JCC 43/2004, of 23 March) reaches its limits at insulting racist or humiliating statements or in those which incite such constitutionally unacceptable attitudes directly. As we stated in JCC 214/1991, 11 November, CL 8, “hatred and contempt for a whole people or ethnic group (any people or ethnic group) are incompatible with respect for human dignity, which is only fulfilled if it is equally attributed to all men, all ethnic groups, and all peoples. For the same reasons, the right of members of a race or ethnic group to honour, in that it protects and expresses the feeling of dignity, is indubitably harmed when a whole people or race of any kind are generically offended and despised”. Based on dignity (art. 10.1 and 2 SC) it is therefore the deliberate intention to despise and discriminate against persons or groups on the basis of any personal, ethnic or social condition or circumstance which is, in these cases, deprives the expression and dissemination of a particular comprehension of history or a perception of the world of constitutional protection, which if it were not for this, could be enshrined in the framework constitutionally guaranteed by art. 20.1 SC.

6. The precept questioned is the first paragraph of art. 607.2 PC, the literal meaning of which has been referred to above. As is indicated in the proceedings which raised this question and as shown by the allegations of the State Attorney and the Public Prosecutor, this precept should be understood in the context of others which, in the criminal sector, comply with the undertakings acquired by Spain in matters of persecution and prevention of genocide; among these, section two of article 22 of the International Pact on Civil and Political rights which establishes that “ any apology for national, racial or religious hatred which incites discrimination, hostility or violence will be prohibited by the law" and art. 5 of the United Nations Convention for the prevention and punishment of the crime of genocide of 9 December 1948, as result of which Spain undertakes to establish, in accordance with its Constitution “effective criminal sanctions” in order to punish those persons guilty of genocide or of “direct and public instigation” to commit it.

Among these, given the proximity of the types of conduct pursued, art. 615 PC should be taken into account, which establishes that provocation, conspiracy and proposals to carry out crimes against the international community shall be punished with a sentence which is one or two degrees less than that of actually carrying out such acts. Together with this precept, art.

510.1 PC introduced into the Penal Code of 1995 as a direct result of the theory and doctrine laid down by the Court in JCC 214/1991 of 11 November, punishment with a prison sentence of one to three years and a fine of six to twelve months for those who incite discrimination, hatred or violence against groups or associations, for racist, anti-Semitic reasons or any others pertaining to ideology, religion or beliefs, family situation, membership of an ethnic group or race, their national origin, gender, sexual orientation , illness or disability. Finally, the titles concerned with crimes against honour and those relative to the exercise of public fundamental rights and freedoms make up the criminal framework of protection in which the precept in question is inserted. Through these classifications our criminal law is aligned with international undertakings to which Spain is committed in respect of this issue. Without prejudice to this, other countries which suffered particularly from the genocide committed during the period of national socialism, have also introduced as a punishable crime, as a result of those tragic historical circumstances, that of the mere denial of the holocaust.

The first paragraph of art. 607 PC completes the specific system of protection required by international instruments in matters binding on Spain , by punishing various modes of perpetration of this crime and by requiring in all cases a specific malicious intent concerning the desire or intention to destroy a social group. As a complement to this, in section two legislature has added an independent penal category which does not include that specific mens rea and which punishes the dissemination of certain ideas and theories. Irrespective of its object, the effects of this type of punishment established in art. 607.2 PC on the fundamental right to freedom of expression (art. 20.1 SC) is determined by the initial description of the types of conduct prosecuted, consistent with disseminating through any medium, ideas or theories which, since no supplementary element is expressly required, should be considered in principle to be a form of dissemination which is to some extent “neutral", irrespective of the revulsion which some particular statements may generate.

While obviously accepting the particularly objectionable nature of genocide, one of the most abhorrent crimes imaginable against the human race, it is true that the conduct described in the contested precept consists of the mere transmission of opinions, however insubstantial they may be, from the perspective of the values on which our Constitution is based. The literalness of the illegality contained in art. 607.2 PC does not require, at first glance, positive actions of xenophobic or racist proselytising, nor even incitement, at least indirectly, to commit genocide, which are indeed present, in terms of racial hatred or anti-Semitism, in the crime established in art. 510 PC, punished with more serious penalties. The types of conduct

described do not necessarily imply glorification of genocides or any intention to discredit, despise or humiliate the victims. Far from it, the literalness of the precept insofar as that it punishes the communication of ideas considered in themselves, without additionally requiring contravention of other constitutionally protected rights, is apparently designed to prosecute a conduct which in that it is covered by the right to freedom of expression (art. 20.1 CE) and even possibly by scientific freedoms [art. 20.1 b)] and freedoms of conscience (art. 16 CE) which are manifested to the contrary (JCC 20/1990, 15 February, CL 5), constitutes an insurmountable barrier for criminal legislature.

Thus, this is not a question of the Penal Code restricting freedom of expression but rather the fact that this interferes with the actual scope of delimitation of the constitutional right. Beyond the risk, something undesirable in a democratic state, of making criminal law a dissuasive factor in the exercise of freedom of expression, a point we have made on other occasions (JCC 105/1990, 6 June, FCLJ 4 and 8; 287/2000, 11 December, CL 4; JECHR in the Castells case, 23 April 1992, § 46), criminal regulations are prohibited from encroaching on the constitutionally guaranteed content of fundamental rights. The freedom of configuration of criminal legislature reaches its limit in the essential content of the right to freedom of expression, in such a way that in the case in question, our constitutional system does not permit the mere transmission of ideas to be classified as a crime, not even in cases where those ideas are truly execrable, being contrary to human dignity, a precept which forms the basis of all the rights included in the Constitution, and therefore our political system.

