Constitutional Court of Chile Decision

STC Rol N° 3729(3751)-17 CPT

August 28, 2017

Re: Constitutional challenge to the Bill that "regulates the decriminalization of voluntary interruption of pregnancy on three legal grounds," corresponding to Bulletin N ° 9895-11.

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Constitutional Court of Chile

Santiago, 28 August 2017

HAVING REVIEWED:

On August 2, 2017, the ladies and gentlemen Senators of the Republic Juan Antonio Coloma Correa, Francisco Chahuán Chahuán, Alejandro García-HuidobroSanfuentes, José García Ruminot, Iván Moreira Barros, Hernán Larraín Fernández, Manuel José Ossandón Irarrázabal, Víctor Pérez Varela, Baldo Prokurica Prokurica, Jacqueline Van Rysselbergue Herrera and Ena VonBaer Jahn, who make up more than a quarter of the current members of said Body, brought before this Court, in accordance with Article 93, subsection first, No. 3, of the Political Constitution, a petition of unconstitutionality to challenge the bill that "**regulates the decriminalization of voluntary interruption of pregnancy on three legal grounds",** corresponding to Bulletin N ° 9895-11.

The Plenary of this Constitutional Court, in a resolution on page 89 of this case-file, on August 8, 2017, accepted the aforementioned petition and, in a resolution of the same date, on page 92, declared it admissible and ordered to bring it to the attention of H.E. the Madam President of the Republic, the Senate and the Chamber of Representatives, so that, as constitutional bodies, within a period of five days, they could make the observations and accompany the documents and background that they considered pertinent on the matter.

In turn, dated August 8, 2017, the Ladies and gentlemen, Representatives of the Republic Ramón Barros Montero, Germán Becker Alvear, Jaime Bellolio Avaria, Bernardo Berger Fett, Juan Antonio Coloma Álamos, José Manuel Edwards Silva, Gonzalo Fuenzalida Figueroa, Sergio Gahona Mazar, Gustavo Hasbún Selume, Javier Hernández Hernández, María José Hoffmann Opazo, José Antonio Kast Rist, Javier Macaya Danús, Patricio Melero Abaroa, Andrea Molina Oliva, Cristián Monckeberg Bruner, Nicolás Monckeberg Díaz, Celso Morales Muñoz, Claudia Nogueira Fernández, Iván Norambuena Farías, Paulina Núñez Urrutia, Diego Paulsen Kehr, Leopoldo Pérez Lahsen, Jorge Rathgeb Schifferli, David Sandoval Plaza, Alejandro Santana Tirachini, Ernesto Silva Méndez, Arturo Squella Ovalle, Renzo Trisotti Martínez, Marisol Turres Figueroa, Jorge Ulloa Aguillón, Ignacio Urrutia Bonilla, Osvaldo Urrutia Soto, Enrique Van Rysselberghe Herrera, Germán Verdugo Soto and Felipe Ward Edwards, who constitute more than a quarter of the current members of the Chamber of Representatives, also brought before this Court, according to article 93, first paragraph, No. 3, of the Political Constitution, a petition of unconstitutionality that challenges the bill that "regulates the decriminalization of voluntary termination of pregnancy on three grounds ,corresponding to Bulletin N ° 9895-11.

The Constitutional Court, in plenary session, in a resolution dated August 10, 2017, on page 288 of the case-file, admitted the case filed by the parliamentarians and, in a resolution of the same date, on page 291, declared its admissibility, ordering to bring it to the attention of H. E. the President of the Republic, the Senate and the Chamber of Representatives, so that, as constitutional bodies, within a period of five days, they could make the observations and the accompanying background that they considered pertinent on the matter.
Then, through a resolution of August 10, 2017, page 295 of the case file, keeping in mind that this unconstitutionality action challenges the same set ofs norms that the petition previously referred by a

group of ladies and gentlemen Senators of the Republic, The Court resolved to arrange a combination [of the cases].

On August 11, 2017, on page 305, Mr. President of the H. Chamber of Representatives, in representation of that Body, formulated within term substantive observations regarding the combined petitions, urging for a total rejection of them, responding to the arguments developed in said presentation.

Finally, on August 13, 2017, on page 330, H.E. Mrs. President of the Republic, Michelle Bachelet Jeria, in a presentation also subscribed by the Minister Secretary General of the Presidency, Mr. Nicolás Eyzaguirre Guzmán, formulated within the term, observations regarding both petitions, requesting their total rejection, explaining how the whole bill is in accordance with the Political Constitution of the Republic.

With the purpose of detailing the arguments of the parties, as well as interested constitutional bodies which took part in these proceedings, here will be consigned the objected provisions contained in the Bulletin Bill No. 9895-11, as well as the contextual arguments and legal grounds that support the actions presented, identifying the constitutionality conflicts that the ladies and gentlemen of the requesting parliamentary representatives criticize in their claim. Along with this, in each section, there will be explicit arguments developed by the President of the Republic and, where appropriate, by the Lord President of the Chamber of Representatives, in which they urged the rejection of the petitions initiated before this Court.

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I. IMPUGNED PROVISIONS OF THE BILL

The requesting parties ask that the Constitutional Court declare unconstitutional and, consequently, remove the following provisions of the proposed law:

1. Article 1, numeral 1, of the Bill, which replaces article 119 of the Health Code:

"Article 1.- Incorporate the following Amendments to the Health Code:

1. Replace Article 119 with the following: "Article 119. Mediating the will of the woman, the interruption of pregnancy by a doctor is authorized, in the terms regulated in the following articles, when:

1) The woman is at "risk of life" [*riesgo vital*] so that the termination of pregnancy prevents a danger to her life.

2) The embryo or fetus has a congenital pathology, acquired or genetic, incompatible with independent extrauterine life, in any case of lethal character.

3) The pregnancy is the result of a rape, provided that no more than 12 weeks of gestation have elapsed.

In the case of a girl under the age of 14, the interruption of pregnancy may be carried out provided that no more than 14 weeks of gestation have elapsed.

In any of the above cases, women must explicitly provide, in advance and in writing, their will to interrupt the pregnancy. When this is not possible, the provisions of article 15, letters b) and c), of Law No. 20,584, which regulates the rights and duties that people have in relation to actions linked to their health care, shall apply, notwithstanding the provisions of the following paragraphs. In the case of people with sensory disabilities, visual or auditory, as well as in the case of people with psychological or intellectual mental disability, who have not been declared "incapable" and who cannot be understood in

writing, the means will be available for alternative ways of communication, so they can consent, in accordance with the provisions of the Law No. 20,422 and the Convention on the Rights of People with Disabilities.

If the woman has been judicially declared "incapable" because of dementia, the authorization must be obtained from her legal representative, always taking her opinion into consideration, unless her disability prevents it from being known.

In the case of a minor girl under the age of 14, in addition to her will, the interruption of pregnancy must include the authorization of her legal representative, or one of them, at the choice of the girl, if she has more than one. The lack of authorization, understanding as such the refusal of the legal representative, or if this person cannot be found, the girl, assisted by a member of the health team, may request the intervention of a judge to verify the occurrence of the legal ground. The court will decide the request for termination of pregnancy verbally and without a trial, no later than forty-eight hours after the presentation of the request, with the background provided by the health team, listening to the girl and the legal representative that refused the authorization. If the judge deems it necessary, it may also hear from a member of the health team that assists her.

When a doctor deems that there are grounds for believing that the request for authorization from the legal representative could generate, for a minor of 14 years or a woman judicially declared incapable because of dementia, a serious risk of physical or psychological abuse, coercion, abandonment, uprooting or other actions or omissions that violate her integrity, judicial authorization will be dispensed as a substitute for the legal representative's authorization. For the purposes of this subsection, the opinion of the doctor must be in writing.

Substitute judicial authorization regulated in the preceding paragraphs will be requested to a judge with competence in family law in the current locale of the child or the woman judicially declared incapable because of dementia. The procedure will be reserved and opposition will not be admitted from third parties other than the legal representative who had denied the authorization. The resolution that denies the authorization will be appealable and will be processed as established in article 69, fifth paragraph, of the Organic Code of Courts.

The willingness to interrupt the pregnancy manifested by an adolescent of 14 years and younger than 18 should be communicated to her legal representative. If the adolescent has more than one, only the one that she chooses will be informed.

If the health team believes there are reasons to reasonably infer that providing this information to the legal representative indicated by the adolescent could generate to her a serious risk of physical or psychological abuse, coercion, abandonment, uprooting or other actions or omissions that violate her integrity, they will do without the communication to the representative and, instead, another family member that the adolescent chooses will be informed, and, in case of absence, another responsible adult that she indicates.

In the case that the adolescent is exposed to any of the risks referred to in the previous paragraph, the head of the hospital or clinic shall inform the family law court, so that it adopts the measures of protection that the law establishes.

The health provider must deliver to the woman truthful information about the characteristics of the medical benefit of her treatment, as established in articles 8 and 10 of Law No. 20,584. Also, he must deliver verbal and written information about the alternatives to the interruption of pregnancy, including the available programs related to social and economic welfare and adoption support. The information will

always be complete and objective, and its delivery may in no case be intended to influence the will of the woman. Notwithstanding the foregoing, the health provider should ensure that the woman is aware of all the alternatives, before her decision is made, and that she does not suffer coercion of any kind in her decision.

In the framework of the three legal grounds regulated in the first paragraph [risk of life], the woman shall be entitled to a program of support services [*acompañamiento*], both in her discernment process, as during the period following the decision, that includes the time before and after delivery or the interruption of pregnancy, according to the case. Each support service will include welcoming actions, biopsychosocial counseling before confirmation of diagnosis. In the case of continuation of pregnancy, along with offering the support described, relevant information will be given to the woman about her health condition and support networks will be activated. These support services can only be carried out to the extent that the woman authorizes them; they must be personalized and respectful of her free decision. In cases concurring with the circumstance described in N° 3) of the first section [i.e. rape], the woman will be provided with the information necessary for her to file criminal accusations
.
In the situation described in N° 2) of the first section [fatal fetus], the health provider will provide the palliative care that the case requires, whether it deals with childbirth or of the interruption of pregnancy with survival of the born child.

The benefits included in the support services program to women who find themselves in any one of the three cases will be regulated by a decree of the authorities referred to in letter b) of article 143 of the decree with force of Law N° 1 of 2005 of the Ministry of Health. In addition, the criteria will be established for the preparation of a list of non-profit institutions that offer support, additional to the support services program, which shall be delivered in accordance with the eleventh subsection [of the Bill]. The mother can always request that the support services to which she is entitled may be provided by civil society institutions or organizations that are accredited by a supreme decree issued by the Ministry of Health, all in accordance with a regulation issued to that effect. The woman will be able to choose freely both the entity that provides the support services program that she considers most appropriate to her particular situation and personal convictions.[1]

[1]It is recorded that in the case file of proceedings brought [before the Court] under Roll No. 3729-17-CPT, the requesting senatorial ladies and gentlemen did not object to the constitutionality of the sentences contained in the first article, subsection thirteen, of the bill, in its provisions, "The mother can always request that the support services to which she is entitled may be provided by civil society institutions or organizations which must be accredited by a supreme decree issued by the Ministry of Health, all in accordance with a regulation issued to that effect. The woman will be able to choose freely both the entity that provides the support services program that she considers most appropriate to her particular situation and personal convictions. ', which was denounced as contrary to the Constitution by the petitioning Representatives in case No. 3751-17-CPT.

In the event that the support services are not offered in the terms regulated in this article, women may appeal to the claim body established in article 30 of Law No. 20,584. Faced with this claim, the health provider must give a written response within a period of five business days, counted from the business day following its receipt and, if appropriate, take the necessary measures to correct the irregularities claimed within the maximum period of five working days, counted from the notification of the response. If the woman presents a claim to the Superintendence of Health, if applicable according to the general rules, it must resolve it and may recommend the adoption of corrective measures for detected irregularities, within a period of time no greater than thirty calendar days. Notwithstanding the above, any woman who has been discriminated against arbitrarily in the support services process may make effective a non-arbitrary discrimination action referred to in articles 3 and following of Law N° 20,609, which establishes measures against discrimination.'

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2. Article 1, numeral 2, of the Bill, which incorporates a new article 119 bis to the Health Code, of which the articles follow:

"2. Incorporate the following 'Article 119 bis':

"Article 119 bis. To perform the intervention referred to in N° 1) [risk to life] of the first paragraph of the previous article, the woman should have the appropriate medical diagnosis.

In the case of N° 2) [fatal fetus] of the first paragraph of the referenced article, to carry out the intervention, two medical specialists shall provide their medical diagnoses in the same sense." All diagnoses must be recorded in writing and be done in advance.

In the case of N° 3) [rape]of the first paragraph of the article 119, a health team, specially formed for these purposes, will confirm the concurrence of the facts that constitute it and the gestational age, informing, in writing, the woman or her legal representative, as the case may be, and the head of the hospital institution or private clinic where the request for interruption is made. In the fulfillment of its mission, this team must give and guarantee dignified and respectful treatment of the woman.

In cases where the applicant is a girl or minor adolescent under the age of 18, the directors of the hospital or private clinic establishments in which is requested interruption of pregnancy must provide the information according to articles 369 of the Criminal Code, and 175, letter d), and 200 of the Code of Criminal Procedure. They must also notify the National Service of Minors.

In the event of a woman over 18 who has not filed a criminal accusation for the crime of rape, the director of the hospital or private clinic must inform the Public Prosecutor's Office of this crime, with the purpose of investigating ex officio the responsible person(s).[†]

[†]It is recorded that in the case file of proceedings brought under the Roll No. 3571-17-CPT, the requesting Representatives objected to the constitutionality of article 1, numeral 2, fifth subsection of the bill, which introduces a new article "119 bis" to the Health Code, provisions that were denounced as contrary to the Constitution by the requesting Senators in case No. 3729-17-CPT.

In all the above cases, the principle of confidentiality will be respected in the relationship between doctor and patient; because of it, it is mandatory to adopt all the necessary measures to safeguard its effective application.

In the criminal proceedings for the crime of rape, the participation of the victim to the acts of the procedure will always be voluntary and may not be required or dictated against her the measures of constraint contained in the Articles 23 and 33 of the Criminal Procedure Code. '

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3. Article 1, numeral 3, of the Bill, which introduces a new article "119 ter" to the Health Code, whose norm is as follows:

"3. Add the following Article '119 ter'
"Article 119 ter: The surgeon required to interrupt a pregnancy due to any of the grounds described in the first paragraph of Article 119 may refrain from so doing when he has manifested his conscientious objection to the director of the health establishment, in written form and in advance [prior to the request of the woman]. The rest of the professional staff who perform functions within the surgical pavilion during the intervention will be entitled to this same right. In this case, the institution will be obliged to immediately reassign another non-objecting professional to the patient. If the health facility does not have a practitioner who has not manifested conscientious objection, the director must refer the woman immediately so that the procedure is carried out by a professional who has not manifested such objection. The Ministry of Health will issue the necessary protocols for the execution of conscientious objection. These protocols must ensure the medical care of patients who require the interruption of their pregnancy in accordance with the articles above. Conscientious objection is of a personal nature and in no case, can be invoked by an institution.

If the professional who has manifested conscientious objection is required to interrupt a pregnancy, he will have the obligation to inform the director of the health institution immediately that the requesting woman must be referred [to another professional]

In the case that the woman requires immediate and unpostponable medical attention, invoking the [risk to life] ground of N° 1) of the first paragraph of article 119, whoever expressed conscientious objection cannot be excused from performing interruption of pregnancy when there is no other surgeon who can perform the intervention Neither can it be excused if the expiration is imminent of the term [temporal limit of gestation] established in case N° 3) [rape] of the first paragraph of article 119. "

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4. Article 1, numeral 4, of the Bill, which introduces a new article "119 quater" to the Health Code, the precepts of which follow:

"4. Incorporate the following article "119 quater":
"Article 119 quater. Strictly prohibits advertising about the offer of centers, establishments or services, or means, benefits, techniques or procedures for the practice of interruption of pregnancy in the grounds of the first subsection of article 119.

The above does not prevent the fulfillment of the duties of information by the State or the provisions of Paragraph 4 of Title II of Law No. 20,584.

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5. Article 2 of the Bill, which replaces article 344 of the Criminal Code, has provisions which state:

"Article 2.- Replace Article 344 of the Criminal Code with the following:
"Article 344. The woman who, outside of the cases allowed by law, causes her abortion or consents that another person causes it, will be punished with minor imprisonment in its maximum degree.
If she does so to conceal her dishonor, she will incur the penalty of minor imprisonment in its medium degree.

6. Article 3 of the Bill, which introduces amendments to article 13 bis, first paragraph, of Law No. 19,451, the text of which follows:

"Article 3.- Insert in the first paragraph of Article 13 bis of Law No. 19.451, continuing after the period, which becomes a comma, the following passage:
"as well as whoever, at any time, intends to encourage for profit or for purposes other than those authorized in this law, organs, tissues or human fluids coming from an intervention specific to the interruption of the pregnancy."

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7. The transitional article of the draft law, which provides:
"Transitional article.- Regulated benefits in this law will be accessible after the dictation of the decree referred to in paragraph thirteen of the Article 119 of the Health Code, which must take place within ninety days of the publication of this law. The excess of the fiscal expense that the application of this law entails, in its first budgetary year, will be financed with charge to the resources on item 16 of the Ministry of Health's Budget. However, the Ministry of Finance, with charge to the Budget of the Public Treasury, may supplement that budget in the expenditure part
that could not be financed with such resources. For the following years, financing will be contemplated in the Budget laws. "

II. GENERAL APPROACHES CONTEXTUALIZING THE CONSTITUTIONAL CONFLICTS SUBMITTED TO THE KNOWLEDGE AND DECISION OF THE COURT.

1. Arguments of the Petitioning Parliamentarians

As a basal antecedent of this case, the requesting Senators, on page 9 of the casefile, request the declaration of unconstitutionality of article 1° N° 1, first paragraph, of the bill, that would introduce in our legislation three legal grounds of direct or induced abortion, which the Bill calls "voluntary interruption of the pregnancy". This issue, they argue, conflicts with the directive that the authors of the Constitution ordered the Legislature in Article 19, N° 1, second paragraph, of the Constitution: "Always protect the life of the unborn." They point out that the rest of the precepts of the Bill are questioned due to their direct connection with this article 1° N° 1, since this [the rest of the proposal] depends on it for intelligence, application and subsistence, so that if the unconstitutionality of such provision is decreed by this Court, the rest of the articles lack meaning and usefulness on their own.

The actors note that, in general terms, the Bill proposes to replace in full the article 119 of the Health Code, which today makes impossible in our legal system the execution of any action destined to cause an abortion. The new regulation disposes that, through the will of the woman, it is allowed for a surgeon to interrupt a pregnancy when: a) the life of the woman is at risk, so that the termination of pregnancy avoids a danger to her life; b) the embryo or fetus suffers from a congenital, structural or genetic abnormality of lethal character; or c) it is the result of a rape. They argue that the

above in any case is a mere decriminalization, imposing rather an obligation since it qualifies the interruption of pregnancy as a medical benefit.

They comment that although in a behavior that was previously defined as a crime the legislative change allows decriminalization, legalization or legitimization, the presidential message of the Bill refers explicitly that the recourse to abortion must be ensured in the future as a legitimate health benefit, pointing out that "at the center of the the proposal are the rights of women." "By regulating, even conscientious objection to the practice, the bill reaffirms the character of a new right that women may require from third parties, including some people against their will and the true judgment of their conscience. Therefore, the proposal does not decriminalize; but rather, it legalizes and legitimates, unlike the current wording of article 119 of the Health Code, which does not prohibit acts according to medical practice that interrupt pregnancy causing the death of the unborn as an unwanted effect, since there is a proportionate reason for this. In the same sense, they mention that there are no real cases that make this proposed regulation necessary in the first legal ground of the proprosal, in which the doctor will always give up the life of the unborn in a decision of that nature with the will of the mother. All these are resolved according to the current *lex artis.*

They add that the Bill consecrates deliberate, direct and autonomous end of the life of a human being who has not been born. That is the right which may be enforced on third parties.

In a similar line of argument, the Representatives point out that mere decriminalization is an action that the Legislature makes in which he only removes the criminality from an act which is no longer considered as against law or unjust. In any case it is possible to sustain that there is decriminalization if there are associated additional elements that govern the contested conduct, This would imply exceeding the field of action of the injustice, generating a framework for action, which leads to the discussion that focuses more on legalization, on what right is conferred, regulating a conduct, that goes beyond mere tolerance or elimination of the injustice and its reproachability, through the generation of a series of precepts and statutes, mutual rights and obligations between the participants and, the certain possibility of demand by the beneficiary, given the decriminalization of the action.

The petitioners comment that the proposal under discussion is part of this logic. If the claims initiated are rejected, woman may demand an abortion treatment with its connected elements as a “support services” space and have the eventual possibility of acting in accordance with the Anti-discrimination Law. In any case, however, the decriminalized conduct can be subsumed as a cause of justification based on the principle of preponderant interest when it is based on the performance of a right.

They add that Chile never had “therapeutic” abortion, as it is badly called. The words "abortion" and "therapeutic" are incompatible. The idea of an induced abortion always implies the intentional suppression of the life of the unborn and could never be understood that this evokes a treatment or therapy conforming to the *lex artis* of medicine. For the same reason, they state that it is ethical, legally and morally reprehensible that the bill allows direct and deliberate action with the object of eliminating a life in gestation, although there is a therapeutic purpose for it. The norm prior to 1989 was dictated in a constitutional context in which Constitution in force did not recognize the life of the unborn and did not entrust a protection mandate to the Legislature. In addition to this, it did not distinguish if with a therapeutic purpose, we were in the presence of a direct abortion or if it was a therapy of the mother resulting in indirect abortion, that is to say, through the principle of double effect.

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2. Observations of H.E. President of the Republic and the President of the H. Chamber of Representatives.

In her reply, the Head of State explains that this Bill was extensively debated in Congress for more than two years in both Chambers, received more than two hundred guests and invited representatives of a wide diversity of political, religious and spiritual positions, which allowed reaching a broad majority agreement. By these unquestionable results, the proposal is legitimized by a democratic process that considered the interests of citizens, a treatment consistent with the constitutional definition of Chile as a Democratic Republic in which the exercise of sovereignty lies with the people, and according to the law when it entrusts the direction of public affairs to the bodies over which there is political control.

In turn, in equivalent terms, the President of the Chamber of Representatives adds that the agreement of the Chamber of the said body to appear in these proceedings was motivated by the need to defend a proposal approved by the majority of the said Chamber, a matter obviated by the petitioners in their claims, as a policy would be followed in the future, in the sense of acting against the claims of minorities that want to impose their positions through an organ other than the Legislative Power. For this same reason, he exposes the need to vindicate the National Congress as the space for political discussion, referring to recent legislative work developed by various committees that worked on the Bill that is being challenged in these proceedings. He also makes present that this Court is a court of law and the question of constitutionality is always a conflict about the nature of norms, so the moral, ethical, sociocultural or axiological issues are outside the Court's competence.

Linked to the above, both the Head of State and the President of the Chamber appearing, note that this Court must defer to the Legislature, useful criteria to face the tension between constitutional justice and democracy. This Court has followed the above, presuming the constitutionality of the acts of the democratic Legislature except one evident struggle with our Constitution that appears impossible to reconcile. Having denounced such a circumstance, the burden of argument must fall on the requesting petitioners, although in this case, their allegations are based on erroneous understandings of the Bill, claiming falsehoods with respect to it.

The President stated that the Bill does not legalize abortion freely; it only decriminalizes it in three extreme circumstances. The articles of the Bill cannot produce abortions, given that these already exist in Chile, seeking rather to take charge of a dramatic reality, given that criminal prosecution is not a good method to avoid them. Today in Chile abortions are practised in an unsafe way, affecting women who find themselves in these three circumstances, violating their fundamental rights. With this proposal, we lift, in a restricted way the absolute ban that exists today. The current legislation makes it impossible for women in these circumstances to make a decision regarding their pregnancy, imposing punishments of imprisonments ranging from 541 days to five years, depending on the case.

She adds that the three legal grounds approved by the National Congress are not uncommon in comparative law. Countries like Argentina, Colombia, Italy, Poland, among others, have approved laws like this one. Today, Chile is one of the six nations in the world that establish an absolute prohibition on abortion.

She points out that the first case, risk to the life of the woman, is not capricious. It is not just any desire of the woman that it seeks to protect. It is about her desire to live. Neither however, is it about hypothetical or eventual discomfort. It is the risk to the life of the woman that must be verified by the corresponding doctor. Despite what is affirmed by the petitioners in their claims, the text of the law today does not allow abortion under any circumstances, not even for the dramatic case of saving the life of the woman. It is a matter of uncertainty that causes clear and determinable harms.

In turn, she argues that the second case takes notice of a reality, that there are diseases that occur during gestation, for which medicine cannot give a solution, diagnosing the death of the fetus within a short period or its survival for a minimal time. These are cases of rare occurrence, in the order of two per

thousand births. However, when they do occur, they expose the woman to a suffering incomparable to any other. Today, a confirmed diagnosis of this nature forces the woman to live in enormous suffering, since she must wait for the death of the embryo or fetus in her womb. The President adds that this legal ground, does not include situations in which the fetus has a significant non-lethal malformation, such as trisomy 21 / Down Syndrome.

Finally, she demonstrates that the third ground regulates the situation of rape, an act that implies a violation of the physical and psychological integrity of the woman, an attack on her dignity, her right to privacy, her sexual self-determination, and her freedom. Worse still, the victim can become pregnant by the aforesaid crime, being obliged to maintain not only the indelible mark of the rape, but also a forced pregnancy. Upon finding that the State failed to prevent the rape, the Legislature now deems that the same State should avoid causing her continued harm by treating the woman like a criminal. It is recognized that forcing her to maintain that pregnancy is a supererogatory sacrifice, unenforceable on the woman, adolescent or girl who has been raped, which affects her fundamental rights. The State must always take care of it, never criminalize it. This ground must be accredited within a determined time, with technical criteria, deriving the background facts to the Public Ministry for its investigation.

Finally, in this section, the President of the Republic comments that the Bill favors a reflective decision of the women, in which they make the final decision. The law is neutral toward the woman: it does not push her to interrupt her pregnancy, her will is never presumed, she will decide in an informed manner when she faces any of the three legal grounds, with the right to a support services program, whatever her decision, in a scheme respectful of the moral convictions of all persons, regulating who and how they can become conscientious objectors.

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III. CONSTITUTIONAL CONFLICTS DENOUNCED.

FIRST CONSTITUTIONAL CONFLICT.
The Legislature would have exceeded its competence, violating the mandate of article 19, numeral 1, second section, of the Constitution, contravening the bases on which the Rule of Law is founded.

The first constitutional violation alleged in both initiated claims, is framed in the principle of Juridicity and respect for constitutional supremacy that all organs of the State must act upon, that was first regulated in Chile in the Constitution of 1833. They comment that the Legislature is subject to the constitutional principle, since its competence is not limited only by the matters set out in the article 63 of the Constitution, but must submit its action to this Supreme Text, not being able to attribute to itself an authority that has not been conferred upon it. The petitioning Representatives remember according to reasoning of this Court in 1983 which is established in article 6, second subsection of the Constitution, the constitutional precepts - norms and principles - directly link both to the political authorities as to the citizens and they are obligatory for both governors and governed.

Thus, the Constitution limits legislative competence in more or less extensive or strict terms, in various subjects, depending on the case, that is a manifestation of the principle of constitutional supremacy and, from there, of the Rule of Law itself. Therefore, the adequacy must be substantive and not purely formal.

They add that the above should be framed in the enunciation of article 19 of the Constitution, around three fundamental decisions that the Constitution authors made: ensure fundamental rights that predate the text of the Constitution itself, which depend on the nature of the human being itself and are not granted by an act of the State; it speaks of persons and not inhabitants and ensures rights to all persons without distinctions of any kind, a matter of harmony with the definition recollected in the Civil Code and that delivers its own constitutional article 1 that replaced. in 1999. the word "men" with "persons."

Thus, and in consideration of the above, the main constitutional conflict alleged by the petitioning Senators, on pages 21ff of its presentation. Article 19, No. 1, second paragraph, of the Constitution imposes on the Legislature a clear and specific obligation: to protect the life of the unborn. Its action is limited and must be respectful and faithful to the mandate to protect the unborn until birth. If that is not fulfilled, as it happens with the impugned Bill, [the Legislature] will not be respecting the constitutional precept that includes an ancient tradition that finds roots in Roman Law and that was taken by authors of the Civil Code of 1855, in the sense that the conceived being [*concebido*] holds an existence independent of the mother and therefore it is understood as a born being [*nacido*] for certain civil purposes. The petitioning Representatives add that this norm includes the consideration of understanding human life as a biological fact defined by science and, as such, an object of protection from its beginning in conception, a moment from which one is in presence of a human being that comprises all the qualities and requirements of such, and from which moment should be considered a person.

They continue by pointing out that protection of the unborn does not emanate only from article 19, numeral 1, second subsection. It is not a differentiated protection and of distinct rank, since the 1980 Constitution did not foresee any distinction between the members of the human species and persons, and did not rank the rights contained in it. Quite the contrary, the Text demands its weighting and harmonization to be interpreted. According to the statement of Article 19, all those who enjoy the exercise of rights, natural or legal, are persons.

The petitioners from the Senate add the same idea, that the Constitution picked up the tradition of the Chilean legal system and the West regarding the duty of protection, which finds such clear manifestations as the Freedom of Wombs Act of 1822. They argue that even though doubts arose within the Constitutional Advisory Commission, they point out that it was unequivocal that the obligation of article 19, numeral 1, subsection second, has its roots in the well-known article 75 of the Civil Code. And, although there were some observations about the admission of exceptions, the only record that survives is in minutes from the same. This transcript of the discussion, add the agents for the Representatives, was not intended to create a duality of protections of different ranks in human life, but only to establish the duty of the Legislature to protect especially the life of the unborn.

Thus, in its claim, the petitioning members of the Senate maintain that it is erroneous to maintain that the competence of the Legislature, in light of the precepts of the Constitution, is very broad and so discretionary that it justifies the constitutionality of the three grounds of removed protection from the life of the unborn configured by the Bill, which does nothing but legalize and legitimize direct abortion. The minimum prohibition that the legislator cannot transgress has been violated with this Bill, since it can only order, prohibit or allow actions that protect the living existence of the unborn until birth. In any case, the Chilean Legislature can legislate unprotecting it. Therefore, when the Constitution imposes a duty on the law, the competent bodies, like this Court, must verify the breach of said mission, activating mechanisms of political or constitutional responsibility. So, the petitioning Representatives point out that the second paragraph of numeral 1° of Article 19, not only must be read in harmony with the first section, but also, with the necessary force that it possesses as an order of its own Political Constitution, addressed to the Legislature, neither is it authorized to choose the conditions of protection, such as its scope, exceptions and even withdrawal of criminal and civil protection, as already held by this Court in the decision Rol. N° 740. This is risky and would be diametrically opposed to the provisions of article 19, numeral 26° of the Constitution.

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Thus, they note that the Bill implies a constitutional weakening. In both petitions, [both the Representatives and Senators] maintain that it has legislated by passing above and beyond its text, unlike the year 1989, in which the Legislature itself, by repealing Article 119 of the Health Code, complied with the mandate to make consistent the legislation in force with the duty that was constitutionally demanded,

prohibiting abortion, direct or induced, which has had different subsequent legislative manifestations, such as the Law on Abandonment of Family and Payment of Food Pensions, the Law on Scientific Research, the Law on Regulation of Fertility or Article 16 of the Health Code, to mention a few, which provided protection to the unborn, in harmony and respect to the text of the Constitution. Of this criterion, the Supreme Court, the Comptroller General of the Republic and the Courts of Appeals have also always ruled in favor, extending and ensuring the protection of the unborn.

Furthermore, add the petitioning Representatives who, together with said case-law, must bear in mind what is indicated in the Report on Qualification of Victims of Humans Rights Violations and Political Violence that was elaborated by the National Committee for Reparation and Reconciliation, which indicated among the victims of violations of human rights those of the mothers and children who were killed as a result of acts committed by agents of the State [during the military coup of 1973].

Together with the above, they argue that the Legislature lacks the competence to prioritize *a priori* fundamental rights and constitutional goods. The legal authorization and mandate of the mother to put an end to a life imply legitimizing the possibility that the Legislature may establish in the foreseen cases the primacy of her deliberate and autonomous decision over the life of the unborn. It is not an admissible possibility for the Legislature to authorize broadly the sacrifice of one right to another, invoking a constitutionally legitimate good. Thus, it is unconstitutional to face tragic or incommensurable conflicts by abstractly recognizing the superiority of one right and of one good over another. The Bill initiated in presidential message pretends to establish a prior and unmovable hierarchy between fundamental rights, carrying out actions for which she was not competent.

Therefore they request their said chapter about alleged inconstitutionality to be welcomed, in the terms previously mentioned.

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Observations of H.E. the President of the Republic on the first alleged constitutional conflict.
In her response, the Head of State indicates that all of the reproached regulations are in accordance with the Political Constitution, so she urges to the rejection of the presentation that, in this respect, the petitioners formulate.

She states that the Constitution distinguishes between the unborn and a person who has already been born. Thus, the literal wording of article 19 No. 1 leads to argue that it is persons who hold the right to life and to physical and psychological integrity. He who has yet to be born is in a state that is distinct from personhood. Its mention in a different section indicates that it is treated as a special case. Although the protection of rights corresponds to persons, there is no incompatibility with the possibility of establishing duties of protection.

She adds that all the utilitarian, finalist, logical, systematic interpretations and the reliable history of their establishment, reaffirm the above. The right to life is only recognized for born persons and not the one who is about to be born.

She argues that the duty of protection enshrined in the second section is, precisely, a duty, but not a rule that cannot be broken like an obligation. Therefore the Legislature in no case has exceeded in its faculties, adopting a decision through the Bill discussed today in this venue, within the margins of discretion that the Constitution itself has granted it, and the framework of respect for the Rule of Law.

That is why she [the head of State] argues that the petitioners have made a mistake in legal interpretation by saying that the Legislature has overreached. The meaning of article 19, numeral 1, second section, is to enable it to decide the form of protection and perform the weighting exercise between this interest and other interests or constitutional rights: The provision of the Constitution is clear that the protection of the

life of the unborn is a matter of law and, therefore, delivered at the discretion of the Legislature. The petitioners are unaware that the legislature has the certain possibility to develop the constitutional minimums without having to find all the answers in the Constitution. The deliberative process of preparing the laws necessarily presuppose that there is a legislative solution compatible with the Constitution in each case. If not, adds the President, political deliberation would be useless.

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In this context, she mentions that in a State of Constitutional Law like Chile, it corresponds to the Legislature to regulate and establish the limits to the rights and freedoms of persons. Upon the law falls the duty to regulate various matters, establishing norms of a general and obligatory nature that establish the essential bases of a legal system, in conformity with article 63, N° 20 of the Constitution. The regulation of matters of singular or concrete content must be explicitly indicated in the Constitution, as an exception to this general rule. The Bill which modifies the criminal and health provisions is thus in accordance with article 63 N° 3 of the Constitution.

Therefore, she adds that the duty of protection must be understood as a mandate of optimization. Our regulation must include the scope of all fundamental constitutional rights. Both the duty of protection of the unborn, which is not absolute, and the other duties of protection, integrate total harmony in our Constitution that serves as guiding criterion of the actions of state bodies. Duty of protection cannot mean mandate of criminalization. Criminal Law is the last resort for the State to use.

She comments that the Constitution, by delivering to the Legislature the decision to determine the measures that will be adopted to make effective the protection of the embryo, implies the transfer to the woman of the ownership of a right that is unavailable to the Legislature in its essence. Today, the woman is left under a status that forces her to decide between committing a crime or suffering a forced violation of her right to life, physical or psychological integrity, or in her dignity. Privileging the protection of the fetus over the rights of women with the tools of Criminal Law is to ignore their quality as rights-holders endowed with dignity. This is contrary to the Constitution.

She adds that this is not the instance to discuss what the petitioners contend, about the option of the Legislature for decriminalization. This is a question of merit. The argued legalization of abortion that the petitioners denounce is not collected according to a constitutional contrast as would be due, obviating what the bill approved by the National Congress really intends: to ensure provision of a safe and dignified health service for women, since the creation of an exemption from criminal liability does not protect them, because, in all cases, they are exposed to passage through the penal system in the three dramatic cases that are regulated in the proposed Bill. The petitioners maintain a radical position that renders women invisible and, in exceptional situations, it can even be considered as torture.

She says that, even considering the fetus as a person, the circumstances are in accordance with Constitution, according to criteria of proportionality. The law cannot presume that people will hold heroic attitudes about their lives. It is not possible to sustain as correct to expect anyone to maintain a pregnancy that includes risking her life, or if she suffered the trauma of a sexual assault.

About the previous statement, the President, unlike what is maintained by the actors of these proceedings, affirms that there was therapeutic abortion in Chile from 1931 to 1989, the year in which the reform to the Health Code was not based on the unconstitutionality of the modified law, being rather motivated by questions of merit, in moral convictions of the Governing Junta of that era and the authors of various technical reports. Its constitutionality or unconstitutionality was not relevant, so what was maintained by the actors in that respect is false.
Therefore, she requests the rejection of the first chapter of the petitioners' denunciation.

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SECOND CONSTITUTIONAL CONFLICT.
The proposal would produce profound arbitrary discriminations, contravening the principle of equality before the law.

The petitioners state that the bill lacks the minimum consistency to rationally achieve the ends that it explicitly declares. If its fundamental axis starts from the explicit purpose of protecting in a harmonious and balanced way, the life of the woman, as well as that of the unborn, the way in which it is enshrined in the proposed regulations is not understood. They do not achieve those objectives but, rather, betray them. Under the pretext of protecting the life of women and that of the unborn, the article introduces legal provisions that allow and mandate acts that directly intend and cause the death of the latter.

Thus is violated the principle of equality enshrined in constitutional article 1, numeral 2°, which prohibits the arbitrary act of any authority that exercises public powers in a Rule of Law. The minimum that can be required of the legislative body is that the purposes of the regulation are minimally consistent with what it proposes, a matter not accomplished by the disputed bill.

In the same sense, the Representatives who intervene in these proceedings comment that the bill produces arbitrary discrimination. The Legislature is not enabled to introduce categories of persons in which the right to life and physical and psychological integrity are attenuated or nonexistent. The fact that inside the maternal womb is a person with an infirmity, even if lethal, is not proportionate justification to infringe upon the fundamental right of the recipient of the norm or, the gestational difference posed by the third circumstance of the Bill, that does not even legally require the concurrence of a doctor, a distinction that has no reasonable or objective justification. United to this, the substitute authorization of the legal representative in the case of the minor of 14 years, also establishes a difference that has no rational basis before an essential equality, like that which exists in a competition of both representatives for custody of children.

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Observations of H.E. the President of the Republic, urging the rejection of this second chapter of unconstitutionality.

The Head of State explains that, in any case, the proposed bill raises arbitrary discriminations, according to what the petitioners allege. The constitutional mandates of embryo or fetus protection and respect for rights of women show the difference that exists between both, who find themselves in different factual and legal situations, which does not imply depriving the former of protection, except to safeguard the rights of women who in serious cases risk their own lives.

The second ground is clear, adds the Madam President. The pathology that affects the non-viable embryo or fetus must always be accredited as lethal, which cannot be ignored in any respect, corroborated by two medical specialists as happens with the rules that regulate the accreditation of brain death. Thus it protects both the viable embryo or fetus, and the rights of women in the framework of their decision on how to cope with the fatal diagnosis.

The same question arises on the ground of rape. A tragic but inescapable reality. We provided with the Bill autonomy for women but also protecting the embryo or fetus with a strict accreditation of the concurrence of the ground with the intervention of a health team. It supports women in an integral and timely manner.

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THIRD CONSTITUTIONAL CONFLICT.
The articles of the Bill would violate the freedom of conscience and the right to exercise the medical profession and, from there, it would transgress the essential guarantee of rights.

In the respective claims combined in these proceedings, the actors state that the new article "119 ter" of the Health Code, when regulating conscientious objection, limit it in the event that the woman requires immediate and unpostponable medical attention, invoking the first ground and there is no non-objecting other health professional available that can perform the intervention, as well as if expiry of the deadline established for the third ground is imminent.

For this reason, it is clear that the intention of the proposed Bill in order to procure direct abortion, is affecting the fundamental right to the freedom of conscience of health professionals, guaranteed in article 19 No. 6 of the Constitution. This is forcing, thus, upon these professionals to act against the true judgment of their consciences, rooted with certainty in their most profound convictions, be they moral or religious, who may consider it intrinsically unjust to directly deprive of life an unborn innocent. With the above and in necessary consequence, violating their right to practice the medical profession according to the *lex artis*, guaranteed in article 19 N° 16 of the Constitution. It replaces the judgment of the professional, one that submits the professional to the will of the woman and her request for "treatment".

The Representatives add that conscience is a more intimate aspect of human thought, not regulated by law, to which the only protection possible is to ensure that it is free, even from the influence of its State. The constitutional regulation, in this section, allows conscientious objection to find due normative anchoring. The Bill does not respect this fundamental guarantee, given that according to the regulation of its articles, the Bill calls the non-professional personnel of the health system to participate, and in instances that vary from the purely surgical.
Due to the above, the violation of freedom of conscience is undermined to such an extent that the said Right loses its essential content, which also contravenes article 19, numeral 26 of the Constitution.

Observations of H.E. the President of the Republic, requesting the third chapter of unconstitutionality be rejected.

The President argues that in any case the Bill violates freedom of conscience in matters of objections. This is a subjective right granted by the State to a natural person that allows him exceptionally to exempt himself from complying with a legal obligation since the right holder would find himself in a situation of impossibility to comply[‡] with this imperative for ethical, moral or religious reasons.

[‡] Translator's note: the transcription error "incumplir" is corrected here, using "cumplir" from the president's actual response 13-08-2017 Formula observaciones S.E. Presidenta de la República online here. , Direct link: http://www.tribunalconstitucional.cl/descargar_expediente.php?id=65128]

She adds that conscientious objection is exceptional, given that it implies a disobedience, tolerated by the State, to current regulations, since the general rule is obedience to the law. Only in exceptional cases can it be disobeyed for beliefs or moral convictions.

The Bill enshrines that the State grants specific recognition to that right, recognizing the importance of moral integrity and conscience of those who dedicates his life to assist patients in the framework of a profession in the area of health. She highlights that the purpose of the conscientious objector should never be the obstruction of social compliance with legal norms, but "to obtain the legitimate respect for their own conscience."

Thus, the President states that the Bill presupposes the existence of a legal obligation to act in a given situation based on religious, ethical, moral, axiological or justice reasons. It is an omission that cannot be authorized for an institution, since it would imply a flagrant unconstitutionality: legal entities lack conscience; only individuals can have it. If an institution presumed to impose a series of principles to which those who perform functions in it, for example to subscribe or maintain a work contract, with it, it would infringe the freedom of labor.

Finally, we call to mind that this is a mechanism that allows resolving disputes by way of exception between majorities and minorities that exist in every society. It reconciles, in this case, the right of women to access legitimate health benefits and the right to freedom of conscience of professionals in the field of health, giving way when there is a superior legal right in play, as is the life of the woman or impossibility for the woman to have access to exercise a right to interrupt her pregnancy due to a rape, when the expiry of the legal deadline is imminent.

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FOURTH CONSTITUTIONAL CONFLICT.
The Bill would undermine the foundations of the institutional framework, insofar as it does not respect the right of association and autonomy of the intermediate bodies. United to this, it would controvert the principle of helpfulness of the State.

The disputing petitioners recall that it is duty of the State to recognize and protect the intermediate groups through which society is organized and structured, guaranteeing its autonomy, a duty that is imposed not only on the State in its administrative function, but also in its legislative function and on every organ of the State in itself, in accordance with article 1, third section , and of articles 6 (first and second paragraphs) and 7 (first and second paragraphs), of the Constitution. Thus the intermediate bodies, the conceived [beings], within the right of legal persons to enjoy their constitutional guarantees, may require recognition, protection and autonomy from the State, not as mere aspiration of the constitutional precepts.

They add that the Bill, by transforming abortion into a medical benefit universally owed in every establishment or health service to the patient who requires it, does not assume responsibility for institutions of which the ideology is not compatible with the postulates and benefits referred by the Bill. It is expected, according to article 1° N° 1, that all health services practice abortions and perform support services --without attempting to influence the woman to desist from her decision to abort -- and that their staff, if there are emergencies or deadlines, must perform abortions or participate in them, even if they are conscientious objectors. This, the petitioners explain, violates the Political Constitution.

Together with the above, the petitioning Representatives claim that from the 1st article, fourth section of the Constitution is enshrined the duty of the State to be at the service of the human person, whose purpose is to promote the common good. The State is an instrument that serves mankind, consecrating its authority and superiority in the face of institutionality, because he produces it. In that way, the State

satisfies complex needs that cannot be reached by simpler social structures like families or intermediate bodies. This duty is a foundation of the constitution, part of the bases of our institutionality and an interpretive tool of all its articles.

The Bill, contrary to Constitutional principle, excludes a category of persons from service and protection that the State has to grant them, belittles their rights and interests and proposes a purposeful model at the service of some people but not of the common good. It does not sympathize with the service that the State must grant to those who are subject to the greatest vulnerability.

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Observations of the President of the Republic, urging for the rejection of the fourth chapter of unconstitutionality.

She claims that the petitioners forget that freedom of association is not a guarantee to act outside the law. The State must guarantee the autonomy of the intermediate bodies in the fulfillment of their specific purposes, in conformity with the indications by the authors of the Constitution themselves. But the law can, next, establish restrictions or interferences in the right to freedom of association, which the Pact of San José in Costa Rica also recognizes.

IV. FINAL ARGUMENTS OF THE PARTIES REGARDING THE INCIDENCE OF INTERNATIONAL LAW IN THESE CONSTITUTIONAL PROCEDURES.

Observations of the petitioning Parliamentarians.
As the petitioning ladies and gentlemen from the Senate, and the original denunciation by the ladies and gentlemen Representatives, refer to the allegations that are formulated around the decision *Artavia Murillo vs Costa Rica*, of the Inter-American Court of Human Rights. They state that said ruling does not have and cannot have real impact in this constitutional controversy. The international obligation that weighs on Chile is to comply only with the decisions of that judiciary in which our country has been a party and since the ruling of this Judiciary in Case No. 346, its jurisprudence has clearly held that International Treaties, including those of human rights, have a lower rank than the Political Constitution. It has even been argued that it is not plausible to directly contrast the legal precepts that are challenged in a case with the International Treaties in order to sustain their eventual unconstitutionality.

In this regard, the Deputy petitioners, making a full review of the American Convention on Human Rights, the International Covenant on Civil and Political Rights and the Convention on the Rights of Persons with Disabilities and its optional protocol, referring to violations of said normative bodies, they also note that under the constant and current jurisprudence of this Court, the question of constitutionality of proceedings the case cannot be resolved with direct reference to any human rights treaty, not consecrating in any international body the consideration of a right to abortion.

Observations of H.E. the President of the Republic.
The Head of State expounds in this regard that the International Law of Human Rights does not prohibit the decriminalization of abortion in certain cases; on the contrary, of the International Treaties that are in force in Chile, as well as of the interpretation that have been made of its articles by the international bodies competent for this purpose, it is inferred that it is allowed, a matter commensurate with respect for the dignity of women.

In this consideration, she argues that neither the Universal Declaration of Human Rights nor the International Covenant on Civil and Political Rights contemplate the *nasciturus* [the one who is not yet born] as a holder of rights. Although that option was discussed in the elaboration of these instruments, that option was rejected.

Furthermore, she explains that the Human Rights Committee, the body in charge of interpreting the Covenant on Civil and Political Rights, has urged various countries, such as Chile, to introduce exceptions to the absolute prohibition of abortion. The aforementioned Committee has never made applicable the right to life recognized in Article 6 to the embryo.

In turn, the Convention on the Rights of the Child does not establish in its article 1 that the *nasciturus* is a child. The Committee on the Rights of the Child, the body in charge of its supervision, has not made the right applicable to the *nasciturus* either.

In the scope of the Inter-American system, the President explains, since Article 4.1 of the American Convention on Human Rights allows exceptions to the right to the protection of life since conception, given the expression "and, in general," contained in the provision, in order to reconcile the possibility that national legislations allow abortion, as it happens today in most of the member countries of the Inter-American Human Rights System.

Finally, in the case of *Artavia Murillo and Others vs Costa Rica* of 2012, the Inter-American Court of Human Rights held that the embryo is not the holder of the right to life in the terms set forth in article 4.1, a right that is not absolute, banning only the arbitrary deprivation of life.

This shows that, thus, there are coincidences with our Constitution, harmonizing the obligations of the Chilean State with the international system.

Public hearings and reviews of the case.
On August 16 and 17, 2017, in plenary sessions convened for this purpose, public hearings were held, in which various duly represented social organizations presented their arguments regarding the constitutional conflict submitted to the decision of this Court, appearing in accordance with the table summarized below:

ORGANIZATION(S) AND SPEAKERS

Asociación Fraternidad	Rodrigo Poblete Reyes
Miles Chile	Alejandra Zúñiga Fajuri
Pontificia Universidad Católica de Chile	Juan Agustín Larraín Correa - Patricio Zapata Larraín
Instituto Chileno de Medicina Reproductiva	Jesús Vicent Vásquez
Asociación Nacional de Funcionarias, Funcionarios del Servicio Nacional de la Mujer (ANFUSEM), Agrupación Nacional de Empleados Fiscales (ANEF), Central Unitaria de Trabajadores (CUT) y, H. Diputada señora Karla Rubilar	Lidia Casas Becerra
Bancada de Diputados del Partido Socialista	Enrique Aldunate Esquivel
División de las Américas de Humans Rights Watch	José Miguel Vivanco
Organización no Gubernamental Acción Mujer y Madre	Virginia Palma Erpel
Organización no Gubernamental de Desarrollo para la Investigación, Formación y Estudios sobre la Mujer - ISFEM	Raúl Madrid Ramírez
Movimiento para la Abolición del Aborto, Fundación Derecho a la Vida	Rodolfo Carmona
Partido Revolución Democrática	Beatriz Sánchez
Corporación Humanas	Camila Maturana Kesten
Asociación Nacional de Mujeres Rurales Indígenas (ANAMURI A.G.), Asociación Chilena de Protección a la Familia (APROFA)	Cristian Riego Ramirez
Partido Comunista de Chile	Camila Vallejo Dowling
Partido por la Democracia	Fernanda Paloma Gajardo Manríquez
Asociación de Magistradas Chilenas	Nicole Nehme Zalaquett
Instituto de Estudios de la Sociedad (IES)	Claudio Alvarado Rojas
Litigio Estructural en Derechos Humanos (LEASUR)	Ignacio Mujica
Misión Iglesia Bíblica Cristiana	Cristian Arévalo Meynard
Fundación Jaime Guzmán	Máximo Pavez Cantillano
Corporación Círculo Emancipador de Mujeres y Niñas con Discapacidad (CIMUNIDIS), Corporación Opción	Jaime Couso Salas
Fundación Centro de Estudios de la Mujer,	Verónica Undurraga

Agrupación por los Derechos de la Diversidad Rompiendo el Silencio y, Asociación Gremial de Mujeres Abogadas	
Fundación Salud, vida y acción social – Savia, Corporación de Desarrollo de la Mujer La Morada	Andrea Huneeus
Fundación Instituto de la Mujer	Antonia Biggs
Sindicato Nacional Unitario Interempresa de Trabajadoras y Trabajadores de casa particular y Actividades Afines o Conexas	Rodrigo Gil Ljuvetic
Fundación Iguales	Lucas Sierra Iribarren
Corporación de Apoyo Amnistía Internacional	Tatiana Rein Venegas
Centro de Derechos Reproductivos	Catalina Martínez Coral
Fundación Luis Claro Solar y, El Ministerio Cristiano Valientes de David	Víctor Manuel Avilés Hernández
Asociación de Consumidores y Usuarios Servicio Evangélico para el Desarrollo	Edgardo Sepúlveda
Ministerio Evangélico Águilas de Jesús	Francesca Muñoz
Consejo Evangélico de Lota	Álvaro Ferrer
Universidad Finis Terrae	M. Angélica Benavides Casals
Universidad Los Andes	Raúl Bertelsen Repetto
Corporación Comunidad y Justicia, Fundación Sin Fines de Lucro Coordinadora por la Vida y, ONG Alma Chile	Magdalena Ossandon Widow
Agrupación Social Cultural Deportiva y Artística Águilas de Temuco y, Corporación Construye Sociedad	Masami Yamamoto Cortés
Fundación Chilena para el Síndrome de Down	Alejandro Romero Seguel
Mirada Más Humana.Org	Tatiana Vargas Pinto
Fundación Advocates Chile	Soledad Bertelsen Simonetti
Fundación Educacional San Francisco de Asís	Gonzalo Letelier Widow
Soñando Chile	Ignacio Covarrubias
Fundación de Investigación San Ramón	Elard Koch Cabezas
Fundación Formando Jóvenes	Ian Henríquez Herrera
Corporación Idea País	Antonio Correa Ferrer
Corporación Amigos del Maule por la Vid	Marcela Peredo Rojas
Fundación Matter Filius	Alejandro Miranda Montecinos
Fundación Instituto Res Pública	Jorge Acosta Acosta
Corporación Estadio Nacional Memoria Nacional, Ex Presos Políticos	M. Angeles Coddou Plaza de los Reyes
Universidad de Chile y, Facultad de Derecho de la Universidad de Chile	Davor Harasic Yaksic
Confederación Nacional de Funcionarios de Salud Municipal	Luis Cordero Vega
Asociación por las Libertades Públicas	Julián Lopez Masle
Asociación de Familiares de Ejecutados Políticos	Alicia Lira Matus
Proyecto Nasciturus y Niños por la Vida	Francisco Javier Astaburuaga Ossa

Partido Amplitud y, Comité de Senadores del Partido Por la Democracia	Ciro Colombara
Partido Socialista de Chile	Karina Delfino
Fundación La Alameda	Nicolás Godoy
O'Neill Institute for National and Global Health Law	Oscar Cabrera
Instituto Igualdad	Patricia Silva
Fundación Sara Phillippi Izquierdo	Carolina Antimán Echeverría
Asociación Brigada Ramona Parra	Irací Hassler
Fundación Protege, Sociedad de Educación y Salud Austral Limitada, H. Senadora señora Adriana Muñoz, Acción de la Mujer Colectivo de Mujeres, Centro de Acción de la Mujer	Leonardo Estrade Brancoli
Colectivo de Mujeres de Copiapó y, Mujeres Presente Movimiento Civil de Padres Objetores Chile OIR-ONG	Roxana Rojas
Iglesia Presbiteriana en América Chile	Walter Vera Garrido
Fundación Roma	Julio Alvear
Fundación Vive la Fe	Marcela Aranda
Centro Cultural La Puerta de Villa Alemana	John Vera Aros
Centro de Integración Cultural El Taller del Maestro	Exequiel González Sepúlveda
Centro de Desarrollo de Justicia Constitucional de la Universidad del Desarrollo	José Manuel Díaz de Valdés
Pontificia Universidad Católica de Valparaíso	Manuel Núñez Poblete
Fundación HeartCoin	Benajmín Lagos Cárdenas
Paraguas ONG	Felipe Langue
Fundación Hospital Parroquial de San Bernardo y, Fundación Música, Historia y Patrimonio Fundación Sin Fines de Lucro	Enrique Oyarzún Ebensperguer
Instituto Libertad	Manuel José Monckeberg
Iglesia Evangélica Misionera Emanuel, Iglesia de Dios Pentecostal e, Iglesia Evangélica Pentecostés	Jonathan Bastías Díaz
Fundación Chile Siempre	Hernán Corral Talciani
Centro de Ayuda a la Mujer Embarazada	Gian Franco Rosso Elorriaga
Psifam Limitada y, Agrupación Ayuda Social Encuentro y Agrupación Comunitaria, Fundación Música, Historia y Patrimonio Fundación Sin Fines de Lucro	María Francisca Decebal-Cuza
Fundación Corre Conmigo	Horacio Figueroa Diesel
Centro de Estudios de la Federación de Estudiantes de la Universidad de Chile	Javiera Cabello Robertson
Partido Progresista	Andrea Condemarín
Universidad Católica del Maule, Iglesia Evangélica El Buen Samaritano, Porta Vitae y, Servicios Médicos y Culturales Limitada	Jorge Becker Valdivieso
Escuela de Empoderamiento Amanda Labarca	Cristina Gómez
Fundación Chile Unido	Francisco Balart

Iglesia Encuentro de Dios e Iglesia Evangélica Cristiana Pentecostés	Francisco Rivera
Fundación Ciudadano Austral	Cecilia Goity Falconi
Confederación de Estudiantes de Chile	Sandra Beltrami Montero
UNAPAC, Fundación Dos Pilares	Carmen Domínguez
Fundación Influyamos	José Antonio Kast
La Iglesia de Dios y, Consejo Evangélico de Talca	Antaris Varela Compagnon
La Iglesia Cristiana Pentecostal Getsemaní y, La Misión Internacional Pentecostal Visión de Cristo	Misael Ocares Lonconao
Unión de Pastores de Iglesias Evangélicas de Pencolirquén	Yanina Contreras Álvarez
La Misión Evangélica Iglesias Cristianas	Gabriel Fuentealba Beltrán
La Iglesia Revelación de Jesucristo Misionera	Tomás Henríquez
ONG CES	Cristina Rosales
Fundación Chile 21	Fernando Atria Lemaitre
Organización Comunitaria Funcional "Defensoría del Nasciturus"	Gabriel Gutiérrez Bustamante y José Tomás Arteaga
Colegio de Matronas y Matrones de Chile A.G.	Marcela Riquelme Aliaga
Fundación Protege	Catalina Valenzuela Maureira
Congregación Evangelista Pentecostal Tiempos de Cosecha	Carlos Javier Soto Chacón

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Once the case was processed, it was decreed "relevant" on August 17, 2017, scheduling the final review on the 18th of the same month and year, arguing by the ladies and gentlemen Senators lawyers Miguel Ángel Fernández González and Mr. Rodrigo Díaz de Valdés Balbontín; by ladies and gentlemen of the Representatives, the lawyer Angela Vivanco Martínez; by the President of the H. Chamber of Representatives, the lawyer Francisco Zúñiga Urbina and, by H.E. the President of the Republic, the lawyer Mr. Alfredo Etcheberry Orthusteguy, adopting an agreement on August 21, 2017, certified on page 1554 of these proceedings.

CONSIDERING THAT:

I. THE CONFLICTS OF CONSTITUTIONALITY ARE SUBMITTED TO CONTROL OF THIS COURT

FIRST. In accordance with the terms of article 93, first paragraph, numeral 3 of the Political Constitution of the Republic it is an attribution of this Court "to resolve the issues of constitutionality that may arise during the legislative procedure of bills or constitutional reforms and of treaties submitted for approval by the Congress";

SECOND. Likewise, based on the terms of the fourth paragraph of the constitutional precept mentioned above, "the Court may only hear the matter at the request of the President of the Republic, of any one of the Chambers or a quarter of their acting Members, always provided that it is formulated before the promulgation of the law or of the issue of the communication that informing the approval of the treaty by the National Congress and, in any case, after the fifth day of the dispatch of the Bill or the indicated communication";

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II. STRUCTURE OF THE DECISION

THIRD. This Court will **dismiss the request to declare unconstitutional article 1,** N° **1**, which replaces article 119 of the Health Code**; article 1,** N° **2**, which incorporates a new Article 119 bis into the Health Code; **article 1,** N° **3, first paragraph, except for the word "professional" and the expression "in no case ", second, and, third**, **with the exception of the phrase "** Nor can it be excused if the expiration is imminent of the term [temporal limit of gestation] established in case N° r 3) [rape] of the first paragraph of article 119," **in the ground of** N° **3 in the first paragraph of article 119.",** which introduces a new article "119 ter" to the Health Code; **article 1, numeral 4,** which introduces a new Article 119 quater to the Health Code; Article 2, which replaces article 344 of the Criminal Code; **article 3 of the Bill,** amending Article 13 bis, first section, of Law No. 19,451; and to the **transitional article,** all of the Bill discussed in Bulletin N°9895-11.

FOURTH. In turn, the Constitutional Court **will partially accept** the objection raised by the petitioners, regarding **article 1, numeral 3, first paragraph, in the word "professional" and the expression "in no case"; and, third, with respect to the sentence "** Nor can it be excused if the expiration is imminent of the term [temporal limit of gestation] established in case N° 3) [rape] of the first paragraph of article 119"**,** of the Bill, precepts which introduce a new article 119 ter to the Health Code and shall be declared, in that sense, unconstitutional.

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FIRST CHAPTER.

DECRIMINALIZATION OF THE VOLUNTARY INTERRUPTION OF PREGNANCY ON THREE GROUNDS.

I. THE OBJECTION

FIFTH. Mediating the petitions of inconstitutionality presented by a group of Senators and Representatives who represent more than a quarter of the practising members of aforementioned bodies and which were combined by a resolution of this Court, challenged, in this bench, different provisions of the Bill that regulates the decriminalization of voluntary termination of pregnancy in three grounds (Bulletin No. 9895-11);

SIXTH. With different arguments, the petitioners object to the said bill. In the first place, they claim that it violates the right to life of the unborn, since it allows abortion in three circumstances. The constitutional protection to which the unborn is entitled, prevents any kind of regulation that tends to unprotect the embryo or the fetus, by way of lifting the criminal sanction. Abortion ends the life of an innocent human being in gestation, in an irreparable and irreversible way. The competence of the Legislature is to preserve life; it cannot contravene that purpose. The Bill establishes a hierarchy of rights in favor of the mother, preventing the protection due to the unborn.
In second place, they challenge the three grounds that the Bill establishes.

Regarding the first circumstance, i.e., the "risk to life" [*riesgo vital*] which puts in danger the life of the woman, it is argued that it allows direct abortion, in circumstances where the Constitution tolerates only indirect abortion, i.e., that which does not intend to kill the embryo or fetus. It is then argued that this legal ground is unnecessary because the current art. 119 of the Health Code allows indirect abortion. Likewise, they consider that this ground ("risk to life"), is ambiguous. Also, they

complain that the legal ground is made operative through the intervention of a single doctor, not two or more, nor a medical team.

Regarding the second legal ground, which is that which authorizes abortion when the embryo or fetus suffers from a congenital pathology of a lethal nature, it is difficult to diagnose. Also, the unborn should not be able to gain or lose rights according to its health condition. Likewise, there is a risk to the health of the mother since this abortion has no legal term; and the higher the gestational age of the fetus, the greater is the risk for her. Similarly, it does not repair the psychological effect that the abortion produces in the mother, affecting her physical and mental integrity, which are [rights] guaranteed by the Constitution. In addition, it is argued that two doctors to certify the legal ground [fatal fetal disease] is insufficient, given that in cases of brain death, a team of doctors and unanimous and unequivocal certification are required. Finally, it complains that there is no agreement between the specialists about the list of diseases included in this legal ground.

Regarding the third legal ground, i.e., that which results from a rape, it is argued that medically it cannot be justified because we are faced with a healthy woman and a healthy fetus. For the same reason, it is a murder. It is then argued that abortion is not a proper way to relieve the trauma of rape; because there is a negative effect on the woman's health, which affects her physical and psychological integrity. Also, it is criticized that there is a risk for the woman. On the other hand, it is questioned that adequate safeguards to prove the rape are not taken into consideration. Hence, it permits it [the rape] to be considered as established, in order to undertake decisions that compromise the life of the unborn. Finally, the counselling service regulated in the Bill is not obligatory but voluntary; and it is not dissuasive counseling.

Third, they question the conscientious objection regulated in the Bill. On one hand they question that the objection is only possible for natural persons and not legal persons. On the other hand, they object that the professional who invokes it cannot have it if immediate and unpostponable medical attention is required; and that it does not cover the whole team that intervenes in the situation. In both cases, the principle of equality before the law and freedom of conscience enshrined in our Constitution is affected.

Fourth, various inequalities are objected to in the Bill. For instance, the age difference in the grounds, by establishing different framework according to the woman in the following age ranges: less than fourteen years; more than fourteen years and less than eighteen; and over eighteen years old. It is then questioned the different forms of accreditation of the three legal grounds in which abortion is permitted. The first one requires only one doctor; the second requires two; and the third requires a medical team. It is also objected the way in which the parents or legal guardians participate in the process. Finally, it is objected that the supportive counseling service is protective of the life of the unborn, only when the woman decides to continue her pregnancy; and is not sufficiently protective when she wants to interrupt it, leaving the unborn defenseless.

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II. PRELIMINARY CONSIDERATIONS.

SEVENTH. The complexity of the subject that we are resolving does not escape us. There is no country in the world where this issue has not made a profound difference.

This petition under consideration affects profound convictions because it is about deciding how we choose to protect the life of the unborn and how we safeguard the rights of women. Society expects our decision to be a faithful interpretation of the constitutional text.

But we cannot evade the decision. We know there are religious positions, values and moral positions involved. However, we will not decide from the perspective of religion, morality, politics, but from the perspective of the Constitution. We are a Court of Law and we will decide accordingly.

We all hold our personal convictions, but we cannot decide according to them. We are required to act as the State Body, in a decision that will affect beyond the beliefs and moral rules that everyone holds.

We understand the legitimate position that certain people have against abortion, for whom this can never be accepted by the State. Some have even made the fight against abortion a cause in their life.

But this is not a debate between good and bad, between sinners and the just, between people with and without scruples. Among people who are religious and others who are not. We cannot read the Constitution according to these parameters;

EIGHTH. On the other hand, we are not going to decide whether there is abortion in our country. That decision is made by the National Congress. We will only review if this decision of the Legislature is within the margins allowed by the Constitution.

Neither will we make a statement about abortion in general. We will make a decision based on this Bill in particular.

Likewise, we will not resolve all objections that exist on abortion. We will only take care of those formulated in the request, and in the terms indicated in it;

NINTH. The Constitutional Court has full legitimacy to decide, for four fundamental reasons. In the first place, because we must all respect the Constitution. This rule includes the National Congress.

Second, because that is the attribution that the Constitution gave to the Constitutional Court. The same norm that established the National Congress to legislate, gave this role to the Constitutional Court.

Third, because we have been required to make a decision by the organ that has the legitimacy to do so according to the same constitution. We are not making a decision about this matter *ex officio* but at the request of a group of congressmen.

Finally, because the Constitution ordered the law to protect the life of the unborn. So the Court must verify that that order is within the limits that the Constitution establishes;

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III. WHAT WE WILL NOT MAKE A STATEMENT ABOUT

TENTH. In the petition is formulated a series of arguments that exceed what this Judiciary can resolve in this instance, because it goes beyond their attributions.

First, we will not address the ontological status of the yet unborn [*nasciturus*]. We know that the concept of person can have different scopes, according to the fields from which it is addressed. Thus, the "person" will not be the same for metaphysics, religion, science, anthropology, etc.

However, here we we will refer to the legal concept, that which is recognized in our Constitution.

Second, we are not going to make a moral judgment of the people who may be able to undergo an abortion;

Third, we will not analyze whether in this case to decriminalize or legalize the behaviors that are within the three grounds set out in the Bill. It is not relevant for constitutional purposes.

Fourth, we will not examine how the judgments of International Courts, International Organizations, nor the Statements made by Committees created by certain international treaties affect Chile. These matters are far from the core issue that this Magistracy must resolve.

Fifth, we will not examine allegations of merit or convenience, like the critics to the regulation nor the way that the Legislature regulated certain situations.

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IV. BACKGROUND.

ELEVENTH. For an adequate analysis of our decision, it is necessary to establish some background regarding four aspects:

the regulation of abortion contained in the Bill;

the regulation of abortion in our country;

the regulation of abortion in comparative law, and

the way in which other Courts of law have resolved the legalization of abortion around the globe;

1. The Bill

TWELFTH. The Bill, in substance, modifies two legal bodies. On one hand, the Health Code, introducing four new regulations (new Articles 119, 119 bis, 119 ter and 119 quater). On the other hand, the Criminal Code, regulating anew the criminal basis of abortion as a crime when it is not committed within the 3 legal grounds allowed in the Health Code (article 344).

As for its content, in the first place, it maintains abortion as a crime. In fact, the new article 344 establishes that "a woman who, outside the circumstances allowed by law, causes her abortion or consents to someone else causing it . . . "

Second, the circumstances allowed by law, in which, according to the will of the woman, the interruption of pregnancy by a medical surgeon is permitted, are three: risk to the woman's life; congenital pathology of embryo or fetus, of lethal character, which is incompatible with the independent extrauterine life; and if pregnancy is the product of rape.

In the first two legal grounds, there is no time limit to proceed with the authorized interruption. In the case of the legal ground of rape, the Bill makes a distinction. On one hand, if the pregnant woman is a girl under the age of fourteen, the interruption can only be performed if no more than fourteen weeks of gestation have passed. On the other hand, if the woman is older than this age the interruption proceeds provided that no more than 12 weeks of gestation have passed.

In any of the legal grounds, the woman must manifest her will expressly prior to the procedure and in writing.

Third, the law requires that the interruption of pregnancy in the authorized circumstances, carry the authorization of medical surgeons. In the case of the first circumstance, the respective medical diagnosis is required from one physician. Regarding the second circumstance, the authorization must have two medical diagnoses of the same tenor, provided by medical specialists. In the case of the third circumstance, there must be the intervention of a team of health providers, specially formed for these purposes, responsible for confirming the occurrence of the facts and the gestational age.

In any case, the diagnosis must be written, and prior to the procedure, and it must always respect the principle of confidentiality in the doctor-patient relationship.

The fourth aspect of the Bill is the regulation of counseling support services and of information
The Bill states that health care providers, should inform the woman of the characteristics of the medical procedure, the alternatives to the interruption of pregnancy, and social, economic and adoption programs available. This information has certain characteristics: it must be complete; objective; it cannot be designed to influence the will of the women; it cannot mean coercion of any kind, and it should ensure that the woman understands all the alternatives before the abortion procedure takes place.

The Bill, on the other hand, establishes the possibility that the decision of the woman may lead to counseling [*asesoría*], whether she chooses to interrupt or whether she decides to continue with the pregnancy. This support service [*acompañamiento*] is prior and subsequent to the decision; it is voluntary; personalized; respectful of the free decision of the woman; it operates in any of the three grounds, and it can also be offered by private institutions. It includes the reception, biopsychosocial support, and support networks. In all cases, the woman chooses the provider and the program. And she can complain about bad providers and discrimination.

Fifth, the Bill regulates the ways in which parents or legal representatives may intervene when the woman is a minor in age. For this purpose, the Bill makes a distinction, depending on whether the woman is younger or older than fourteen years.

If the woman is under the age of fourteen years, in addition to her desire for interruption of pregnancy, the authorization of its legal representative must be provided. If she has more than one, she can choose which. If the legal representative cannot be found or denies authorization, the woman, assisted by a member of the health team, can request the intervention of a judge, so that he, verbally and without a trial and verbally, can resolve it. This judicial procedure is reserved, no position of any third parties is admitted, other than the legal representative who denied authorization, and only the resolution denying the authorization is appealable.

If the woman is over fourteen years of age and under eighteen, she must only inform her legal representative.

However, when, according to the medical team, the authorization or information to the legal representative generates serious risk of physical or psychological harm, coercion, abandonment, uprooting, or other actions or omissions that violate her integrity, the authorization or communication must be replaced. As a substitute mechanism, the authorization must be provided directly by a judge. In the case of information, it must be provided to an adult family member indicated by the adolescent; if

there isn't any, it must be provided to a responsible adult that she designates.

Sixthly, the bill regulates conscientious objection. This benefits the surgeon physician required to interrupt the pregnancy, for any of the designated circumstances, and the professional team that performs its functions inside the surgical pavilion during the procedure.

Conscientious objection allows to whomever invokes it, to refrain from intervening. This objection must be manifested in advance and in writing to the Director of the medical institution. The institution must promptly reassign another non-objecting professional who can provide medical attention to the patient. If the healthcare facility does not have any practitioner available, the woman must be immediately transferred to another medical center.

Conscientious objection has two characteristics. On one hand, it is personal in character, in no case can it be invoked by an institution. On the other hand, if the woman requires immediate an unpostponable medical attention and her life is at risk, the objection does not operate if there is no other surgeon who can perform the intervention. Neither does the objection operate if the expiration is imminent of the deadline for realizing interruption of pregnancy in the case of rape;

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2. Historical Regulation

THIRTEENTH. A second necessary background to consider, is the historical regulation of abortion. In our country, the criminal regulation of abortion has passed through different stages.

The first happened between 1875 and 1931. In this time period, abortion was punished with no type of exception. However, criminal law required specific intent for its commission, by using the expression "maliciously."

The second stage happened between 1931 and 1989. In 1931, by D.F.L No. 226, abortion is introduced with therapeutic purposes. This was later regulated in D.F.L No. 725 of 1967. This last legal body required the documented opinion of two medical surgeons. D.F.L n° 226, on the other hand, required the opinion of three practitioners.

The third stage began in 1989. That year the Government enacted Law No. 18,826. It provided that "no action may be executed to provoke an abortion. " This is the norm that the Bill replaces;

3. Regulation in Comparative Law and International Treaties.

FOURTEENTH. A third background antecedent is the regulation of abortion in other countries and regulation of the right to life in the Constitutions and International Treaties.

In comparative law, the laws that allow abortion are relatively new. They started in the 1970s. In fact, there are very few countries with absolute prohibition of abortion.

Countries have two models of regulation. On one hand, there are countries with free abortion, that is to say, without circumstances or legal grounds that justify it. Some set deadlines and others do not. On the other hand, there are the countries that establish grounds, or indications for its provenance. Some must be tried judicially and others not.

The legal grounds that different legislations establish are of different types. Among them are contemplated: therapeutic abortion, eugenics, ethics, and that for social or emergency indications;

FIFTEENTH. In regard to the constitutional framework, countries do not establish abortion explicitly. However, they regulate the right to life and the physical and mental integrity of the person.

Some establish the right to make decisions regarding reproduction and the right to security and control over one's own body (South Africa, Article 12).

A few other constitutions refer to the unborn. In Latin America, we have the Constitution of Peru ("the unborn is a rights-holder in all matters that favors him ", Article 2); Honduras (" the unborn is considered born for everything that favors him within the limits established by law," article 67); and Paraguay ("the right to life is inherent to the human person; It is guaranteed protection, in general, from the moment of conception ", Article 4). Some constitutions take one step further. Thus, Guatemala ("The State guarantees and protects human life from its conception," Article 3), and the Dominican Republic ("The right to life is inviolable from conception until death," Article 37);

SIXTEENTH. With regard to human rights treaties, signed and ratified by Chile, it is worth mentioning the Universal Declaration of Human Rights, in which the third article establishes that " Everyone has the right to life, liberty and security of person. " then the American Convention on Human Rights, in which Article 4 provides that "Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life." Along the same lines, the International Covenant on Civil and Political Rights establishes in its sixth article that "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."

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4. Decisions of Other Countries [Comparative Law]

SEVENTEENTH. The final matter to consider before starting our reasoning, is jurisprudence of other countries when ruling on objections of constitutionality to abortion bills or laws.
The first thing to be observed is certain periods or waves when these decisions were made.
The first period begins in 1973, in The United States; and continues in Europe with decisions in Germany, Italy, and France in 1975.
The second period occurred in the 1980's. Here we find decisions of Portugal (1984), Spain (1985) and Canada (1988).
Then came the decisions of 1990. Here we found Hungary (1991), Ireland (1992) and Poland (1996).
Finally, there are all the sentences of the 21st century. Here are the decisions of Colombia (2010), Mexico (2007) and Slovenia (2007);

EIGHTEENTH. The second things to analyze are the different ways in which judgments consider the unborn.

The vast majority of countries do not recognize the right to life to the unborn. These decisions consider it an interest. In the United States, in 1973, the unborn is considered a legitimate interest that the State could protect. In the judgment of the Italian court in 1975, it was considered as a constitutionally protected interest. In Spain, it was considered a legally protected good.

There are also decisions that have considered it as a value (Colombia, 2006); a fundamental value (Slovenia, 2007); an objective value (Portugal, 2010)
However, some countries have ruled to recognize that right. For example, Germany (1975) and Ireland (1992);

NINETEENTH. A third aspect to be analyzed is the way these judgments have resolved the compatibility of abortion with their respective Constitutions. For this, they have used different criteria. First, the United States stands out. The Supreme Court of that country has used three arguments to sustain the legitimacy of abortion. The first is the privacy of women (*Roe v. Wade*, 1973); the second, is that of the viability of the fetus (*Roe v. Wade*, 1973); and the third, is that of undeserved or undue burden (*Planned Parenthood v. Casey*, 1992).

Another standard used by the Courts is "inexigibility." The woman cannot be required to do more than is reasonable. This criterion was used by the German Court in its judgment of 1975. The pregnant woman's interests may have so much weight or relevance that they render the prohibition of abortion unenforceable. The Constitutional Tribunal of Portugal in 1984 also used the same standard to argue that it cannot force a woman to sacrifice constitutionally protected interests.

The German court, in 1975, also established the standard of the extreme coercion of the criminal path; this must be a last resort [*ultima ratio*].

Another standard is whether there was an obligation of the Legislature to establish a criminal prohibition. The German court, in its judgment of 1993, established that the legislature may not criminalize an abortion that is not constitutionally justified. The Court of Portugal, in 1984, said that it did not exist in the Constitution an obligation of criminalization. The same argument was made in the Mexican decision of 2007.

It has also been established as a criterion, the incremental protection of the embryo and fetus. The interest of the State prevails over that of the woman, as the months of gestation advance and the fetus becomes compatible with independent extrauterine life. During the first months, the mother and fetus are considered as unit, the mother; in those following, they are considered a duality. This is established by the German court in 1993, the Slovenian Court in 2007, and the Portuguese court in its judgment of 2010. The latter Court further argued that as gestation progresses, the existential reality of the fetus also progresses.

In the same sense, the Inter-American Commission on Human Rights expressed in the case: *Artavia Murillo and others vs Costa Rica*. The Court declared that the protection of the unborn is not absolute, but gradual and incremental according to their development, it does not constitute an absolute and unconditional duty.

On the other hand, the criterion of proportionality has been used. The German court held in 1975 that in some extreme cases, it may be prohibited to impose the burden on the woman to maintain the pregnancy. In the same sense, the Portuguese Court held that it was not possible to require women to sacrifice interests constitutionally protected. The Court of Slovakia in 2007 affirmed that in some situations, to continue with pregnancy at all costs was not an obligation imposed by the Constitution. The Court of Colombia, in 2006, argued that criminalization in every circumstance implies complete preeminence and consequent sacrifice of pregnant women's rights.

Finally, as another variant of proportionality, the Slovenian Court (2007) established the suitability of legal measures for the protection of the unborn on the basis of a distinction between measures that must be done through the woman; and others that must be done against her decision-making autonomy;

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V. THE PRECEDENTS

TWENTIETH. On the other hand, it is necessary to refer to the decisions that this Court has dictated previously and that has to do with the matter that we must resolve in these proceedings, that is, the right to life.