7. As we have repeatedly maintained in virtue of the principle of preservation of the law, it is only necessary to declare unconstitutional those precepts “whose incompatibility with the Constitution are clearly evident due to the fact that they cannot be interpreted in accordance therewith" (for all mentions see JCC 111/1993, 25 March, CL 8; 24/2004, 24 February CL 6; 131/2006, 27 April, CL 2). Therefore, it would be appropriate to “explore the interpretive possibilities of the questioned precept, should there be any which would safeguard the primacy of the Constitution” (JCC 138/2005, 26 May, FJ 5; 76/1996, 30 April, CL 5) having admitted ever since our first judgments, the possibility of delivering interpretive rulings, though a specific text may be declared unconstitutional if it is understood in a particular manner. We cannot therefore, attempt to reconstruct a rule against its obvious meaning in order to conclude that that reconstruction is the constitutional rule (JCC 11/1981, 8 April, CL 4). And this is because the effectiveness of the principle of conservation of rules does not go as far as “ignoring or disfiguring the meaning of clear legal statements” (JCC 22/1985, 15

February, CL 5; 222/1992, 11 December, CL 2; and 341/1993, 18 November). In short, as we indicated in JCC 138/2005 of 26 May "the appropriate interpretation cannot be a contra legem interpretation as this would imply distortion and manipulation of legal statements, nor is it the task of this Court to reconstruct a regulation which has not been properly elucidated in the original legal text, thus creating in effect a new regulation with the concomitant assumption by the Constitutional Court of a positive legislative function, which institutionally does not correspond to it (JCC 45/1989, 20 February, CL 11; 96/1996, 30 May, CL 22; 235/1999, 20 December, CL 13; 194/2000, 19 July, CL 4; and 184/2003, 23 October, CL 7)".

Our mission should necessarily be confined in this case to confronting the contested text in art. 607.2 PC with the scope confined to the right tp freedom of expression, in the terms indicated in the previous legal findings. In a purely semantic analysis of the content of the legal precept, the first paragraph provides two different conducts classified as a crime, according to which disseminated ideas or theories deny or justify genocide. As an initial impression, the denial may be understood as the mere expression of a point of view on specific acts, sustaining that they either did not occur or were not perpetrated in a manner which could classify them as genocide. The justification, in turn, does not imply total denial of the existence of the specific crime of genocide but relativises it or denies its unlawfulness, based on certain identification with the authors. In accordance with the previous legal findings, the precept would conform to the Constitution if it were possible to assume from its terms that the conduct penalised necessarily implies a direct incitement to violence against specific groups or contempt for victims of the crimes of genocide. Legislature has specifically consigned a provision with respect to the apology for genocide in art. 615 PC which establishes that provocation, conspiracy and proposals to carry out crimes of genocide shall be punished with a sentence graded at one or two degrees less than that of actually carrying out such acts. The fact that the penalty established in art. 607.2 PC is slightly lower to that of this mode of apology prevents any idea that it is the intention of legislature to introduce a qualified penalty.

8. It is therefore appropriate to determine whether the types of conduct punished in the precept subjected herein to our constitutional control may be considered as a version of that "discourse of hatred" to which as has been described previously, the European Court of Human Rights refers as a way of expressing ideas, thoughts or opinions which are not appropriate to be covered by the right to freedom of expression.

With respect to the conduct consistent with the mere denial of a crime of genocide, the

conclusion has to be negative, as said discourse is defined – in the aforementioned JECHR Ergogdu and Ince vs. Turkey, 8 July 1999 – as that which, in its own terms, presupposes a direct incitement to violence against citizens or against specific races or beliefs, which, as has already been stated, is not the case considered in this point by art. 607.2 PC. It is appropriate to point out that the mere dissemination of conclusions in respect of the existence or non existence of specific facts, without issuing value judgments on these or their unlawful nature, affects the scope of scientific freedom acknowledged in section b) of art. 20.1 CE. As we declared in JCC 43/2004, of 23 March, our Constitution confers greater protection to scientific freedom than to freedom of expression and information, the ultimate purpose being based on the fact that "only in this way is historical research possible, which is always, by definition, controversial and debatable, as it arises on the basis of statements and value judgments the objective truth of which it is impossible to claim with absolute certainty, with this uncertainty consubstantial to the historical debate representing what is its most valuable asset, to be respected and meriting protection due to the essential role it plays in forming an historical awareness adapted to the dignity of citizens of a free and democratic society". (CL4)

The mere denial of the crime as opposed to other types of conduct in which specific values adhere to the criminal act, promoting it through the externalisation of a positive opinion, is, in principle pointless. Furthermore, not even tendentially – as the Public Prosecutor suggests- can it be stated that all denial of conduct legally defined as a crime of genocide objectively pursues the creation of a social climate of hostility against those persons who belong to the same groups, and who in their day, were victims of a specific crime of genocide, the inexistence of which is claimed, nor can it be stated that any denial may per se be capable of achieving this. In that case, without prejudice to the corresponding judgment of proportionality determined by the fact that a merely preventive purpose or assurance cannot constitutionally justify such a radical restriction of these freedoms (JCC 199/1987, 16 December CL 12), constitutionality, a priori of the precept would be sustained by the requirement of another additional element not expressive of the crime classified in art. 607.2 PC; namely that the penalised conduct consisting of the dissemination of opinions denying genocide were in truth conducive to creating an attitude of hostility towards the affected group. To impose from this Court a restrictive interpretation in this aspect of art. 607.2 PC, by adding new elements, would exceed the limits of this jurisdiction by imposing an interpretation of the precept totally contrary to its literal meaning. As a result, the

aforementioned conduct remains in a state prior to that justifying the intervention of criminal law, in that it does not even constitute a potential danger for the legal rights protected by the regulation in question, so that its inclusion in the precept assumes violation of the right to freedom of expression (art. 20.1 CE).

9. A different conclusion is reached in respect of the conduct consistent with disseminating ideas justifying genocide. Since it expresses a value judgement, it is indeed possible to note the aforementioned tendential element in the public justification of genocide. The special danger of such despicable crimes such as genocide, which place the very nature of our society in jeopardy, in exceptional circumstances permit criminal legislature, without any constitutional loss, to punish public justification of that crime, provided that the justification operates as an indirect incitement to its perpetration ; that is incriminating itself (and this is what it should be understood that art 607.2 PC does) conduct which although it was in an indirect form presupposes an incitement to genocide. Therefore, legislature may, within the scope of its freedom of configuration prosecute such conduct, including making it subject to criminal punishment provided that the mere ideological affiliation to political positions of any kind is not deemed to be included therein, which would be fully protected by art. 16 CE, and, in connection by art. 20 CE.

Therefore, it will be necessary for the public dissemination of justificatory ideas to enter into conflict with constitutionally relevant rights of particular importance, which require the protection of penal sanctions. This will occur, firstly, when the justification for such an abominable crime is a means of indirect incitement to its perpetration. Secondly, it will also occur when by means of conduct consistent with presenting the crime of genocide as fair, some kind of incitement to hatred towards specific groups, defined on the basis of their colour, race, religion or national or ethnic origin, is attempted, in such a way that it presents a clear danger of generating a climate of violence and hostility which may be concentrated in specific discriminatory actions. It should be emphasised that indirect incitement to commit some of the types of conduct classified in art. 607.1 PC as a crime of genocide – which include among others, murder, sexual aggression, or forced displacement of populations – committed with the purpose of exterminating a whole human group, affect essential human dignity in a special way, in that it is one of the foundations of the political system (art. 10 SC) and sustains fundamental rights. Such a close link with the core value of any legal system based on the rights of persons enables legislature to prosecute modes of incitement in this crime , including indirect modes, which otherwise could remain outside the scope of criminal

rebuke.

The consideration of punishable dissemination of conduct justifying genocide such as a manifestation of the discourse of hatred is, furthermore, totally in line with the most recent international texts. Thus, art. 1 of the Proposal for the Framework Decision on combating racism and xenophobia, approved by the Council of the European Union in a meeting of 20 April 2007, restricts the obligation of the member states to adopting measures for ensuring that any public apology for, denial or flagrant trivialisation of crimes of genocide should be punished in cases where "it is exercised to advocate the use of violence or hatred" against the social group affected.

Furthermore, disrespectful or degrading behaviour towards a group of people cannot be claimed to be valid in exercise of the freedoms guaranteed in art. 20.1 SC which do not protect "totally degrading expressions, that is, those that in the specific circumstances of the case and irrespective of their truthfulness, or lack thereof, are offensive or contemptible" (for all cases see JCC 174/2006, 5 June, CL 4; 204/2001, 15 October, CL 4; 110/2000, 5 May, CL 8).

Thus, it is constitutionally legitimate to punish as crimes conduct which, even when it is not clearly seen to be directly inciting the perpetration of crimes against the rights of peoples, such as genocide, it does presuppose an indirect incitement to do so, or provokes in some way discrimination, hatred or violence, which is precisely what in constitutional terms is permitted by the establishing the category of public justification of genocide (art. 607.2 PC). This comprehension of public justification of genocide, always with the customary caution for respect regarding the content of ideological freedom, in that includes the proclamation of personal ideas or political stance, or adherence to those of others, permits the proportional penal intervention of the State as the ultimate solution for defending protected public fundamental rights and freedoms, whose direct affectation excludes conduct justifying genocide from the scope of protection of the fundament right to freedom of expression (art. 20.1SC) so that, interpreted in this sense, the punitive regulation does, on this point, conform to the Constitution.

Therefore, the doubts of the court proposing the question of unconstitutionality are resolved, which drew this Court's attention to the fact that the literal text of art. 607.2 PC at no time considers an element of direct incitement to perpetrating a crime of genocide, and to the fact that the penalty of a prison sentence established therein is from one to two years, and thus it would not be in proportion, given the levity of the sentence with the type of crime described

in a general manner in art. 18 PC, nor with that punished according to the terms of art. 615 PC with a severity one or two degrees below the incitement to crime.
In effect, the aforementioned interpretation of art. 607.2 PC in conformance with the Constitution cannot be understood to detract from the intentions of legislature, as it provides the precept with its own punishable and specific framework which, in application of the principle of proportionality, may be considered to be reasonably adapted in respect of penalties, to the gravity of the conduct prosecuted.
Obviously it is not the task of this Court to technically purge the laws, avoid duplicity or correct systematic defects, but solely and exclusively to ensure that they do not violate the Constitution. It should, however, be underlined that this interpretation, which constitutionally conforms to art. 607.2 PC does in no way detract from the intention of legislation to sanction in a specific manner the direct incitement to the crime of genocide (art. 615 PC), insofar as it provides the precept with its own punishable framework which presupposes, if appropriate, a specific mode of incitement to crime which therefore merits a differentiated penalty, adapted according to the criteria of legislation to the gravity of said conduct, pursuant to the parameters of proportionality. Similarly, it may be said of the possible regulatory consensus of art. 510 PC which punishes with a different penalty that of art. That the question of unconstitutionality be partially accepted, and as a result:
1º Declare the inclusion of the expression “deny or” in the first paragraph of article 607.2 of the Criminal Code to be unconstitutional
2º Declare that the first paragraph of article 607.2 of the Penal Code which punishes the dissemination of ideas or theories likely to be justify a crime of genocide, interpreted in the terms of conclusion of law 9 of this Judgment is not unconstitutional.
3º The question of unconstitutionality in respect of the remainder is dismissed.

This judgment shall be published in the "Boletín Oficial del Estado" (Official State Gazette)
Given in Madrid on the seventh of November of two thousand and seven

Vote

Dissenting vote of Senior Judge Roberto García-Calvo y Montiel in respect of the Judgment delivered in the question of unconstitutionality number 5152 -2000 proposed by the Provincial Court of Barcelona in respect of article 607.2 of the Penal Code for alleged violation of article 20.1 of the Constitution.

While I respect the majority decision on the question of unconstitutionality case no. 4142-2000, I exercise my right to disagree, pursuant to art. 90.2 OCLC and I wish to state my contradictory opinion in respect of the Judgment delivered, and to this effect I wish to make the following observations.

1) Firstly, and by way of explanation for my views as detailed below I find it unacceptable to conclude constitutionality which according to the literal text of the ruling establishes that: "Declare that the first paragraph of article 607.2 of the Penal Code which punishes the dissemination of ideas or theories likely to be justify a crime of genocide, interpreted in the terms of conclusion of law 9 of this Judgment."

Such a determination - in respect of which formulation, through reference to one of the legal findings of the judgment- has always been unacceptable to me -although it is frequently used in this Court- not only because it clouds the clarity which should prevail in the substantiation of court judgments, but also in that, as it requires recourse to some of the reasoning expressed in that part in order to understand the breadth of the conclusion, it thus breaks the discursive thread of the Judgment whose factual concurrence and continued reading should result, without any referential connection, in an understanding of the ruling, even for those who are not experts in the law.

Subsequently I shall use what I consider to be an orthodox structural analytical technique and, based on the content of the sole legal finding (nine) which the Judgment I oppose dedicates to the problem, from that perspective I am surprised that what I consider to be an erroneous discourse is obliged to resort, by means of "specifications" of exceptional nature and indirect justification for legislature's freedom of configuration, in an exercise far removed from correct interpretation, in order to claim that the thesis maintained in said point which it is attempted to corroborate by means of the addition of further supplementary arguments, the discourse which leads to the conclusions with which I am in disagreement.

Conversely, I believe that it is sufficient to describe without any need for collateral arguments, the aforementioned freedom of configuration accorded to legislature in order to reach solutions which differ from those in the second section of the Judgment ruling. Later I shall explain my reasons for reaching this conclusion, since if I failed to do so, my opinion would reduced to a purely incontrovertible critical statement.