The first of these judgments is STC 220/1995,on brain death. This sentence was issued after the petition that a group of parliamentarians made to the Organ Donation Bill, where Congress decided to regulate brain death.

The law was impugned because it allowed a team of doctors to unanimously and unequivocally certify the total and irreversible absence of all brain function, to declare a person dead and proceed with the extraction of the organs. For the same reason, it was argued that it violated the patient's right to life.

The Court rejected the petition. It argues, in the first place, that defining death is a matter for the Legislature. For the same reason, it was legitimate for the law to do so. The Court continued saying that the Constitution regulates life from birth and throughout the existence of a person, which ends with his natural death. With death, the Court added, there is no longer a person. Finally, the Court established that in this case the Bill allowed the death of a person to be declared when there is total and irreversible loss of all the brain functions, certified by a medical team. That is death definitive and unequivocal;

TWENTY FIRST. The other important decision made by this Court is STC 740/2007. In this, the regulation discussed was the so-called morning-after pill.

The Court ruled on the basis of a petition that was filed by a group of members of Congress. The Court ruled in favor of their request. Regarding what interests us here, It argued that the unborn is a person. As a rightsholder because, on the one hand, it has all the genetic information necessary for its development. On the other hand, it is a different being and completely distinct from its father and his mother. Is a unique and unrepeatable being. The unborn, added the Court, has dignity, it cannot be subsumed in another entity and it cannot be manipulated. And, [it also argued] that the constitutional protection of the person starts from the very moment of conception;

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TWENTY-SECOND. This decision affirms, moreover, that the constitutional status is built on the basis of the recognition of the person as a legal holder of rights That the unborn is free and equal in dignity and rights. Secondly, that the unborn, therefore, has the right to life, and not only enjoys the protection granted as a legal good.

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TWENTY-THIRD. As it can be seen, there are differences between both decisions. In the first place, the role of the Legislature. In the decision about brain death, defining when human life ends is something that the Legislature can decide, when it does not compromise the
right to life. The Legislature has full capacity to regulate situations related to life and death of people, as it has traditionally done. In the judgment about the morning-after pill, instead, the Court holds that the Constitution makes a decision in respect of the unborn, a decision that the Legislature cannot modify or infringe. Second, while in the brain death decision, it is argued that, according to the Constitution, life begins at birth and ends with death, in the decision of the morning-after pill, it is argued that this [life]

begins with conception;

TWENTY FOURTH. As can be seen, the Court has two doctrines that do not dialogue with each other. The main discrepancy has to do with the role of the Legislature. The point is central because of what the Article 19 (1), second subsection, mandates, in the sense that the law must protect the life of the unborn. In addition, it must be considered that after the morning-after pill decision, the Legislature addressed the matter in Law No. 20,418, of 2010. In this law, it was established the right of every person to choose freely, without coercion of any kind, and in accordance with their beliefs or training, the methods of regulating fertility of their choice. In the same way, it established the obligation for the administration of the state of making the methods available to the population as part of the public policy on regulation of fertility.
This law also provided that methods which aim to terminate a pregnancy and cause an abortion are not considered contraceptives and are not part of this public policy.
As a result, the morning-after pill is distributed by the State and is marketed in the category of regulation of fertility;

TWENTY-FIFTH. For the same reason, this is the opportunity to resolve the discrepancies between those decisions, as we shall see below;

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VI. INTERPRETATIVE CRITERIA.

TWENTY-SIXTH. Next, it seems relevant to us to reveal some interpretative criteria that will guide our reasoning.

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First, a functional correction. This Bill arrived at this Court once the legislative process was completed, although it could be contested since the President first presented it to Congress.

The National Congress is the entity called to establish the legal frameworks that govern our society. According to Article 63, paragraph 3 of the Constitution, it is a legal issue that can be codified. In this case, the contested Bill covers the modification of two Codes: the Criminal Code and the Health Code. In this way, the Bill addresses a matter typically regulated by the law. For this reason, to approve, amend or repeal statutes (Article 66), falls within the scope of Congress, which is responsible for passing legislation (article 46).

Since a matter of law is being addressed here, the Legislature has a scope of discretion inherent to legal regulation. It is Congress, together with the Executive acting as co-Legislature, that explores and chooses how to solve a certain problem in society. The solutions that could be considered for this purpose should be defined by both of them.

Likewise, evaluation of the goodness or suitability of the legal regulations corresponds to no one but the State. As long as these regulations remain within the margins allowed by the Constitution, no reproach can be formulated;

TWENTY-SEVENTH. The second interpretative criterion that we want to establish is the presumption of constitutionality. Unless there is a reasonable doubt, statutes approved by Congress should be considered as complying with the Constitution. For this reason, the party who challenges the constitutionality of a statute has to clearly and undoubtedly make its case. It is neither the Congress nor the Executive who must demonstrate the conformity of the text of a statute with the Constitution, but

those who claim the unconstitutionality.
In the same line, it is worth remembering the "in-conformity with" principle of interpretation, according to which only in those cases where there is no possible reconciliation between a Bill and the Constitution, can a Bill be declared unconstitutional.

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TWENTY-EIGHTH. The third interpretative criterion is a systemic one. The rules of the Constitution cannot be interpreted in isolation from one other; its meaning must be a product of the harmonious interpretation of its various precepts. No matter how important some articles may be, they cannot be isolated from the rest of the constitution and be considered as the only existing ones, subordinating the rest of the Constitution to their prescriptions or effects;

TWENTY-NINTH. The fourth interpretative criterion is the dynamism of constitutional interpretation. This dynamism, on the one hand, should allow the adaptation of the constitutional text to different realities. And, on the other hand, must be able to consider those context changes that may exist between the date of the enactment of the constitution and its application. As we will see in a moment, there are constitutional, legal and international law changes that strengthen autonomy decision-making, full equality and the rights of women which the interpreter of the Constitution cannot ignore;

THIRTIETH. In this sense, it is particularly complex to resort only to the originalist constitutional interpretation criterion. This is so because the Constitution has had 40 constitutional amendments, which have profoundly changed its original design. Also, the legal and political context in which the Constitution was enacted has changed. Likewise, the Constitution has dictated all the statutes that complement it, giving to its constitutional text a certain sense and scope. Additionally, originalism translates into the use of the proceedings of the Commission of new studies for the Constitution, or the files of the Council of State. While this Court has resorted in some cases to these documents, their use has difficulties.

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Indeed, in the case of the records of the abovementioned commission, this was technically an advisory commission (D.S. No. 1064/1973 / Justice). Also, its members changed over time. Moreover, the records they kept for themselves and another is a report reflecting the ideas of the commission. In addition, after the commission, the project went through the Council of State and the Governing Board. The latter had the attribution of the constitution-writing power (decrees laws N°1, 128, 527, 78, 91). Also, the Governing Board had its own legislative advice (decrees 36, 460, 527, 91). In fact, the founding rules of the original text of the Constitution, decided by plebiscite in 1980, only cite legal regulations (decrees Laws No. 1, 128, 527, 788, 991).
Therefore, the use of this type of criteria should be subsidiary, not central nor decisive. Also, it can be used in very justified cases and never to make rigid the sense of the text;

THIRTY-FIRST. In this particular case, we want to put on record a set of precedents present in the various stages of the development of the Constitution, both in the Ortúzar Commission and in the Governing Board, which demonstrate that the discussion of this decision occurred 40 years ago, without any change in the assumptions, given that the central norm to the debate has remained the same.

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Indeed, the Commission to Study the New Constitution discussed the basic elements that should be included in this first paragraph of the rights protected by the constitution drafter and, in that context, the

situation of several issues such as the death penalty, self-defense, and abortion was represented. Members of the Commission -- Guzmán, Silva Bascuñán -- were supporters of the right to life, arguing that its protection needs to be secured at the constitutional level. Others, however, believed in specifically ignoring the issue of abortion in the new legal system. In this respect, Mr. Ovalle felt that there were certain circumstances of overlapping rights that could justify it, "(...) especially in all those cases that by virtue of an offense -- rape, for example -- a woman carries a child in her womb unloved by her and, above all, rejected by her." For their part, commissioners Mr. Ortúzar and Evans, bearing in mind that it was a topic naturally crossed by religious convictions, expressed their doubts as to whether the constitutional text should be absolute about the life of the unborn or, to include a "flexible" standard that gives protection, but at the same time allows the law to authorize, in certain cases, eliminating the unborn child, without criminalization, for example, in the choice between the right to life of the mother or the right to life of the child (Enrique Evans de la Cuadra, "The Constitutional Rights", Ed. Juridical of Chile, T. I., pp. 146, 148 and 149);

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Finally, in the absence of an agreement, the Commission to Study the New Constitution arrived at the conclusion to ensure, at the constitutional level, the right to life and physical and mental integrity of the person, a born subject, and leave to the Legislature the power to protect the life of the unborn and to determine the various hypotheses that may occur in this matter, as already contemplated in article 75 of the Civil Code. In this regard, Professor Enrique Evans de la Cuadra said:"(...) We estimate, however, that there is, in this constitutional precept, a flexible mandate to the criminal legislator not to sanction therapeutic abortion in qualified [=authorized] cases where there is an authorization of the father or treating physician. What neither the law nor the authorities could authorize or tolerate, without violating the constitution, is the practice of mass abortion (...) "(op. cit. page. 114);

While it is true, that the Commission for New Constitution, created in October 1973 by the Military Board, did not exercise constitution-drafting power, as this last one did, when assuming the "supreme command of the country," it is worth examining the discussion held by the drafting commissioners before their own members of said Board, of which minutes were recorded about the main opinions and agreements adopted. Thus, in meeting No. 280 of the Board held on September 3, 1976 (transcribed in footnote) [§] aimed at drafting Constitutional Act No. 3 "About Constitutional Rights and Duties,"

[§] Footnote 3: **Minutes of the Military Junta, 280th Session held on September 3, 1976**
In the context of the presentation by Counselor Enrique Ortúzar on the advisory matters on Constitutional Acts No. 2, 3 and 4, the debate around the right to life, and especially that of the unborn, is hereby addressed.
- In attendance: Miguel Schweitzer, Minister of Justice; General of the Army Sergio Covarrubias, Chief Minister of the Presidential General Staff; General of the Army Patricio Torres, Chief Minister of the Advisory Committee of the Junta COAJ; Enrique Ortúzar, President of the Constitutional Commission; Captain Mario Duvauchelle, Undersecretary of Justice; Jaime Guzman, member of the Constituent Commission; Captain Aldo Montagna, Secretary of Legislation; Rear Admiral Rodolfo Vio, member of I Legislative Commission; Colonel of Aviation (J) Julio Tapia, member of the Second Legislative Commission; Colonel of the Army (3) Fernando Lyon, Deputy Chief of Staff Legislative Committee of the Junta COAJ; Captain (3) Sergio Rillón, member of the First Legislative Commission, and Ms. Mónica Madariaga, legal adviser to the Presidency.
PRESIDENT OF THE JUNTA.- Let us see Act No. 3 "Of Rights and Constitutional Duties."
Mr. ORTUZAR.- "CHAPTER I OF CONSTITUTIONAL RIGHTS AND THEIR PROTECTION"
PRESIDENT OF THE JUNTA.- There are several observations.
Mr. ORTUZAR.- The provision would read like this:
"1.- The right to life and to the integrity of the person, with the exception of the penalties established by law. The law shall protect the life of the unborn being,
MINISTER OF JUSTICE.- It seems to me that there is a redundancy here. The expression "unborn being" does not make sense. The expression "of the unborn" does.
CAPITAN (J) RILLON. - True, the word "unborn" implies the idea of being.
Mr GUZMAN - We realized the redundancy, but wanted to affirm the concept. This was a matter of a rather long

analysis and we struggled with using both "being" and "unborn," but we thought that it was best to leave that cacophony, in order to make it very clear that life begins with conception and not with birth. The unborn is a being.
MINISTER OF JUSTICE. - Excuse me, but that's what the Civil Code says.
The Civil Code ensures it, and the Criminal Code establishes specific crimes against it.
Mr. GUZMAN – Our aim was not to perfect the writing for didactic reasons, but to reaffirm the idea that it is a being. That is why it protects him.
MINISTER OF JUSTICE. No one has argued that. Those in favour of abortion do not deny that it is a being that is yet to be born. They establish certain legitimacy in certain situations. That it is appropriate, that it is lawful, that it is legitimate, that it is useful, that is not a crime, in certain and specific circumstances: if it is done in clinics, etc. the whole range. But the fact that it is a being yet to be born has never been a question. And that is what is protected: the life of the unborn. That's why a death sentence cannot be pronounced on a pregnant woman. Therapeutic abortion is lawful. It has always been that way.
Mr. ORTUZAR. - We did not intend to impose the Christian or Catholic doctrine or philosophy on all inhabitants of the Republic who will be governed by the Constitution. That is why it was established that the law protects the life of the unborn.
The Legislature shall determine in which cases they deserve protection or in which cases the Constitution allows therapeutic abortion. We leave it in the hands of the law.
PRESIDENT OF THE JUNTA. - The law protects the unborn. But there is a case where nothing can be done: the mother or the child. The law protects the unborn, which would harm the mother.
Mr. GUZMAN. – If faced with such an interpretation, the right to life of the mother and integrity of her person could also be invoked. In other words, leaving aside whatever position each of us may have regarding the issue, the , the Legislature does seem to have the flexibility to establish it as they see fit. The mother could claim the first paragraph. The Legislature would be the one to decide.";
Mr. ORTUZAR. - The legal provision is likely to penalize only malicious abortion, and not therapeutic abortion. And as for the abortion faced by those who have to decide whether to save the mother or the child, I agree that most would save the former.
MINISTER OF JUSTICE. - There is a case that I would consider legitimate. The woman who is a victim of rape could have a perfect and legitimate right not to be permanently stigmatized with a child..
Ms. LEGAL ADVISER OF THE PRESIDENCY. - And how would the child be at fault?
Mr. GUZMAN: But that would all be left to the discretion of the Legislature.
MINISTER OF JUSTICE – Neither would the mother be at fault, given the conditions in which it occurs. And it would be the result of a crime. It is debatable, really. That is why I said that I'm in favor of it. It does not keep it from being challenged. But these are things that will be legislated.
Mr. COLONEL (J) TAPIA. - Consequently, seeing that the being exists from conception, and that this precept is imperative because it states that "the law shall protect," I believe it will not be possible for it to be limited to any further extent by law.
Mr. ORTUZAR. - No, because in this case the Constituent Assembly itself has not established, directly, so to speak, the protection, but has handed it over to the Legislature.
Ms. LEGAL ADVISER OF THE PRESIDENCY. - But it has ordered the Legislature to do so.
Mr. ORTUZAR. – But with such amplitude as for it to determine how and when to protect.
Mr. GENERAL LEIGH, MEMBER OF THE JUNTA. - Well, but if this creates doubt, discussion, hesitation, why do we not remove this precept from the constitution and the "whereas" clauses and leave it in codes and legislation?
Ms. LEGAL ADVISER OF THE PRESIDENCY. - It's already in the codes.
Mr. GENERAL LEIGH, MEMBER OF THE JUNTA. - So, if it is in the Civil Code and the Criminal Code, etc., why do we put it in the Constitution? Let's remove it from this constitutional text and be done with it. Because if we already notice that there are problems among those who are erudite, we can only imagine what it will be like outside. This matter was on my list of sections to suggest removing. I strongly believe that it is not an issue that should be included in the Constitution.
Mr. ADMIRAL MERINO, MEMBER OF THE JUNTA. – There is currently a trend that favours abortion in the world in general. By including the text in its current form in a Constitutional Act, we are expressing the will of the Chilean Law that abortion not be carried out in Chile, except in duly qualified cases.
Mr. GENERAL LEIGH, MEMBER OF THE JUNTA. - But let us assume that in all the countries of the world and in law there is a popular manifestation, through members of congress, etc, and it turns out that we are actually imposing this on the country. Clearly, I am opposed to abortion as a matter of principle, but given that this is

included in the current legislation, the issue of when it is or is not allowed is very clear in different legislation. So, why are we putting this wedge in the Constitution, this wedge of doubt?
Mr. ORTUZAR. - I will tell you the reason why we chose that wording. Had it not been established, the first paragraph would be the rule, which ensures the right to life, then it could be argued that abortion is not acceptable in any case at all. Therefore, it was intended to establish not an exception, but, rather, to leave the decision to the Legislature on how to protect right to life of the unborn. If this article's subsection is suppressed, the other interpretation would lead to the other extreme and would say: "We pronounce definitely against abortion, even therapeutic abortion; that is, all kinds of abortion. This is the reason for which the provision was contemplated.
Mr. ORTUZAR. - Therefore, as we've already pointed out, the law protects the life of the unborn. The Legislature will see how and in what way the problem is solved."
Mr. COLONEL (J) LYON.- There would be no problem there.

focused on discussing the right to life and on the unborn, several opinions were expressed, including that of the then Minister of Justice, who argued that abortion was legitimate and legal, that it was not a crime under certain circumstances, and that therapeutic abortion "has always been that way." And he ended up arguing in favor of abortion in cases of rape, in which the woman "could have a perfect and legitimate right not to be permanently stigmatized with a child. " But what calls our attention is the reasoning of Commissioner Guzman when responding the argument of the President of the Board. The latter claimed that if the law protects the unborn, it "would harm the mother." Guzman responded with the following: "If faced with such an interpretation, the right to life of the mother and integrity of her person could also be invoked. In other words, leaving aside whatever position each of us may have regarding the issue, the Legislature does seem to have the flexibility to establish it as they see fit. The mother could claim the first paragraph. The Legislature would be the one to decide.";

Finally, the President of the Commission, Mr. Ortúzar, faced with an idea of eliminating the subsection on the life of the unborn [that had been] formulated by some of the attendees, among them the General of the Air Force Gustavo Leigh, Mr. Ortúzar said: "I will tell you the reason why we chose that wording. Had it not been established, the first paragraph would be the rule, which ensures the right to life, then it could be argued that abortion is not acceptable in any case at all. Therefore, it was intended to establish not an exception, but, rather, to leave the decision to the Legislature on how to protect right to life of the unborn. If this article's subsection is suppressed, the other interpretation would lead to the other extreme and would say: "We pronounce definitely against abortion, even therapeutic abortion; that is, all kinds of abortion. This is the reason for which the provision was contemplated. Therefore, as we've already pointed out, the law protects the life of the unborn. The Legislature will see how and in what way the problem is solved."

The Ortúzar Commission, at its 407th meeting on August 9, 1978 (transcribed below) [**] {p.72}

[**] Footnote 4: **Minutes of the Committee for the Study of the New Constitution 1.61. 407th Session, held on August 9, 1978.** Committee meeting chair: Enrique Ortúzar Escobar
The following members are in attendance: Raúl Bertelsen Repetto, Juan de Dios Carmona Peralta, Jaime Guzmán Errázuriz, Gustavo Lorca Rojas, Luz Bulnes Aldunate and Alicia Romo Román, and acting as secretary, the Assistant Secretary, Rafael Larraín Cruz.
Mr. ORTÚZAR (President) declared, in the name of God, that the session is opened.

ORDER OF THE DAY

Report from the Commission
Mr. GUZMÁN suggests replacing the final phrase in the sixth paragraph, subsection 50 which reads: "it is no less that from its conception as a human being ...", with the following: "it is no less that already, in intrauterine life, they have a real existence that must be recognized]. Therefore, this regulation is constitutionalized, though it is already considered in our Civil Code since its enactment." He explains that, with this change, the controversy regarding the moment in which the human being has a real existence would be avoided.
Mr. BERTELSEN considers the suggestion from Mr. Guzman to be dangerous, as it could be thought that this Commission is so progressive in its criteria that it recognizes the right to life of a being in a test tube.
Mr. GUZMAN replies that the problem could be solved by expressing: "it is no less that already before it" – before the birth – "the being has a real existence that must be recognized.
Mr BERTELSEN considers that this suggestion constitutes a truism, and that he prefers the original text proposed by the Committee.
Mr GUZMÁN says that, if that is the case, he will reformulate his earlier proposition.
Mr BERTELSEN insists that at this time, it is not advisable to include a reference of that nature.
Mr. ORTUZAR (Chair) disagrees with this statement, because in stating that "this regulation is constitutionalized, though it is already considered in our Civil Code since its enactment," the content of the paragraphs that may be removed is given a scope that the Commission did not consider.
Mr. GUZMAN states that the phrase in question merely formalizes what the Chilean legislation has always done.
Mr. ORTÚZAR (President) deems it essential that the Legislature be the one to protect the life of the unborn being, given that if the Constitution were the one to do it directly, it would be approaching an issue that is highly

conflictive and delicate, which is abortion.
Mr. GUZMÁN suggests that the sentence end with the granting of "the protection of the life of the unborn being" to the Legislature, which is what matters from a legal perspective, and that the reference to abortion be removed, along with the following paragraph. This would serve to avoid a conflictive and controversial topic, the hurting of either sector, as well as the fact that this decision was made by the majority, but that it was not unanimous, to become apparent.
Mr ORTÚZAR (President) points out that the advantage of the text resides precisely in that it clarifies the thinking of the Commission, since otherwise one may interpret that the Constitution condemns abortion in some way. He reminded them all that, when the point was discussed, the majority concluded that personal religious beliefs could not be imposed on such a delicate and transcendental issue as a Constitutional norm.
He states that a paragraph similar to the one below could scarcely hurt anyone –furthermore, he indicates, it is proof of a very significant level of tolerance and is not supportive of any particular position.
'The Legislature would thus have greater flexibility to determine the cases in which abortion is considered a criminal offense. A total ban in the constitutional text would necessarily have included cases of therapeutic abortion and others in which conception may have been the result of non-consensual violent actions – these are situations that may be considered differently depending on the beliefs and religious principles that impact the moral or social perspectives of the individuals judging them.'"
Mr. GUZMAN is in favor of leaving the issue up to the interpreters.
Mr. BERTELSEN states that he does not wish to formulate reservations regarding specific opinions on the agreement reached by the Commission about a very delicate matter seeing that he was not able to intervene in the discussion leading to it. Therefore, he requests to remove the section that is being examined.

focused on the final wording of the text of the Constitution of 1980, decided by plebiscite on September 11 of the same year, the Commissioner Bertelsen's response to Commissioner Guzman's suggestion to include in the constitutional text the recognition that the unborn, in the uterus, has a real existence. Commissioner Bertelsen considered "the suggestion from Mr. Guzman to be dangerous, as it could be thought that this Commission is so progressive in its criteria that it recognizes the right to life of a being in a test tube." Finally, the last to present his arguments was the President of the Commission, Mr. Ortúzar, agreeing to the formula that is currently in our constitution, based on "the advantage of the text resides precisely in that it clarifies the thinking of the Commission, since otherwise one may interpret that the Constitution condemns abortion in some way. He reminded them all that, when the point was discussed, the majority concluded that personal religious beliefs could not be imposed on such a delicate and transcendental issue as a Constitutional norm.
He states that a paragraph similar to the one below could scarcely hurt anyone –furthermore, he indicates, it is proof of a very significant level of tolerance and is not supportive of any particular position.
'The Legislature would thus have greater flexibility to determine the cases in which abortion is considered a criminal offense. A total ban in the constitutional text would necessarily have included cases of therapeutic abortion and others in which conception may have been the result of non-consensual violent actions – these are situations that may be considered differently depending on the beliefs and religious principles that impact the moral or social perspectives of the individuals judging them.'"

In conclusion, the Constitutional provision of Section 2, Subsection 1, of Article 19 -- the law protects the life of the unborn -- involves a difference with the protection of the right to life that precedes it in the first paragraph, since by giving its safeguard to the Legislature, Congress has a margin of adaptation or flexibility to address cases where the deliberate interruption of pregnancy is not considered as constituting a crime. The Legislature does not have any reservation or direction to ban abortion; its wording is simply enabling the Legislature to regulate protection. Otherwise, if it is considered that the constitutional right to life, recognized in the first paragraph of Article 19, No. 1, includes the unborn, the second paragraph would be absolutely redundant;

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THIRTY-SECOND. Finally, to finish this analysis, it is necessary to keep in mind that fundamental rights are not conceived or embodied, neither can they be protected in an absolute or unlimited way, since, in the first place, they will always find a natural limit in the rights of others, and, secondly, by the limitations or restrictions established by the Constitution itself or by law provided that they do not affect the essential content of such rights, as stated in article 19, no. 26 of the Constitution. This is so even regarding the right to life itself, the Constitution authorizes the Legislature to establish with increased quorum requirements, the death penalty against a person, although it is now practically repealed in almost all the legal system, but yet to be abolished. In the same way that the criminal legislator establishes grounds of exculpation and justification in certain offenses against people, for example, in situations of legitimate defense or states of necessity;

VII. THE ELEMENTS THAT WILL GUIDE OUR REASONING.

THIRTY THIRD. After analyzing the interpretative criteria just mentioned, we want to settle certain elements that will guide our reasoning. These have to do with four aspects: with the pluralism guaranteed by our Constitution, with the autonomy of the rights of women as individuals, with criminal law conceived as the last resort and with the rights of patients;

1. Pluralist society.

THIRTY-FOURTH. The Constitution guarantees organizational pluralism, and pluralism of ideas. This

prevents that any particular model of thought or morality can be imposed, whether of one or more organizations, or of one or more people, upon the rest of society.
For this reason, the Constitution obliges the State to promote the harmonious integration of "all sectors of the nation." The Constitution also does it within private organizations, since it recognizes the right of association (Article 19 No. 15), their autonomy as an intermediate group (Article 1), and it regulates some of these organizations (political parties, Article 19 No. 15, colleges of professionals, Article 19 No. 16; and trade unions, Article 19, No. 19). In the same way, the Constitution mentions neighborhood, professional, business, trade union, and student organizations (Article 9, Article 57 No. 7). Likewise, the Constitution guarantees the manifestation of all beliefs and the free exercise of all cults (Article 19 No. 6). For the same reason, there is no official State religion. And the Constitution guarantees the free elaboration and circulation of ideas (Article 19 No. 12).

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2. Women's rights.

THIRTY-FIFTH. That a woman is a person and, as such, a right holder. For this reason, she has rights and can acquire obligations. Among the rights, she can assert in her favor: her liberty and equality (Article 1 subsection first, 19 No.2), her equality before the law, just like men (Article 19 No. 2), her right to life and physical and psychological integrity (Article 19 No. 1), her right to health (Article 19 No. 9), her right to privacy (Article 19 No.4), and her right to the greatest possible spiritual and material realization (article 1). A woman is, in the language of the Constitution, a human person;

THIRTY SIXTH. In addition, different normative bodies have sought to deepen and develop the rights of women, the generation of an institutional framework aimed at promoting gender equality, equality of rights, the elimination of any form of arbitrary discrimination against women, and the establishment of affirmative action measures in their favor;

THIRTY-SEVENTH. In fact, both the Constitution editors and the Legislature, without prejudice to the subscription of international treaties, have made progress in this matter. Therefore, in constitutional matters, the most important change is equality between men and women, and the establishment that men and women are born free and equal in dignity and rights (Law of Constitutional Reform No. 19,611 / 1999). The Legislature has also sought to advance in this line: in civil law matters, labor, social security, institutional and other aspects.
In civil law matters, we can highlight the law that established new patrimonial regimes in marriages (Law N ° 19.335 / 1994), the new law on filiation (Law No. 19,585 / 1998), and the law against domestic violence (Law No. 20,480 / 2010).

In the workplace, we can highlight non-discrimination in applications for employment (Law No. 19,739 / 2001), the law that prohibits sexual harassment (Law No. 20,005 / 2005), and the law of equal remuneration between men and women (Act No. 20,348 / 209).

As far as social security is concerned, there is the right of a mother to breastfeed her child (Act No. 20,166 / 2007 and 20,367 / 2009), a [financial] bonus for each child towards retirement [from paid work] (Law No. 20,255 / 2008), and parental leave (Law No. 20,545 / 2011).

With regard to institutional aspects, we must highlight the creation of the National Women's Service (Law No. 19.093 / 1991) and the Ministry of Women and Gender Equity (Law No. 20.820 / 2015).

In other areas, we can highlight the regulation that protects pregnant students (Law No. 19,688 / 2000), the law that regulates fertility (Law No. 20,418 / 2010), the "Zamudio" [anti-discrimination] law (Law No. 20,609 / 2012); the quota law for Representatives and Senators (Law No. 20,840 / 2015); and the law

that establishes that it is not possible to arbitrarily discriminate, and that this leads to exclusions or restrictions, which has the purpose of nullifying or altering the equality of opportunities in employment (Law N ° 21.015 / 2017).

With regard to international treaties, they all point to a similar direction as the constitutional and legal changes, the enactment of the Inter-American Convention for the Elimination of All Forms of Discrimination Against Women (D.S. No. 789 External Relations, 1989), and the enactment of the Inter-American Convention to Prevent, Punish, and Eradicate Violence Against Women (D.S. N° 1,640 / 1998);

THIRTY EIGHTH. These treaties have reiterated that a woman has certain traditional rights, such as her liberty [and] her privacy, of which she can enjoy, exercise and demand full protection. But treaties have recognized new rights that deepen and develop traditional rights.

In this regard, it must be highlighted that an effective protection against any act of discrimination against women exists: her right to be valued and educated free of stereotyped behavior and social and cultural practices based on concepts of inferiority or subordination; the right to a life free of physical, sexual and psychological violence; [and] the right to a legal capacity identical to that of man.

These new emphases include aspects related to maternity. Thus, it recognizes the right (of a woman) to get married, to freely choose a spouse, and to have the same rights during a marriage or its dissolution. It recognizes recognize a right of access to adequate health care services, including information, advice, and services related to family planning. Also, the right to decide freely and responsibly the number of children she wants, intervals between births, etc;

THIRTY-NINTH. It is within this framework of new emphases defined by the Constitution editors, the Legislature and international treaties that pregnancy and motherhood must be interpreted. Pregnancy is a temporary status, typical of a woman, usually voluntary, very personal, that compromises the body of a woman. Pregnancy compromises the physical and mental integrity of woman, because, among other things, a fetus occupies her body and causes physical and physiological changes;

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3. The unborn

FORTIETH. The Constitution refers to the unborn in the article 19,N° 1, second paragraph. There, the Constitution entrusts the law to protect the life of the unborn. The fact that the Constitution passes this duty on to the Legislature depletes the protection in no way. An Act passed by Congress is the main source of law. Notwithstanding the foregoing, the Constitution does not grant to the unborn the category of a person. This does not prevent the unborn from being considered a legal interest of the highest relevance.

In this sense, the analysis of this Bill involves examining that there is a measure or legislative decision which reasonably weighs between a fundamental right and a legally protected interest. In this case, the Legislature has chosen to maximize the protection of the constitutional right to life of a mother or woman, by decriminalizing (abortion) in exceptional circumstances given their gravity and drama. Certainly, the cost of interrupting pregnancy and ending the gestation of a human life with high expectations of becoming a person is high and can be painful, but it cannot be compared or proportional to the sacrifice of the life of a person with full capacity; that is, a woman or a mother with a life project that is in full

development in the world, in the social and family environment.

In a context where the unborn remains in a maternal womb, sharing a common existence with the mother, without an individual or autonomous life, constituting an existence contingent upon birth and survival even for a single moment, it seems necessary and reasonable to differentiate between a person and one yet to be born (nasciturus}, between a legal subject full of rights and duties and a subject that is still an expectation of a person, a life on its way that is, certainly, an object of valuation of the law which protects it during its gestational development;

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4. Criminal law as the last resort (*ultima ratio*)

FORTY-FIRST. Criminal law puts a burden on persons, due to the greater restrictions of rights that it implies, both in the process of generation of a sanction and in the sanction itself. Also, because of the greater social and legal blame that Criminal law entails.

For the same reason, Criminal law cannot always operate in all events as an instrument for the preservation of certain legal interests because it may be excessive. The Legislature, responsible for establishing criminal penalties, may consider the existence of other regulatory mechanisms. For this reason, criminal statutes are approved, modified or repealed, since the Legislature makes this judgment of how Criminal law fits best the reality it intends to regulate, build or improve;

4. [5] Rights of patients.

FORTY-SECOND. With the entry into force of Law No. 20,584, in 2012, which regulates the rights and duties that people have in relation to actions related to their health care, the paradigm of medical care changed in our country. This centered on the discretion of a physician. Instead, this law puts the focus of attention on the patient and his/her rights, without prejudice, to give certainty to the actions of a physician.

This is expressed in the fact that every person now has the right to give or deny his/her consent to undergo any procedure or treatment related to his/her health (Article 14). This consent must be free, explicit, voluntary, informed, prior and given in writing (Article 14).

The only instance where a physician may circumvent a patient's consent is in the occurrence of three grounds established by the law. These have to do with public health, or when a patient is in no condition to give his/her consent and risk to life exists, and/or when a patient is disabled and his/her representative is not available (Article 15).

Likewise, the only cases where any treatment can be imposed on a patient is in those cases where the refusal he/she makes artificially accelerates his/her death or puts the public health in danger (Articles 14 and 16). If these grounds are not given, the will of a patient will prevail and only ordinary support measures or palliative care can be delivered.

From this paradigm shift, the Bill that we examine can be explained. On the one hand, it requires the will of a woman to interrupt her pregnancy. On the other hand, it requires a medical team to verify the grounds that allow such an interruption;

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VIII. ARTICLE 19 N° 1, SECOND PARAGRAPH OF THE CONSTITUTION.

FORTY-THIRD. We are now prepared to address the substance of the case.
The petitioners mainly base their argument on Article 19, No. 1, second paragraph, of the Constitution. This establishes that the law protects the life of the unborn.

This provision is interpreted by the claimants not only as a passive duty, to do no harm, but also as an active duty to defend the unborn. It is also interpreted as a criminal law obligation to characterize abortion as crime, without the possibility of regression such as through decriminalization, mitigating factors, or exemptions from responsibility. There would exist a prohibition in this sense. Also, they interpret it as granting the status of legal subject to the unborn. The unborn has, they affirm, the status of human person, and thus enjoys the right to life, just like the woman;

FORTY FOURTH. The origin of this provision is found in the Civil Code, in Article 75.
The disposition that was in that instrument was moved to the Constitution;

FORTY-FIFTH. The expression found in the Constitution is composed of the following elements: First, it uses the expression "law." In doing so, it excludes the possibility that the Constitution deal directly with the matter. The Constitution requires that a general and obligatory law, subject to the democratic process, fulfill this protective role. Consequently, it excludes individuals, the administrative authority or courts from being primarily responsible for this task. Undoubtedly, the law can call for the effort of all these actors. But in a secondary role, not an primary one. The Constitution did not want to exhaust the matter itself. It referred it to the judgment of the Legislature; to decide when to grant protection, when to deny it, and how. It is also necessary to point out that the Constitution does not refer to a specific legal instrument. This could be through criminal law, civil law, labor law, social security law, etc. .;

FORTY-SIXTH. That, secondly, the Constitution requires the law to protect. The first thing that we should point out is that the Constitution makes a distinction with what is established in the first paragraph. While there, it establishes "the right to life and physical and mental integrity of the person," here, it used different language. This is logical, since it is not dealing with rights, but entrusting the law to protect. It is not that the Constitution does not establish protection; but that it mandates the Legislature to do so. It introduces an intermediary. It gave a role to legislation, rather than exercising it directly. It also spoke "of the one who is to be born," in a context where the first paragraph speaks of "the person".

Furthermore, this is not the only constitutional norm that speaks about protection. Several constitutional provisions use the same expression. Thus, the State must offer "protection" to persons and to family (Article 1, paragraph 5). Under the right to health, it is established that this consists of the "right to protection of health" and that the State should protect the free or equal exercise of acts of promotion, protection and recovery of health and recovery of the individual (Article 19 No. 9). Likewise, the State is charged with the "protection and increase of the nation's cultural heritage" (Article 19 No. 10). In addition, the Constitution guarantees "freedom of work and its protection" (Article 19 No. 16). Also, the Court of Appeals must ensure, through recourse to a constitutional right the "due protection of the person concerned" (article 20). Finally, the Public Ministry must "protect victims and witnesses" (article 83). As can be seen, these provisions make different entities responsible. In some cases, the State; in others,

all persons; and in others, specific organs (Court of Appeals, Public Prosecutor's Office, Legislature). These provisions have never been interpreted in isolation from the other ones found in the Constitution. Nor have they been interpreted as amounting to criminal provisions. Likewise, they have not been considered as supreme mandates and applicable in all cases. Nor have they been considered as reasons to sacrifice other juridical goods. Finally, they have never prevented the development of new rights. For example, the protection of the family has not prevented the law on divorce, the law on filiation, [or] the law on civil union;

FORTY-SEVEN. To protect is, undoubtedly, an active duty, since it implies to care, look after and defend. It implies a non-harmful intervention on a daily basis; and positive measures of empowerment. This duty can neither imply unprotection, in the sense that no measures of any kind are adopted for the safekeeping of the unborn; nor can it mean overprotection, in the sense that these measures would go beyond what is reasonable and sacrifice the rights of others.
Therefore, it cannot signify a mandate for the neglect of women. The text of the Constitution does not imply, nor can it be inferred, that the protection of the unborn is an issue that may prejudice the mother. This should be obvious, since some of the protective measures must in fact be achieved with her involvement. The first subject obliged for the protection, and without whose actions or omissions this duty could not be fulfilled, is the woman. The Legislature cannot discount such actions or omissions. Also, the mother cannot be considered as a utilitarian instrument for protection of the unborn. The Legislature, precisely because of this primary duty, cannot go against the woman by imposing its will and even putting her life in peril or imposing duties beyond what is required of any other person. Motherhood is a voluntary act, which requires the vibrant commitment of the pregnant woman. It cannot be an imposition of the State at any cost for the woman. She is not a means. In addition, when the Constitution aims to give priority to a certain right over another or have superior interests prevail, it says it expressly. This is the case with the social function of property (Article 19 No. 24); with freedom in the interest of public safety (article 19, paragraph 7); with privacy regarding publicity (Article 19 No. 12) with transparency (Article 8); or with rights during states of emergency (articles 39 and following); or even with the same right to life, in the case of death penalty (Article 19 No.1). Furthermore, this Court has considered that requiring lawyers to remain on duty places an intolerable burden on them, by forcing them to defend individuals for free (STC 755/2008). This burden is not proportional in any way with those that would need to be borne by women in the three circumstances contemplated in the Bill;

FORTY-EIGHTH. The third element of the constitutional wording, is that the Constitution mandates to protect the life of the unborn.
As already indicated, it does not speak about protecting the right to life.
The right to life is recognized and defined in international treaties. Thus, both the International Covenant on Civil and Political Rights (Article 6) and the Inter-American Convention on Human Rights (Article 4) establish that "no one can be arbitrarily deprived of life."

This definition explains principles such as legitimate defense or necessity, applicable to cases where one person kills another and thus deprives them of their life in a way that is not “arbitrary”. The same can be said of a medical act involving high risks that results in death. The right to life is different from life itself, the biological and psychological support for the former. Both of these concepts should not be confused;

FORTY-NINTH. The right to life is not an absolute right, since no fundamental right is absolute and since fundamental rights bear limitations inasmuch as they must be compatible with the protection of the human being and its dignity, such as in the cases of self-defense, death penalty and interruption of pregnancy.

The right to life comprises two basic elements: the right to have and live a life in dignified conditions, and the right not to be arbitrarily deprived of ot.

However, by its very nature, the constitutional right to life contains a positive obligation of protection and is not a right to freedom that includes one's own death, but this does not prevent - as affirmed by the Spanish constitutional tribunal- recognition that, since life is a good of the person that exists within the circle of their freedom, they decide the circumstances of their own death. However, that provision constitutes an example of *agere licere* (freedom to act), insofar as the deprivation of one's own life or acceptance of one's own death is an act that the law does not prohibit, but it is not a subjective right that would imply the possibility of receiving support from the public authorities to overcome obstacles to one's will to die, nor a fundamental subjective right that would prevail over the will of the Legislature, which cannot reduce the essential content of the said right (Spanish STC 120/1990);

FIFTIETH. Finally, the last element established in article 19 N° 1, second paragraph of the Constitution is that the protected life is the life of the unborn.
Our legal system designates the unborn in different ways. Some provisions use the constitutional expression (Court Statute Code, article 369; Civil Code, article 75; article 1, Law No. 14,908; single article, Law N° 20,699). Other designations are also used. This includes "creature" (articles 74 and 77, Civil Code; article 7, D.L. No. 824); "child in period of gestation" (article 66 Labor Code); "unborn" (article 75 Civil Code); and "human embryos" (Article 6, Law No. 20,120).
In contrast, the Constitution designates one who is born as "person" (Article 1, Article 19, No. 1, first paragraph). We will return to this later. The rest of the legal system uses other expressions that it is necessary to highlight here. Thus, it is uses "already born child" (article 1, Law No. 14.908); "girl" or "boy" (article 199 and 205 of the Labor Code; article 16, Law No. 19,968); "minor in age" (Articles 199 and 200, Code of Labor); "minor children" (Article 203, Code of Labor); "minor" (article 3, Law No. 19,620); " human being under fourteen years of age"(article 16, Law No. 19,968); "child" (section 195, Labor Code; Article 16, Health Code).

When the Constitution uses the expression "child", it only does so for those who are born. For example, regarding nationality, it speaks of "children of foreigners ", and of "children of Chilean father or mother" (Article 10, No. 1 and 2). In Article 19, No. 10 and 11, it enshrines the right of parents to choose the educational institution for their children; and the right to choose for their children and the duty to educate them;

FIFTY- FIRST. Consequently, the temporal limit of this condition is clear: birth. With delivery, and total separation from the mother, this condition ceases.
However, the Constitution is silent regarding the commencement of this condition.
In STC 740/2007, the Court held that this occurred at conception.
We consider that, given the silence of the Constitution on this matter, it does not behoove this Court to make a finding to this effect. Even more so when there is scientific disagreement and divergence of moral views on the matter.
For this reason, in some cases, the Legislature has been the one to come forward to set criteria in this matter. It did so in Law No. 20,120, regarding scientific research on the human being, its genome, and the cloning. There, the law stated that protection began "from the moment of conception".
The same was done by the Inter-American Convention on Human Rights, which established that the right to life is protected by law and, in general, from the moment of conception.
We all know the interpretation that the Inter-American Court of Human Rights gave to this provision in the case of *Artavia Murillo v. Costa Rica*. Regarding the present issue, it made two relevant findings. On

the one hand, that the protection of the unborn is not absolute, but gradual and incremental, depending on its level of development, because this duty is not absolute nor unconditional. On the other hand, [the Court found] that this protection also implies protecting women, because conception occurs within their bodies.
On the issue of temporal limits of life of the person, the Legislature has defined when a person suffers brain death (Law No. 19,451). This constitutes the definition of when a person is dead.
As a result, the Legislature is much more qualified and legitimate than this Court to resolve the question of when the life of the unborn starts, given the absence of an explicit threshold in the Constitution;

FIFTY-SECOND. In addition, to settle unequivocally this issue which is closely related to the question before us: To affirm that life begins at the moment of conception implies an immediate separation and the establishment of a competing interest between the mother and the embryo or fetus. It also implies a hierarchy, because the mother would become the place where the pregnancy occurs, and would not have much more to do or to say;

FIFTY-THIRD. For the same reason, we cannot avoid pronouncing on certain aspects related to this question. The aforementioned does not mean that we avoid the point. Only that we will focus on the concept of person established by the Constitution;

On this issue we will make progress in an instant;

FIFTY-FOURTH. But before this, we want to further examine whether the duty to protect the unborn established by the Constitution prohibits the decriminalization of certain practices;

FIFTY-FIFTH. For a start, the Constitution used certain language to express prohibitions. In the same article 19 N° 1, there is a clear example, since it "prohibits the application of any illegitimate constraint." It is true that in other cases other expressions are used. For example, "no one can" (article 19 No. 7, 19 No. 15, 19 No. 24), "in no case" (Article 69, 76), "they shall not" (Articles 92, 94a, 95, 100, 19 N ° 15, 16, 19), "no one" (article 19 No. 3, 7, 15, 24), "not one" (Article 7, 19 N ° 3, N ° 7, N ° 15, 103). But "to protect" cannot be interpreted as a prohibition. In he constitutional language, an interpretation to this effect would be asymmetrical;

FIFTY-SIXTH. Secondly, the Constitution very rarely refers to crimes. Thus, it refers to terrorism (Article 9), offenses arising from freedom of expression (article 19 No. 12), to crimes that constitute grounds for constitutional accusations (treason, extortion, embezzlement, bribery) (Article 52 N ° 2) and the responsibility of judges (bribery, denial of justice, wrongful administration of justice, abuse of authority) (article 79).

The Constitution does not address nor refer to abortion.

The reason is that the Constitution entrusts the Legislature with the prerogative of punishment (article 19, No. 3 and Article 63 No. 3). The law may create crimes, determine which behaviors are reprehensible, and establish punishments;

FIFTY-SEVENTH. The Constitution assumes that the Legislature may change the definition of crimes. As such, it may establish, modify, or repeal offenses. Because of the issues that arise from the above, it establishes two rules. On one hand, a person cannot be punished if the law was not enacted before the

commission of the crime. And on the other hand, criminal laws cannot have retroactive effects, "unless the new law benefits to those concerned" (article 19, No. 3);

FIFTY-EIGHTH. That, for the same reason, there is no obstacle to "criminal regression". Obviously, because there exists a guarantee that the law may become more favorable. Also, because criminal law is always the last resort.

In the provision under analysis, the presumption of innocence is neither excluded nor limited.

In addition, the provision refers the matter to the law, which can either criminalize or decriminalize;

FIFTY-NINTH. The Constitution guarantees the right to life. The Criminal Code punishes homicide. But these are not synonymous. Protecting the right to life is not the equivalent of characterizing the crime of homicide.
In fact, the Legislature has been able to create new cases of homicide (for example, parricide between people who lived together); has adopted new aggravating circumstances; has established new extenuating circumstances or changed existing ones; has created different levels of homicide (simple or qualified homicide, parricide; infanticide);

SIXTIETH. This margin of appreciation that was given to the Legislature has allowed it to establish abortion as a crime that is distinct from homicide and infanticide.

Also it is treated as a different crime than those against persons in the Criminal Code. This offense is located within Title VII of the Code, which deals with crimes against families, public morality, and sexual integrity.
Likewise, the Legislature has established a sentence for abortion that is considerably less than it established for homicide.
And the same Legislature is that which omitted to include a crime of assault against the fetus. And that has restricted the crime of culpable abortion, because it only partially falls under article 343 of the Criminal Code;

SIXTY-FIRST. Secondly, the constitutional protection under review cannot be limited to the criminal sphere, since there are various norms that are not of this character and that pursue the same purpose.
In fact, our legal system includes rules that protect maternity and others that protect the unborn.
Amongst the rules that protect maternity, for example, is the protection and oversight of the State during pregnancy and up to six months after the child is born (Health Code, article 16).
There are also all the labor laws. For example, the Code includes provisions dealing with pregnancy as a prohibited factor at the moment of hiring, remaining at the work or renewing a contract (Article 194); pre and postnatal leave (article 195 and 197 bis); special permission in case of serious illness of a child under one year (article 199); special permission for very serious illness of a child under 12 years (article 199 bis); legal protection of pregnant women (Article 201); the right to access a crib (Article 203); and the right to feed (article 206). There are also social security provisions, such as the child supplement at the moment of retirement (Law No. 20,255).

Furthermore, among the norms that protect the life of the unborn, different types can also be found. Of course, this includes labor laws: for example, pre-natal leave (Article 195); pre-natal leave in case of sickness (Article 196); the right to request a change of duties during pregnancy (article 202); the right to

request up to three days off in case of the death of a child during gestation (article 66, Labor Code). There are also norms of recognition: thus, Law No. 20,558 established the Day of Premature Boys and Girls; Law No. 20,699 established the Day of Adoption and of the Unborn. There are also provisions in the Civil Code, that allow deferral of punishment of the mother until after childbirth or that allow a judge to take special measures in cases of risk to the unborn (Article 75); on succession and receiving donations (articles 962 and 1390). There are also norms that protect the embryo in the course of scientific research (Law No. 20,120). Also, rules that prevent birth control methods that have the objective or direct effect of causing abortion (Law No. 20,418). Similarly, there are social security regulations. For example, the "Chile Grows with You Program" accompanies the development of children in the public health system, starting at the first gestation test (Law No. 20,379).
All these laws point out that the protection of the unborn is heterogeneous and not comprised of criminal provisions only. In addition, they were authored by the Legislature. As such, they fit within the framework of Article 19 N ° 1, second paragraph, aimed at protecting the unborn through the provisions to be developed by the Legislature over time;

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IX. THE CONCEPT OF THE PERSON IN THE CONSTITUTION.

SIXTY SECOND. For the petitioners, the unborn is a human person. In this sense, it is a subject and can acquire and exercise rights.
The Executive and the Chamber of Representatives, for their part, maintain that the status of person begins at birth;

SIXTY-THIRD. The first thing to note is that the Civil Code states that the legal existence of every person begins at birth (article 74). And it ends with natural death (article 78). Additionally, the birth occurs with the complete separation from the mother (article 74). In addition, the Code defines person as "all individuals of the human species" (article 55). Finally, since legal existence begins at birth, this produces two effects in the Civil Code. On one hand, the rights given to the unborn are deferred until it is born. These rights become enjoyable if the person is born (Article 77). On the other side, if it is not born, it is considered to have never existed (Article 74). This happens whether it dies in the womb or perishes before being completely separated from its mother or if it fails to survive separation even for a single moment (article 74).
As can be seen, those who are born are called persons. And those who are about to be born, creatures. And if they have not existed, they are never considered persons;

SIXTY-FOURTH. As noted, the Civil Code emphasizes the birth as a separation.
We have to analyze the Constitution's view of the matter;

SIXTY-FIFTH. The Constitution uses the term "person" in twelve of the twenty-six numbers of Article 19. It is used in the heading of Article 19, and its numerals 1, 2, 3, 4, 7, 9, 10, 12, 15, 16 and 24. In some of them, it is used more than once (numerals 3, 7, 12, 15 and 16).
In addition, the Constitution uses the expression "person" in the singular (the person) (articles 12, 16, 19 N ° 1, 2, 4, 10 and 12) and in the plural (persons) (article 1, 19 Nos. 15, 16 and 24). In some cases, it speaks of "human person"(Article 1). It also refers to "group of persons "(articles 7 and 19, No. 15). It also emphasizes that which includes "every person" (article 6, 19, No. 3, No. 7, 12 and 16), to every "natural or legal person" (Article 19 No. 12); or to "any person" (Article 19 No. 7 letter c); or "each person" (Article 19 No.9).
On other occasions, the Constitution speaks of the: "individual" (article 19, no. 9 and article 21);

"inhabitant" (article 19, No. 18, and article 22); "Chileans" (Article 22); "men and women" (article 19, No. 2); "individuals" (article 19 No. 24, final paragraph);

SIXTY-SIXTH. One of the most important effects of attributing the condition of personhood to someone for constitutional purposes is that only persons have rights. This is what the Constitution says. The rights are ensured to "all persons" (heading of article 19).
The same is indicated in the first paragraph of article 1 of the Constitution: "people are born free and equal in dignity and rights." Several subsections of article 19 also use the term "person" to highlight the holder of the right established and regulated;

SIXTY-SEVENTH. The Constitution refers to birth in Article 1 (persons are born) and in article 10, when it regulates nationality. It also refers to death, concerning the regulation of the death penalty (article 19, No. 1), of the death of candidates for President (article 26) and of annuities (article 32 No. 11);

SIXTY-EIGHTH. The Constitution's concept of "person" is also established from the moment of birth. In the first place, because this is what is established in article 1° first paragraph of the Constitution. This article states that "people are born free and equal in dignity and rights".
In the controversy unleashed as a result of the present petition, a number of arguments have been put forward to reject the above.
The first is that the term "born" that the indicated article uses has a meaning which is different from that of the biological fact of birth;

SIXTY-NINTH. Indeed, this term points to the fact that this condition is not inherited. Persons, on the basis of that fact alone, and from then on, acquire originally and freely that condition, without further requirements. This is automatic because of the birth, without requiring any act, contract, registration or recognition. Neither can this condition be lost. Nor is it temporary, or for a time. It is acquired forever. Hence, it cannot suspended, deprived, canceled, nor can it be renounced. It becomes inherent. Further, all persons hold this condition. There is no single human being or group of human beings, privileged to have this condition, and others who do not. Men and women have it, irrespective of their sexual orientation or gender identity, children, youth, adults, believers and nonbelievers, married and single, whether or not they belong to indigenous ethnic groups, have any disease or disability, are Chileans and foreigners. Since everyone has it, it is also opposable to all;

SEVENTIETH. However, this is not the only meaning that can be attributed to this term. It also has the sense of a biological fact. Essentially, for the Constitution "birth" is not a minor legal fact. Indeed, the Constitution uses it to define nationality, by distinguishing between those who were born "in Chilean territory " and those born "in foreign territory " (Article 10. Nos. 1 and 2). It immediately uses it to establish citizenship. According to article 13 of the Constitution, in order to be a citizen, one must be Chilean. The Constitution also uses it to set the age requirement. It is also established by the Constitution for two purposes. On one hand, 18 years of age is required (article 13) to obtain citizenship, and, on the other hand, to hold public office.

Thus, to be President of the Republic one must be 35 years old (Article 25); to be a member of Congress, 21 (article 48); to be a Senator, 35 (article 50); to be an Attorney General, 40 years (Article 83); to be

Comptroller General, 40 years of age is required (article 98). Finally, it is used to establish the condition of personhood (article 1, first paragraph);

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SEVENTY-FIRST. The second argument to disregard the interpretation of the expression "born" of the article 1, first paragraph, as the legal norm to acquire the condition of personhood was an expansion that occurred when the constitutional reform of Law No. 19,611, in 1999, was ratified.
In fact, the original article of the text stated that "men are born free and equal in dignity and rights. " The reform incorporated the expression "persons" to replace the term "men".
During the reform proceedings, the incorporation of the expression "men and women" was proposed. But it ended up with "persons." Let us recall that this same reform incorporated in article 19 N° 2, following the right to equality before the law, that "men and women are equal before the law." This formulation was not contemplated in the original text of the
Constitution. During the Senate debate of this constitutional reform, a reservation was approved, in which "the yet-to-be-born [*nasciturus*], from conception, is a person in the constitutional sense of the term, and therefore, a holder of the right to life ";

SEVENTY-SECOND. The first thing to note in this regard, is that before and after the constitutional reform, the text uses the expression "born". Before, it said, "men are born", but now it says "persons are born." In this sense, nothing has changed.
It is necessary to maintain right away that such scope of the approved provision is not part of the constitutional text. It may be considered as an interpretative element, provided that it does not contradict other sections or the text of the Constitution itself.
Likewise, the scope cannot, in any case, be used as an interpretative norm of the text itself that is incorporated in the Constitution. These laws [that interpret the Constitution] are explicitly expressed and hold a special quorum requirement for their approval (Article 66).

The Constitution can be interpreted officially through these types of laws. But they require two important requisites: There must be a special quorum (article 66) and they must be subject to the constitutionality control of the Constitutional Court (Article 93 N ° 1). This reservation did not follow this procedure.
Similarly, this reservation did not seek to interpret the reform of Article 1, but of Article 19 No. 1, second subsection, of the Constitution. It actually sought to set down the meaning and scope of another constitutional precept (Article 1, first paragraph of the Constitution). This goes beyond its scope.
Finally, Law No. 19,611 had two modifications. First, to replace the expression "men" with "persons". And, second, to incorporate equality between men and women.
The latter has particular relevance for the controversy under analysis, insofar as the crux of the discussion is whether or not a woman is a sufficient rights-holder in order to authorize termination of pregnancy. The scope [of the reservation] formulated in the Senate distorts this
purpose, since it limits her autonomy vis-a-vis the unborn [nasciturus];

SEVENTY-THIRD. It has also been argued in this controversy, that the expression "person" is equivalent to "human species" and "human nature". The argument is as follows: There exists a human nature which does not depend on birth. Even an unborn being has it. This nature gives it rights. This [nature] is what gives them [i.e., the rights], not the State. Hence, it [the unborn] would have a right to life;

SEVENTY-FOURTH. In this regard, it should first be noted, that the Constitution uses the expression "essential rights that emanate from human nature" (Article 5).
However, the same text adds that such rights are not just any rights, but rather those "guaranteed by this Constitution, as well as by the international treaties ratified by Chile and that are in force." In other

words, the rights that the State agencies must respect and promote are those that are guaranteed in both texts. Not those that emanate solely "from human nature."

In the same sense, the heading of the Article 19 states: "the Constitution ensures for all persons." The same thing is stated by Article 39 of the Constitution (the exercise of rights and guarantees that the Constitution "ensures" for all people).

However, one could argue that the expression "ensures" and not "grants", allows one to sustain that there are rights inherent to human nature.

Regarding this, two things must be noted. On one hand, it can be agreed that there are certain rights that emanate from human nature. But the rights that are being considered by this Court, are those that the Constitution ensures. On the other hand, concerning the definition of the common good, the Constitution states that it must be procured "with full respect for the rights and guarantees that this Constitution establishes." It is not, therefore, any type of rights but those that the Constitution creates and configures.

Indeed, Article 19 N°26 states that the legal provisions that regulate or complement rights or that limit them, are not just any rights, but those for which guarantees "are established [by the Constitution]".
In addition, let us remember that by Constitutional Reform Law No. 19,295, a new right was incorporated in Article 19. N°295: that of creating and disseminating the arts. What meaning would such an incorporation have if rights emanate from "human nature". Article 20 reiterated this upon regulating the "recurso de protección" [legal injunction], that protects the rights and guarantees "established in Article 19 ...".
Otherwise, what would these rights be, what content would they have, who would be their holders, against whom and how they would be exercised, what are their limits?
Finally, here the controversy is not about those rights that would exist beyond any legal order. It is about the Article 19, N° 1, second section, of the Constitution;

SEVENTY-FIFTH. It has also been argued in this controversy that the expression "individual of the human species" includes the unborn.
Let us recall that Article 55 of the Civil Code points out that persons are "all individuals of the human species." Here, why is there no distinction between embryo and fetus? However, the same Article 55 adds that it is not possible to distinguish on the basis of age, sex, ethnicity or condition in order to assign the condition of personhood.
The use of age as a factor for non-discrimination [highlights] a problem, since age is computed from [date of] birth. Consequently, the Code states that conception is inferred from the moment of birth (Article 76). And the family status of the child is tested by a birth certificate (Article 305).

Moreover, the problem is that the Code itself says in the following articles, in the already indicated Article 74, that the legal existence of every person begins at birth. And the yet-to-be-born [*nasciturus*], by definition, is in the womb; not yet born.
The Code also distinguishes between persons, those who must already be born from those who are not born yet, whom the Code calls "creature", "unborn."
This is, in any case, a legal discussion, not a constitutional one;

SEVENTY-SIXTH. A second argument for maintaining that the unborn is not a person is Article 19 N° 1 of the Constitution.
This one begins by pointing out that the Constitution ensures [rights for] "all persons." These are those whose rights are recognized. Then, the first paragraph of Article 19 N° 1, guarantees the right to life and to physical and mental integrity of "the person."

However, the second paragraph no longer uses the expression "person". It mentions instead "the unborn."
As the lawyer of the Executive has stated before the Court, if the Constitution had wanted to assimilate the unborn to a person, it would not have used the pronoun "of it", but "of he/she" that is about to be born;

SEVENTY-SEVEN. A third argument is that the rest of the subsections of article 19 works on the basis that the [right holder] is a born person of a certain age. In this sense, it is not a mere error in drafting. For example, the unborn cannot be accused of a crime. That is why Article 19 N°3 fourth subsection, speaks of "every person charged with a crime".
Likewise, people have the right to honor and respect for and protection of their privacy (Art. 19 N° 4). Similarly, Article 7 declares that every person has the right to reside and to stay anywhere in the Republic and to travel from one place to another and to enter or leave its territory. This cannot be done by the unborn. Neither can it exercise the right to choose a health system (Article 19 No. 9), nor the right to education (Article 19 No. 10), nor the right to free recruitment in labor matters (article 19 No. 16), etc. The unborn does not have the enabling conditions to be recognized as a person and a right holder.
As it can be inferred from the above, the correct form of interpreting the Constitution is by not altering a systematic interpretation or subordinating the rest of the constitutional concepts to accommodate the yet-to-be-born [*nasciturus*], forcing it to be incorporated in conceptual categories that are not designed for it;

SEVENTY-EIGHT. The unborn is a juridical good of great importence for the Constitution. For that reason, the Constitution mentions it and entrusts its protection to the Legislature.
The unborn does not need to have the status of personhood and distort the rest of the constitutional and legal system in order to be protected. The Constitution has relieved the unborn from that. There is no such entity in our legal system that can have such possibility;

SEVENTY-NINE. Nevertheless, this protection [of the unborn] cannot be done without due consideration to the rights of women. The Constitution does not enable the State to endanger the life of the mother nor does it require her to bear a child as a result of rape. Protecting the unborn is not an excuse to abandon the woman.
The unborn is not the only one protected by the Constitution. The Legislature must search for a formula so that the unborn can reach birth. Nonetheless, beyond a certain limit, the rights of the woman must prevail.
The right to life that all persons have is not absolute. As it was declared before the Court, this is limited by the death penalty (article 19 N° 1 of the Constitution), and also, by a series of institutions that legitimize death, such as self-defense, state of necessity or the use of a firearm with police authority. Therefore, it cannot be considered, as it was indicated before the Court, that the life of the unborn is the only one that cannot be affected under any circumstance, reason or interest;

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X. THE GROUNDS THAT AUTHORIZE ABORTION

EIGHTIETH. That, next, we must analyze the arguments against the three legal circumstances for the interruption of pregnancy which are mentioned in the Bill.

First, it is necessary to mention that the Bill maintains the characterization of abortion as a crime. Article 344 of the Bill states that "the woman who, under different circumstances than those mentioned in the law, causes or gives consent to an abortion procedure conducted by other person, shall be punished with minimum imprisonment sentence in its maximum degree".

For this reason, the article 119 introduced into the Health Code by the Bill establishes three circumstances for the interruption of pregnancy.

These circumstances are required: firstly, that the will of the woman be expressed, in advance and in writing; next, that a medical surgeon authorizes the abortion; and finally, that we find ourselves within the three circumstances mentioned by the Bill;

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1. Description of the grounds

EIGHTY-FIRST. That, the three circumstances are as follows. In the first, the woman is at risk to her life [riesgo vital], in a way that the interruption of the pregnancy avoids a danger to her life.

As it can be observed, this ground focuses on the woman, since there is vital risk to her life. The interruption of pregnancy must avoid the danger that this implies.

The current Health Code´s Article 119 states that "No action for the purpose of provoking an abortion must be performed." This law has existed since 1989. Formerly, the rule was in D.F.L. No. 725 of 1967, allowed pregnancy interruption with therapeutic purposes.

The former legal gound for pregnancy interruption "with therapeutic purposes ", was much broader than that of risk to life.

The term "risk to life" is not alien to our legal system. The law that regulates people´s Rights and Duties related to health care (Law No. 20,584) uses it in three cases: in the first case, to define emergency medical care (article 10 and15); in the second case, to refer to involuntary hospitalization (article 25); and in the third case, when a doctor requests the advice of the Ethics Committee of the institution, about a patient's decision on treatment that threatens his or her life or causes serious health issues (Article 17).

To proceed with the interruption, according to the proposed Article 119 bis, there must be a medical diagnosis.

EIGHTY-SECOND. That the second circumstance is that the embryo or fetus suffers from a congenitally acquired or genetic pathology, incompatible with independent extrauterine life and, in all cases, lethal in character.

As can be observed, while the previous circumstance was centred on the woman, this one centres on the embryo or fetus.

The pathology of the embryo or fetus must comply with three requirements. Of course, it must be congenital --that is to say, acquired or developed in the womb. Next, it must be a pathology that is incompatible with independent extrauterine life of the embryo or fetus incompatible. That is, it cannot live, even if supported by technology, outside the maternal womb. Finally, it must be a lethal pathology. That is, one that causes the death of the embryo
or fetus.

This ground requires the intervention of specialist doctors with two medical diagnoses that are in the same sense (in agreement with each other];

EIGHTY-THIRD. The third circumstance allows the interruption of pregnancy if it is a product of a rape.

This ground seeks to protect the physical and psychological integrity of the woman, who has suffered two acts. On one hand, she has been raped. Rape is a crime according to our criminal code, in articles 361 and 362. It basically consists of carnal access, using force or intimidation, or taking advantage of any situation in which a person has been rendered unconscious or cannot oppose. There is also rape when a mental disorder of the victim is abused. These said circumstances are not required if the carnal access is on a minor person (less than 14 years of age). On the other hand, the woman must have become pregnant as a result of that rape.

This legal ground requires the diagnosis of a health team, specially formed for this purpose. This said team must confirm, from the medical point of view, the concurrence of facts and the gestational age.

This legal ground is unique, being the only one of the three that requires a maximum period of gestation. This varies according to whether a girl is less than fourteen years old or older. If the victim is

a girl under the age of fourteen, the interruption can be provided if the gestational age is no more than fourteen weeks of gestation. If she is older, the maximum gestation period is 12 weeks;

EIGHTY-FOURTH. From all described above, it is inferred that the circumstances that allow these three legal grounds in the present law are characterized: they reflect grave situations; they hold strict requirements and they seek to ensure that women will not be subjected to criminal reproach in the case of interruption of the pregnancy;

EIGHTY-FIFTH. As noted, the Bill-as opposed to what the petitioners maintain-- doesn't leave the unborn unprotected. Firstly, because there is still a crime of abortion. Secondly, because the project only lifts criminal persecution in three circumstances. Thirdly, because the grounds are subject to strict requirements, which do not depend only on the will of the woman, since they require a medical diagnosis. Finally, because the Bill does not derogate nor modify the set of legal provisions of all kinds that seek to protect the unborn;

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2. The Constitutionality of the three grounds.

EIGHTY-SIXTH. The petitioners object to all three those circumstances. On these arguments, we will focus on the following paragraphs.
Nevertheless, certain aspects of the petition will be treated separately, in another chapter,
since they are formulated as inequalities before the law;

a. The first legal ground does not violate the Constitution.

EIGHTY-SEVENTH. As we already indicated, the objection that is formulated regarding this ground, is that direct abortion is permitted, in circumstances where the Constitution tolerates only indirect abortion. The petitioners then argue that the ground is unnecessary because of the current art. 119 of the Health Code allows indirect abortion. Likewise, they consider that the ground that proceeds from "risk to life", is ambiguous. Also, they complain that the ground is made operative through the intervention of a single doctor, and not two or more, or a medical team;

EIGHTY-EIGHTH. First of all, we must separate the legal-constitutional reproaches from the objections of merit or expediency. We can only take care of the former. The latter ones can be evaluated by the National Congress.
We consider what is encountered in the last situation the reproach of the intervention of only one doctor is not enough and others are needed.
However, we leave evidence between 1931 and In 1967, therapeutic abortion required three physicians. Then, between 1967 and 1989, it was reduced to two. The Bill requires the medical diagnosis of one medical surgeon.
It can be argued that this requirement is based on two criteria. On the one hand, on advances in medicine. On the other hand, that the ground requires risk to life. For this same reason, it is not possible to delay attention for the patient with more consultations.
Moreover, in other scenarios involving risk to life, no more diagnoses are required;

EIGHTY-NINTH. Another argument that falls into the analysis of merit is that the modification is unnecessary because the current article 119 allows therapeutic abortion.
Congress considered that it was necessary to legislate in this matter. It can be disputed whether or not article 119 effectively allowed indirect abortion. The fact is that this provision is replaced by a new legal text.

We cannot judge the law in force. All we can do is review the Bill that we has been submitted for examination;

NINETIETH. Neither can we review arguments involving the control of exercise or application of legal provisions. This is typical of inapplicability or actions of illegality. The control that this Court is exercising, on this occasion, is control of the constitutionality of abstract nature.
That is why we cannot address the complaint that argues that the ground can be used to conceal many hypotheses. We cannot speculate on this matter;

NINETY-FIRST. That the first legal constitutional complaint they formulate against the ground is that the Constitution allows only indirect abortion in the circumstances in which the law now under review allows direct abortion.
Behind this argument is the doctrine of double effect. This postulates that it is morally lawful to exhaust all possibilities of saving the mother and the fetus. But if is not possible, and the mother is saved, there is no intention of killing the fetus;

NINETY-SECOND. That, in this regard, it should be noted that the Constitution does not refer to abortion. We already reviewed that in the expression "protects" there is no criminal mandate, but rather a general burden on the Legislature to protect or defend the unborn.
Indubitably, it does not exclude criminal intervention. But, as for any crime, the task of legal configuration is delivered to the Legislature.

NINETY-THIRD. That, on the other hand, the law of the rights and duties that people have in relation to actions related to their health care, the decision on how to proceed is not only of the physician, because such legislation requires the consent of the patient. For the same reason, there can be no indirect abortion without such volition. It is the woman who must establish how to proceed. Not even in case of risk to life, can a physican proceed without that consent (Article 15, letter b);

NINETY-FOURTH. In any case, in any type of abortion, the result will always be the same: the death of the fetus. In abortion, there is no natural death of the unborn. There is a medical action that causes his death. In this particular case, such death is because the pregnancy puts the woman in vital danger;

NINETY-FIFTH. To do nothing in the face of risk the pregnancy creates for the mother, is a kind of decision. Required by the woman to interrupt the pregnancy and “risk to life” diagnosed by the surgeon, there is no other solution than the interruption to save the mother's life;

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b. The second legal ground does not violate the Constitution.

NINETY-SIXTH. Regarding this ground, the petitioners state that it is difficult to diagnose. Also, that the unborn cannot win or lose rights according to its state of health. Likewise, there is a risk for the health of the mother since this abortion does not have a [maximum] term, and the higher the gestational age of the fetus, the greater the risk for her. Similarly, it does not repair the psychological effect on the mothers that abortion produces, affecting her physical and psychological integrity guaranteed by the Constitution. In addition, they argue that two doctors certifying the ground are not enough, given that brain death requires a team of doctors with unanimous and unequivocal diagnoses. Finally, they complain that there is no agreement between the specialists regarding the list of diseases that would be encountered in this ground;

NINETY-SEVENTH. That as in the ground above, we must distinguish objections that we can address from those that we cannot.

We cannot address the rule that requires two doctors to certify the ground. In any case, the contrast that they formulate regarding brain death is not effective. Law No. 19,451 requires that unanimous and unequivocal certification to be granted by a medical team. But the regulation of the law (D.S.35 /Salud /2013), established that such a team must be composed of "at least two medical surgeons, one of which must be a specialist in the field of neurology or neurosurgery "(Article 17). Because of this, two doctors are required;

NINETY-EIGHTH. Neither can we address the difficulty of diagnosis of the pathology. Again, this argument is about the control of the application of laws, not of attribution of powers.

In any case, how easy or difficult the diagnosis of a certain disease is does not make the law more or less constitutional. It must also be considered that the pathology that permits the interruption of pregnancy is not the only disease difficult to diagnose in our country. This has not prevented medicine from operating, nor paralyzed the process of attending to the patient.

Likewise, these kinds of obstacles cannot impede the legal position granted by the Bill to the woman. Physicians must deploy the maximum effort their science allows so that they don't contribute to the fetal pathology, the substantive danger of decision paralysis due to lack of a correct and timely diagnosis.

Undoubtedly, physicians must act on the basis of relevant, complete and reliable information. But that cannot be guaranteed by the Bill. It has more to do with medical specialties, infrastructure [and/or] equipment;

NINETY-NINTH. That in relation to the objection of the psychological effect on mothers and their possible threat in physical and psychological integrity, it should be noted that, during public hearings ,specialists referred to various studies.
In some, it was claimed that abortion was harmful in these cases; while in others, it was argued that it provides relief. As it is the mother who initiates the process of interruption of pregnancy, notwithstanding all the information and the counselling that she can receive, it is she who conscientiously assumes the effects of her decision.

We cannot start from the basis, as was maintained during the public hearings, that a woman's judgment is clouded under these circumstances. The latter, in any case, did not emerge from the studies. The woman is she who must decide whether to go ahead with the pregnancy, despite the pathology of the embryo or fetus, which will necessarily end in its death, or to end this situation and proceed to terminate the pregnancy. Why must the judge, the husband, the doctor decide, and not the woman? While a woman is pregnant, she can authorize acts and contracts, she is responsible before the law, she can continue working or studying, she can run for office, she can vote. For all these acts she is not considered temporarily incapable;

HUNDREDTH. Regarding the possible risk that the mother may incur, due to the abortion not having a [maximum term, it must be considered that the decision is subject to the prior and favorable report of two medical diagnoses that accord with each other. And not from any doctor, but from "medical specialists." For the same reason, we must rely on the ability of that team and the lex artis that guides any medical diagnosis.

Other diseases, however, which produce greater risk to the patient, do not require this type of collective diagnosis.

Moreover, the risk is assumed fully by the woman, every time that her consent is required;

HUNDRED-AND-FIRST. The above keeps in harmony with the mandate of protection of the unborn, every time that the decision to terminate the pregnancy will always constitute a measure of "last resort," so that it must always intend to minimize the possibility of an error in the diagnosis and to approach from science to the greater certainty that is possible, in order to avoid the harms derived from a determination that will be irreversible;

HUNDRED-AND-SECOND. In relation to the possibility that the abortion takes place and the fetus survives, on the one hand, the Bill provides that the health care provider must give it palliative care. In case he doesn't need it, the general rule of Health System is applicable; and, therefore, must be subject to it.
It is not that there is no rule for the case that the fetus is born alive and survives without difficulty. The complex situation in which the fetus is born and with difficulties, is solved by the Bill. If the fetus is born alive, it is entitled to the same healthcare as anyone. That is why the Bill speaks of childbirth.
In any case, this is a very exceptional situation, since the definition of the ground in the Bill implies that the pathology is incompatible with independent extrauterine life;

HUNDRED-THIRD. On the other hand, a whole chapter of the petitioners expresses that the decriminalization would be more of a medical benefit that constitutes a genuine subjective right, it is not possible to ignore that the Political Constitution ensures for all persons, in article 19 No. 9, the right to the protection of health, which means that health actions established therein, the State is obliged to guarantee, whether they are provided through public or private institutions, in the form and conditions determined by law. As can be seen, it corresponds to the State and individuals via private clinics to provide the health benefits, in the case of abortion on the decriminalized grounds, considering that there is an effect on the life and physical and psychological integrity. The protection of health is a constitutional right that guarantees the right to life;
The medical benefits derived from the interruption of pregnancy on the justified legal grounds being decriminalized, are inherent and indispensable, cannot be understood without a health or sanitary policy in this situation from the State. Its omission would cause the State to be responsible for lack of service. Because of the above, the medical benefit of procedures to provide justified abortion are not a new subjective right, but, only one concretization and confirmation of the constitutional right to protection of health, which must be guaranteed to women as holders of the same right and that are found to be faced with the decision to terminate their pregnancy. There is no new right, but the guarantee of equality before the law, since this is an eventual category of patients who should be treated in the same way;

HUNDRED-FOURTH. Finally, it is claimed that the fetus cannot win or lose rights according to its health condition.
We have already explained in another part of this judgment that the fetus does not hold a right to life, because it is not legally a person.
It is also about an embryo or fetus that suffers a lethal pathology. For the same reason, the decision is whether the death will occur before or after the interruption, standing outside the hypothesis of protection of the life of the unborn.
As will be indicated later, we cannot impose on the woman a burden of bearing her pregnancy in every event, with this embryo or fetus destined to die. She is the one who holds the decision, with the two specialist physicians;

c. The third legal ground does not violate the Constitution.

HUNDRED-FIFTH. That in relation to the ground of rape, it is argued that it is not medically unjustified because we are facing a healthy woman, and a healthy fetus.
For the same reason, it is a murder. Then it is argued that alleviation of the trauma of rape is not the abortion; for the same reason, there is a negative effect on women's health, which affects their physical and psychological integrity. Also, The petitioners also complain there is a risk for the woman. On the other hand, it is questioned whether appropriate safeguards are taken to prove the rape. Hence, it is allowed have it established easily to make decisions that compromise the life of the unborn. Finally, the counseling regulated by the Bill for the woman who has to decide, is not mandatory; and is not dissuasive counselling;

HUNDRED-SIXTH. We must again distinguish between legal and constitutional questions and those of merit or critique of the regulation established in the Bill.

It is claimed that abortion is not alleviation of the trauma of rape, this is a decision of convenience or merit. It is the Legislature that evaluated an alternative solution. In any case, it is not a decision imposed by the State, but falls on the decision of the woman and the medical team responsible for examining it.
In this same category lies the allegation that the ground can be used for abusive situations. That is control of law enforcement. Infringing a law is not a constitutional matter.

HUNDRED-SEVENTH. It is not effective that we are dealing with an unstable woman. Any woman who has been raped, and moreover impregnated as a result of that rape, has trauma. This may be major or minor; but it cannot be ignored;

HUNDRED-EIGHTH. In relation to the allegation that the fetus is healthy, is not the only situation where this can happen. Regarding the ground of "risk to life," this risk is not necessarily the product of some pathology of the fetus. It could be a consequence of diseases of the mother, existing or acquired, developed or not, product of the pregnancy.

On the other hand, the emphasis does not have to be put on the embryo or fetus, but on the suffering of the woman.

Even more so if, as noted at the public hearings by Dr. Huneeus, 66% of pregnancies due to rape occur in adolescents. Of these, 12% are under 14 years of age; and 7% are under 12 years old. And in 92% of those cases, the rape is committed by family members; and in almost half of those cases, they are repeated.

Thus, we are facing the suffering of a minor;

HUNDRED-NINTH. About giving the woman a belated defense against the vexatious attack of which she was subject. The woman does not have to take care of the consequences of the crime. In effect, pregnancy is a temporary situation; another is motherhood, which lasts a lifetime.

In addition, all the international treaties above, establish that it is the State's duty to prevent physical, sexual and psychological violence against women;

HUNDRED-TENTH. Regarding the risk to the woman exposed to abortion, unlike the other grounds, this has a time limit. We have already pointed out that this period is 12 weeks for women over 14, and 14 weeks for minors of that age or less.

This term means that within that period, the woman has the option of interrupting the pregnancy. After that period has passed, the Legislature understands that she has assumed it, renouncing the interruption. And for the same reason, she must continue with it, like any other woman. This is a way to protect the unborn.

The term is established on the basis how rapes with pregnancy product of rape usually affect girls, they do not perceive the situation until it is evident.

The term reduces the risk, because risk increases with the gestational age.

HUNDRED-ELEVENTH. As for the argument that alternative solutions are not contemplated and that counseling is not mandatory, it should be noted that the Bill obliges the health care provider to provide the woman with verbal and written information on alternatives to termination of pregnancy. This information must be complete and objective. With regard to the counseling being not dissuasive, that does not make it unconstitutional. The important thing is that it is the woman who can decide how to get a better treatment. Neither counseling nor the information can be coercive, that is to say, destined to force the will of the woman in a particular sense. The important thing is that there's a receptivity, support and support networks to help her. Only this way will her rights be adequately respected.