2) Furthermore, I do not believe that the statement which I assume – as the Judgment states- "is not the task of this Court to technically purge the laws, avoid duplicity or correct systematic defects, but solely and exclusively to ensure that they do not violate the

Constitution” furthers any justification of the constitutionality of the paragraph in art. 607.2 of the contested Penal Code on the basis of the statement that the preceding interpretation - which is self titled "pursuant to the Constitution" - as I believe that, instead of permitting the majority's conclusion I consider that, on the contrary, operating both with the interpretive technique described in art. 3 of the Civil Code, that is, “Regulations shall be interpreted according to the proper meaning of their words in relation to the context, the historic and legislative background, and the social reality of the period in which they are to be applied, principally on the basis of their spirit and purpose", and with the actual system provided by the Penal Code which contains the aforementioned precept, and to which this Dissenting Vote refers, said formula leads to a determination of a different kind. To this effect it is apposite to recall that in title XXIV of the current penal Code - Crimes against the International Community “the second chapter regulates "Crimes of Genocide". There is, therefore, a classificatory pattern, to which chapter II bis adds -"Crimes against humanity" - which shows the intention of legislature to close the range of criminal conduct contained in that title through typical descriptions which, in my opinion, are exhausted in a downwards direction - although not for this reason do they attain attain impunity. A simple reading of art. 607 of the Penal Code in force show a comprehensive list of such punishable behaviour, the definition and sanction of which is in accordance with recent trends in European comparative law.
A palpable example of the foregoing is the literal transcription of the precept:
“ 1. Those who, with the intention to total or partially destroy a national, ethnic, racial or religious group, perpetrate the following acts, shall be punished:
1) With a prison sentence of fifteen to twenty years, if they kill any of its members.
If the fact oftwo or more aggravating circumstances concur, the more severe degree of punishment shall prevail.
2) With a prison sentence of fifteen to twenty years, if they sexually attack any members [of the group] or caused any of the injuries listed in article 149.
3) With a prison sentence of eight to fifteen years, if they subjected the group or any of its individual members to living conditions which endangered their lives or seriously disturbed their health, or when they caused any of the injuries listed in article 150.
4) With the same sentence if they forcefully displace the group or its members, adopt any measure which would prevent their way of life or reproduction, or forcefully transfer individuals from one group to another.
5) With a prison sentence of four to eight years, if any harm were caused other than the types

of injury indicated in points 2 and 3 of this section.

2. The dissemination by any means of ideas or doctrines which deny or justify the crimes typified in the previous section of this article, or which attempt to restore regimes or institutions which protect practices which would generate such behaviour, shall be punished with a prison sentence of one to two years."

As further reinforcement to the arguments put forward in this dissenting vote, the following should be mentioned:

a) The grounds set out in Organic Law 4/1995 of 11 May amending the Penal Code in respect of the innovations introduced in the precept under scrutiny herein, which states:

- The proliferation in various European countries of episodes of racist and anti-Semitic violence perpetrated under the banners and symbols of Nazi ideology has led to the need for democratic states to undertake decisive action to combat this phenomenon.

-Spain is also affected by this growing phenomenon.

- And finally, because that proliferation is evident, we are obliged to go a step further beyond the repression of any conduct which may present apology or dissemination of the ideologies which defend racism or ethnic exclusion, given that they constitute- according to JCC 214/1991— an obligation which should not be restricted in the name of ideological freedom or freedom of expression.

b) The content of the New York Convention of 9 December 1948 for the prevention and punishment of the crime of genocide and its instrument of adherence of 13 September 1968 art. 19 of the Declaration of human rights, arts. 10 and 18 of the Rome Convention and arts. 3 and 19 of the International Covenant on Civil and Political Rights and the case law of the European Court of Human Rights.

c) The legislative background attesting to approval, without any opposition from all parliamentary groups, of the new Penal Code deriving from the aforementioned Organic Law and therefore, the wording given to art. 607.

d) Art. 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (Official State Gazette of 10 October 1779) which includes freedom to hold opinions and to receive and impart information and ideas may be subject to restrictions or penalties as are prescribed by law which, in regulating freedom of expression and information, should be interpreted pursuant to the related conventions to which Spain is signatory.

And finally,

e) Judgment 214/1991 of this Constitutional Court which literally states that “Neither ideological freedom nor freedom of expression include the right to carry out demonstrations, expressions or campaigns of a racist or xenophobic nature since, as art. 20.4 CE states, there are no unlimited rights and this is contrary not only to the right to honour, but also to other constitutional rights such as that of human dignity.. Hatred and contempt for a whole race or ethnic group (any race or any ethnic group) are incompatible with respect for human dignity which is only fulfilled if attributed equally to all persons, all ethnic groups and all peoples”.

3) The aforementioned explicitness referring to the freedom of legal configuration should rest on the basis of denying that the type of crime in question suffers from vagueness or is "diffuse" but having as a specific point of reference the crime of genocide, since - as the State Attorney points out- in a detailed and substantiated report, “it is sufficient to read art. 607.2 PC to ascertain that the types of crime resulting from the text cannot be identified with this nebulous “remainder” without explanation and content, as the Chamber which has raised the question of unconstitutionality appears to suggest. The justification and denial of the crimes of murder, sexual aggression, or forced displacement of populations, or sterilisations, or efforts to restore regimes which approve such crimes, are not slight disruptions of legal equality, nor does their punishment respond to the modest proposal to prevent occasional discrimination. The question is one of condemning actions which the legislator has assessed as causes of an extremely direct impulse to perpetrate serious crimes which harm the most essential interests of human coexistence. And taking into account this causal link between divulging certain theories or ideas and the most abject crimes, it is not an occasional or sudden whim of legislature, nor an unreasonable or excessive assumption but the product of painful historical experience. Therefore, art. 607.2 does not lack content”.

Therefore, however much the majority Judgment endeavours to do so, it does not justify the second conclusion of the ruling as it only provides - in the mere two and a half pages that are dedicated to justifying the decision of unconstitutionality and which I dispute, - dialectic clarifications, which in my view are no more than a formal digression given that, as may be derived from those arguments, they are based on a theoretical and not empirical distinction between direct or indirect incitement to the perpetration of crimes against the right of peoples, situating denial of genocide in "the scope of mere opinions on historical facts, that is, in the sphere covered by the right of free expression", permitting the play of articles 16.1 CE (ideological freedom) and 20.1 CE (freedom of opinion) and consequently, the impossibility of considering that conduct in the frequently repeated art. 607.2 PC as constitutionally correct.