HUNDRED-TWELFTH. As for the argument that rape, before proceeding with the interruption of pregnancy, must be judicially accredited, note the following. At the present moment, when anyone reaches a hospital, even if he has participated in a crime, it is treated, they are not asked to prove their participation in the crime. Doctors proceed immediately to deliver the corresponding treatment. It is not conditioned upon demonstrating that one has been a victim or a participant in the crime.

To initiate the interruption procedure, the law follows the same logic. It separates attention of the patient from the judicial branch.

That is why Article 200 of the Code of Crime Procedures obliges every person who is in charge of a health facility to report to a prosecutor the entry of any individual who has significant injuries. But you are not allowed to deny or impose a condition on medical care.

The Bill then obliges to make the relevant complaints. For this purpose, it makes a distinction. On one hand, for women over 18 years of age, according to article 369 of the Criminal Code, they are not obliged to make a complaint to the prosecutor or the Public Ministry.
Despite this, the Bill says that if the woman did not make the complaint, the heads of hospital establishment or private clinics must inform the Public Ministry about this crime.

On the other hand, regarding persons under the age of 18, these hospital heads should proceed to make the complaint and notify the National Service for Minors.

It is not, therefore, that the criminal complaint does not matter. It is only that the interruption procedure is not conditional upon it.

Likewise, the medical team should focus on confirming the occurrence of events and gestational age and respect the principle of doctor-patient confidentiality. In such team, there must be all kinds of professionals who can contribute to the situation that the woman has indicated (doctors, psychologists, psychiatrists).

The reports of this team will be if great importance for the decision and including the the verification of the crime in the criminal investigation.
Finally, the Bill states that any appearance of the victim in the judicial process is always voluntary, without any pressure;

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XI. THE TEST OF PROPORTIONALITY.

HUNDRED THIRTEENTH. That, on the other hand, is necessary to review the claim of the petitioners to the test of proportionality. They argue that the best way to protect the unborn is through criminal sanctions;

HUNDRED FOURTEENTH. As far as the suitability, the central question is whether the criminal measure is the most effective to protect the unborn.

In the annexes submitted by the Executive accompanying her answer, are a series of statistics that are not disputed by the petitioners. In them, it is pointed out that during the year 2014 there were 30,799 hospital discharges for abortion. However, between 2005 and 2016, the number of women formally charged with abortion offenses and for abortion without consent, correspond to 378 women. The condemned women only amount to 148.
This immediately demonstrates that prosecution and punishment has not been the ideal mechanism for protecting the unborn.
It should also be noted that in the figure of about 30,000 does not include clandestine abortions. From the sole reading of this statistics, it is shown that criminal protection is not very suitable;

HUNDRED FIFTEENTH. As for the test of necessity, we pointed out already in this decision that criminal law is always a last resort. Because of this, by definition, there are other less harmful measures. In addition, the absolute prohibition and criminal sanction of abortion, not allowed in any circumstances, conflicts with the rights of women. Consequently, we do not give the second element of the test.

HUNDRED SIXTEENTH. Finally, regarding the balance or proportionality, neither proceeds. Of course, the rights of women are contrasted with a protected legal right. Afterwards, pregnancy causes for the woman a vital commitment which affects her whole life. The intensity of the union between her and the embryo or fetus establishes a unique link, different from what is known. Nevertheless, the possibility of the three circumstances that the Bill describes, forces us to ponder the excessive burdens placed on women. Law cannot force people to act against themselves, being forced to bear risk to life, the death of her child from a lethal pathology or motherhood as consequence of the rape;

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XII. EQUALITY IS NOT AFFECTED BY THIS LAW.

HUNDRED SEVENTEENTH. Finally, the petitioners claim that a series of differences made by this Bill violate equality before the law. In the first place, they argue against the different forms of accreditation of the three grounds provided.
In this respect, it should be noted that these grounds are different from each other, subject to different requirements, and they cannot be assimilated and subjected to a same common rule. As for the rest of the medical situations, except in very exceptional cases, there is practically no legal regulation. In this sense, the Bill complements the *lex artis* with mandatory and regulated interventions by physicians.
Likewise, as the ground becomes more complex, the number of specialists involved in the procedure increases.

HUNDRED-EIGHTEENTH. It is also argued by the petitioners the age difference of raped women between 14 years of age and under.
This age separation is done on the following basis. In conformity with the Law of Responsibility of Adolescents for Infractions to Criminal Law, it is necessary to distinguish between those who are over 14 years of age and those who are younger. Children are not subject to criminal liability. The aforementioned law applies to those who are over 14 and under 18. And for those over the age of 18, a general statute applies.
This point is important because we are talking here of circumstances that prevent a criminal sanction in a crime: the crime of abortion. Then, the distinction is based on the fact that, according to our Criminal

Code, carnal access to a woman under the age of 14 is always rape (article 362 of the Criminal Code). Therefore, the distinction is not artificial, but consistent with the rest of the legislation;

HUNDRED-NINETEENTH. Thirdly, it is claimed that the way parents or legal representatives are involved in the process is unreasonable.
The Bill makes a distinction between women under the age of 14 years and those over 14 but under the age of 18.
For women under the age of 14 years, the authorization of the legal representative is required. For those over 14 but under the age of 18, it is sufficient that the legal representative is informed; but, if there is more than one representative, the information must be given to whom the minor decides. The abovementioned distinction is based on the fact that highly personal rights are at stake. It is also based on the fact that breaking confidentiality can be extremely burdensome for the minor. The best interest of the child is at stake.
In fact, the Bill itself contemplates that when the risk is greater, no authorization from the representative is needed, and the medical team must go directly to a Judge. The same applies in cases where no authorization is needed, but information must be provided. If the grounds apply, the medical team will disregard the obligation of communication of information and will only inform to the adult-relative whom the adolescent indicates and, if there is none, to the responsible adult whom the adolescent chooses. Furthermore, this is not the only case in which the law operates in this way. Similar procedures exist under Law No. 20,584, on the rights and duties people have in relation with actions related to their health care (article 15), and also in Law No. 20,418, which sets standards for information, guidance, and benefits in regulation of fertility (Article 2). Likewise, Law No. 19,779, which covers HIV treatment, establishes another equivalent procedure (Article 5);

HUNDRED-TWENTIETH. Fourthly, it is argued against counseling. It is not sufficiently dissuasive when a woman wishes to interrupt her pregnancy.

In this regard, it should be noted that the Bill structures all its provisions on the basis of the dignity of the woman. By all means, she decides. For this, the Bill emphasizes that her consent must be expressed -- in advance and in writing. Right away, she is informed about all the possible alternatives. Then, she is given counseling, even if she decides to terminate the pregnancy. For the petitioners, if the counseling is not dissuasive, the life of the unborn is not protected. However, at this stage, it is already clear that this protection is not a title to impose sacrifices on the woman. The State must respect her decision, not impose or coerce it;

HUNDRED-TWENTY-FIRST. On the merits of all the above, we consider that the petition should be rejected in all its parts.

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CHAPTER TWO.
CONSCIENTIOUS OBJECTION

HUNDRED TWENTY SECOND. The Constitutional Court will accept this chapter of the parliamentary petitions, declaring partially unconstitutional the new article 119 ter of the Health Code, which adds Article 1, No. 3, of the challenged Bill;

HUNDRED TWENTY-THIRD. Numeral 3 of the Bill introduces a new article 119 ter to the Health

Code, regulating for the first time in an express form in our law, the issue of conscientious objection. It dispenses this right both to the medical surgeon required to terminate the pregnancy due to any of the grounds described in the subsection of Article 119 – and No. 1 of the same Bill - and to the rest of the professional staff who perform their duties inside the surgical pavilion during the intervention, of the obligation to perform the respective surgical act, fulfilling the formalities indicated;

HUNDRED TWENTY FOURTH. The aforementioned provision commits the Ministry of Health to issue the "protocols necessary for the execution of the obligation of conscience", safeguarding the duty to "ensure the medical attention of patients who require the interruption of their pregnancy. Then, the final section of subsection 1 of this new article states that "Conscientious objection is of a personal nature and in no case may it be invoked by an institution."

It is precisely this passage of the legal mandate that has been criticized as unconstitutional, as the petitioning parties understand that: a) the restriction of this right to only the doctors and professional personnel concerned [i.e. affected] would constitute arbitrary discrimination against non-professional health personnel who also participate in the corresponding medical act, as well as affecting the freedom of association and the autonomy of the intermediate bodies for the fulfillment of their own specific purposes, and b) that the right to conscientious objection also cannot be limited exclusively to the professionals involved in the provision in question, but must also be expanded to the institutions in which they provide their services, under penalty of breaking the guarantees mentioned and that will be made explicit in the development of this argument;

ANALYSIS OF CONSCIENTIOUS OBJECTION AS A CONSTITUTIONALLY GUARANTEED RIGHT

HUNDRED TWENTY-FIFTH. The constitutional basis of the right in question is usually established in Article 19, No. 6 of our Political Charter, insofar as it ensures to all persons "freedom of conscience, the manifestation of all creations and the free exercise of all religions that do not oppose morality, good morals or public order. "However, as can be seen from its simple reading, this precept does not contain an express recognition of this right, which has been defined as "the right not to be obliged to comply, for reasons of conscience, with the impositions of the law" (Report No. 43, Case 12219 Fondo Cristián Daniel Sahli Vera and others v. Chile (03/10/2005, No. 37);

HUNDRED TWENTY-SIXTH. There are not many Constitutions that, in comparative law, explicitly recognize in their text the institution under analysis, granting it the liberating one from some specific obligation. Among the exceptional ones that do it, it is worth mentioning the law from Spain of 1978, whose article 30.2 entrusts to the Legislature the regulation, with the due guarantees of conscientious objection, entirely with regard to the military obligations of the Spaniards.
The National Constitution of Paraguay, of 1992, does the same in its article 37, which together with recognizing it, extends it "for ethical and religious reasons, for the cases in which this Constitution and the law admit it";

HUNDRED TWENTY SEVENTH. The issue that calls us has been addressed in constitutional justice bodies both in Europe and Latin America.
The European Court of Human Rights, in effect, recognizes and admits the national legislation referring to the conscientious objection of medical personnel (CEDH, P.S. vs. Poland, application number 57375-08, of 5.11.12, paragraph 107). The interruption of abortion in certain circumstances, raises, in many European countries, a persistent debate on the scope and entitlement of the right to conscientious objection, not only by individuals, but also by health institutions, a very complex aspect especially when dealing with private institutions that have an ideology contrary to said practices;

HUNDRED TWENTY-EIGHT. The Parliamentary Assembly of the Council of Europe, in its Resolution 1763 of 2010, had the opportunity to invite the member states of the Council of Europe "to develop clear and complete legal frameworks that define and regulate conscientious objection in relation to medical and health services which should guarantee' the right to conscientious objection in relation to the participation of the procedure in question "(4.1.). h;

HUNDRED TWENTY-NINTH. The Inter-American Human Rights System recognizes that "the rights and obligations attributed to moral persons are resolved in the rights and obligations of the individuals who constitute them or who act on their behalf or representation" (I/A Court HR, Cantos vs. Case) Argentina, Preliminary Objections, Series C, No. 85-2001, paragraphs 22 and 23). The Court has therefore opened the door to allow, exceptionally and in certain circumstances, legal persons to be considered as holders of certain rights and obligations under the inter-American system. However, on repeated occasions it has also stated that legal persons do not have the right to freedom of conscience and religion. With all this approach that, as shown, is not completely uniform - it is not binding for this instance of constitutional justice. As previously expressed in the dissent related to the causes of voluntary interruption of pregnancy, such statements are not binding in their respect, without prejudice to its importance as a hermeneutic tool, relativized on this point by the lack of complete uniformity of these decisions;

HUNDRED THIRTIETH. Consequently, this Constitutional Court will base its decision regarding the right to freedom of conscience and religion held by legal persons, in matters of institutional objection, on a perspective different from that supported by the Inter-American Court, with strict adherence to the norm of article 19, No. 6, but also, considering the guarantees contained in numerals 11 and 15, in relation to article 1, third subsection, of our Constitution, according to the argumentative development which takes into account the following considerations.

ANALYSIS OF CONSCIENTIOUS OBJECTION IN THE CHALLENGED BILL.

HUNDRED THIRTY-FIRST. Conscientious objection, in the form proposed by the Bill that regulates the decriminalization of the voluntary interruption of pregnancy on three grounds, must be understood as protected by the dignity of the persons who - individually or projected in their association with others, refuse to perform certain types of actions (the interruption of pregnancy), for ethical, moral, religious, professional, or other reasons of marked relevance;

HUNDRED THIRTY-SECOND. In effect, the Political Constitution, in article 1, first subchapter, expressly already recognizes -- between the "Bases of Institutionalization] "-- the dignity of the persons, understood as that quality of human beings that makes them owed respectful treatment, because it is the source of the essential rights and guarantees destined to obtain that they be protected (STC Role N ° 389, c.17). In this way, no law can dispose of people as a means; to a point such that even at the cost of having to alienate the convictions that define one as a person, as a human resource, it is set to satisfy the desires, appetites or needs of others.
Such an alienation implies, then, to deprive the recipients of the norm of their same quality of persons, and to impose blind obedience in the face of the dictates of a law that fails to recognize the basic right, to rely on their own convictions, to avoid an act that violates their conscience.

HUNDRED THIRTY THIRD. Conscientious objection, that is, the rejection of a practice or duty that conflicts with the most intimate convictions of the person is, precisely, a manifestation of the freedom of conscience ensured by our Constitution, in its article 19 N ° 6 °.
The doctrine has indicated that freedom of conscience "means to believe in what you want, be it political, social, philosophical or religious, is a variant of freedom of thought and includes

right to think freely, the right of each one to form his own judgment, without interference. "(Sagüés, Néstor Pedro, Constitutional Law 3 Statute of Rights, Astrea Editorial, Buenos Aires, 2017, p 255).

HUNDRED THIRTY FOURTH. So, it is unanswerable that conscientious objection may be interposed by individual persons; all the moreso when the Constitution expressly ensures to all persons the freedom of conscience, in its article 19, N ° 6, first subsection. It is the same freedom that the constitutional text does not authorize to limit (N ° 26 of the aforementioned article 19), especially when, as in this case, its exercise affects, precisely, in the ambit of other human lives according to sustained personal convictions;

HUNDRED THIRTY-FIFTH. In the same line of reasoning, given the nature and peculiarity of the Bill under review, there is no legal reason to restrict conscientious objection only to natural persons who are professionals, when those who are not [professionals] could also object, in conscience, to the procedures in which they must intervene;

HUNDRED THIRTY SIXTH. It is no less evident that conscientious objection can legitimately be raised by legal entities or private associations, in this case, in accordance with the constitutional autonomy that the intermediate groups of society recognize in their own Constitution, Article 1, third subsection. The interposition of this legitimate reparation is not exhausted in the individual order, since it also extends and propagates to the associations destined to embody the same freedom of thought, in accordance with the right that is ensured for all people, in Article 19, No. 15° of the Constitution.

And identically, it can be invoked in religious institutions, legal persons or entities with confessional [Catholic] ideas that are projected towards the ambit of health, under Constitutional Article 19, No. 6. It is also possible to assert the objection in question to the educational establishments with a function and ideology in the indicated sense, in accordance with Article 19, No. 11, of the Constitution;

HUNDRED THIRTY SEVENTH. It should be pointed out that constitutional jurisprudence has recognized that educational establishments have an ideology that must be respected. Thus, the same Constitutional Court of Spain, reasoning about the freedom of teaching, has stated that "In private schools, the definition of the teaching position is given, in addition to the characteristics of the educational level, by the ideology that, in use of the freedom of education and within the limits indicated above, has given to its owner. Any interference of the public powers in the professor's freedom of teaching would be thus, at the same time, violation also of the freedom of teaching of the head of the center (...)" Further on, it states that this ideology" is part of the center's own freedom. " (Judgment 5/1981, of February 13, 1981);

HUNDRED THIRTY EIGHTH. Consequently, the following expressions contained in the new article 119 ter of the Health Code are declared unconstitutional and should be eliminated from the Bill:
1) The expression "professional", which occurs between the phrases "the rest of the staff" and " staff who perform functions within the surgical pavilion during the intervention ", which is in the first subsection of article 119 ter of the Code , added by article 1, N ° 3, of the Bill under consideration.
2) The phrase "in no case", which is used between " objection is of a personal nature and" and "can it be invoked by an institution", in the first subsection of Article 119 ter of the Health Code, added by Article 1 , No. 3, of the aforementioned Bill.

3) The phrase " Neither can it be excused if the expiration is imminent of the term [temporal limit of gestation] established in case N° 3) [rape] of the first paragraph of article 119", contained in the final part of the final subsection of the new article 119 ter, added by article 1 °, No. 3, of the same Bill.
AND BEARING IN MIND the provisions of article 93, first subsection, No. 3, and fourth and subsequent paragraphs, and the other provisions cited and pertinent of the Political Constitution of the Republic, and articles 61 and following of Law N° 17.997, Constitutional Organic Constitutional Court,

IT IS RESOLVED:
1°. That the objections made to the article 1, numeral 1, which replaces article 119 of the Health Code; article 1, numeral 2, which incorporates a new article 119 bis to the Health Code; article 1, numeral 3 °, first subsection, except for the term "professional" and the expression "in no case"; second; and, third, with the exception of the sentence "Neither can it be excused if the expiration is imminent of the term [temporal limit of gestation] established in case N° 3) [rape] of the first paragraph of article 119.", which introduces a new article 119 ter to the Health Code; article 1, numeral 4, that introduces a new article 119 quáter to the Health Code; article 2, which replaces article 344 of the Penal Code; Article 3 of the bill, which introduces amendments to Article 13 bis, first subsection, of Law No. 19,451; and, to the transitory article, all of the Bill passed on in Bulletin N ° 9895-11.

2°. That the Constitutional Court will partially accept the challenge to article 1, numeral 3°, first subsection, in the term "professional" and the expression "in no case"; and, third, with respect to the sentence "Neither can it be excused if the expiration is imminent of the term [temporal limit of gestation] established in case N° 3) [rape] of the first paragraph of article 119.", of the bill, which introduces a new article is imminent. 119 ter to the Health Code and that is declared as contrary to the Political Constitution.

3°. That, consequently, this Magistrature declares that article 1, numeral 3 of the bill, which introduces a new article 119 ter to the Health Code, in its non-objected part, is as follows:

"3. Enter the following article 119 ter:
"Article 119 ter: The surgeon required to interrupt a pregnancy due to any of the grounds described in the first paragraph of Article 119 may refrain from so doing when he has manifested his conscientious objection to the director of the health establishment, in written form and in advance [prior to the request of the woman]. The rest of the staff who perform functions within the surgical pavilion during the intervention will be entitled to this same right. In this case, the institution will be obliged to immediately reassign another non-objecting professional to the patient. If the health facility does not have a practitioner who has not manifested conscientious objection, the director must refer the woman immediately so that the procedure is carried out by a professional who has not manifested such objection. The Ministry of Health will issue the necessary protocols for the execution of conscientious objection. These protocols must ensure the medical care of patients who require the interruption of their pregnancy in accordance with the articles above. Conscientious objection is of a personal nature and can be invoked by an institution.

If the professional who has manifested conscientious objection is required to interrupt a pregnancy, he will have the obligation to inform the director of the health institution immediately that the requesting woman must be referred [to another professional]

In the case that the woman requires immediate and unpostponable medical attention, invoking the [risk to life] ground of N° 1) of the first paragraph of article 119, whoever expressed conscientious objection cannot be excused from performing interruption of pregnancy when there is no other surgeon who can perform the intervention. "

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DISSENTS

FIRST CHAPTER. **Decriminalization of the voluntary interruption of pregnancy on three legal grounds.**

The Judges Marisol Peña Torres and Iván Aróstica Maldonado, Juan José Romero Guzmán and Cristián Letelier Aguilar welcomed the petitions brought by a quarter of the Senators (Rol No. 3729) as well as a quarter of the Representatives (Rol No. 3751), at page 1 of the respective records, based on the following considerations:

I. THE CONFLICT SUBMITTED TO THE CONSTITUTIONAL COURT FOR DECISION.

1. In Rol No. 3729, and pursuant to article 93, first paragraph, No. 3 of the Constitution, a group of senators - who represent more than a quarter of the members in office of the Senate -- has claimed the unconstitutionality of a series of precepts of the Bill, originated in a Message of H.E. [President] of the Republic, which regulates the decriminalization of voluntary interruption of pregnancy on three legal grounds (Bulletin N ° 9895-11).

The provisions objected, already reproduced in the Expositive part, are the following:

- **Article 1 ° N ° 1, first paragraph, numerals 1), 2) and 3)**, authorizing the interruption of a pregnancy by a surgeon, mediating the will of the woman:
a) If the woman is at risk to life, so that the interruption of pregnancy prevents a danger to her life (first ground);
b) If the embryo or fetus has a congenital pathology, acquired or genetic, incompatible with independent extrauterine life, in any case of lethal character. (second ground), and
c) If the pregnancy is the result of a rape, provided that no more than 12 or 14 weeks of gestation have elapsed according to whether the rape has affected a woman who is over or under the age of 14 years old.

- **Article 1, paragraphs 2 to 14**, except for the two final sentences of the paragraph 13 which begin with the expressions "The mother can always request (…)", which regulate the necessary mechanism so that the three aforementioned grounds can operate. Specifically, they allude to the manifestation of a woman's will (including the case of people with disabilities who have been declared incapable or not), either directly by her, by her legal representative or through substitute judicial authorization. They furthermore include the duty of the health provider to truthfully inform the woman about the characteristics of the medical service leading to the interruption of pregnancy, of the alternatives to this interruption, and the available support programs, whether social or economic, or for adoption purposes. The accompaniment program is also detailed and regulated in these precepts.

- **Article 1 ° N° 2**, which refers to the necessary medical diagnoses so that the voluntary interruption of pregnancy can operate in the three abovementioned grounds, specifying a series of additional aspects related to the complaint and procedure applicable to the crime of rape when it comes to the third ground.

- **Article 1 ° N ° 3**, which regulates the conscientious objection that can be raised by both the surgeon required to interrupt the pregnancy and the rest of the professional staff who would participate in this act inside the surgical pavilion. The institutional conscientious objection is excluded.

- **Article 1 ° N ° 4**, which prohibits the advertising of procedures or establishments where the interruption of pregnancy is performed.

- **Article 2**, which replaces article 344 of the Criminal Code to adapt it to the new regulation.

- **Article 3**, which modifies Law No. 19,451 on transplant and organ donation, and

- a **Transitory article** which regulates the period of time in which the health benefits associated to the voluntary interruption of a pregnancy are due and the form of financing for the system that is associated with these benefits;

2º . The constitutional infringements denounced in this first petition have to do with articles 6º, 7º, 19º, No. 1º, second paragraph, and No.2° of the Constitution;

3º . In Rol No. 3751, and under the same Article 93, first paragraph, No. 3 of the Constitution, a group of Representatives - representing more than the fourth part of the current members of the Chamber of Representatives- has demanded the [delclaration of] unconstitutionality of the same precepts of the abovementioned Bill , with the exceptions indicated below:

- In the case of **article 1 ° N ° 1, paragraph 13**, they contest that part which, near the end of this provision, states that "A mother will always have the right to" (request that the accompaniment be granted by institutions or civil society organizations who are duly accredited by a supreme decree issued by the Ministry of Health).

- In **Article 1 ° No. 2, the fifth paragraph** refers to the obligation of heads of hospitals or private clinics to bring to the attention of authorities the crime of rape perpetrated against a woman over the age of 18. Likewise, **seventh paragraph** of this article has to do with both the always voluntary appearance of the victim in legal proceedings in those cases where the crime of rape is being prosecuted and the prohibition of decreeing enforcement measures against it.

The constitutional norms that are deemed to be transgressed by the indicated precepts of the Bill are article 1º, paragraphs three and four; article 5º, second paragraph; article 6º, second paragraph and 19, Nºs 1, first and second paragraphs, 2º, 6º, first paragraph; article 15º, first paragraph and article 26º of the Constitution;

4º. As opposed to what was ruled by the majority of this Court, these dissenting Judges appreciate that the fundamental principle of the various objections contained in both petitions centers on the fact that, by regulating the disputed Bill - via a new legal right (provision of health services) - the interruption of pregnancy based on the free will of a woman, the right to the life "of one that" is yet to be born, ensured in article 19 N ° 1 of the Political Constitution, is violated. By proceeding in that way, the Legislature would transgress the duty imposed by the same constitutional norm of providing protection to the *nasciturus* [the one to be born*];*

II. PRELIMINARY CONSIDERATIONS OF THIS VOTE.

5. Coinciding with the majority in this ruling, it does not escape the consideration of these Judges that the matter that has been brought before this Constitutional Court has multiple connotations (ethical, cultural, social, medical). However, the decision reached must be based on strict considerations proper to the Law of the Constitution (using here the expression of the Constitutional Chamber of the Supreme Court of Costa Rica), not the one that we would like to read but the one in force. This perspective is consistent with the nature of a court of law even when this court must resolve issues rooted in diverse convictions from the aforementioned perspectives.

At the same time, to interpret the Constitution is not the same as to interpret any law. As Guastini states, "The very existence of a (broad) bibliography on constitutional interpretation strongly suggests that the interpretation of a constitutional text is something decidedly different from the interpretation of other legal texts (the law, in particular): it is assumed that the interpretation of the Constitution demands special methods, different from those that are normally used in the interpretation of the law. " (Riccardo Guastini, [*Theory and ideology of the Constitutional interpretation*]. Editorial Trotta, 2008, pp. 53-54)

Hence, bearing in mind the very nature of the Constitution whose violation has been reported in these proceedings, the reasoning contained in this dissenting opinion will be based, in particular, on the following principles of constitutional interpretation: a) Constitutional supremacy; b) the unity of the Constitution; c) the normative force of the Constitution; d) interpretation in accordance with the Constitution; e) rationality and reasonableness; and f) proportionality or prohibition of excess;

6º. Going straight to the analysis of the disputed Bill, it should be noted that, in the legal notification to Her Excellency the President of the Republic, it has been emphasized that "the challenged Bill was extensively debated in the National Congress" during its more than two years of processing, reaching a high degree of consensus, combined with broad citizen approval (pages 330 and 331). Such a circumstance would force this Magistracy to be particularly deferential to the Legislature through the "presumption of constitutionality of the law" (pages 331).

The response submitted by the Chamber of Representatives, in turn, also refers to this deference, and to the presumption of constitutionality in which it is expressed arguing, moreover, that "the control of Constitutionality cannot replace the political control and the social control of power." (page 324);

7º. In this regard, these dissenting Judges want to make clear that the abstract control of constitutionality that they exercise today does not ignore either the presumption of constitutionality of the law nor the necessary deference to the work of the Legislature, long-established principles in the jurisprudence of this Court. (Eugenio Valenzuela Somarriva, ["Constitutional interpretation criteria applied by the Constitutional Court. In: *Notebooks of the Constitutional Court]* No. 31, 2006, p. 35 and following).

On the contrary, the control activated as a consequence of the presentation of two parliamentarian petitions about the Bill that is before us today, is inserted within the system of checks and balances that is typical of the Rule of Law (STC Rol N ° 681, considering 7º). Furthermore, it is a control aimed at making effective the principles of constitutional supremacy and of direct binding of the precepts of the Constitution with respect to every organ of the State, including the Legislature (article 6º, paragraphs first and second, of the Constitution);

8 °. Respect for constitutional supremacy which the Constitution requires of all organs of State in the first paragraph of Article 6º of the Constitution acquires a special relevance when fundamental rights are compromised. As Luigi Ferrajoli states, "the subjection of the judge to the law is no longer, as in the old positivist paradigm, subject to the letter of the law, whatever its meaning, but, rather, subjection to the law as valid; that is, coherent with the Constitution. And, under the constitutional guarantor model, validity is no longer a dogma associated to the mere formal requirement of the law, but, rather, to a contingent quality of it, linked to the coherence of their meanings with the Constitution, coherence that is more or less debatable, and always subject to the valuation of the judge. It thus follows that the judicial interpretation of the law is also always a judgment on the law itself, and the judge has to choose the only valid meanings; that is, those **compatible with the substantive constitutional norms and with the fundamental rights established by them.** "(Emphasis added). ([*Rights and guarantees - The law of the weakest.]* Editorial Trotta, 2010, p. 26).

Therefore, and following the same author, *"No majority, not even unanimously, can legitimately decide the violation of a right of freedom or not decide the satisfaction of a social right."* (Ibidem, p.24).

On the same idea, *"we can say that beginning with the configuration of the democratic State of law or the constitutional democracy, the rule of the majority stopped being a simple numerical valuation to become a dual principle of protection, as it is both the majority and minority, in so far as both the activity of the most and the activity of the least, is subject to the respect and guarantee of rights, values and principles enshrined in the Constitution of each State. "*(Jorge Alejandro Amaya, [*Control of the constitutionality of the law*] 2nd edition, Editorial Astrea, Buenos Aires, 2015, p. 85);

9 °. Consequently, the statements expressed in this process by two of the co-legislating organs do not agree with the validity of an authentic Democratic Rule of Law where the opinion of the majorities is subordinated to the unrestricted respect of the fundamental rights that are not created, by the way, by the Constitution, but simply recognized and ensured by it. This statement is based on the fact that fundamental rights are the recognition, in a positive legal order, of those rights inherent to the human being as such.

For the same reason, in the decision Rol N ° 740, this Court stated that the meaning of the verb "ensure" [*asegurar*], contained in the heading of the constitutional article 19 means: "a) that it can only be ensured what previously exists; b) that the security that the Constitutional Assembly wishes to provide to the rights it recognizes implies to stop any transgression or violation that, beyond the limits set out in the Charter, can experience such rights, as well as to prevent any threat or imminent danger that can affect them; and c) that all the necessary mechanisms must be designed and implemented to provide effective protection, to both the entitlement to those rights as well as their exercise."(considering 47º);

10 °. There is no doubt, then, that our Constitution has embraced a constitutional guarantor conception. This is reinforced by the duty imposed on State organs to respect and promote the essential rights emanating from human nature, guaranteed by both the Constitution and the international treaties ratified by Chile and that are in force (article 5º, second paragraph);

11 º. In this way, those who subscribe to this dissenting opinion will look at the trial that has been required of this Constitutional Court from a strict fundamental rights perspective, such as those rights that recognize life and protect the physical and mental integrity of any woman, as well as those which protect the life of the weakest and most vulnerable of human beings: the unborn.

The aforementioned statement takes on all its relevance if it is agreed that the only way in which the decision of the Legislature --embodied in the Bill that is being examined -- will acquire democratic legitimacy, consists of whether it has a rational foundation from the perspective of the concerned fundamental rights. Following Luis Prieto Sanchís, "(…) the fundamental rights in the constitutional State are characterized by presenting a special force or legal resistance against the Legislature and, in general, against public powers. This resistance is basically translated into the requirement of justification of any limiting measure, a requirement that curtails the political discretion of the Legislature and adds a **supplementary element of legitimacy**: in terms of freedoms, even the constitutionality or validity of a law does not reside only in the principle of competition(…) but it also requires a material or substantive respect to the content of rights, respect that ultimately **implies a requirement of rational foundation of the legislative decision.** "(*Fundamental rights, neoconstitutionalism and judicial pendency*. Editorial Palestra, Lima, 2007, pp. 75-76);

12°. For the reasons expressed, this dissenting opinion will affirm that this Bill that regulates the decriminalization of the voluntary interruption of pregnancy based on three legal grounds lacks the due

rationale to justify the violation of the right to life of the unborn and, particularly, the Legislature's violation of its constitutional duty to protect such a right. Thus, it is necessary to refer, in the first place, to the constitutional conception of the person and the entitlement of the right to life under the terms enshrined in the Constitution.

III. THE CONSTITUTIONAL CONCEPT OF THE PERSON.

13 °. The Universal Declaration of Human Rights, of 1948, points out, in its article 1º, that: "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood." It adds, in the first paragraph of its article 2º, that: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.";

14 °. In light of the aforementioned Declaration, it is worth asking who fundamental rights holders are.

Among us, it has been pointed out that this entitlement (to human rights) is associated with "the definition of those right holders who are legally enabled to invoke, as defense titles, all or some of the rights and freedoms recognized in art. 19 of the constitution." (Manuel Núñez, ["Entitlement and passive subjects of fundamental rights." In: *Journal of Public Law*,] Vol. 63, Volume I, 2001, p.200);

15º . From that concept, scholarship has given the entitlement of fundamental rights to the "person" as an individual of the human species.

Thus, Carlos Nino has maintained that "Given **the quality of a human being the aforementioned circumstance, which serves as a sufficient condition for all these rights**, all men have an equal title to these rights (unless it is held, as some supporters of slavery and abortion have considered, that humanity is a quality that can have various degrees). " (Emphasis added) (Quoted by Humberto Nogueira Alcalá, [Fundamental rights and constitutional guarantees.] Volume III. Editorial Librotecnia, Santiago, 2007, p. 47).

Humberto Nogueira argues, on the other hand, that "entitlement to rights is independent of age and legal capacity, even the "one yet to be born" is holder of the right to life. " (Emphasis added). (Nogueira, Op. Cit., P.48).

Eduardo Aldunate adds that "first of all, fundamental rights arise as rights of every individual of the human species. ";

16 °. What has been said finds perfect connection with what is prescribed in the article 25 of our Civil Code: "The words man, person, child, adult and similar related terms **apply to individuals of the human species** without distinction of sex (…). "And with what is prescribed in article 55 of the Civil Code: "Persons are **all individuals of the human species,** regardless of their age, sex, lineage or condition. They are divided into Chileans and aliens. "(Emphasis added);

17 °. Jurisprudence has followed suit.

In its sentence of 27 July 1994, the French Constitutional Council recalled that in the Preamble of the 1946 Constitution - which is an integral part of the constitutional block-, after the victory of the (French) Revolution, the French people proclaimed the novelty that **every human being**, regardless of race, religion or difference, is entitled to several inalienable and sacred rights, proclaiming, also, that

safeguarding the **dignity of the human person** against every form of enslavement and degradation is a principle of constitutional value. (Decision 94/343DC, cons. 2, p. 100). (Emphasis added).

The Federal Supreme Court of Brazil, meanwhile, has stated that "[When] the Great Federal Text refers to 'rights of the human person' and also to 'individual rights and guarantees' as a petrified clause, it is talking about **rights and guarantees of the individual person who has become the recipient of the fundamental rights** to life, freedom, equality, security and property, among other rights that are equally distinguished with the stamp of fundamentality (like the right to health and family planning) ".(ADI 3.510, Rel.Min.Ayres Britto, julgamento em 29-5-2008, DJE Plenary on 05-28-2010). (Emphasis added);

18 °. If, in the light of these doctrinal, legal and jurisprudential precedents, a person is every individual of the human species, it is worthwhile to specify, for the purposes of this pronouncement, what is the scope of the term "person" used in Article 19 Nº 1º of the Constitution, in direct connection with Article 1º, first paragraph of the Constitution, given that the Constitution must be interpreted as a unit which means that "no normative statement of the Fundamental Charter can be analyzed and interpreted exclusively on its own. "(Nogueira Alcalá, Humberto. [*Guidelines of constitutional interpretation and constitutional block of rights*.] Editorial Librotecnia, Santiago, 2006, p.114).

In this regard, it is necessary to highlight the change in the wording of the article intended to ensure constitutional rights since the 1925 Charter to the one that governs us today.

As it is known, Article 10 of the 1925 Constitution had a heading that stated: "The Constitution grants to all **inhabitants of the Republic**." Article 19 of the current Charter states: "The Constitution grants to all persons."

In the document "Goals or Fundamental Objectives for the New Political Constitution", the Commission to Study the New Constitution affirmed that the constitutional regulation to be developed would be founded, among other aspects, in "the affirmation that the essential rights of men are based on the attributes of the human person and they do not come from the recognition given by a certain State, being, therefore, prior and superior to all legal order."

In Session No. 156ª, October 7, 1975, and as a proposal of the Subcommittee on Studies of the Law of Property, it was discussed the change in wording of Article 10 of theCharter of 1925 to which is now read in Article 19 of the current Constitution. In that debate, it was recorded that it was about to overcome the dialectic effort that implied the expression "inhabitants of the Republic ", which also circumscribed its spatial scope of application. Thus, José María Eyzaguirre called for the "use of the word "persons", who are **the real right holders** and which has a much clearer philosophical connotation than the term "inhabitants", given that a person is a human being that is endowed with much greater significance than an inhabitant."

When its turn came, in the reform debate of Constitutional Law Nº 19,611, which modified Article 1º, first paragraph, and Article 19, Nº 2º of the Charter, to expressly accept equality between men and women, it was explained that the word "person", which was suggested for the first of these Articles "corresponds to a neutral legal technical language (…) which is, precisely, the one that the Constitution uses in Article 19, which has "persons" as holders of the rights that the same Article enshrines. "(Statement by Senator Hamilton. *History of Law* No. 19,611, p. 96)

Hence, in the conception that explains the heading of Article 19 of the Constitution (and which also explains Article 1º, first paragraph), "person" is equivalent to "rights holder";

19º Following the same line of argument, it should be recalled that this Court has interpreted Article 19 of the Constitution -- "The Constitution grants to all persons "-- in the decision Rol No. 740, in 2007. Likewise, in the same ruling, it interpreted the scope of the right to life, following the reasoning previously made in the decision Rol N ° 220;

20º. The aforementioned statements constitute, undoubtedly, an obligatory reference to solve the present constitutional conflict, and, although in Chile there is no mandatory precedent system, it is not less true that, according to general rules, this Court cannot deviate from its doctrine set out in previous judgements. This statement only yields if the same Court provides, in a new judgment, arguments to detract from or to overcome what has already been reasoned. Indeed, even though the Constitutional Court should be open to adapt constitutional norms to new social realities, "the modifiability of the jurisprudential doctrine of the Constitutional Court has, however, the conditioning of its reasoning; every modification must be made explicit and must be reasoned in such a way that its ability to adapt (to new social realities) is subject to an elementary imperative of legal security **and to guarantee and show loyalty to the principles enshrined in the Constitution.** " (Emphasis added) (María Asunción García Martínez, [*The control of constitutionality of the laws*.] Jurist editors, Lima, 2005, p. 300).

As will be shown, the majority's decision does not deliver sufficient arguments that might invalidate what was reasoned and decided in decision Rol N °740. It should be recalled, however, that the conflict settled by this decision only involved the violation of the right to life of the unborn, as a consequence of the free distribution of a drug to which abortive effects were attributed, with no relationship with other fundamental rights concerned;

21º . The present constitutional conflict differs from the one that has been indicated, given that the challenged Bill presents an apparent collision between rights granted to different holders: the mother, on the one hand, and the creature who is in her womb, on the other, and which is solved by the Legislature in favor of the former;

22 °. H.E. the President of the Republic has affirmed, when responding to the legal notification of these proceedings, that "It should be considered that the Constitution distinguishes people from embryos or fetuses " recognizing a different status for both " (page 351) adding that "persons are the ones who hold the right to life and the right to physical and mental integrity and the unborn has a different status from those who have personhood. This is so because the Constitution explicitly mentions "the unborn", not including it in the category of person, together with the fact that "unborn" is mentioned in a different paragraph within the same article. Everything indicates that this is a special case "(pages 351 and 352).

Notwithstanding that in the chapter that follows we will address the constitutional status of "the one" unborn, it should be noted that the appreciation of our Head of State is based on a doctrine that distinguishes between person as holder of fundamental rights and the holder of a mere "right of protection", pretending to see a conceptual difference between the first paragraph and second paragraph of Article 19 of the Fundamental Charter, which has no basis in our constitutional law.

Eduardo Aldunate is a scholar who points out that the unborn is excluded from the quality of person (in accordance with the traditional position of our Civil Law, and according to the moment of birth established in Article 1º, first paragraph, of the Constitution). In his opinion, the unborn "only holds the right of protection provided by this article. To claim that an individual has the quality of person from the moment of conception is sustainable from an extra-juridical point of view, but it does not seem to find foundation in the structure of art. 19. " (["The entitlement to fundamental rights." In: *Constitutional Studies*] Year 1, No. 1, 2003, p. 191);

23°. The thesis supported by the President of the Republic i.e. that the unborn --or nasciturus-- would lack entitlement to fundamental rights because he/she is not included in the constitutional conception of person identifies with the legal conception of person followed by the Civil Code. In this context, and during the public hearings held during the substantiation of the present constitutional process, there were voices claiming that 'person' does not include "the one who is conceived" and "the unborn" so that he/she is not a right holder (Camila Maturana for Corporación Humanas), starting to be a person only at the time of birth. Such assertion was based on Article 74 of the Civil Code;

24 °. That the forced attempt to identify "constitutional conception" with the simply "legal conception" of the person fades away if careful attention is paid to the history of the constitutional amendment of June 1999 (Law No. 19,611), which enshrined equality of rights for men and women, thereby replacing, in the beginning of Article 1º, first paragraph, of the Constitution the term "Men" for "Persons" (who are born free and equal in dignity and rights);

25 °. That, precisely, in the debate held during the first constitutional process of that amendment, in the Constitutional Committee of the Chamber of Representatives, it was warned, among other observations and comments, that "the proposed formula, to the extent that it maintains the verb "to be born" is imperfect, because it could be argued that, after birth, men and women would stop being equal." ([*History of Law*] No. 19,611, page 14).

On the other hand, during the ratification of this amendment by the Full Congress, the President of the Senate, senator Andrés Zaldívar, said that "dictionary provides the following definition of "person": 'Individual of the human species.' Therefore**, one is a person from the moment of conception or gestation**. And the rights of the individual are protected by constitutional norms. Furthermore, according to the second paragraph of Article 1 of the Charter, the law must also protect the life of the unborn. "(Emphasis added). ([*History of Law*] No. 19,611, page 246).

Senator Hernán Larraín manifested, in identical sense, that "some concerns have arisen regarding the use of the word "persons" together with the verb "to be born", which could lead in the future to a wrong interpretation of the will of the drafter of the Constitution. Thus, someone could understand that, as a result of this new wording, the acknowledgement of "person" of the human embryo would be removed before his birth. And if it were so, the path would be cleared for those who support the interruption of pregnancy or the legalization of abortion so they could take hold of this wording, as if the fetus were not a human being."

He added that "in the Upper House itself, before a motion presented by the Honorable Mr. Bombal aimed to clarify the sense in which this new wording had to be interpreted, in my capacity as Chairman of the Constitution , Legislation, Justice and Regulation Committee of the Senate, I pointed out that it was entirely evident that in the amendment introduced there was no innovation regarding the meaning that the current constitutional provision has in this matter, since the change sought to enshrine the essential equality between men and women, and not to change the nature of the being that is found in the maternal womb. This interpretation is subscribed by Article 19, number 1), second paragraph, of the Constitution when it provides that 'The law protects the life of the unborn', which constitutes an explicit acknowledgement of the existence of a 'living being' in the maternal womb and one that the law should protect." He ends by stating that "**the author of the Constitution has not intended, under any circumstances, to modify, ignore, reduce or suppress the acknowledgement of constitutional personality that our legal order confers in a unequivocal way to men and women from the very moment of conception, that is, from the moment at which life starts**. " (Emphasis added) ([*History of Law*] N °19.611, p. 29)

26º The various records included in the process of ratification of the mentioned constitutional amendment - of which only some have been extracted for supporting the central argument of this vote – demonstrate that the revisers of the Constitution understood that the person, as a right holder, does not begin at birth but before: at moment of conception.

The detractors of the legitimacy of the current Constitution could hardly refute an argument consolidated in full force of our democracy, before the Full Congress, and with regard to such a goal according to human dignity as it is to enshrine, in the text of the Constitution, the equality between men and women;

27 °. What has been explained only confirms what was explained during the public hearings held in these proceedings in the sense that the "legal" existence of the person, marked by his birth, and mentioned by Article 74 of the Civil Code, only refers to the consolidation of its patrimonial capacity (intervention by Professor Hernán Corral for the Chile Siempre Foundation). Precisely, the mandatory content of Article 77 of the Civil Code indicates that "The rights that would be deferred to the creature that is in the maternal womb, if it were born and alive, **will be suspended until the birth takes place**. And if the birth constitutes a principle of existence, the newborn will come to enjoy these rights, as if he had existed at the time when the rights were deferred. In the case of Article 74, paragraph 2º, these rights will pass to other people, as if the creature had never existed. " (Emphasis added).

In addition, and as indicated by Professor José Manuel Avilés, who spoke on behalf of the Luis Claro Solar Foundation, it is not possible to interpret the Constitution using legal norms, such as Law N° 20,584, which regulates the Rights and Duties that persons have in relation to actions linked to their health care, nor using the opinions that some members of the Commission for the Study of the New Constitution manifested in isolation when discussing the regulation of the right to life;

28 °. As a result, the 'constitutional conception of the person' cannot be confused or identified, in so far as a person who is holder of fundamental rights, with the 'legal conception of the person', as a person who is holder of subjective rights, especially, patrimonial rights.

And it should not be overlooked that fundamental rights can coincide, in some cases, with subjective rights, but the former demand something else. So, to have the character of fundamental rights these rights must be encased in formal and material properties which not all subjective rights have, because, apart from being entrenched in a positive source (the Constitution or international treaties on human rights), fundamental rights protect moral faculties of the person, his capacity for discernment or for satisfying his basic needs (such as food) and these rights ensure equality in the exercise of the faculties derived from the respective fundamental right (Carlos Bernal Polished, ["The fundamental nature of fundamental rights." In: Clérico, Laura; Sieckmann, Jan-R and Oliver-Lalana, Daniel. *Fundamental rights, principles and argumentation: Studies on the Legal Theory of Robert Alexy*] Granada, 2011).

IV. THE RIGHT TO LIFE OF THE UNBORN.

29 °. Article 19 No. 1º, paragraphs first and second, of which infringement has been reported in these proceedings, with regard to the Bill that regulates the decriminalization of the voluntary interruption of pregnancy on three grounds, points out that: "The Constitution grants to all persons: "1. The right to life and the right to physical and psychological integrity of the person. The law protects the life of the unborn.";

30 °. A quarter of the Representatives wonders: "What is the reason, then, that it has been deemed by some authors that Article No. 1 ensures the life of people who are born in its first paragraph, with the

weight of the Constitution, and it would only legally protect the "unborn" in its second paragraph? In other words, is this a case of differentiated protection and/or one of different rank? " (Fojas 50).

The answer to that question is clear: there is no sustainable difference between the first and second paragraphs of the aforementioned Article 19, No. 1 since both have to do with the right to life (and the right to physical and psychological integrity) of "persons";

31 °. As already shown, our Constitution grants fundamental rights to "all persons ", a concept that, after the 1999 constitutional amendment (Law No. 19,611), unequivocally includes every individual of the human species, including "the unborn". This is demonstrated through the intervention of Senator Hernán Larraín who, during the second constitutional procedure of this amendment, expressed that the exchange of the expression "men and women " for "persons ", in the first paragraph of the Article 1 of the Constitution, "does not alter the search for equality as the central objective of the initiative and does not change the notion about the term "person " which, within the legal tradition, **includes the unborn as a right holder . "** ([*History of Law]* No. 19,611, page 154) (Emphasis added).

Furthermore, Senator José Antonio Viera-Gallo agreed with a proposal raised in the sense of using the word "persons" in Article 1° of the Constitution and to incorporate the differentiating words of "man" and "woman" in Article 19 of the Constitution. In this regard, he highlighted that "the Constitution author uses these same terms, in the aforementioned provisions and in others, as well as other concordant expressions, for example, "nobody", "the one", "every person", "every individual", "every inhabitant", "anybody", "every natural or legal person"". ([*History of Law]* No. 19,611, page 97);

32 °. Consequently, the fact that the second paragraph of Article 19 No. 1 of the Constitution provides that "The law protects the life of the unborn" does not introduce a substantive difference with the first paragraph of that same norm which grants to "all persons "the right to life and the right to physical and psychological integrity. To put it in other words, the special mandate or specific authority conferred on the Legislature does not alter the entitlement to the fundamental right to life and the right to physical and mental integrity that is granted to "every person", including the unborn child. On the contrary**, it is about a specification of the constitutional protection of life** that acquires a special dimension of protection because the holder of the right is especially vulnerable, he is still under development and he cannot express his will;

33 °. In the same sense that it has been expressed, the Constitution grants to "all persons "the right to legal defense as part of the equal protection of the law in the exercise of rights (Article 19 No. 3, first paragraph, of the Political Constitution). The Supreme Law specifies that "the law will arbitrate the means to grant advice and legal defense to **those who** cannot ensure them on their own"(article 19, No. 3, third paragraph, of the Political Constitution).

Meanwhile, Article 20 of the Constitution gives legal standing to "the one" who, by arbitrary or illegal acts or omissions, suffers deprivation, disturbance or threat in the legitimate exercise of the rights and guarantees mentioned therein.

No one could seriously argue that each of these constitutional norms does not refer to holders of fundamental rights because they do not repeat what Article 19 says: **"all persons".** Contrary to what has been claimed by counsel Alfredo Etcheverry, in the courtroom, who argued that the expression "the one

to be born " , inserted after the heading "the Constitution grants to all persons ... ," should have said that the law protects the life of **THE ONE to be born** (that is, the elided noun (sic) or underlying noun "person"), an argumentative move that is justified, instead, in the Civil Code where the one to be born is not yet expressly considered legally a person. " (Minute of allegation, pp. 5 and 6). On this point we also disagree with the majority of this Magistracy;

{p.156}.

34º. Although it would suffice to mention the records contained in the process of the constitutional amendment of the year 1999 to dismiss all insinuation that the right to life is not granted to the unborn, as a holder of fundamental rights, let us recall that prior jurisprudence of this Magistracy, contained in decision Rol N °740, came to the same conclusion.

Indeed, in that decision, it was held that "it is clear that, for the Constitution author - and in contrast to the examination that can be derived from specific legal norms -- the embryo or nasciturus is a person from the moment of conception" (considering 54°).

The recalled jurisprudence agrees with the one emanating from the European Court of Human Rights which has never closed the door for the unborn to be considered as a person for the purposes of the protection of Article 2 of the European Convention, and on the other hand, the Court has maintained **a wide margin of appreciation** so that each State may take its own position with reference to the beginning of human life and, consequent, personhood. Example of this are the rulings of *Vo vs. France* (2004) and *A, B and C vs. Ireland* (2010), in which the Court has dismissed the existence of a European consensus around an alleged right to abortion (referred to in the Law Report of professor Francisco Orrego Vicuña, accompanied to these proceedings, p. 10).

It can be observed, then, that the thesis of the famous decision in *Roe vs. Wade*, of the Supreme Court of Justice of the United States (1973) -- cited in the majority vote-- and in which the controversy about when life begins is one that has not reached a definitive answer by philosophy, theology or science, so that the U.S. Supreme Court could not speculate about it, has been rightly superseded in our era;

{p157}.

35 °. Based on what has been expressed and being irrefutable to affirm that, in our Constitution, the human being is a holder of fundamental rights from the very moment when he is conceived, it is necessary to ask: What is the nature of the mandate given to the Legislature in the second paragraph of Article 19 N ° 1 of the Constitution?

This is decisive to specify in this conflict, since the action brought by a quarter of the senators argues that "the base of this petition is to request the declaration of unconstitutionality of Article 1 ° No. 1 paragraph 1º of the Bill, as it admits three grounds of direct or induced abortion - called voluntary interruption of pregnancy- that stand against the duty that the Constitution has imposed to the law in Article 19 No. 1, paragraph 2, in order to always protect the life of the unborn, in relation to what is provided in Article 6º and Article 7º of the Fundamental Charter and, also, because it violates what is provided in Article 19 No. 2 of the Constitution. "(Fojas 9);

36 °. As has been recalled, for H.E. the President of the Republic, what would be enshrined in the second paragraph of Article 19 No. 1 of the Constitution would simply be the "duty of protection" of the life of the unborn, which is not the same as to state that [Article 19 No 1) grants a entitlement to the fundamental right to life. On this point, and in public hearings, it was common to hear that this interpretation would be supported, among other precedents, in what has been ruled by the German Constitutional Federal Court, in its 1975 and 1993 decisions (interventions made by Professors Cristián Riego, from ANAMURI A.G.

and APROFA and Verónica Undurraga, from the Association for the Rights of the Diversity Breaking the Silence and the Trade Association of Women Lawyers, as well as by Nicolás Godoy, from Alameda Foundation). Specifically, reference was made that, in its 1975 decision, the German Court ruled that there was no need to solve the question -– a controversial question in both the jurisprudence and the scientific literature -- of determining whether the nasciturus, as such, is a holder of fundamental rights, or if, due to a lack of legal capacity, the right to life of the nasciturus is protected "only" by objective constitutional norms (Chapter I, 3 of the judgment of the First Chamber, 25 February 1975).

In this regard, it should be borne in mind that the Fundamental Law of Bonn, 1949, does not have an identical provision in terms of the right to life to the one included in our Political Constitution. In fact, Article 2. (2) of the Fundamental Law of Bonn states that: "Everyone has the right to life and to physical integrity. The freedom of the person is inviolable. These rights can only be restricted under the law. "

From a comparison between this text and that of Article 19 No. 1, second paragraph, of the Constitution, it can be appreciated that they are not identical. Indeed, the German Constitution does not contain an order or specific authorization to the Legislature like the one included in the second paragraph of article 19, N ° 1: "The law protects the life of the unborn."

37 °. In addition, the decision of May 28, 1993, of the same [German Constitutional] Court, stated that: "In the present resolution, there is no need to decide whether human life already begins with the fusion of a ovum and a spermatozoon, as suggested by the scholarship provided by medical anthropology" (Chapter I, No. 1, a)) to further develop, to a greater extent, the duty of protection of the life of the unborn.

At this point, we cannot put ourselves in a similar position as the one described in the German precedent, since in decision Rol No. 740 it was argued that "if, at the moment of conception, there emerges an individual who has all the necessary genetic information for his development, becoming a human being different and completely distinguishable from his father and his mother – as already argued in these proceedings-- it is possible to argue that we are dealing with a person who is a right holder. The singularity that the embryo possesses from the time of conception enables us to see it as a unique, unrepeatable human being that deserves, from that very moment, the protection of the law and it cannot be subsumed in another entity, let alone be manipulated without affecting the substantial dignity that he already enjoys as a person "(considering 50°).

In this way, this Court has taken a position on the question of when life begins and, therefore, on the entitlement of the right to life which has not been refuted in the present constitutional process. The arguments of Dr. Juan Larraín, representing the Pontificia Universidad Católica de Chile, that with fertilization a new genome is produced, thus starting the formation of the nervous system of a new individual of the human species, and thereby revealing, also, evidence of human organization within two days after fertilization, were categorical in confirming what this Court had already ruled in its decision Rol N ° 740. With this. it was demonstrated that the moment of the beginning of life has a scientific-medical basis and it cannot be determined by conventional definitions of cultural nature or any another order outside of science;

38 °. Having clarified that the order given to the Legislature by the Constitution author in Article 19 N° 1 °, second paragraph, of the Constitution does not consist of a mere "duty of protection" disconnected from the entitlement to the right to life of the unborn as a person or right holder, it is now necessary to analyze the nature of that order;

39 °. For these purposes, we must inevitably turn to the Original Constitution author; in one of its stages -- that of the Commission of Studies of the New Constitution-- it was expressed that "if the right to life is going to be enshrined, there must be enshrined, as well, the right to the life of the unborn, but

leaving a possibility open for the Legislature that, in the future, as required by social conditions, it may, under certain circumstances, proceed with certain flexibility" (Intervention of commissioner Jaime Guzmán in Session N ° 84, of November 4, 1974, p. 44). This was due to the various understandings of other commissioners, such as Enrique Ortúzar and Jorge Ovalle, mentioned during the debate about leaving the possibility open for the Legislature to allow abortion in certain cases;

{p.161}

40 °. Consequently, it cannot be ignored that the Constitution author gave a command or authorization to the Legislature, that is stated positively rather than in a negative way, to "protect" the life of the unborn as a holder of the right to life. Neither can be ignored the fact that the Constitution itself did not specify the form in which such an order must be fulfilled, leaving the field open to legislative discretion. This leads us to ask the question whether the Legislature is affected by some kind of limitation at the moment of fulfilling such an order or, on the contrary, the Constitution does not constrain the Legislature in any way;

41 °. The response to this question, is necessarily positive. Indeed, the order made to the Legislature, in the second paragraph of article 19 N ° 1°, is subject to important limitations:
a) The first limitation comes from the very nature of the verb used in that constitutional provision: "to protect". As the former President of this Court, Raúl Bertelsen, pointed out during the public hearings held in the course of this process, "to protect is not simply to respect, which is a passive activity that does not harm, 'to protect' demands something else, and, sometimes, it demands much more. It obliges to safeguard, to defend, especially the weak, against those who attack them and even make an attempt on their lives."

Strictly speaking, the Constitution author could have omitted this order [to protect the unborn] that was commented, upon, yet this order would have existed because article 5º, second paragraph, of the Constitution, amended in August 1989, imposes on the organs of the State (including the Legislature) the duty to "respect" and "promote" the essential rights that emanate from human nature (like the right to life) enshrined in the Constitution and international treaties ratified by Chile and that are in force. The duty to "respect" coincides with what is prescribed in Article 1º of the American Convention of Human Rights (1969) because it supposes an obligation not to hinder the free and full exercise of **the rights acknowledged to every person who is every human being**. The duty to "promote", for its part, coincides with article 2º of the same Convention, as it implies adopting all the necessary measures to make such rights effective, removing any obstacle that prevents their free exercise.

Then, "to protect" the life of the unborn, in the terms on which this duty has been incorporated into the Constitution has a close relationship with the duty to "promote" the right of the unborn. Indeed, to provide protection implies a need for the Legislature to adopt all the necessary measures to protect the life of the nasciturus in its state of vulnerability, which excludes to put him to death, since nobody can reasonably understand that to protect means to kill the protected person (Professor Raúl Bertelsen´s aforementioned intervention).

b) The second limitation comes from what is prescribed in Article 19 No. 26º of the Constitution which guarantees to all persons: "The assurance that the legal norms that by mandate of the Constitution regulate or complement the rights established therein or limit such rights in cases where the Constitution authorizes it, cannot affect rights in their essence, or impose conditions, taxes or requirements that prevent their free exercise. " (Emphasis added).

In this way, the exercise of the legal reserve in what refers to the protection of the life of the unborn cannot deprive the right of what is consubstantial to it in such a way that it ceases to be a right recognized by the legal order, nor can it subject the right to requirements that make it unrealizable, that go beyond what is reasonable or deprive it of legal protection (STC rol No. 43 and 200).

{p. 163}.

In other words, it means not to affect the core of the aforementioned right that is not at the disposal of the Legislature [it cannot be altered by it]. This core comes from the very nature of the right to life which prevents any attempt on it, except in those cases where the same Constitution authorizes it, as in the case of the death penalty (limited today to the scope of the military justice).

Thus, in the fulfillment of its duty, the Legislature cannot create a normative development which completely suppresses the right to life.

On the other hand, the terms in which the legislative authorization is designed in article 19 N° 1 does not allow restrictions on the right to life of the unborn, as it happens, for instance, with the right to property for reasons of social interest;

42 °. From all that has been expressed, it can be concluded that, in no case, does the fulfillment of the mandate conferred upon the Legislature in the second paragraph of Article 19 of the Supreme Law give a "wide margin of discretion" (pages 356 of the letter of transfer of H.E. the President of the Republic);

V. THE CONFLICT BETWEEN THE RIGHT TO LIFE OF THE UNBORN AND A WOMAN'S RIGHT TO LIFE AND TO PHYSICAL AND PSYCHOLOGICAL INTEGRITY IN LIGHT OF THE BILL THAT REGULATES THE DECRIMINALIZATION OF THE VOLUNTARY INTERRUPTION OF PREGNANCY ON THREE GROUNDS.

43 °. When responding to the legal notification of these proceedings, H. E. the President of the Republic argued that "the questioned Bill does not violate the Constitution, but quite the contrary. The Bill protects and safeguards constitutional rights, treating women as right holders and taking their dignity into account. Indeed, the Bill will consider (sic) the quality of women as persons and right holders, and gives special attention to the protection of their rights to life, to equality, to health and to privacy and freedom of conscience." (Page 380)

But, later on, the President of the Republic affirms that the Legislature weighed the different values in conflict (she does not speak of rights) (page 19), **preferring the protection of the fundamental rights of women** (page 20), whom can even be subject to a form of torture, (page 57) over the measures of an **object of protection** such as the unborn (pages 29 and 52). Indeed, the notification referred to above specifies that "the constitutional status of an embryo consists of an assistance delivered by a duty of protection, not a right to life like the one granted to all persons." (Page 379);

44 °. Contrary to what was argued by the Executive, and in a consistent manner with what has been said, these dissenting Judges consider that the challenged Bill involves a conflict of fundamental rights, giving preference to the rights of the woman over the right to life of the nasciturus. Hence, the petitioners claim that the Bill does not weigh rights, but makes a hierarchy of rights (pages 51 of Rol 3729 and 17 from Rol 3751).

Consequently, in the regulation contained in the Bill, "two lives" are involved: the one of a woman and the one of the unborn, which leads to a need for harmonization, since neither of these two rights could be annulled to such a point that it ceases to exist for its holder;

45º . Even though the German Constitution differs from ours, the Federal Constitutional Court has set a criterion worth considering in the event that there is a conflict between the rights of the nasciturus and the rights of the mother who carries him in her womb. In this way, the German Constitutional Court has expressed that: "It is impossible to find a balance aimed at protecting the life of the nasciturus and, at

the same time, granting to a pregnant woman the freedom to interrupt her pregnancy, since **the interruption of pregnancy always implies the destruction of the life of the unborn.** Therefore, in the weighing that must be done, both values should be considered in their relation to human dignity, which constitutes the central point of the value system of the Constitution." (Decision of the First Chamber, 25 February 1975, Chapter II, 2)

Hence, if the right to life of the unborn conflicts with other fundamental rights, the way or method of solving such conflict necessarily implies a weighing of the disputed rights, taking into account the criteria of necessity (the sacrifice experienced by one of the rights is based on lawful purposes); suitability (the sacrifice constitutes a suitable or appropriate means to achieve the aim pursued), and proportionality in strict sense (the sacrifice of the right is objectively harmonious and tolerable for [the one] who experiences it) (STC rols Nos. 1046, 1061 and 2922,among others). In accordance with these standards, we will analyze the three grounds of voluntary interruption of pregnancy in the following findings of fact.

VI. ANALYSIS OF THE THREE LEGAL GROUNDS IN WHICH THE CHALLENGED BILL AUTHORIZES THE TERMINATION OF PREGNANCY

46 ° In her submission responding to the petitioners' claim, the President of the Republic contends that "this Bill does not deregulate abortion, but rather, it provides for a ban that is currently total to be lifted in a limited manner " (pp. 334). The first statement is a remark, but the second one denotes a legal understanding that this vote must consider in this opinion.

It is important to recall the grounds introduced by the bill to Article 119 of the Health Code to allow the voluntary termination of pregnancy:

1) The woman is at "risk of life" so that the termination of pregnancy prevents a danger to her life.

2) The embryo or fetus has a congenital pathology, acquired or genetic, incompatible with independent extrauterine life.

3) The pregnancy is the result of a rape, provided that no more than 12 weeks of gestation have elapsed. In the case of a girl under the age of 14, the interruption of pregnancy may be carried out provided that no more than 14 weeks of gestation have elapsed.

47 ° Undoubtedly, these three grounds for the voluntary termination of pregnancy impact the constitutional protection of the right to life of the unborn and the duty of the Legislature to protect that life, as may be inferred from Article 19 N° 1, first and second paragraph of the Political Constitution.

As a result of the above, the petition of one quarter of the Senators is based on the need to assert that the legislative lawmaking of authorizing a direct or induced abortion on three legal grounds –"forces health service providers to perform the required task or to refer to another party for this purpose; forces the surgeon to induce the abortion, in an emergency, based on the ground of risk to life, or if the window of time is about to expire, as per the third ground; prevents the father of the unborn as well as other relatives from opposing the decision; and, ultimately, inescapably causes the death of the unborn innocent." (pp. 16).

For their part, the petitioning Representatives argue that "instead of protecting the life and integrity of the unborn, possibilities for aborting it are created; instead of setting legislative measures to protect the life of the unborn, the present law allows for it to be disposed of, as a form of service, and, lastly, it extends

its interpretation not only to the cases that are "decriminalized," but allows for an overall conceptualizing of the status of the embryo that is clearly reduced to a "partially protected interest ", turning away from the possibility of considering rights in its regard. "(pp. 58).

48 °. The President of the Republic has indicated in her submission responding to the petitioners' claim that "our current legislation prevents women in these circumstances from deciding on their pregnancy due to the total ban on abortion which, as we have indicated, is set out in Article 119 of the Health Code and the offenses set out in Articles 342 to 345 of the Criminal Code." (pp. 334);

49 °. The previous statement requires explaining.
And the duty of the Legislature to prevent the unborn from being harmed, given its innocence, fragility and helplessness, results in the need to deem punishable all conduct that would lead to directly causing its death, as the Criminal Code has done since 1874, without interruption and without any doubt about its constitutionality.

It has been erroneously argued that the Health Code permitted abortions since 1931 through the enactment of the Statutory Decree No. 226, of the former Ministry of Social Welfare. Actually, what Article 226 stipulated was that "*A pregnancy can only be terminated for therapeutic purposes*," with the written opinion of three physicians, as requested in Title II, "On the Practice of Medicine and Similar Professions." "The one and only purpose of this regulation is to prevent non-regulated midwives or labour attendants from carrying out abortion practices through potions based on traditional birth control methods and folk pharmacology." (Javier Castro Arcos, "*Guerra en el vientre: control de natalidad, maltusianismo y Guerra Fría en Chile*" [*War in the Womb: birth control, Malthusiansim and Cold War in Chile*], 2017, Centro de Estudios Bicentenario, pp. 50-51);

The Health Code, found in Statutory Decree No. 725 of 1967, modified the previous legal regulation of 1931, still allowing the termination of pregnancy only with therapeutic purposes but reducing, from three to two, the number of physicians needed to authorize it in Article 119.

None of these legal bodies, therefore, intended to decriminalize abortion, a fact that may be further proven by an examination of the respective delegatory laws Nos. 4,945 and 16,585. At the same time, the Heads of State who subscribed to said Statutory Decrees, did not at any point expressly state so in any of those texts. This assertion is supported by the rejection of the modifying motion of Article 119 of the Health Code which Deputy Héctor Campos conciliated in order to allow the termination of pregnancy "for therapeutic, socio-economic and ethical purposes", presented in the Chamber of Representatives, in its Extraordinary Session of Wednesday, October 15, 1969, session 1º (Castro Arcos, Ob. Cit. p. 408);

Given that the 1968 regulation allowed for legal loopholes or abuses which led to an increase in the number of abortions, Law No. 18,826 of 1989, replaced the aforementioned article 119 with the aim of restoring its original idea: "no action may be carried out with the purpose of inducing an abortion."

The Technical Report submitted by the First Legislative Commission during the proceeding of this motion, states that the provision that "a pregnancy may only be interrupted for therapeutic purposes" "is unconstitutional and must be replaced as it does not fully protect the life of the unborn and, ultimately, authorizes its death." It specifically considered that the definition of "therapeutic abortion" was not univocal, clarifying that "the unwanted death of the being in gestation as an indirect result of a medical procedure practiced on the diseased and pregnant woman and which, indirectly and unintentionally, **produces a double effect,** represents a different situation. "(History of Law No. 18,826, pp. 8 and 9) (Emphasis added);

50º. Consequently, the ban on abortions derived from the duty that the Constitution bestows on the

Legislature in the second paragraph of article 19, N° 1, is completely in line with the history of the creation of the pertinent regulations of the Health Code.

In addition, the history reviewed allows one to infer that the ban on inducing abortions has not been total in Chile, given that an abortion that seeks to save the life of the mother when she is in imminent danger by ending the life of the human being that is unborn is deemed to be compatible with the Constitution, so long as there is no deliberate intention to cause its death. This type of abortion is based on what is called "undesired effect," where there is no manifest purpose to end the life of the embryo which, in and of itself, would be incompatible with the medical praxis by which physicians are to save lives, and not end them, using all means at their disposal.

It should be noted that the Code of Ethics of the College of Physicians of Chile A.G. states that "Respect for human life from its inception until its end constitutes the foundation of medical professional practice. Any medical intervention performed during the nine months of gestation, must always protect the best interests of mother and child. "(Article 8). Further, it states that "the medical professional shall, in no circumstance, carry out actions of which the direct objective is to put an end to the life of a patient." (Art. 9).

Apart from that, this medical praxis is also in line with the regulation of the Chilean legal order. Hence, Law No. 20,584, which regulates rights and duties concerning actions related to individuals' health care, foresees that even when a person exercises their right to refuse a procedure or health treatment, such rejection "may not have as an objective the artificial acceleration of death, euthanasic practices or assistance in suicide." (Article 14). Therefore, in this situation, the respective physician has the legal imperative to be consistent with the practice of not favoring death if the continuation of life can be favoured. The imperative nature of medical praxis that derives from the outlined regulation is correlated by the procedure regulated by Article 38 of Law No. 20,584 to ensure that public and private health care providers comply with this law, recommending the adoption of necessary measures to address irregularities as may be detected;

51 °. Therefore, Article 119 of the Health Code as it is currently, refers to the ban of actions whose purpose is to "induce an abortion." In this manner, the carrying out of therapeutic abortions, understood as explained above, does not go against the aforementioned ban nor does it contravene the duty of the Legislature to protect the life of the unborn, as per Article 19 N° 1, second paragraph of the Constitution.

The preceding statement is complemented by articles 342 to 345 of the Criminal Code, which require, in general terms, that the abortion be "maliciously" induced, as stated in the first of those provisions;

52 °. Having clarified the above, it is important to specifically examine each of the grounds for the voluntary termination of pregnancy which the challenged bill incorporates into Article 119 of the Health Code. With this purpose in mind, this vote will be particularly mindful of the criteria for constitutional interpretation outlined in the 5th Whereas clause.

1) First ground: The life of the woman is at risk, and terminating the pregnancy would save her life from being endangered.

53 °. This first ground for the termination of pregnancy is structured to address the notion that "pregnant women, adolescents and girls may decide to interrupt their pregnancy, as long as this prevents their life from being endangered" and when, furthermore, this termination is "the only possible course of treatment to save the life of the woman." (submission responding to the petitioners' claim from the President of the Republic, pp. 335 and 336).

54 °. The petitioning Senators argue that this first ground does not render medical praxis in a positive light and, rather, the initiative fosters "the compulsory provision of health services so that, when the mother agrees that her life is in danger, the physician is authorized to end the life of the unborn in a direct and deliberate fashion, without any requirement for this to be the unavoidable and inevitable consequence of the treatment, not sought either as an end or a means." (pp. 17 and 18).

The petitioning Representatives, for their part, assert that this first ground tends to be confused with a currently accepted practice for which there is no need for additional legal authorization. This refers to the "termination of pregnancy " that lacks the malicious nature of an abortion and that is seen as justified by the lex artis and fulfilling medical duties. Instead, "the provisions of the Bill (…), only consider the life and interests of the mother (the attempt is for the termination of pregnancy to "prevent her life from being endangered"), any danger to the life of the child is not considered, nor is it relevant, therefore the physician has neither a reason to weigh opportunities nor procure avoiding it to save both; physicians can act as though they only had a single patient; furthermore, since the "termination" can be done at any time, there is no need to wait for fetal viability, even if this were feasible because, once again, this is not considered in the physician's analysis." (pp. 60).

55 °. In considering the need for a policy to decriminalize the termination of pregnancy under this ground, the legal basis included in the Presidential Message, and further explained in the submission by the Executive, responding to the petitioners' claim in this case, seem to have legitimate ground when examined with regards to the unsustainability or inexigibility of requesting that a woman continue a pregnancy when her own life is at risk, as examined in the 1993 judgement of the German Constitutional Court. In fact, this decision stated that "the existence of an exceptional situation, which under the Constitution permits the duty to carry a child to term to be dispensed with, can only be considered where there is a grave danger to the woman's life or a serious impairment to her health […] The criterion used to recognize them, as determined by the Federal Constitutional Court, is that of unsustainability." (cf. BverfGE 39, 1 [48 ss.]).

In any case, as has been previously demonstrated, the situation that poses an objective danger to the life of the woman is addressed in the current Chilean legal system, bearing in mind that when a therapeutic abortion is carried out, it shall not be performed based on the sole wishes of the woman and that the attempt to save her life, in no case, shall involve the deliberate intention to end the life of her child, and shall be, instead, an undesired effect of the medical procedures carried out;

56 °. During the public hearings convened by this Court, it was stated that the risk to life that this first ground of the proposed bill addresses is not, in Chile, what the Bill actually intends it to be. In this sense, Dr. Enrique Oyarzun, a specialist in maternal-fetal medicine, stated that studies conducted in 2014 showed that only 56 maternal deaths were related to pregnancy, of which 22 occurred postpartum. He also noted that the risk factors that warrant the termination of pregnancy in our country are related to ectopic pregnancies, hypertension, cancers during the first trimester of pregnancy, partial molar pregnancy and maternal diseases such as heart or kidney failure, all of which can be treated under the modality of therapeutic, not intentional, abortions.

Further, Dr. Jorge Becker explained that, in Chile, all indicators of obstetric risk regarding maternal mortality have improved significantly since 1989. This all has occurred while the fetus is considered a "patient" worthy of care. The growing investments in expensive technology for intrauterine interventions is a proof of this;

57 °. The aforementioned presentations, which were not refuted by other specialists, demonstrate that, in Chile, the life of a woman being at risk because of the pregnancy is, fortunately, an exceptional situation.

Further, and in line with what was stated in the public hearings, the World Health Organization indicates that the maternal mortality rate in Chile has decreased from 57 in 100,000 live births in 1990 to 27 in 2015 (apps.who.int/gho/data/view.main1390?lang=en).

Moreover, the 2015 Perinatal Guide published by the Ministry of Health states that, in 2012, indirect obstetric deaths were the leading cause of maternal mortality (page 21), that is to say, that death resulted from diseases that were either pre-existing or developed during pregnancy and it was not linked to direct obstetric causes, which are aggravated by the physiological effects of pregnancy.

The above thus suggests that the Bill regarding the decriminalization of the voluntary termination of pregnancy, as it regards the first ground, aims to regulate a situation that is truly exceptional in our country.

Thus, the need for the measure, although it may seem to be justified from the perspective of inexigibility from the mother, is not sufficient to modify the current legislation;

58 °. When considering the suitability of the policy on the termination of pregnancy when the life of the mother is endangered, it is worth considering whether there may be a different, less harmful, course of action to succeed in saving that life without having to sacrifice the person that is sheltered in her womb and who, unlike her, is not yet able to state his or her will.

In this sense, the Bill that is questioned sets, as a starting point, a dilemma for which it does not consider that there could be a solution: that, in order to save the life of the mother, the life of the being in gestation must unquestionably be ended in situations where, as has been outlined in this vote, an appropriate medical focus would assert that there are two patients whose lives must be preserved, so that if the attempt to save the mother's life leads to the death of the fetus, this would be an undesired effect.

From this perspective, there is no doubt that the Legislature's actions are at odds with the Constitution given that the former introduces, in this case, a justifying ground to legalize the practice of deliberately killing a human being, that is, to induce an abortion.

It has already been explained that this type of abortion is not protected by the Constitution under Article 19 N° 1, unlike therapeutic or indirect abortion which does not seek to deliberately end the life of a human being;

59°. In any case, the legal order cannot ignore the suffering of a woman, worthy of dignity, who considers her life to be endangered as a result of a pregnancy. This is because the woman – like any person – enjoys the right to life resulting from the quality of human dignity recognized in Article 1, first paragraph, of the Constitution.

Therefore, the termination of her pregnancy as an undesired effect of the medical procedures and techniques used in an attempt to save her life is not criminalized in Chile given that, as stated by Minister Sergio Muñoz, former President of the Supreme Court, in his reservations included in the Report submitted to the Supreme Court to inform the current Bill "at present, in Chile, there is no ban on therapeutic abortions as such, and so-called embryonic abortions (…). In 1989, Article 119 of the aforementioned Code was amended so as to ban any action with the purpose of inducing an abortion. This legislative determination did not penalize or criminalize therapeutic abortions carried out in strict adherence of the law, with the consent of the woman and ensuring adherence to the stipulations that enable its occurrence."

In this same sense, Professor Magdalena Ossandon indicated in her presentation at the hearings convened by this Court that the best way to achieve the goal of saving the life of the mother, even if it results in the death of the fetus, would have been to establish a generic "ground for exculpation" instead of a "ground for justification" as in the examined Bill, which results in the action no longer being illicit. The constitutional compliance of this more suitable option for achieving the objective sought lies in that, with a ground for acquittal such as need or a similar ground, the action continues to be criminalized, as indicated in the Constitution, but the behaviour is not punishable or those who participated do not merit criminal reproach, even though the life of another is deliberately ended. In this manner, the judge can decide, in each specific case, that the abortion will not be punished;

60 °. That, due to the above, the first legal ground of risk to life under review in these proceedings, does not meet the suitability test, in that there exists a less onerous judicial means to achieve the objective stated in the Presidential Message that led to this Bill being created;

61 °. That, from the perspective of proportionality **stricto sensu**, the bill is unequivocal: saving the life of the mother implies sacrificing the life of the being in gestation, and this is done deliberately in situations where there is the alternative to make use of medical procedures to save her life while at the same time attempting to save the life of the embryo. The approach is completely different. The latter protects two rights, which two different beings hold, and which are protected in the Constitution, the only difference being that in the case of the life of the unborn, a special responsibility is conferred upon the Legislature to protect a life that is in a particular state of helplessness.

Thus, the deliberate attempt to end the life of the unborn does not fulfill the proportionality test because the complete fulfillment of the right of the mother requires the complete and irreducible sacrifice of the life of her child, resulting in an *a priori* hierarchy where one right prevails over another.

2) Second legal ground: Lethal congenital pathology, acquired or genetic, that is incompatible with independent extrauterine life.

62 °. This second ground for the termination of pregnancy is based on the notion that "the condition or prognosis is not likely to improve through therapeutic interventions (…) so that the pregnant woman is forced to grieve throughout the rest of the pregnancy, waiting for the death of the embryo or fetus in her womb." (Submission by the President of the Republic responding to the petitioners' claim, p. 337);

63 °. With regards to this second legal ground, the petitioners deem that "in this case, the short life after birth is a determining factor in that life no longer being protected and in it being taken away" adding that "the proximity to death is not an admissible constitutional exception to the protection of life" (pp. 61 and 62);

64 °. As can be observed, this second case does not present a conflict between two beings who hold the same right (the right to life). Instead, this is a conflict between the right to life of the human being that is about to be born and the right of the woman to make autonomous decisions which, although they may not be explicitly enshrined in the Constitution, they are considered, implicitly, in the freedom of all individuals as per the first paragraph of Article 1 of the Constitution which states: "All people are born free and equal in dignity and rights.";

65 °. These dissenting Judges are especially mindful that, according to the United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) of 1979, in force in Chile, all States parties are to take all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men (Art. 3).