Once again I quote the State Attorney: “the ideas and theories criminalised in art. 607.2 PC are genocides. It is not a question of propagating theories which are simply adverse to a national, ethnic racial or religious group. Nor does it deal with the pure negation of facts, such as, for example, the extermination of some six million Jews by the criminal regime which governed the German Reich between 1933 and 1945. The precept penalises denial or justification “of the crimes”, not the pure denial of facts, breathtakingly true, unfortunately for humanity, in the case of the destruction of European Jews. In fact, it is not freedom of information which is in play, which does not protect deliberate untruths (“true information”, art. 20.1 d CE.) It is the dissemination of a certain type of ideas or theories that is in play".

4) In short, we are in the presence of a crime of abstract danger which with its own specificity is designed on the basis of the polyvalent expression "dissemination" which covers three modes of perpetration with a specific reference to “crimes classified in the previous paragraph of this article". With this the circle of penalties established by legislation for conduct relating to genocide is closed, which therefore is distinct and differentiated from other criminal behaviour such as incitement to commit crime (art. 18 PC) or incitement to racial hatred (arts. 510, 515.5, 519 and 615 of the same PC) cases of contest or conflict of laws for which art. 8 of the Penal Code offers the appropriate solutions.

In my opinion, I believe that the only conclusion to be reached is that, given the systematic reasons explained and the nature of the crime, the typical description referring to "the justification of genocide" conforms to that as a type of crime of abstract danger, insofar as, in line with my criterion and with the clear objectivity and taxing reminder, to which the State Attorney refers, that nature conforms, in contrast, “to the specific danger represented by a shot in the back of the head, the car bomb, or expulsion from a country for certain classes of persons. The dissemination of racist or xenophobic ideas and theories have managed to stimulate little known psychological and social springs, and have created a social atmosphere which, as the development of events in Nazi Germany have shown, begins with legal discrimination in access to public and professional office; it continues with the stimulus of emigration of part of the population, and extends and intensifies all fields of coexistence to the extremes of destruction and extermination now known to history".

It is therefore these preceding references which lead to the conclusion reflected in this dissenting vote in that it derives from its “systematic comparison with other criminal precepts, with those which truly have a narrower and more direct relation, that is, with crimes of particular gravity which are listed in the first section of the article and which are grouped

under the title “crimes of genocide”. This connection is further intensified in that the type of crime which the majority decision adopted denies is constitutional, is integrated through remission with defining elements of the crimes enumerated in the various sections of paragraph 1, which are simply crimes of result".

If – as the Public Prosecutor points out – added to this the “core of the punished action is framed within the common title of dissemination which implicitly requires publicity, as the term in the heading implies the use of communications media in order to ensure that the opinion or value judgment will become general knowledge, which, subsequently, presupposes the extension of that knowledge or what is opined or valued at least potentially to a plurality of persons”, the only conclusion can therefore be that both types of criminal conduct - denial and justification - and even the third which is that of "attempting to restore regimes which approve crimes which generate such conduct” (crimes listed in the previous section) all of which are joined by the disjunctive conjunction “or” not by the copulative “and” - reflected in the paragraphs of section 2 of art. 607 of the Criminal Code – should be qualified in the same way, which can only be in accordance with the Constitution.

5) Based on the previous specifications in which it is clear how, in the light of specific types of crime – once new in a different era and which have re-emerged in the present (think in addition to genocide of drug trafficking, or terrorism) – legislature offers responses in which the support of fundamental rights which conflict or which are affected are not altered but are limited, we cannot constitutionally remove authorisation for the principle of legal configuration, nor any minimum intervention of criminal law with benevolent, contrived and theoretical preventions which instead of consolidating those rights, actually weaken their protection which, due to their objective primacy and effective reality deserve – not with privileged preference, but rather with empirical and casuistic evaluation and with no other purpose than that of adjusting to the terms of reasonability and proportionality – another legal solution to that provided by the Judgment approved by the majority of my colleagues, in order to resolve the conflicts which may arise between them.

I believe that the above comments have justified my contradictory opinion of the Majority Judgment, the body of which, in my humble opinion, should declare the two sections referred to therein as constitutional. An opinion which, with all due respect, I must state contrary to those who have voted in the decision approved by the Plenary Session of this Constitutional Court.

Given in Madrid on the seventh of November of two thousand and seven

Dissenting vote lodged by Senior Judge Jorge Rodríguez-Zapata Pérez in respect of the Judgement delivered by the Plenary Session on 7 November 2007, on the dissemination of ideas which deny or justify crimes of genocide.

1. I disagree with the Judgment approved today. The question of unconstitutionality from which this proceeding derived in 2000, raised, and shall raise, procedural problems which I do not propose to address here. Nor do I propose to enter into a legal and criminal analysis of art. 607.2 PC. It is sufficient for me to point out that the types of crime indicated in art. shall not be differentiated from those of art. 607.2 PC (contrary to the statements of CL 6), nor is it appropriate to criminally differentiate between the denial of crimes in art. 607.1 PC, which is considered pointless, from their justification which is accepted following a laboured interpretation (CL 9 of the majority Judgment). A critique of these points is found in the comments contained in the dissenting votes of two of my Colleagues of the plenary session which I too share. I shall explain my own differences in respect of the Majority Judgment from the perspective of constitutional law and future community law, which are those which concern me.

2. Article 1.1 of the Spanish Constitution declares that both freedom and political pluralism are the highest values of our legal system.

Since the democratic transition, the anniversary of which was recently celebrated, Spain has been a country of pluralism. In the social, economic, political sector and in the territorial backbone of the State, pluralism has been the defining factor in these thirty years of democratic experience. Within this framework, our 1978 Constitution has generously encompassed all Spaniards irrespective of their ideology, credo or party.

It has been stated however that “the paradox of freedom is also the paradox of pluralism”. The experience of European constitutionalism in the 20th century interwar period demonstrated that the appearance of anti-pluralist forces in a democratic society placed in question, and far too easily, freedom and the pluralist system itself.

Europe experienced a golden age of classic constitutionalism between 1918 and 1945 in what was expressively called an “excess of confidence in legal salvation”. To profess innocent faith in constitutional law, considering it as a saving reality which in itself ensures freedom or pluralism, was a path abruptly halted by the dramatic experiences of countries which boasted Constitutions that were technically more perfect than any created by any human genius.

Leaving aside our own experience of the civil war, despite the Constitution of the 2nd Spanish Republic of 1931 , the collapse of the Weimar Constitution of 1919, a few months after Hindenburg entrusted a coalition of parties supporting Adolf Hitler to form a national socialist government in 1933, or the impotence of many Central or Eastern European constitutions in halting Communist totalitarianism, following the second world war, led just after the war to the Universal Declaration of Human Rights of 10 December 1948, to the Rome Convention of 4 November 1950, to the Strasbourg Court and the same Convention for the prevention and penalisation of the crime of genocide of 9 December 1948 in compliance with which art. 607 PC which concerns us here was drafted.

As in the case of the Basic Law of Bonn (article 1), the Spanish Constitution of 1978 proclaimed therefore, that "human dignity" is an essential and primary requisite of the basis of the political system and peaceful way of life (art. 10.1 SC) since it considers that only a concept of law based on that dignity may underpin a social and democratic state of law, and that said State should also, in order to be a plural one, be provided with mechanisms which guarantee the repetition of attempts to pervert that pluralism.

This historic context explains the laws incriminating those who deny or trivialise the Nazi holocaust or as in Spain do so in respect of the crimes enumerated in art. 607.1 PC or the glorification of terrorism, in art. 578 PC. 607.2 PC declared in the Judgment I dispute herein, the name of Spain fades into the background. The European Parliament Resolution on the memory of the Holocaust, anti-Semitism and racism recalls that on 27 January 2005 the sixtieth anniversary of the liberation of the Nazi extermination camp of Auschwitz-Birkenau should not only serve to recall with horror how one and a half million Jews, Gypsies , Poles Russians and prisoners of various nationalities as well as homosexuals were murdered, but it should also serve as a lesson to remain alert to the dangers deriving from the "disturbing increase in anti-Semitism, especially anti Semitic incidents in Europe" (sic).

In effect, the danger of anti-pluralist groups is not restricted merely to anti-Semitism today. Contempt and vilification also threatens African, Arab and Asiatic minorities and non European immigrants who have arrived in the continent during the present century. For this reason the classification of various forms of genocide classified in art. 607.1 PC and the subsequent punishment of the dissemination of ideas or theories which deny or justify such crimes in art. 607.2 PC. This anti-pluralism may today be a "clear and present danger" in a new European union formed by five hundred million human beings. Therefore, the proposal of the Framework Decision on combating racism and xenophobia approved by the Council of

the European Union of 20 April 2007, considers that racism and xenophobia currently constitute a threat to the 27 member States of the Union who should now define a new penal law, common to the five hundred million citizens of the European Union, which should punish "denying or grossly trivialising" crimes of genocide. No European state should be allowed to become a refuge or propaganda centre for new anti-pluralist groups in order to avoid repeating the errors of the twentieth century in this new century. The proposal for a Framework Decision should of course be compatible with the freedoms of expression or association recognised in arts. 10 and 11 ECHR, and should have a wider scope than that contained in CL 9 of the majority judgment and obviously should be consistent with the tendential element called for in art. 607.2 PC prior to our Judgment, as Pascual Sala Sánchez argues in his dissenting vote.

3. In a well known dissenting vote (the case of Milk Wagon Drivers Union of Chicago v. Meadowmoor), Judge Black of the US Supreme Court stated in 1941 that the freedom to speak and write on public affairs is as important for the US government as the human body needs the heart. Freedom of expression – he said- is the very heart of the US governing system. Therefore, when the heart is weakened, the system fails and when it is silenced the result is death.

The Judgment which I dispute herein is inspired by this theory, basing its argument on deciding (CL9 and ruling) on the freedom of expression of art. 20 CE and operates on the meaning and scope of art. 607.2 PC, in respect of this freedom of expression (FCLJ 4, 6 and 9).

This breadth of freedom of expression represents however, an inopportune and serious setback to the guarantees of pluralism governing Spain and the countries of the present democratic Europe I have just mentioned. In 1941 when Judge Black wrote his famous dissenting vote, a trip to the USA was not an online virtual visit. Thousands of ships voyaged across the Atlantic fleeing the Shoah, holocaust or burning , carrying thousands of human beings with “lives unworthy of living”. Meanwhile old world Europe contemplated the sacrifice of six million Jews, who had not been able to escape a monstrous reality which ignored the dignity accorded to every human being in their unrepeatable individuality. Every continent generates its own monsters, and the bureaucratic cruelty of a regime which scientifically practised all the types of genocide listed today in art. 607 PC did not occur in the USA, but in Europe. For this reason the first amendment of the United States Constitution includes, faithful to the tradition of the pilgrim fathers of the American Union, a "precious

freedom of expression “whereas - with the exception of the United Kingdom and the Scandinavian countries - European democratic states have no scruples in adopting laws which incriminate those who deny or trivialise crimes of the Nazi holocaust or genocide. In Europe the place of honour in the list of fundamental rights is held by that of human dignity, and thus we should not let ourselves be overwhelmed by categories which are removed from the European experience.

4. The constitutional problem grows, and thus also my own differences become more pronounced when, citing JCC 48/2003, of 12 March on the Organic Law 6/2002 of 27 June on Political Parties, the majority ruling produced an amendment to the theory laid down in legal conclusion 7 of that unanimous decision of the Plenary Session, in that it did not consider that in the event of crimes such as that of genocide, human dignity should always be adduced, something we treat with extreme care in legal conclusion no. 7 of the aforementioned JCC 48/2003. The majority Judgment considers that the ideas or opinions which have given rise to this question of unconstitutionality “are repulsive from the perspective of constitutionally guaranteed human dignity” (sic in CL 4) however this does not deter from concluding that at least in part they should be protected in a vision of freedom of expression of art. 20 CE, with which I disagree.