Nevertheless, they also considered the Convention on the Rights of the Child of 1989, whose Preamble sounds similar to the Declaration of the Rights of the Child indicating that "the child, by reason of his physical and mental immaturity, needs special safeguards and care, appropriate legal protection, **before** as well as after birth" (emphasis added). The document states that "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, **the best interests of the child** shall be a primary consideration" where child is understood to mean "**every human being** below the age of eighteen years unless under the law applicable to the child, majority is attained earlier" (Arts. 1 and 3)

It is imperative that this international regulation be considered in this decision in light of the duty that the Constitution, in the second paragraph of Article 5, bestows on State bodies, calling on them to respect and promote the essential rights that stem from human nature protected both by the Constitution and the international treaties ratified by Chile and in force;

66 °. The Message of the Bill under review states that "women's rights are at the core of this proposal "(page 3). It adds that "In accordance with International Human Rights Law, the denial of the termination of pregnancy, in certain circumstances, can constitute violations of fundamental rights" (p. 12) and cites a series of recommendations and observations by the bodies that make up the international system for the protection of human rights (pp. 13-16).

Certainly, however, these proceedings have not mentioned any international treaty that would force Chile to legally enshrine the right of the woman to abort a supposedly unviable fetus because it would result in her suffering. And this could not be otherwise because, as Professor Francisco Orrego Vicuña states in his report on law attached to these proceedings, there is no universal treaty that enshrines such a right, nor is there any in the regional context of the Americas (p. 7). It further states that "it is also not certain that there exists a clear and manifest *opinio juris* from the part of the States, with regards to the permissibility of the carrying out of abortion procedures as a consequence of an international obligation, regulated as a subjective right by the woman requesting it" (p.8).

It follows that there is no formal source of Public International Law – whether treaties or customary– that enshrines a supposed right to abortion, even to avoid the suffering in the terms analyzed above;

67°. When further examined, the recommendations and observations quoted in the Message of this Bill constitute international *soft law*, that is, non-mandatory guidelines that States are to consider in drafting their public policies, but whose non-compliance does not lead them to be held responsible at an international level. This criteria has already been followed by this Court in the judgment of [cases] Rol. Nos 3016 and 3026 (accumulated);

68 °. Based on these considerations, the necessity, suitability and proportionality *stricto sensu* of the second legal ground challenged by the petitioners must be analyzed;

69 °. With regard to the **necessity** to interrupt a pregnancy in this case, the message of this Bill indicates that according to statistics from 2004 to 2012 "close to 500 deaths per year result are produced by the impossibility of extrauterine life, due to the prevalence of pathologies" (p. 5); *cerca de 500*

Even if this were true – a topic that has been discussed in these proceedings – there are no exceptions, from a constitutional perspective, that grant permission to deliberately end a life and which do not correspond to the exceptional cases in which the death penalty may be imposed as a result of a crime considered in a qualified quorum law (article 19 No. 1, paragraph 3, of the Constitution).

In other words, taking the life of another could never be considered "necessary," even when this life is not expected to last. It follows that the termination of a pregnancy in this case, based solely on the will of the mother who does not wish to sustain it, is not congruent with the constitutional protection of the right to life of the unborn and which is an imperative duty for the Legislature;

70 °. With regards to the suitability of interrupting a pregnancy in this second legal ground, it is worth considering whether there may be a less harmful means, with respect to fundamental rights, to support a woman who is in an undoubtedly complex situation. As the German Constitutional Court determined, in the decision previously cited, "To the extent that unsustainability limits the woman's duty to bear the child, it does not relieve the state of its obligation of protection vis-à-vis every unborn human life. The state is compelled by its obligation of protection to support the woman with help and advice, thereby convincing her to decide in favor of carrying the child to term."

In fact, a support service model that seeks to support the woman throughout a difficult pregnancy and labour, given that these concern a child who is supposedly not viable, is a suitable solution to adequately balance the protection of the right to life of the unborn along with a responsible woman's manifestation of her freedom with her own duty to respect and not interfere with the life of another human being who, moreover, had no say in its conception;

71 °. The new article 119 of the Health Code, that this Bill incorporates, provides for a support services program for women in cases where a pregnancy has been willingly terminated. Paragraph 12 of this new regulation states that "In the situation described in paragraph 1, number 2, the health care professional shall provide the necessary palliative care according to the specific case, whether it regards a birth or the **voluntary termination of a pregnancy** where the child is born and survives."

This support services model is not sufficient for this Bill to meet the suitability test, as far as this second legal ground is concerned, for it is not conducive only to save the life of the unborn in a way that is compatible with the Constitution, but instead considers the possibility of ending its life;

72°. With regards to proportionality *stricto sensu*, this second ground also does not satisfy the criteria of duly harmonizing the conflicting rights. The life of a human being is completely subordinated to the freedom of the woman to the point that the former is totally sacrificed, and the right that it holds is annulled in its very essence.

In contrast, the support services model previously mentioned is indeed more harmonious and in line with the constitutional petition, as it does not sacrifice the right to life of the unborn and only circumscribes the life of the woman in that it does away with one option – the termination of pregnancy – which, as has been stated in these proceedings, results in severe mental health disorders for the woman (presentation and studies cited in the public hearings by Dr. Maria Francisca Duceval-Cuza).

3) Third legal ground: Voluntary termination of a pregnancy resulting from rape.
73 °. In her submission responding to the petitioners' claim, the President of the Republic has stated that "a rape implies a violation of the physical and psychological integrity of the woman, an attack on her dignity, her right to intimacy, her sexual self-determination, and her freedom" (pp. 338). We are in complete agreement with this assertion.

The Head of State adds that "the Bill acknowledges that forcing a woman to keep such a pregnancy is a supererogatory sacrifice that is inexigible from the raped woman, adolescent or girl, and which affects her fundamental rights" (pp. 339). In conclusion, she states that "in this legal ground, the Legislature has pondered, with the greatest care possible, over the life of the one that is unborn. With this purpose, it

imposes a set of burdens on the pregnant girl, adolescent or woman who has been raped, in order to lift the general ban on the termination of pregnancies that are a result of a rape." (pp. 340);

74 °. The petitioners, both the Representatives and the Senators in turn, state that the duty entrusted on the Legislature by Article 19 N° 1, paragraph 2 of the Constitution cannot be distorted to the extent that it ceases to protect that which it must. Thus, in Judicial Record No. 3751, the petitioning Representatives indicate that: "The child resulting from rape is not the aggressor, nor is it responsible for it; it is as much a victim as the mother, for it has been conceived in a context of violence or abuse (...) the fact that it may be "unwanted" cannot be considered a justified exception to the legal and constitutional protection of its life; quite the contrary, this situation warrants the use of all supports, both for the pregnant woman and the child (…)." (pp. 62);

75 °. The unconstitutional nature of this third ground for the termination of pregnancy would be sufficiently proven by the fact that the Constitution cannot annul the protection that the Legislature must provide to the life of the unborn, which, undoubtedly, limits the "flexibility" that, through various actions in the Commission to Study the New Constitution, attempts were made to grant to it. Such flexibility could only point to various protection methods, but in no case could it point to the idea that the right is to disappear due to a lack of a right holder.

And, as has also been explained, indirect therapeutic abortions do not, in and of themselves, constitute an exception to that regulation, for they are based on the occurrence of an undesired effect consisting in the death of the embryo with the purpose of saving the life of the mother;

76 °. When considering the rights that are supposedly in conflict, it is important to bear in mind that this legal ground – as was the case with the previous one – does not meet the standards of necessity, suitability, and proportionality *stricto sensu*;

77 °. With regards to necessity, it is surprising that the bill asserts that "in the case of pregnancies that are the result of sexual violence (rape), "there is no data that can provide an idea of the magnitude of this situation" (p. 6). Unlike the first ground, the Message does not specify the "risks" of keeping the pregnancy for the woman. Instead, it emphasizes the torturous nature of being used as a "human incubator," as Mr. Etcheberry, a lawyer, stated in court.

During the public hearings, these reasons were complemented by Dr. Andrea Huneuus's presentation, amongst others. She indicated that, in Chile, 10 percent of raped women become pregnant and that 66 percent of rapes involve girls aged 18 years and under. She also addressed various effects of pregnancies resulting from rape and pathologies that commonly affect those born to raped women;

78° These dissenting judges understand and share the concern of the authorities regarding these situations that afflict our society. However, it is up to them to determine whether, according to the Constitution, it seems necessary to terminate a pregnancy – or not to penalize it – in order to compensate for the victimization suffered by the woman as a result of as loathsome an act as rape.

And, from this perspective, the legislative decision to prioritize the mother's interest, authorizing the practice of an abortion, does not seem to be supported by sufficient reasons that would go beyond the mere will of the woman, based on what these judges have been able to ascertain in this proceeding. All the more, this is supported by the fact that, as has been previously argued, the Constitution does not grant legislative flexibility in the fulfillment of the duty to protect the life of the unborn so far as to remove all protections and, further, to make an attempt on that life.

The impact of rape is undeniable, but the need to face this scourge does not invalidate the right to life of the person in the maternal womb and who constitutes another victim of this reprehensible act;

79 °. In what concerns the suitability of this third legal ground for the ends proposed in the Message, this standard is not met.

Firstly, this is the case because the least harmful means order to address the consequences of a rape is not used , but instead, the means which are most harmful: ending a human life, absolutely disregarding the imperative, imposed on it by the Constitution, to protect the life of the unborn.

This is so, also, because as has been argued in the examination of the second ground, the support services program that the new Article 119 of the Health Code considers is not necessarily destined to preserve the life of the unborn, but instead it allows the woman to choose whether to keep the pregnancy or to have an abortion, flagrantly violating, in the latter, the protection that the Constitution guarantees to the unborn as a person;

80 °. In considering proportionality *stricto sensu*, this third ground also does not meet the required standard, given that, as has already been argued, this test seeks to balance or to harmonize the conflicting rights, but in no case can it consider that a right be completely disregarded or sacrificed over another right. This is all the more supported if we consider that the freedom which we all enjoy to choose whatever decisions will shape our lives, enshrined in the first paragraph of Article 1 of the Constitution, is limited by the respect for the rights of others. And this criterion, in turn, is based on the second paragraph of Article 6 of the Constitution, which indicates that all persons, institutions or groups are bound by the precepts of the Constitution.

The voluntary termination of pregnancy, in the case of rape, regardless of the gestation period, thus leads to the doing away with the right to life of the unborn affecting its very essence which, as has been argued, falls outside the domain in which a lawmaker may legislate.

VI. FINAL CONSIDERATIONS.

81°. Based on the preceding arguments, the judges that subscribe to this opinion declare that Article 1, N° 1 of the bill that regulates the decriminalization of the voluntary termination of pregnancy in three legal grounds, violates Article 19 N° 1, paragraph 1 and 2 of the Constitution in relation to Article 1, paragraph 1 of this document. The reason for this is that the Legislature disregards the applicable framework for the fulfillment of the duty entrusted upon it by the framers of the Constitution with regards to protecting the life of the unborn. In so doing, it also violates Article 6, which indicates that all persons, institutions and groups are bound by the precepts of the Constitution, and Article 7, second paragraph, which regards the principle of closure of public rights, according to which, "No judicature, person or group of persons may assume, even on the pretext of extraordinary circumstances, any other authority or rights than those expressly conferred upon them by the Constitution or by law."

Further, it violates article 19 N° 26 of the Constitution which enshrines the principle of legal reservation with regards to fundamental rights, which only allows these to be limited as authorized by the Constitution so long as the essence or irreducible core of the right in question is respected. The reason for this is that the three legal grounds in the aforementioned regulations lead to taking, in a definitive and irreparable manner, the life of the human being in gestation without there being a consideration of the other relevant rights – which are not solely for the Lawmaker to determine – in a way that would satisfy the permitted constitutional standards;

82 °. Notwithstanding the above, the totality of the mechanism addressed in paragraph 1 of Article 1 of the Bill that is being challenged – which modifies Article 119 of the Health Code – is also unconstitutional due to the aforementioned reasons. The paragraph describes the process by which the woman would give permission, the required information that would be shared, and the respective support services program that would operate.

83 °. Numeral 2 of Article 1 of the Bill, which incorporates a new article 119 bis to the Health Code, is also unconstitutional, because, in regulating the requirements of the medical diagnosis in order for the three legal grounds to come into effect, the resulting vagueness and lack of specificity only aggravate the effect of ending the life of a human being.

The Bill is so vague that, in the end, the life of the unborn is left up to the ample discretion of physicians who will respond in situations of extreme emergency and, in many instances, without adequate technological support, to issue a diagnosis that can lead to ending of life. In fact, the first ground requires that there be the "respective medical diagnosis." In the second ground, the intervention required that there be "two medical diagnoses issued by specialists." The third ground requires a "a health team, specially formed for these purposes," which would confirm the rape and the gestational age. The Bill provides no information as to the specialty of these professionals, augmenting the indeterminacy of the process, thus presenting aspects that are open and flexible, opening the door to fraudulent actions.

If – hypothetically – one was to assert that the Legislature is regulating limitations to the protection of the life of the unborn, there is no doubt that the constitutional standards developed by the jurisprudence of this Court with regards to detail and specificity which must encompass the limitation to a fundamental right would not be met.

In these proceedings, it became clear that fetal pathologies are not always diagnosed with absolute certainty and that there are not enough specialists in our country who can issue the diagnoses that would be required by the enforcement of this law. The indeterminacy of the legal norm will thus lead to the death sentence of a number of people that is also undetermined due to wrong or superficial diagnoses.

With all of this in mind, we cannot declare as constitutional a legal norm whose glaring effects will result in higher vulnerability and violation of the rights of human beings who are unborn and of the woman herself. The only way to avoid it being declared unconstitutional is if this would result in effects that are more unconstitutional than the ones that the challenged regulation seeks to address, which is not the case (STC judgments Nos. 558 and 590 accumulated, c. 19°);

84 °. On the basis of the above reasoning, the subscribers to this opinion declare the unconstitutionality of Article 1, No. 4, and the articles 2, and 3, and the Transitory [provisions] of the bill under review, to the extent that the rules already declared unconstitutional -- and that are directly related to those-- also affect the violation of the duty that the Constitution imposed on the Legislature in the second subchapter of article 19 N° 1 of the Constitution;

85 °. Lastly, we, the dissenting Judges, consider that the Bill that has been challenged in these proceedings not only lacks clarity in a number of clauses, but draws in a series of issues that could be deemed as belonging to the very essence of the right to life, to the regulation of the regulatory power, which is also unconstitutional and detrimental to the fundamental rights of the unborn.

In this context, we cannot fail to mention that, in our opinion, there is nothing in this Bill that prevents or annuls the filing of an appeal for the protection of the constitutional guarantees of those conceived and unborn, whenever, as a consequence of the application of the norms that soon will become law, result in

the threat, disruption or loss of the legitimate exercise of the right to life as established in the Article 20 of the Constitution.

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SECOND CHAPTER: CONSCIENTIOUS OBJECTION

The Judges Mr. Carlos Carmona Santander and Gonzalo García Pino decided to reject the petitions of this procedure regarding the matter of conscientious objection, for the following reasons:

I. The Rule.

1° That the first article n° 3 of the Bill that introduces a new article 119 ter to the Health Code, provides the first express legal recognition of conscientious objection in the Chilean legal system, in this case, applicable to the medical procedure of abortion with the characteristics that we will indicate. First, it is an exception to compliance with the law based on abortion awareness imperatives.
Second, it covers the "required surgeon" and "other professional staff" who perform their functions within the surgical ward and who have communicated their objection to the "director of the health facility". Third, it is about conscientious objection that protects exclusively the indicated subjects and not the institution where they work. Fourth, these professionals can work indiscriminately in public or private health institutions. Fifth, the interposition of conscientious objection obliges the medical center to have a non-objecting professional to care for the woman. Sixth, if there is no non-objecting staff, the woman must be referred to another medical establishment. Seventh, there are two counter-exceptions to conscientious objection: One is in the case of abortion derived from the first ground when "the woman requires immediate and unpostponable medical attention " , and regarding thme ground derived from rape, " if the expiration is imminent of the term". In both cases, ", whoever expressed conscientious objection cannot be excused from performing interruption of pregnancy ". Finally, it is the duty of the Ministry of Health to dictate the necessary protocols for the execution of conscientious objection, which must be aimed at ensuring medical attention for the patient.

II. The challenges.

2°. The existence of this institution implies three different challenges. First, that the beneficiaries of the exception are not all those who intervene in a patient within the surgical pavilion, without reaching non-professional staff in each health facility. Likewise, the objection is only limited to those acts that carry out the final phase of the medical intervention in the pavilion and not to all its preparatory acts (pp. 91 and 97 of the case file 3751). These differentiations are understood as arbitrary, violating article 19, numeral 2 of the Constitution. We will call this challenge **extended *[ampliada]* conscientious objection;**

3° Another challenge is the one referred to the practical impediment of interposing conscientious objection in grounds number 1 and 3 of article 1, numeral 1 of the Bill, both in a limited situation. Being forced by the law to perform the abortion would violate their own freedom of conscience, especially in the case of the expiration of the deadline in the case of the third ground, because in the first one, the expression "immediate and unpostponable attention" is associated with a danger of the mother's life (page 98 of the application in case file 3751). This circumstance implies a violation of article 19, numeral 6 of the Constitution. In this dissent, we will call this infraction **conscientious objection without exceptions;**

4° The third and final challenge is that conscientious objection does not cover the health institutions which are required by this law to carry out the termination of pregnancy. Thus, this absence of recognition of this conscientious objection, translated into an institutional ideology, would violate the constitutional autonomy of the intermediate bodies covered in the third subsection of article 1 of the

Constitution and in the reflection of its guarantee in the first subsection of numeral 15 of Article 19 of the Constitution, as an infringement of their freedom of association (pages 98 to 106 of the requirement/petition of the case file 3751). The type of infraction denounced implies that this objection would only cover private institutions, which are the only ones capable of requiring an associative statute, and that the reproach does not include article 19, numeral 6 of the Constitution. We will review it as an institutional conscience objection;

III.- Normative effect of what was requested by the petitioning parties and the decision-making power of the Court.

5° Both petitioners request to declare the unconstitutionality "of Article 1 (...) No. 3 in its totality "(page 152 of file No. 3751 and page 61 of file No. 3729). However, they grant jurisdiction to deem such petitions accepted and declared unconstitutional in a "total or partial" manner;

6° As we have explained, the rule that introduces conscientious objection to the medical provision of abortion, implies establishment of the objection itself. Moreover, beyond the debate about the need for the introduction of the law to constitutionally arbitrate this procedure, it is highly counterproductive to eliminate the whole idea of conscientious objection from the whole bill, especially if the Bill in the establishment of his grounds for justification was deemed constitutional by this Magistracy;

7° Due to the above, it is necessary to redirect the challenges to partial regulatory aspects of Article 1, numeral 3 of the Bill, especially if the powers of the Constitutional Court reside in an ablative or negative dimension, eliminating part of its articles;

8° Under this interpretation, extended conscientious objection would imply twice eliminating the term "professional" from the first subchapter of the aforementioned article in order to broaden the subjective framework of the persons covered by this objection. And, in turn, eliminate the expression " within the surgical pavilion " in order to expand conscientious objection beyond the medical act, including its preparatory acts;

9° Similarly, conscientious objection without exceptions can be reflected in two different ways. On the one hand, that which implies a complete absence of exceptions to conscientious objection, which would mean eliminating all of the third subchapter of article 1, numeral 3 of the Bill. However, as the requesting Representatitives themselves consider it a contradiction, since in defense of conscientious objection there is a risk of causing the death of the mother in the case of ground number 1, the challenge would be reduced to eliminating the paragraph of the indicated subsection in the part that mentions that: " Neither can it be excused if the expiration is imminent of the term [temporal limit of gestation] established in case N° 3) [rape] of the first paragraph of article 119.";

10° Finally, institutional conscientious objection would result in the elimination in the Bill of the final sentence of the first paragraph of article 1, numeral 3, which states that: " Conscientious objection is of a personal nature and in no case, can be invoked by an institution. . "

11° That this introductory interpretive exercise is essential to describe the constitutional conflict that has arisen and on which these dissenting judges consider it necessary to reject these challenges;

IV.- Foundations of conscientious objection.

12°. Being the first time that it is introduced into the Chilean legal system through a specific legal provision and that it becomes an unconstitutional part of the Bill, it seems key to refer initially to the foundations of this institution;

A.- Duty of obedience to law, civil disobedience and conscientious objection.

13° Even before the reasoning about positive law, it can be understood that while we have argued that the control of this law is born from a purely normative perspective, away from the language of moral reasoning, the dilemma of conscientious objection has a intimate connection with that approach. This is not the place to solve it, but as a starting point, we must identify that there is a duty of obedience to the law that manifests itself on the plane of efficacy of norms [Elías Díaz (2009), *Doxa*, N ° 32, "*Realismo crítico y filosofía del Derecho* [Critical Realism and the Philosophy of Law]," page 99.] Certainly, there are other planes to verify it as the ethical foundation of the obligation to obey the law within the framework of the obligation to respect democracy (Javier Muguerza (1987) , *Doxa*, No. 4 " Sobre el exceso de obediencia y otros excesos [On the excess of obedience and other excesses]"). But in any case, the conscientious objection that is inserted among these duties entail limits, if the law is the construction of wills until a general will is configured through deliberation that generates legal obligation, disobedience is the separation of the collective will in the reaffirmation of an individual will by arguments related to injury to the moral integrity of a conscience;

14° That the Law in democratic and pluralistic societies is based on a basic understanding about the effectiveness, validity, legitimacy and force of the normative mandates. This understanding is translated into rules so clear as the imperative that the law applies to everyone equally and that it is presumed to be known to all, although in fact we ignore it. A society is based on the Law, because it is the only way to organize the basic consensus that allows it to build a Rule of Law with its characteristic elements. Therefore, few would doubt that the erosion, evasion or circumvention of the democratically deliberated law imply a weakening of the Rule of Law itself. There is no attribution that delivers the order itself that enables its citizens to disregard the mandates of law. That is a return to lawlessness, to the supreme command of an individual will, or of naked force;

15° Despite what has been said, in a democracy, the law or some of its mandates can put into tension the personal convictions of its citizens from the construction of legal duties that violate their consciences, whether it is based on the definition of rules of moral autonomy or a certain deontological code. This insubordination within the democratic order can manifest itself in two dissimilar ways. On the one hand, through civil disobedience or, on the other, by exercising conscientious objection;

16° Civil disobedience implies an active political option through opposition to the norm with the precise object of changing it, or of overturning a certain public policy. This is how John Rawls defines it stating that it is "a public, nonviolent, conscientious yet political act, contrary to law, usually done with the aim of bringing about a change in the law or policies of the government " John Rawls (1971 -2011), Theory of Justice, FCE, 8th reprint, p.332). Disobedience, therefore, can be a mixture of political activism, with a public character, highly symbolic of the set of individual or collective acts and with the conscious will to tolerate the punishments and sanctions that result from the breach of the norm. None of this seems to occur in conscientious objection, since in it the objector's opposition to the norm seeks simply the respect of one's conscience because it is intolerable to fulfill the ordered legal mandate. The objective sought is to protect the integrity and inviolability of one's moral judgment that cannot be forced by external mandates, such as that of the law, that injure the intimately reached conviction of the injustice of an imposed duty.
Conscientious objection is lived to avoid a duty and not to make propaganda about it. The foregoing does not imply that there are no connections between these acts of insubordination. Many may be disobedient against this same law but very few (determined medical personnel) may be in the circle of objectors. The specialist doctor in perinatal matters can be objector and, in addition, disobedient. An oculist lacks the first option, from which it is deduced that disobedience does not require the enabling of a legal norm,

since the freedom of expression and freedom of assembly is enough. On the other hand, conscientious objection necessarily requires a normative framework;

17° Finally, it is about a duty of obedience to Law and not to a law. No matter what theories of justice we profess, we understand in them a critical pressure of Law to modify a law's iniquitous mandates. It is evident that "the laws" are not identical to "Law" and this is what allows to preserve justice before the law. The democratic law itself can contain tolerable degrees of injustice according to essentially pluralistic political and moral conceptions. For the same reason, it is Law that enables the Legislature to define the assumptions that allow the identification of mandates that can intensely violate conscience. Therefore, in doctrine there is no general regime of conscientious objection but as many objections as those expressly circumscribed and enabled by the Legislature (objection to compulsory military service, objection to the oath, tax objection or objection to abortion, etc.);

B.- Summary of the constitutional framework of freedom of conscience.

18° Freedom of conscience in Chile has an express rule, interpretative scope and juridical effects that delimit the foundation of conscientious objection, as we shall see;

19°. With regard to the rule of recognition, the Constitution provides in article 19, numeral 6, first subchapter, the assurance to all persons of "freedom of conscience, the manifestation of all beliefs and the free exercise of all religions that do not oppose morality, good customs or public order ";

20° In relation to its interpretative scope, "freedom of conscience" appears in our legal system with the Constitution of 1925 as a reflection of the separation of the Catholic Church and the State of Chile, recognizing in article 10, numeral 2° a norm very similar to the current one, although it started with the primary consecration of the manifestation of all beliefs and then, of one's own freedom of conscience. This consideration, and the framework of the discussion of this precept in the Commission to Study the New Constitution, gave rise to a restricted reading of the freedom of conscience associating it with "the belief in a god or superior being, this is religious adherence "[Eduardo Aldunate, Coordinator (2009) Political Constitution of the Republic of Chile, Volume I, Thomson Reuters, p. 175). This restricted version is supported by Alejandro Silva Bascuñán insofar as he recognizes the broad dimension that "freedom of conscience exists in all forms of thought and belief, the conceptual tradition is specifically to allude with such an expression to the right to think and believe without constraints in what refers only to the Divinity" [Alejandro Silva Bascuñán (2006), Treaty on Constitutional Law, Volume XI, Editorial Jurídica de Chile, p. 235). There is a broader dimension that would protect "all elaboration of the intellect, be it religious, philosophical, ideological, political or any other adherence" (Aldunate: 2009, p. 175);

21° The scope of both theses are based on a common point of view: freedom of conscience operates as a recognition of protection to one's internal consciousness. In terms of José Luis Cea, "the conscience is an intrinsic quality and, therefore, unregulated by the law as long as it is not externalized or manifested, in a sensible way through observable or perceptible behaviors" [José Luis Cea Egaña (2004) , Chilean Constitutional Law, Volume II, Editions Universidad Católica de Chile, p. 207]. The same is argued by other authors [Alejandro Silva Bascuñán (2006): pp.234-237 or Mario Verdugo and Emilio Pfeffer (2005), Constitutional Law, Volume I, Editorial Jurídica de Chile, reprint of the second edition, p. 258-

22° The legal effect is that with respect to the conscience "constitutes an obligation of abstention of the State, which fixes a primary faculty of formation of one's own judgment, without any type of interferences, making possible the determination of values according to which each one develops his/her life "[Gonzalo García and Pablo Contreras (2014), Chilean Constitutional Dictionary, Constitutional Court, p. 613]. This framework of abstention seems to be more urgent than ever since through

technological means what was believed protected within the inner consciousness could be interfered with in the future, an irrelevant issue in this case;

C - Freedom of conscience as a constitutional basis for conscientious objection.

23° It is not possible to automatically infer that freedom of conscience should result in conscientious objection. This requires some explanation in which there is disagreement. First, because the Constitution does not mention the idea of conscientious objection. Second, because this absence of mention leads to the need to specify the constitutional legal status that protects it;

24° About the same, in our doctrine there is a negationist-limiting thesis. Supported by Professor Rodolfo Figueroa, part of the basis to define that the scope of conscientious objection is a resort to the Legislature and cannot be based directly on the freedom of conscience. Therefore, it would be recognized by the Legislature and cannot be held in a "moral right to conscientious objection" and that at least has an "absolute" character, since to be linked to freedom of conscience should not be forgotten that this is subject to limitations derived from "morals, good customs or public order." [Rodolfo Figueroa (2016), "Conscientious Objection and Abortion", in Lidia Casas and Delfina Lawson (2016), Debates and reflections on the decriminalization of abortion in Chile, pp. 147-178];

25° In the opposite thesis, supported by Professor Angela Vivanco, is that conscientious objection would be an implicit right and derived from article 19, numeral 6 of the Constitution. [Angela Vivanco (2016), "Conscientious objection as a constitutional right, and special mention of conscientious objection to the decriminalization of voluntary termination of pregnancy in three cases, proposed in the Chilean case", in Lidia Casas and Delfina Lawson (2016), Debates and reflections on the decriminalization of abortion in Chile, pp. 147-178];

26° The difference between both theses is that the broad one associates it with the freedom of conscience and the restricted one with the limits of the same, defined in the first subchapter of numeral 6 of article 19 of the Constitution. In any circumstance, both have a constitutional anchorage. One of the legal consequences of this difference occurred in the Spanish Constitution as a result of the express mention in it of conscientious objection to compulsory military service. The absence of the enactment of the law for a time, led to the recognition of an essential intangible content to the objection even in the absence of law. This was the case of the Judgment of the Spanish Constitutional Court 15/1982, of April 23, which indicated that "the constitutional mandate may not have, until the regulation occurs, more than a minimum content that in the present case would be identify with the provisional suspension of joining the ranks" of military service (legal basis 8°);

27° If a strong thesis of conscientious objection were upheld, the express recognition in the Constitution would still be lacking to invoke an intangible essential content, as in the Spanish example just mentioned. For this reason, it is possible to reason with both theses as they require the express legal recognition of conscientious objection by the Legislature since there is no direct mode of conscientious objection in the Constitution itself. In other words, it cannot be inferred from the implicit nature of conscientious objection a violation of an essential content by a generic rule of non-compliance with respect to potential objectors;

28°. A first consideration is that freedom of conscience cannot be protected only as a mandate of non-intervention with an idea that is housed in the internal consciousness of individuals. The right operates on its external manifestations and it would be simple for the State to always give its duty of abstention in a kind of freedom of conscience one hundred percent guaranteed. It can be said that the conscience has to manifest itself in a belief and that only these would be the external protected manifestations;

29° In our concept, it is clear that the Constitution protects the freedom of conscience as a separate dimension of religious freedom, founding moral pluralism compatible with a democratic regime with a broad ideological spectrum. Thus, "Religious convictions may well shape individuals' conscience, but religion has no monopoly on conscience and is indeed subject to scrutiny and evaluation on grounds of conscience" [Bernard Dickens (2016), "The Right to conscience", in Rebecca Cook, Joanna Erdman and Bernard Dickens, eds., *Abortion Law in Transnational Perspective*, FCE, Mexico, p. 271; [English edition, p. 211];

30°. We can maintain that it is part of the constitutionally protected content that the conscience manifests itself with "freedom," and it would not be if it concluded only in "beliefs" of religious origin. Precisely, in the inversion of the terms from the 1925 Constitution to the present one implies a reinforcement of the ideological freedom of every person;

31° In this sense, conscientious objection is born in the intermediate space of the transit of an authentic manifestation of the conscience, from its consecration in the heart of the internal judgment of the conscience of a person until its concretion as belief in a broad sense and not only of those expressions of religious freedom. It is part of the judgment of conscience, freely acquired, to be able to defend it against normative contents that violate it in an intolerable way. The constitutional legal content of the objection is the reaction of the conscience in the face of a normative mandate that attempts against one's autonomous, reasoned and essential convictions, all of which is part of the notion of the freedom of conscience in order to represent an external legality characteristic of the Constitutional right;

32°. This broad thesis of freedom of conscience, in its link with the objecting reaction, is in line with that held by international human rights law (Article 18 of the Covenant on Civil and Political Rights and Article 12 of the American Convention of Human Rights) in order to concatenate freedom of conscience, first, and freedom of religion, subsequently, even preceding the freedom of thought in the first case;

33° Likewise, it should be noted that the only expression of conscientious objection in human rights treaties is limited to an interpretative thesis in order not to consider military service as compulsory or compulsory labor, as well as the national substitute service thereof. " in countries where the exemption for reasons of conscience is admitted "(article 8.3.c) ii) of the International Covenant on Civil and Political Rights. Therefore, it recognizes conscientious objection but as a competence issue of the internal law of States;

34°. Another consequence of this broad consideration that we have defended in this dissenting opinion lies in the fact that an objection of conscience is admissible based on convictions of a moral nature and not only of a religious nature, as a reaction to the violation of conscience. by legislative mandates;

35°. It is not enough to preserve the extension of conscience through personal convictions but that we must define when conscientious objection can be invoked and who can invoke it. Of course, these considerations start from the basis that these two dilemmas are part of the core of conscientious objection, beyond the decision of the Legislature;

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D - Conscientious objection: the characteristics of its essential core.

36°. Having recognized the constitutional status of conscientious objection, it is necessary to identify the elements that compose the essential core of this principle. To this end, we have reviewed a series of national and foreign doctrinal works and have constructed a different idea that is not attributable to their authors [Ramón Soriano, Las libertas públicas, Tecnos; Luis Prieto Sanchís (2006), "Freedom and Conscientious Objection" in Person and Rights, No. 54; Luis Prieto Sanchis (2011), "The objection of

health conscience", in Marina Gascón, María del Carmen González and Josefa Cantero (coordinators), Health Law and Bioethics, Tirant lo Blanch; Diego Papayannis, "Conscientious objection within the framework of public reason", Legal Journal of the University of Palermo; Angela Aparisi and José López (2006), "The right to conscientious objection in the case of abortion" in Persona y bioética, Revista N ° 1, Volume 10; Javier García and Frank Cranmer (2010), "Conscientious Objection to Abortion in the United Kingdom" in the General Review of Canon Law and Ecclesiastical Law of the State N ° 23; Karin Neira and Esteban Szmulewicz (2006), "Some reflections on the general right of conscientious objection", Law and Humanities, No. 12];

37°. These [core] requirements are: first, the existence of an unjust legal obligation. Second, that the objector is faced with a moral dilemma that cannot be avoided. Third, that there exist no legal rights of a superior order that would weigh in favour of a sacrifice of conscience. Fourth, that the conscientious objection be raised within a legal framework restrictively established by the Legislature. Fifth, that the exercise of conscience be made in a way that reflects the nature of the dilemma in question. Sixth, that the objector engage in behaviour of the nature of an omission. Seventh, that the conflict of conscience be based on religious, ethical, moral or axiological grounds. Eighth, that the exemption to comply with the law constitute an exception to the principle of general compliance with the law and, ninth, that conscientious objection does not affect the rights of third parties;

1.- Unjust legal obligation.

38°. Except for the reference of the International Covenant on Civil and Political Rights [Article 8.3.c).ii)] to compulsory military service, any unjust obligation must be established in unequivocal language. For example, the Constitution considers the case that some people may consider it unfair to pronounce promissory oaths as a condition for the exercise of public offices, in the name of beliefs that may not be theirs. However, the Constitution, in the third paragraph of Article 27, defines this as "oath or promise", thereby averting any hypothetical injustice;

39°. The injustice of an obligation resides in a specific conjunction of circumstances that must be verified on a case-by-case basis. Therefore, if it is difficult to determine the constitutional status of all duties, and more reasons to identify the possibilities of exemption, based on conscience, from these same duties. In this sense, the dilemma must posed in intense terms, and the cases in which it has been raised reflect a certain level of intensity. The most paradigmatic case is the performance of compulsory military service by people whose strong religious convictions forbid carrying arms. At a similar level is the case of objection to abortion that we will deal with. Another example is that of fiscal objection, regarding use of tax revenue for ends that are incompatible with one's beliefs;

2. - Unavoidable moral dilemma.

40°. It is not enough to identify an injustice in a legal obligation to authorize an objecting response. There is an additional issue : it must be a borderline situation in which there is no other possible conduct. The lack of alternatives is what hurts the human conscience, since the law must be complied with in a way that obliges the subject to violate his or her own conscience by doing so;

41 °. This crossroads must be so inevitable that any available option would result in enforced compliance with the law. As such, the laws of many countries consider that the obligation to carry out compulsory military service is compatible with a conscientious objection limited to one specific aspect, that of carrying arms, but not extended to the performance of substitute duties. As there are more options, the sacrifice is not unavoidable. Likewise, some precedents have clearly held that one cannot have an exaggerated view of the moral dilemma, because in certain cases the dramatic event has already

happened. This is the case with all actions that are subsequent to an abortion, as held by the Supreme Court of the United Kingdom in Rol UKSC 2014/68 of December 17, 2014;

3.- Absence of legal rights superior to the conscientious objection.

42°. An obligation that is unjust and unavoidable does not meet in of itself the requirements to invoke an objection of conscience in all cases. This only constitutes the legal condition for an objection to operate within this framework. However, such a posture would imply that conscientious objection is absolute and devoid of any limits, and have the result of violating the Constitution in its Article 19, numeral 6, since its first paragraph submits freedom of conscience to certain limits: morality, good customs and public order. It is impossible that the explicit freedom be subject to limits, while the objection is devoid of them;

43 °. This is the example of the necessary balancing of legal goods that must be carried out in cases that are unavoidable and involve a superior legal good. For example, the existence of the first ground faced with a limited hypothesis of interposition of conscientious objection must necessarily yield when faced with risk to the life of the mother. This exercise is nothing more than the simple contrast of norms on the basis of their hierarchical status. We have indicated that conscientious objection is part of the constitutional content of freedom of conscience, and that it must be articulated with the unequivocal right to life of women, as well as with her rights to physical and psychological integrity, and to protection of their health;

4.- Legal framework of conscientious objection.

44°. -- one of the most obvious consequences of the recognition of a protected constitutional content regarding freedom of conscience is that it is impossible to identify specific instances of objection as an abstract question. The Constitution recognizes conscience as a protective reaction, but from there no specific forms of conscientious objection can be deduced. For this reason, the existence of a legal framework determined by the Legislature on a case-by-case basis is absolutely essential;

45°. It can be argued that there exists some sort of general right to conscientious objection that complements the absence of specific grounds for objection [Neira and Szmulewicz (2006), p. 195-197]. Although it is an uncertain point of departure, we must take such a position prima facie as a principle. If a general right of conscientious objection were considered as a definitive rule, this would amount to an unacceptable "right to behave in all circumstances of life according to one's beliefs" (Sentence of the Spanish Supreme Court of February 11, 2009). The greatest or the least fidelity to its authenticity is not a reason to be exempted from the law;

46°. The jurisprudential consequence of this precedent is that it is impossible to determine specific cases of conscientious objection without a legal framework. Comparative law shows that conscientious objections that are completely deregulated or deformalized do not exist. Nor do objections that are configured, complemented or defined with regard to legal expectations of a general nature exist. The only way to establish a conscientious objection is through the exercise of legislative powers, with the National Congress identifying its beneficiaries, delineating its normative contours, adopting the applicable requirements and establishing a procedure;

47°. Conscientious objection is regulated for the benefit of the objector, since he or she must be certain that his or her insubordination has a concrete normative meaning that will shield him or her from responsibility and will attribute his or her duty to another person or institution. All of which requires an explicit legal foundation;

5.- Exercise according to the nature of the conscientious dilemma.