This doctrine contrasts with our declarations in JCC 214/1991, 11 November (case León Degrelle) and 176/1995, 12 January (case of the Hitler-SS comic). In effect, JCC 214/1991 developed a revolutionary theory on procedural legal standing, in order to grant such to Violeta Friedmann, a Jewish survivor of the Auschwitz-Birkenau concentration camp who claimed her right to honour and that of all Jews against a denial of the crimes of the notorious Dr. Mengele. We state in CL 8 that extremely significant Judgment, that article 20.1 SC does not ensure the right to express and disseminate a specific version of History and the world tending to despise and discriminate against persons in an anti-Semitic, racist or xenophobic discourse, as this violates human dignity which is (in art. 10.1. CE) one of the foundations of political order and social peace: Even more convincing if possible, was JCC 176/1995 when in CL 5 it stated that freedom of expression is a fundamental value of the democratic system proclaimed by our Constitution, however, one of its uses, which denies human dignity, which is the unquestionable core of the right to honour in our times, is itself outside constitutional protection (JCC 170/1994 and 76/1995). “A comic such as this one, which turns historic tragedy into a burlesque farce should be qualified as defamation of the Jewish people, holding their characteristics and qualities in contempt and thus unworthy of consideration by others, a

determining element of infamy or disgrace".
For this reason I wish to express my dissent in Madrid on the seventh of November of two thousand and seven

Dissenting vote of Ramón Rodríguez Arribas, in the Judgment of the Plenary Session of 7 November 2007, delivered in the question of unconstitutionality number 5152-2000.

In exercising the powers accorded to us under art. 90.2 OCLC and with every respect of the opinion of the majority, I wish to express my divergence with the judgment based on the following considerations:

1. The Judgment in its final part of legal conclusion 7 maintains that the precept which penalises the denial of genocide "would only be in conformance with the Constitution if it could be deduced therefrom that the penalised conduct necessarily implies a direct incitement to violence against certain groups or contempt for victims of the crime of genocide".

Therefore, the so called "denialism" is itself at the very least a clear manifestation of contempt shown towards the victims who suffered, and thus it occurs on several occasions in reality in the shape of those who maintain, for example, that the holocaust did not exist and that it is merely part of Zionist propaganda; to claim to protect such attitudes in freedom of expression is to degrade that right; on the contrary, and as the Public Prosecutor maintains, such attitudes are conducive to creating states of distorted opinion on this historic fact, certainly contrary to what really occurred, thus attempting to encourage people to forget what actually happened, and so the precept does not attempt to punish the free dissemination of ideas or opinions, however morally reprehensible and repugnant they may be, but rather to protect society from those behaviours which, through a systematic psychological preparation of the population, using propaganda media, would generate a climate of violence and hostility which through the media could result in specific acts of racial, ethnic or religious discrimination; certainly this is a risk that a democratic society cannot afford to run in present day circumstances, in which it cannot be denied that such attitudes are returning.

It is not a question of favouring a "militant democracy" but rather one of preventing the institutions which ensure freedom from becoming an "ingenuous democracy" which will bring that supreme value of coexistence to the point of permitting those who attempt to deviate or destroy it from acting with impunity.

2. Nor do I share the view that the precept, in the part which is declared unconstitutional, may be violating scientific freedom (art. 20.1 b CE) because it is not a question of punishing the

result of the research of a demented historian who has arrived at the ridiculous conclusion of the non existence of a universally contrasted genocide, in which case there would be no intentional element and therefore it would not be punishable, but rather to place a limit, through criminal penalties, on the proliferation of information directly designed to minimise or explain monstrous acts of genocide in order to break down the barrier of social repugnance which serves to prevent a terrible reoccurrence of such events.

That this intentional element, which, furthermore, is not in any way placed in doubt in terms of justification, is the same as that which is tending to affect denial of the crime of genocide, highlights the comparison which Spanish legislature is required to make between both types of conduct when it classifies in section 2 of art. 607 PC as a punishable conduct “the dissemination through any medium of ideas or doctrines which deny or justify crimes" using significantly, the alternative preposition “or” which could have led to a belief that both forms of action refer to crimes and therefore are not contrary to our Constitution, avoiding the somewhat paradox situation, in which Spain, which had anticipated this type of crime in its code, while many countries are beginning to punish the crime of aforementioned “denialism” and postulating its general inclusion in the penal codes of the European union, is now precisely a state which is decriminalising it.

Given in Madrid, on the seventh of November of two thousand and seven.

Dissenting vote of Senior Judge Pascual Sala Sánchez in respect of the Judgment of this Court on the question of the unconstitutionality 5152-2000 raised by the Third Section of the Provincial Court of Barcelona in respect of article 607.2 of the current Penal Code.

With the greatest respect for the majority opinion, I object to the legal basis on which the ruling is founded which leads only in respect to the declaration of the unconstitutional nature of the first paragraph of the aforementioned article 607.2 PC 1995, at the point where it punishes the dissemination of ideas or doctrines which “deny” a crime of genocide without therefore permitting an interpretation pursuant to the Constitution as opposed to its attitude with regard to conduct consistent with the dissemination of ideas or theories which "justify " a crime of the same type.

I base my objection having defined the terms of its context above on the following grounds:

1. The requirement of a tendential element in the type of crime defined in the aforementioned article 607-2 PC which the Judgment I wish to oppose considers to be included in conduct

consistent with the dissemination of ideas or doctrines which "justify" a crime of genocide (CL9) and which, however, do not admit in those who deny it , this element which the Contested Judgment (CL8 final paragraph) specifies in that the dissemination of ideas or theories -it calls them opinions – “was really appropriate for creating an attitude of hostility towards the affected group", is -with all due respect- contradictory in itself due to the fact that the criminal figure identifies them when it lumps together denial and justification, types of conduct which it simply separates with the word “or”.

By this it is meant that if "justification" as the Approved Judgment states, is equivalent to "indirect incitement" to the perpetration of crimes of genocide, in such a way that it would produce “firstly when the justification of such an abominable crime presupposes a means of indirect incitement to its perpetration” or when secondly, “it will also occur when the conduct consistent with presenting the crime of genocide as fair seeks a type of incitement to hatred of specific groups defined on the basis of their colour, race, religion or national or ethnic origin, in such a way that it represents a certain danger in generating a climate of violence and hostility which may be concentrated in specific discriminatory actions” (CL9), does not comprehend how that same interpretation may be inadequate in the case of conduct consistent with "denial", and the fact is that the precept in question punishes both types of conduct – remember, they are legislatively compared – it is not the simple abstract “denial" or “justification” consistent with “ the proclamation of one’s own ideas or political positions or adherence to those of others” (CL9) but those same “denials” or “justifications” in that they mean, as has been stated, the presentation of a crime of genocide as fair in terms which may be assumed to be a indirect incitement to its perpetration.

2. Even setting aside the aforementioned tendential element which, as has just been argued, if it is admitted for one of the two conducts considered in article 607.2 PC it should be admitted for both, it is necessary to reach the same conclusion that the precept is constitutional as soon as the fact that it is not only an unreasonable or erroneous interpretation of the type of crime defined in article 607. 2 PC is taken into account, but also on the contrary it adjusted to the parameters of the logical consideration that the precept in question defines the crime of genocide in a manner common to all the criminal forms considered, namely: the requirement of the proposal to destroy either totally or partially a national, ethnic, racial or religious group. What occurs is that article 607-1 in its five sections refers to conduct which is directly and also physically harmful to legal rights concerned with life, physical integrity, health or living conditions and, conversely article 607.2 PC makes a relation, as has been reiterated, only to

the dissemination of ideas or doctrines which deny or justify, not the acts which support the means of perpetration indicated in section 1, but “the crimes typified” in that section, crimes which cannot be committed without the previous “proposal” mentioned earlier. This being the case, to consider that this tendential element is also part of the means of perpetration in the aforementioned section 2 is a reasoning which is perfectly consistent with the most elemental legal logic.

3. It is true that this argument could be accused of interpreting ordinary legality, a task which is not incumbent on this Court and which is the work of the corresponding courts of ordinary jurisdiction. However, at least it serves to highlight the fact that it is an interpretation the same as that which is argued in section 1 of this Vote, which is perfectly feasible and therefore likely to be sustained a quo by the Court which raised the question which is partially upheld in the majority opinion, in the same way that in respect of the specific case being tried, it could have resolved any problem of competition or compatibility which this case could have raised in respect of crimes pertaining to the exercise of public fundamental rights and freedoms cited in the Proposal (arts. 510, 515.5 and 519 PC).

4. Nor can it be said that the declaration of unconstitutionality of the dissemination through any media of ideas or theories which "deny" crimes of genocide are in conformance with the most recent international texts or, with a constitutional perspective, with the need to avoid the introduction of the criminal type of elements which are not actually mentioned in the literal text.

The first because, precisely, article 1 of the Proposal for a Framework Decision on combating racism and xenophobia approved by the European Union Council in its meeting of 20 April 2007 to which the Judgment I oppose refers in CL9 , restricts the requirement of member states in adopting measures which will ensure punishment of the public apology for crimes of genocide and also the denial or flagrant adoption of such crimes, to cases in which the conduct is executed in a way that it may imply incitement to violence or to hatred” against the social group affected. That is, the proposal mentioned continues on this point the same criterion as that of article 607.2 of the Spanish penal code or, which is the same, requires that both public apology for crimes of terrorism (in the proposal justification is not directly addressed) and for its denial or trivialisation it is necessary to have the tendential element that "the conduct is carried out in a way which could imply incitement to violence or hatred”. Note how this instrument does not raise any doubts as to whether the denial of crimes (legal qualification, as is also that of crimes made by the Spanish code) enters into the requirement

of States to adopt punitive measures or punishment against such acts, provided that, as in the other cases (apology or trivialisation), the aforementioned tendential element is present.
Secondly, because the principles of presumption of constitutionality of democratic legislature and conservation of the Law, as the Judgment I contest also recognises (CL 7), leads to the consideration that only those precepts which are clearly incompatible with the Constitution can be declared unconstitutional, since it is impossible to make an interpretation in conformance therewith (JCC 111/1993, 25 March, CL 8; 24/2004, 24 February, CL 6; 131/2006, 27 April, CL 2). Although the aforementioned principles do not permit the Constitutional Court to reconstruct a norm in order to conclude its constitutionality, nor that the agreed interpretation ends up being an interpretation contra legem, to do so it is necessary for the meaning of that norm to be “evident” and as such, contrary to the aforementioned possibility (JCC 11/1981, of 8 April, CL 4) or that, instead of an authentic agreed interpretation it leads to a distoriton or manipulation of the aforementioned legal declarations, equivalent to the creation of a new norm and to the conversion of the Constitutional Court into a positive legislative body (JCC 235/1999, 20 December, CL 13; 194/2000, 19 July, CL 4, and 184/2003, 23 October, CL 7).
Therefore, it is sufficient to reiterate the previous considerations to reject that the requirement of the tendential element of indirect incitement to violence or to hatred in the conduct of dissemination of theories which deny crimes of genocide may be qualified as distortion or manipulation of the legal text, when it is certain that that element is not explained in the equivalent conduct of justification, and when it would never be admissible to interpret that the legislature of the Penal Code had wished to incriminate only an aseptic conduct of factual denial deprived of all intentionality. This with all respects, could indeed merit the concept of abusive interpretation and taken out of context and, at the same time, that of an unnecessary restriction in the incrimination of punishable types of conduct of what is graphically known as "discourse of hate", which all the modes of genocide and their defence imply, and which every democratic State is obliged to prosecute.
Bear in mind, furthermore, that it is difficult to compare the case examined in JCC 43/2004, of 23 March, with that which is considered in the present question of unconstitutionality, as does CL8 of the Judgment I oppose when it invokes it. The aforementioned Judgment was concerned with an alleged violation of the right to honour as the result of a biographical report which narrated a criminal case before a council of war during the civil war, which this Court deemed to have been protected by the scientific freedom of the historian in order to deny the

protection required by the sons of the witness who had testified in the aforementioned proceedings. In the case in question, in contrast, a conduct of distribution, dissemination and sale of all types of materials in documented and bibliographic support in which "in a reiterated and unequivocal degrading manner for the social group integrated in the Jewish community (sic in the narration of the evidence of the Judgement dismissing the case delivered in the first criminal instance, neither contradicted nor questioned or modified in appeal) the persecution and genocide suffered by that people during the historical period of the Second World War was denied" and all of which with the addition of the fact that "the great majority of said publications contained texts which incited discrimination and hatred towards the Jewish people, considering them to be inferior beings who should be exterminated like rats" (sic also in respect of the aforementioned proven facts). The existence is therefore clear in the case under analysis here of the frequently mentioned tendential element which provided the propagation of both the conduct disseminating negative theories on the crimes of genocide, and the necessary distinctive elements of this type of crime in respect of the mode of provocation defined in general in art. 18 PC or with those specific to articles 615 and 510 of the same legal body, which in the ultimate term and as has been pointed out previously, could, all in all assume a concurrent problem which in order to resolve the Chamber a quo did not require any proposal of unconstitutionality.

Therefore, the type of crime declared unconstitutional in the Judgment could not be deemed to be unaware of the right to free expression and dissemination of thoughts, ideas and opinions recognised in art. 20.1 CE and, as a result, the question of unconstitutionality should be dismissed.

Given in Madrid on the seventh of November of two thousand and seven.