48°. Another requirement is to verify the extent of the exercise of the right to conscientious objection. There are many findings that the enjoyment of freedom of conscience only extends to natural persons. This reflects its etymological, psychological, legal and practical meaning. Jurists from diverse philosophical orientations reach this conclusion. "Given that conscience only belongs to the individual person, freedom of conscience is held only by persons individually considered and not by communities or groups" (Aparisi and López: 2006, p.38). This derives from the very nature of the objection. We cannot ignore that the term "conscience", regardless of its form, always refers to natural persons. The five relevant definitions of the Royal Spanish Academy all lead to the same conclusion: "1. f. Knowledge of good and evil that allows the person to judge reality and actions, especially their own, from a moral point of view. 2. f. Moral or ethical sense of a person. *These people are without conscience.* 3. f. Knowledge of a reality that is spontaneous and more or less vague. *I was not conscious of having offended someone*. 4. f. Clear and reflexive knowledge of reality. *There is little ecological consciousness here*. 6. f. Phil. Mental activity of the subject that allows one to feel present in the world and in reality." Specialized dictionaries also leave no doubt: "at the psychological level, human self-knowledge and recognition of one's own individuality, at the intellectual level, reflexive and accurate knowledge, at the ethical level, a moral faculty that distinguishes good from evil; and figuratively, healthy action, just conduct "(Guillermo Cabanellas (1982), Encyclopedic Dictionary of Common Law, Volume II, Editorial Heliasta, Argentina, p. 254). From the psychological point of view, consciousness "is the pinnacle of the evolution of the nervous system. It is a mental process, that is, neuronal, through which we become aware of the self and of its environment in time and space (...) "[Natalia Consuegra (2011), Dictionary of Psychology, Ecoe Ediciones, Bogotá, p. 49]. Finally, the practice of courts of justice in various parts of the world has given it the same natural ownership. For example, this was the conclusion of the Constitutional Court of Peru in the Exp. N° 0895-2001;

49°. Freedom of conscience and its related objection can only be ascribed to people who have the capacity to consciously form a will. And, based on their nature, these are only human persons. According to the epigraph of article 19, rights are enjoyed by "all persons", and it is necessary to interpret legal persons extensively and "to the extent that this be reflected by their own condition";

50°. Perhaps for the same reason, some national authors support extending this objection beyond natural persons, based on an interpretation outside of freedom of conscience and based on the right of associations, recognized both in Article 1, third paragraph of the Constitution, and in the specific guarantee of Article 19, numeral 15, as well as on religious freedom. (Manuel Antonio Núñez, "Institutional Ethical Convictions and Collective Conscientious Objection in the Public and Private Health Sector", in Lidia Casas and Delfina Lawson (2016), Debates and Reflections on the Decriminalization of Abortion in Chile, Universidad Diego Portales);

6.- Omissive behavior of the objector.

51°. The behavior of the objector consists only in an omission. Conscientious objection is radically different from political disobedience and or from proposing a reform to the normative system that imposes a legal duty, and it constitutes "a method that is peaceful and absolutely respectful of the democratic process. The conscientious objector only peacefully requests respect for an ethical or justice-based posture that is part of their own personal identity" (Aparisi and López (2006), p.40);

52°. The need for complementary laws, subsidiary juridical or jurisdictional interpretations, or the possible intervention of the Legislature would imply abandoning a concept of conscientious objection that is essentially reactive and passive;

7.- Ethical, religious or axiological bases of the conscientious objection.

53°. -- it is fundamental to recognize that, within the Chilean legal system, the invocation of conscientious objection permits a broad ideological spectrum and is not reserved for personal convictions of a religious nature. We have already described that the Constitution (article 19, numeral 6) protects convictions that range from a general nature (conscience) to a specific one (religious). The natural consequence is that the objection depends on the objector and not of the legal nature of the entity in which they work or to which they belong. It cannot be otherwise, because "the State is at the service of the human person"; their convictions are a core element that no imposition can infringe upon;

8. Conscientious objection is an exception to the general character of the law.

54°. Another difference, it is not a belligerent attitude towards the law, characteristic of civil disobedience, which fights against the injustice of a norm and, by this means, seeks to reform it. The objector, on the contrary, understands that its requirement is unfair to according their own convictions, but may not deem it as such regarding society, nor seek that its application be suspended. Therefore, what they seek is to exempt themselves from its general character, something that technically constitutes an exception;

9.- Conscientious objection does not affect the rights of third parties that are subject to other legal obligations.

55°. Conscientious objection is a personal and regulated exception of omission, that may yield to higher legal rights depending on the nature of the legal obligation in question. This demands looking at the effects of such obligations and in whose favour they are established. "Raz distinguishes between paternalistic duties, those that benefit the objectors themselves, duties towards other specific persons, and duties in the public interest. He considers that conscientious objection is more difficult to grant in the second category of legal duties, because the first category of duties are favourable to the individual and she or he may prefer to object to a norm in his or her favour, and because the third category of rules enjoy a certain flexibility, because the contribution of each one of the obligated persons is much less significant"[Soriano, 1990: p. 28];

56°. Without prejudice to the nuances made by this author, this distinction reinforces the idea that there are duties that may be more freely transferred, such as compulsory military service, because their contribution to the general welfare is lesser. There are thousands of citizens who can exercise this function annually. There are others that depend on very personal considerations without affecting anyone otherthan the objector, such as the person who refuses to take an oath to his or her disadvantage. There is also a grey area where duties are neither intimate nor generic obligations in the public interest, where fundamental rights and laws that require a small group of people to comply with their normative content are involved. Within this grey area is the objection to abortion;

57°. As the nature of these obligations is more intense when the rights of third parties are involved, in this case the mother is placed in extreme situations, it is impossible to consider exceptions abstractly, without a detailed description of the limits of the entitlements invoked, the content of the conscientious objection, and its consequences. Therefore, "the objection must be included within the democratic legal order, as a form of ideological freedom and of freedom of conscience, when it absolves someone from legal duties that are transferable, interchangeable and the negative effects of which have no impact on third parties "[Soriano, 1990: 31];

V.- Interpretive criteria of this vote.

58. In accordance with the above, the interpretive criteria should be delineated, to proceed subsequently to base the rejection of the petitions and evaluate the constitutionality of the three conscientious objections raised by the parliamentary minority in relation to the special case of objection to a medical procedure to interrupt a pregnancy;

59° There are interpretative criteria of a general nature that cover all conscientious objections. And there will be others that will be specific to the normative expectation of extending conscientious objection to certain legal entities;

1. Conscientious objection requires regulation.

60°. We have argued that conscientious objection is derived from freedom of conscience. However, it is deduced in a way that establishes only a generic provision to object, as a legal position at first sight, and that must be harmonized with other legal rights and interests involved. The objections are exceptional and should be interpreted restrictively. So far we can extend to the maximum the provision of Article 19, numeral 6, of the Constitution since it is not possible to indicate what types of conscientious objection the Legislature defines. Only that the Constitution provides an enabling title to the Legislature to dispose them;

61°. The definition of entitlement, content, procedure, requirements and effects of the filing of conscientious objection based on abortion depends entirely on the definition of the Legislature. For the same reason, it is contradictory that the request of the petitioners has been to declare the complete unconstitutionality of conscientious objection to the interruption of the pregnancy. We understand it only as a manifestation of dissent to the whole Bill, but not dissent to a personal right that has a solid constitutional links;

2.- Objection to abortion is included within constitutional and legal regulation.

62°. The Bill in its 1st article numeral 3, introduces a new regulation in article 119 ter of the Health Code creating the conscientious objection to abortion. Article 1 of the Health Code regulates the promotion, protection and recovery of health, "except those subject to other laws." All of Book V is dedicated to the practice of medicine and related professions, within which the aforementioned precept is inserted;

63°. In this understanding, the law introduced three cases of justification for abortion that this Magistracy considered constitutional. In this regard, they are inserted within the constitutional order that provides the "right to health protection" (Article 19, numeral 9 of the Constitution). Being the duty of the State to protect "the free and equal access to the actions of promotion, protection and recovery of the health and rehabilitation of the individual". For this, the State must "guarantee the execution of health actions, whether they are provided through public or private institutions, in the manner and conditions determined by law." In this task, the corresponding state bodies must pay particular attention to the "coordination and control of actions related to health". Finally, it must keep open the right of every person to "choose the health system to which they wish to be admitted, whether state or private";

64°. In turn, the same regulations of the indicated Bill refer to Law No. 20,584 that regulates the rights and duties of people in relation to actions related to their health care;

65°. This is the essential regulation to identify this problem posed by the various conscientious objections that are questioned without prejudice to institutional, financial or planning aspects of the health benefits that operate in an area of strict legality;

3 .- Conscientious objection is integrated into a health action full of duties that do not authorize exemption.

66°. Every health action is part of a procedure and the interruption to pregnancy is no exception to this legal and regulatory constitutional statute. In fact, we start from the basis, as a result of the legal authorization of this same bill, that conscientious objection to abortion on the part of the holders of this right cannot be interposed in a spontaneous or informal way. Regardless of the entitlement that we will see, the conscientious objection must be filed with the Director of the medical establishment in advance, and in written form. Only this personal burden, easily enforced, transfers the duty of "coordination" (third paragraph of numeral 9 of article 19 of the Constitution) to those who have organized health actions in a certain way. The lack of such opportunity and formality to interpose the objection, would affect sensitive constitutional legal rights;

67°. That is not the only requirement, since there are previous steps related to focusing attention on the patients and their rights to the security of the benefit; [rights] to a dignified treatment; to sufficient, timely, truthful and understandable information and the right to grant or deny their will to submit to any procedure or treatment (articles 4, 5, 8 and 14 of Law No. 20,584, respectively). Within the framework of these general rights of the patient, the burden of attending falls fully upon the establishment. If the treating professional has previously communicated their objector status in writing, it will be the duty of the center to reassign the treatment to another non-objecting professional. If there is no other professional in the entire center, there is an obligation to refer the patient to another hospital. The dimension of the referral to another hospital center implies the permanent duty to guarantee the "free and equal access" to health actions. And even in cases of immediate and urgent medical attention, conscientious objection must yield to the ethical-medical imperative;

68°. Therefore, the objection is not automatic, it is subject to procedures, concatenated to a set of steps, which requires strengthening coordination efforts and, after all of them, the valid interposition of the objection has not yet been assured in cases of limited risk for the mother. None of this is improvised and everything must be subject to previous planning and programming within the framework of the Constitution, laws and protocols of the Ministry of Health "necessary for the execution of conscientious objection";

69°. The exemption from the unjust legal obligation for reasons of conscience only affects the very act of interruption of pregnancy within a surgical ward. Neither preparatory acts nor subsequent acts are subject to such exemption. If there were an excessive extension of such exemption, there would simply be a negligent treatment of such a nature that we would not hesitate to define it as discriminatory and in violation of the free and equitable access to this health benefit. All of the foregoing, without prejudice to the responsibility derived from it as well as the impacts on the inter-institutional coordination of the health system;

4.- Conscientious objection is not a general title of exemption from the ordinance, nor a modality to discriminate.

70°. The jurisprudence of the Constitutional Court has been answered in estimating that any juridical figure that implies exemption from legal duties cannot be presumed or consecrated in an absolute, general and unconditional way, or even less from a constitutional norm. This is how it has estimated that it is the duty of the Legislature to set up a tax exemption (Ruling 1234); an exemption from payment for the duty to cancel patents for non-use of water rights (Ruling 2881); by the rules of definition of a tax benefit (Judgment Rol 1452) or exemptions in the payment of university credit (Judgment Rol 2865). Likewise, it

is part of the "essential bases of every legal system" (Article 63, numeral 20 of the Constitution) to define the contours of the complementary regulation to configure an exemption or a benefit (Ruling 2614);

71°. This criterion is evident, since conscientious objection implies withdrawal from the mandate of the equal application of the law among all. Therefore, new exemptions cannot be configured through an interpretation, nor is it possible to extend entitlements without addressing their effects and it is alien to our competencies to set up an a statute of exception;

72° In the same way, when explaining conscientious objection in a restrictive way, it seems clear that in the difference of treatment authorized by the Constitution, it cannot behave in an arbitrary and discriminatory way. Conscientious objection raises the duty to act for the conflict of conscience, but not to authorize [someone] to discriminate. In this, there is not only the generic mandate of Article 19, number 2 of the Constitution, but also the most precise rule of obligation regarding free and equal access to health actions, which demands the right to health protection in Article 19, numeral 9 of the Constitution;

5. Conscientious objection has limits in public order and morals.

73°. Conscientious objection shares the characteristics of freedom of conscience, including its limits established in Article 19, numeral 6 of the Constitution. Within them, it is necessary to emphasize that the interposition of a conscientious objection that results in the risk to the life of the mother configures an evident moral transgression, since it seriously violates the professional ethics;

74°. In the same way, it is not reasonable to ignore the preparatory stages of a health action or the subsequent ones, if any. Neither act in a negligent manner ignoring the formalities of the interposition of conscientious objection and the duties of preparation, treatment, professional reassignment and referral, if necessary. Also, the delay in medical care in the case of the third ground in relation to narrow deadlines. All these obstacles, impediments and legal or normative breaches would configure rules that affect public order in the exercise of a fundamental right such as the protection of health;

6.- The institutional design of the health sector is based on a public-private collaboration scheme that imposes social security duties.

75. That the right to health protection is articulated in our country through public and private actions. Inter-institutional coordination is required and the right of choice of people between public and private institutions is always guaranteed, according to mandates already reiterated from the Constitution;

76 °. In this sense, the entire health sector has a complete system designed for coordination and adequate control. The hospitals and clinics that make up the health sector constitute the national health system (article 2 of DFL N ° 1, of 2006, of the Ministry of Health). Also, the Ministry itself supervises the due compliance with health regulations (article 4, number 3 of DFL N ° 1, of 2006, of the Ministry of Health). Exactly that task is of the Health SEREMI (articles 4 and 12 N ° 1 of the DFL n ° 1, of 2006, of the Ministry of Health);

77 °. The Court has held that "it is possible to infer not only that individuals can assist the State in its duty to guarantee the fundamental right to health protection, which is in full harmony with the principle of subsidiarity that recognizes the Fundamental Charter, but, in addition, such institutions, in doing so in relation to their affiliates, are placed on a plane analogous to that of their original right holder, the State. " (STC Rol N ° 1287, c.52 °). The private institutions that collaborate in the execution of health actions have specific characteristics and duties, which justify a greater state intervention. In effect, health actions are benefits of promotion, protection, recovery and rehabilitation of the individual, and the State has a

preferential duty to guarantee its execution. Such duty is performed through public and private institutions, "in the manner and conditions determined by law." This regulation includes the law and the regulatory authority of the organs of the Administration that control and coordinate actions related to health (STC Rol N ° 1710, c.123 °);

78°. Consequently, it is not then about associations that have full autonomy to define their purposes and the ways to execute them. They are institutions that complement a preferential state duty, under the control and coordination of the State, and in which people have the right to freely and equally access health actions, and to freely choose the health system from which they wish to receive benefit;

7.- Personal conscientious objections and institutional ideologies are two different statutes that can be incompatible.

79°. The objection of personal conscience is proper to the individual dimension of consciousness, as we have already seen it from repeated etymological, philosophical, psychological and legal conceptualizations, and cannot be transferred in an unreflective way to juridical persons;

80°. The position of this minority agrees with the Bill, by restricting conscientious objection to natural persons and denying it to juridical persons. This affirmation is controversial, and there have been many doctrinal debates in our country and abroad. It has been argued that certain legal persons exercise rights related to freedom of conscience and religion, by ascribing certain religious beliefs in their statutes. In this case, the institution "is legally authorized to conduct itself according to its beliefs - certainly compatible with public law - which transfers to the State the duty to procure benefits that they cannot provide according to their own regulations and statutes, known and recognized by the State itself. " [VIVANCO, Angela (2016) "Conscientious objection as a constitutional right. "A special mention of conscientious objection to the decriminalization of voluntary termination of pregnancy on three grounds, proposed in the Chilean case", in Casas, Lidia and Lawson Delfina (comp.), Debates and reflections on the decriminalization of abortion in Chile (Santiago, LOM), pp. 179-208, p. 198]. This situation should not be understood as an conscientious objection, but "as a limitation to the demands that the State can make to the aforementioned institutions, given that the same State has recognized for them the statutory right to ascribe to certain religious beliefs and to conduct themselves according to this ascription. " [VIVANCO, Angela ob. cit., p. 197];

81 °. It has also been affirmed that the freedom of association and the freedom of beliefs contemplate a collective aspect, which are exercised by private institutions with [ideological] tendencies. "The freedom of associations, together with the autonomy that the Chilean Constitution recognizes for intermediary bodies, presupposes the capacity to determine ends and choose the means" [NÚÑEZ, Manuel (2016): "Institutional ethical convictions and collective conscience objection in the public and private health sector ", in Casas, Lidia and Lawson Delfina (comp.), Debates and reflections on the decriminalization of abortion in Chile (Santiago, LOM), pp. 209-227, p. 217]. Thus, "if the law protects moral, religious or political beliefs that have an excluding potential for those who do not share those beliefs, then it must also recognize its correlation in the social spheres in which those beliefs are developed, as education, work and health "[NÚÑEZ, Manuel ob. cit., p. 218];

82°. These beliefs imply an interpretation that reduces the broad scope of the hypothesis of institutional conscientious objection only to those that can manifest a certain ideology. This conclusion is partial but significant, since it limits the scope of the institutions that could identify an ideology to a very limited set of organizations. First, although it is obvious, it must be ruled out that public institutions can invoke a different ideology than just belonging to the public state structure without exercising any freedom of conscience. Although we reiterate that the will of the individual members who work in the public sector can manifest their personal conscientious objection. Second, we discard all those institutions which lack

a dense sense of belief. They may be deeply rooted in the Chilean population, as may be the example of the different firefighting stations, but they are not affiliated to a dogmatic institution that can be used as a source of personal ideological convictions. Therefore, it is not enough to be an association, or exercise the collective will of one, to understand that they can be compared to the individual conscience. Third, the scope of freedom of association (which grants legal status to all private associations that are constituted in accordance with the law) would require the associations to follow specific legal rules that its founding documents cannot grant. These beliefs can only be found outside Article 19, numeral 15 of the Constitution. But at the moment, these cannot be found in the set of Health rules that identify the so-called institutional health providers (Article 3 of Law No. 20,584). To support the thesis of institutional conscientious objection, it is based on constitutional statutes that admit the hypothesis of institutional ideals, those found in the religious world (article 19, number 6) and in the educational sphere (article 19, number 11). ;

83°. That in our opinion this thesis is wrong because it goes beyond the institutional mechanisms, denaturalizing them in search of a wider protection, in circumstance [where] the Constitution defines the solution itself. The institutions that follow an ideology that deem it necessary to invoke conscientious objection, must communicate that requirement to their members;

84 °. To this end the Constitution admits the formula of horizontal efficacy of fundamental rights ("The precepts of this Constitution bind (...) every person, institution or group", article 6, second subchapter of the Constitution). Therefore, the institutional ideology admits the possibility of contemplating mechanisms of adherence to certain values that could make a given health service incompatible, due to the moral objection to abortion. These can be communicated to its members. However, this is not conscientious objection, since individual members always keep their freedom of reflective conscience intact and can estimate the best way to react to that violated conscience. In this case, the members of this institution could be subject to a double infraction to their conscience. First, the very objection of the individual regarding the act legally imposed as a duty is incompatible with his/her convictions. And, second, the orientation of an institutional objection that is not compatible with his personal convictions and that threatens his professional ethical sense. Therefore, it is not possible in the name of conscientious objection to authorize the infringement of the conscience of its members;

85 °. The solution is not to force the shortcut of an institutional conscience that would take time to identify. The controllers, the director, the manager, the church that supports them, the decision of a majority of shareholders, a vote of quality within the board of directors, an ethical advisory board, the Committee of institutional ethics, etc.? Neither can the mere fact of belonging to a religious entity imply that they oppose any event to the completion of the medical procedure of abortion. Sometimes they can make the decision in an exactly opposite sense as a testimony of exception. And, where are the rights of its members? Are we going to presume that they are conscientious objectors or that none of them is? Are we going to violate the private life of the professionals who work in these medical facilities and we are going to force them to declare their ideology, religion or beliefs?

86°. That all this set of problems is solved by admitting that there is no institutional conscience and allowing the relations between the members of an association and the legal person of this one to be verified through acts of loyalty. The best way to protect the fundamental rights of both is not by forcing an ideological conscience but leaving the problems bordering on the exercise of the horizontal efficacy of fundamental rights. According to our jurisprudence, this guarantee operates in an indirect way to limit the autonomy of the institutions from the abusive exercise upon the fundamental rights of their members (Ruling 2626);

87°. It is legal for these associations to ascribe to certain religious beliefs, but such a definition does not totalize the consciences of the people who work in the institution. It is clear that those who work or

belong to a health institution with a religious tendency also enjoy the right to freedom of conscience guaranteed by the Constitution. Likewise, those who hold the indisputable right of conscientious objection are the people who work as health professionals, and who will directly execute the health actions related to abortion. Just as a hospital or clinic could not claim that all its personnel are obliged to perform abortions, it could not ensure that all of them are objectors, unless this is convincingly stated. Associations have the right, in accordance with their own statutes and within the limits of the Labor Law, to hire or dismiss personnel who do not ascribe to their ideas. As an example, the European Commission of Human Rights in the Rommelfanger case with Germany (1986) decided that it is not against the Convention for a Catholic health institution to dismiss a doctor who signed a letter to a media outlet, opining in favor of the legal regulation of abortion. The Commission considered that if the employer is an organization that is based on certain convictions and values, it is part of the freedom of expression of the employer to impose certain duties of loyalty upon its employees. In this sense, the European Court of Human Rights has ruled, stating that "religious communities may demand a certain degree of loyalty from the people who work for them or who represent them." [Case of Fernández Martínez with Spain, of June 12, 2014, para. 131];

88°. It should be remembered that when the legislation guarantees these certain institutional ideals, as is the case of the caution of the educational project (f) of article 10 of the General Education Law], these institutional ideals cannot infringe against the current legislation, including indeed the personal human rights of all [literal f) of article 46 of the General Law of Education];

8.- The autonomy of the institutions is not an exemption from the law

89°. The Constitutional Court of Colombia ruled on this point that "Legal persons do not have the right to conscientious objection and, as a result, healthcare providers cannot oppose the practice of voluntary termination of a pregnancy. [...]A conscientious objection claim is not based on an individual's opinion regarding a specific issue; on the contrary, it is grounded in the most intimate and deeply-rooted convictions of an individual. Legal persons cannot experience intimate and deeply-rooted convictions. Though they can embody principles such as free enterprise or represent the fundamental rights of their individual members, legal persons cannot possess an ethical or moral character transmitted to them by natural human beings. " (Judgment T-388 of 2009). [English translation of T-33 derived from excerpts in: *T-388/2009: Conscientious Objection and Abortion, A Global Perspective on the Colombian Experience* ((Georgetown, USA: O'Neill Institute and Women's Link Worldwide, 2014), p. 44]

Regarding the distinction between public and private legal entities, the Court emphasized that in this case it is about the provision of a public health service, established and coordinated by the State. "In these events, we are not dealing with a private institution that provides health services under conditions established by a private agreement based on the mere liberality of the parties involved; on the contrary, it is about the implementation of the public health system, created and supervised in its execution by the State and financed with public resources, in which, although private legal entities have the opportunity to participate, the rules are very distant from those that regulate the first situation mentioned, when it is the public aspect that prevails in the provision of a [public] service, private autonomy must be understood as drastically reduced, especially when it comes to the effective and real protection of fundamental rights such as health, life, the free development of personality, among others. ";

90° Our Constitution establishes in article 1, that "people" are born free and equal in dignity and rights, and that the State is "at the service of the human person and its purpose is to promote the common good". Regarding associations, the State "recognizes and protects the intermediate groups through which society is organized and structured and guarantees them adequate autonomy to fulfill their own specific purposes." Article 19 No. 15 assures people the right to associate without prior permission, and prohibits

associations contrary to morals, public order and State security. Likewise, article 23 orders the law to punish intermediate groups and their leaders "who misuse the autonomy recognized by the Constitution, intervening unduly in activities beyond their specific purposes.";

91°. That the Constitutional Court has affirmed that "[1] The intermediary groups are all associations other than the public apparatus, that is, all those that are not organs of the State in all their manifestations [...] These groupings, located in the social structure between the State and the person, and created by individuals, make up what is called "civil society." Therefore, the Constitution states that through these associations society "is organized and structured" (Article 1 ') These have their own ends different from those of the State and its organs, contributing to "the richness of the social fabric and, ultimately, the common good of society" (STC rol. 226/95). (STC Rol. N ° 1295, c 55 °). The Court has established that "[t]he right of association is constituted in a certain instrumental sense, as legal entities are tools for the execution of the rights and wills of the natural persons that make up this group.

What is regulated by the Constitution, without prejudice to some types of specific associations, is the human society that manifests itself in the individual right to associate and in the collective right to configure a self-government of an organization. "(STC Rol N° 2626, c.18 °). Likewise, it has affirmed that "an association has the broadest right to be founded within the framework of an autonomous and voluntary union, and that by virtue of its capacity for self-government, associations contemplate the rights and obligations of their own members. "(STC Role No. 2626, c. 21) It has also noted that "private groups have the freedom of association and self-regulation that allows a collective exercise of associative law, especially in the determination of its purposes, means, internal rules and resolution of the differences that arise within their associates. This generic determination of autonomy does not contradict the ability of the Legislature to issue general and obligatory norms valid for all subjects to a specific legal system. The legislative power has constitutional status and the intermediary groups are not outside the Legislature's mandates. All the above is adequate because of the autonomy guaranteed by the Constitution. Autonomy is "inadequate" when it claims to be invoked to carry out illegal, harmful or illicit activities, or to protect excesses in the performance of the body that invokes it. "(STC Role N ° 2731, c.28);

92°. Notwithstanding the broad interpretation of the freedom of association and the autonomy of the intermediary groups, the Court has considered constitutional specific legislative interventions. Thus, for example, it has affirmed that "Law No. 20,564 determines a difference since it describes the public meaning of the purposes of the Chilean Fire Department, in accordance with the final clause of article one of the Constitution, in order to state duty of "providing protection to the population" in cases of risks, fires and other emergencies. In this sense, the Legislature has recognized a kind of institutional guarantee, since it regulates the public function of duty but does so respecting that these ends are met by means of private organizational forms . " (STC Rol N ° 2626, c 18 °). It has also expressly pronounced on private institutions that guarantee social security benefits related to health, stating that "the contract that an affiliate celebrates with a certain Isapre [health insurer] is not equivalent to a mere individual health insurance, governed by the principle of autonomy of the will, since it operates in relation to a right constitutionally guaranteed to people in the framework of social security and in which the private entity that grants the insurance, is insured, by law, a quotation, that is, a guaranteed income. Thus, the rules that regulate this legal relationship are of public order. " (STC Role No. 1710, c. 154 °). The same has been held with respect to universities, stating that "both the economic and administrative autonomy that the law confers upon the establishment of higher education (Article 104, General Education Law) is subordinated to compliance with the statutes and the law. In this way, it should be remembered that the powers that are delivered to the Ministry of Education are defined by law, according to article 65, fourth subchapter, No. 2, of the Constitution, which defines the organizational form that must be adopted by institutions of higher education, the modalities of accreditation, receipt of subsidies, etc. " (STC Rol N ° 2731, c.30 °). This also applies to subsidized private educational establishments when affirming that "the freedom of

education is not outside the regulations that the Legislature can impose, that make it possible and reconcilable with the right to education." (STC Rol No. 2787, c.242);

93°. The institutions that subscribe strongly to certain beliefs or convictions have the autonomy to do so, but at the same time, their adequate autonomy is subject to the state regulation in the field of health actions. Many of these organizations are not only under the supervision of the State, but they sign specific agreements with it, to guarantee benefits in free choice mode, to execute GES guarantees, to solve issues not contemplated in public health, among others. These specific types of associations, by the area in which they operate, are subject to their own statutes, but also strongly to the law and administrative regulation;

94°. If institutional conscience objection is admitted in our health protection system, the State will not be able to fulfill its preferential duty of guaranteeing health actions through private institutions. The idea of the system, which was precisely to prevent the state monopoly, cannot be carried out. This not only implies a series of organizational and coordination difficulties, but also limits the right of people to "freely choose" the health system. When the democratic Legislature "adopts statutory regulations allowing abortion in some situations, it must not structure its legal framework in a way which would limit real possibilities to obtain an abortion." [European Court of Human Rights. Case P. and S. v. Poland, of October 30, 2012, para. 99 ~~58~~]. Also, if the Legislature establishes health actions related to the interruption of pregnancy, the State has the duty "to organise their health service system in such a way as to ensure that the effective exercise of freedom of conscience by health professionals in a professional context does not prevent patients from obtaining access to services to which they are entitled under the applicable legislation" [European Court of Human Rights. Case P. and S. v. Poland, of October 30, 2012, para. ~~65~~ 106]. If, in addition to the individual conscientious objection, a hypothesis of institutional objection is admitted, the State will not be able to fulfill its preferential duty, and the coordination of the system will be excessively limited;

9.- Collateral damage of so-called institutional conscience objection

95°. Consequently, it cannot be considered that it is within the nucleus of collective self-government of the associations to exempt themselves from the law, to withdraw from their compliance and to consecrate an expectation of law that would violate any rule in operation within the Rule of Law. It would suffice to think, for example, of the claim to sustain an objection of fiscal conscience, as a hypothetical consequence of the self-government attribute of certain institutions, to argue the impossibility of paying taxes. This expectation derived from the unthinking extension of conscientious objection to legal persons is so fallacious that the case falls apart completely. In such an example, it is the Constitution itself that declares that certain churches and their dependents"shall be exempt from all kinds of taxes" (third subchapter of numeral 6 of article 19 of the Constitution) in the name of freedom of religion, and not as the result of a dubiously sustained conscientious objection

VI.- Application of these criteria to the methods of challenged conscientious objection.

1.- Extended conscientious objection.

96°. According to a good set of criteria already held it is not possible to deem that we are facing an unconstitutional rule for the following reasons. First, because the Health legislation is that which specifies who are the persons susceptible to exercise, under the condition of individual provider, the rights and obligations of Book V of the Health Code where conscientious objection is regulated (Article 3 of Law No. 20,584). Therefore, it is a matter of legality that is not solved, only with the help of this norm, but it is necessary to look at Health legislation as a whole. Second, because the Constitutional Court

cannot create exemptions from compliance with the law. An activism of this nature would weaken the very notion of the Constitution, since, constitutionally empowered, the challenged Bill would be questioned through specific discriminations. Thirdly, we cannot objectively broaden this conscientious objection, because all the preparatory acts and those subsequent to the medical provision of interruption of pregnancy are not subject to conscientious objection. These are acts that do not constitute an unavoidable moral crossroads. All offer alternatives and, even more, the law itself demands them since the duties of treatment, professional reassignment and referral must be met within the framework of regulated procedures for the interposition of conscientious objection. Fourth, that the subjective dimension of non-professional personnel participating in a provision of this nature is subject to the development of specific protocols issued by the Ministry of Health for the execution of conscientious objection. It would address [the situation of] any staff member who does not participate directly in the act and does not have the aptitude to produce the result who concludes that his/her personal convictions have been injured. However, it is admissible that some may consider that they are part of a medical team and demand equal treatment and rules. But it does not seem to be the general rule that rights and obligations fall with the same force on certain types of personnel, even this decision itself constitutes an unacceptable dependence of the right of conscientious objection on staff, because its exercise is subject to the decision of the original doctor, since there is no regulation of the derivation of non-professional objecting personnel;

2.- Conscientious objection without exceptions.

97°. We have already held that conscientious objection shares the characteristics of the freedom of Conscience, including its limits established in article 19, numeral 6 of the Constitution. Consequently, the interposition of a conscientious objection that accrues to the risk to the life of the mother constitutes an obvious transgression of morality, insofar as it seriously violates professional ethics;

98°. That we believe that there are no two opinions about the impossibility of abandoning a patient to her fate, in the case of immediate and urgent medical attention, which, when linked to the first ground, can only mean the real and present risk of danger of the life of the mother;

99°. Regarding a delay in medical care in the case of the third ground, in relation to narrow deadlines, all these obstacles, impediments and legal or normative breaches would configure rules that affect public order in the exercise of a fundamental right such as the protection of health. Therefore, we believe that these rules are based on the constitutional limits of conscientious objection;

3.- Institutional Conscientious Objection **{p.235}**

100°. There is a wide range of reasons to dismiss the hypothetical unconstitutionality of the non-extension of conscientious objection to certain institutions. First, because it is not possible to claim violation of a constitution when the rule of conscientious objection is only born automatically from article 19, numeral 6 of the Constitution, in a circumstance that is not communicable [cannot leak into] to the freedom of association. Second, because the Constitutional Court cannot create exemptions from the law. Third, because it is a matter of legality to circumvent that the exercise of conscientious objection regulated in article 119 ter of the Health Code only reaches the individual providers regulated in Book V of said Code and not the institutional providers. Fourth, that the collateral effects of these exemptions would generate expectations of rights that would make the generality of the law an exception under the mere discretion of the collective will of the associations.

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Fifth, because institutions cannot have a conscience. Sixth, because only some institutions have ideas. Seventh, because the values of these ideologies can be defended constitutionally through the indirect application of horizontal efficacy of fundamental rights. This is essential to ensure that the rights of its

members are not subjected to institutional abuse of an authoritarian nature. Eighth, that a conscientious objection applicable to institutions would require a wide range of regulations, in circumstances where conscientious objection would lead to omission of some of them [?regulations or legal duties?}. Ninth, that the activism of the institutions that wish to impetrate organic objection brings them closer to an exercise of disobedience of the law within the framework of the purpose of reformulating it, which excludes them from the subjective dimension of the mere objector. Tenth, because there are countries like France that allow institutional conscientious objection, but regulated by law and not as a result of the freedom of conscience, and only applicable for those that do not receive state subsidies of any kind. Eleventh, because its recognition would affect rights of third parties that must be specified by the Legislature. Thus, for example, those of the patient herself, risking safe care and in comformity with respect for her consent. Also of the Health Insurance Institutions that must finance benefits that are part of the content of the health plan of each person and that may end up becoming excluded by the type of health plans (for example, the closed ones) leaving the insurer without the possibility of fulfilling the contract. Or of the providers themselves, who risk setting up a lack of service or a negligent act, depending on the way in which the objection evolves. Or of the professionals themselves, who, confronted by their institutions, may see their own consciences injured. Or the state itself that can result in a broad regime of incoordination. Twelfth, because the Constitutional Court cannot repeat sentences (such as the Rol 3016 Judgment) creating expectations of law outside the scope of any regulation by the Legislature, weakening the argumentative force of its own jurisprudence;

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101°. Having given the reasons for the rejection by these two judges, it is finally necessary to verify the legal effect of the state of unconstitutionality declared by this Magistracy in terms of its scope on some of the forms of conscientious objection. The majority, who accepted these objections, only kept them in relation to specifying the extended conscientious objection to all the personnel that directly enter the surgical pavilion and intervene in the interruption of the pregnancy, but excluded other people's acts preparatory and subsequent to it. In addition, it welcomed the elimination of the invocation of conscience as an exclusively personal faculty, in what we consider the so-called institutional conscientious objection. And, finally, it accepted the conscientious objection to emergency treatment only of the ground of rape, since even with narrow deadlines, the majority considers that there is possibility of referral. The same would not happen in the case of the first ground that leads to the risk of life of the mother, because it constitutes a flagrant violation of medical ethics;

102°. In short, having presented all this with a hundred preliminary considerations to deem that all these supposed unconstitutionalities -- by the conceptual arguments reflected, by the criteria explained and by their application to the diverse modalities of objection that were challenged – are all lacking in normative meaning and lead us to uphold the constitutionality of the entire regulation of conscientious objection.

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Judges Mrs. Marisol Peña Torres and Mr. Iván Aróstica Maldonado, Domingo Hernández Emparanza, Juan José Romero Guzmán and Cristián Letelier Aguilar furthermore, declared unconstitutional the entire final subchapter of Article 119 ter of the Health Code, added by Article 1, No. 3, of the same Bill, for the following reasons:

1°. The questioned regulation prevents those who have expressed their conscientious objection from being excused from performing the interruption of pregnancy in the case of immediate and unpostponable medical care, when the aforementioned interruption is required on the grounds of numerals 1) and 3) of the new article 119 of the Health Code. That is, where the woman is at risk to life and when the pregnancy is the result of a rape and the expiration of the 12 or 14 weeks of gestation period is

imminent , respectively. In addition, the situation is configured thus when there is no other surgeon who can perform the intervention;

2°. The situation alluded to places the doctor in an insoluble dilemma, because the exercise of his/her freedom of conscience, through the respective objection, struggles with the fulfillment of a legal duty that completely violates his/her deepest convictions, so that, forced by the law to do what he/she does not believe in, ends up being denaturalized as a free and dignified human being;

3°. A legal system that respects human dignity must seek voluntary and conscious adherence to its dictates. On the contrary, the imposition, based only on the coercive dimension of the law, certainly assures efficacy, but at the expense of treating the human being as a thing rather than as a rational, intelligent and free being, as proclaimed in the first subchapter of article 1 of the Constitution;

4° It can be argued that, in emergency medical care, the risk to life or the impact of a rape are sufficient grounds to subordinate the exercise of conscientious objection. However, since what is at stake, as expressed, in the decision, is freedom of thought itself, which is one of the most distinctive features of humans among the rest of living beings, the prohibition of asserting conscientious objection in these cases implies ignoring that dimension of freedom of thought to the point of annulling it. That is why, from this perspective, the prohibition contained in the final clause of the new article 119 ter of the Health Code violates the essence of the right to the free expression of beliefs, freedom of belief or freedom of thought, by making it unrecognizable as its own attribute, innate to the person.

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RESERVATIONS / PARTIAL CONCURRENCES

Justice Domingo Hernández Emparanza indicates that he has concurred with his vote to the rejection of the petitions regarding the challenge to the three grounds that legally allow the termination of pregnancy, while holding the following reservations:

I °. The majority bases the rejection on several premises to which I do not subscribe:

a) Firstly, the legal grounds for the termination of pregnancy presented in the bill cannot be thought of as the acknowledgement of the free will of the pregnant woman with regards to her own body and/or as a result of some of the rights that pertain to her gender, traditionally neglected by society though positively recognized at present, in a context where there is a conflict between the life of the woman and the one who is unborn as a mere legally protected interest and not a person, and thus, one whose fate, in case of conflict, is to be disposed based upon the opinion of the woman. I am not in agreement with this, given that the notion of free will consists in the exercise of one's own freedoms and the subsequent addressing of the consequences of personal decisions, so that it ends where the right of others begins without the possibility to externalize and non-consensually have another party be the recipient of the consequences of these decisions. With regard to this idea, the embryo or, at a later stage, the fetus, constitutes an intrauterine human life, which is to say, a human being who is alive, despite depending on the mother in biological and even psychological (cognitive-emotional) terms. This other human being is in clear and distinct perception as diverse and unique as any other human being, who already exists as such from its conception, with its specific genetic individuality, whether this begins when the gametes fuse to form a zygote, or from the time that same zygote is implanted in the endometrium. At that point, the complete genetic information is already in existence, which needs only to develop during the gestational process and unfold throughout the course of human life after the birth, which is the continuity of the very reproductive and evolutionary process;

b) Due to the above, the cultural associations linked to the roles that society assigns to both sexes of the human species have little to do with reproductive biology in and of itself. There is no doubt that the woman, upon insemination by the man whether through natural or artificial means, is the one to carry out the gestational process. It could not be the other way around. Neither is parthenogenesis a possibility. Human reproduction cannot occur otherwise. This type of human reproduction thus concerns both parents, male and female, in their varied resulting biological and socio-legal roles. Therefore, the right to have or abort a child does not exclusively pertain to the pregnant woman, even when the mother is most exposed to the risks and burden of the gestational process in all situations, including anomalies. It also is not a form of using her as a mere material means of reproduction for the species. On the contrary, this is precisely what grants maternity such high regard;

c) Beyond the above, discourse that is, to a lesser or greater extent, semantic, originalist or literalist, each relying in some way on formal or material sources of the Law, regarding whether the embryo is or is not a human person, seem somewhat irrelevant. It is not the role of the Law to decide on the nature of human personhood, or on human nature. These are age-old philosophical, theological or anthropological topics that cannot be solved rationally and which, ultimately, are decided upon at a personal or collective level through a question of faith or thoughtful choice. These understandings are all valid in principle, in a pluralist and democratic society, even at a religious level. The diversity of understandings regarding personhood and society must coexist within a common regulated framework that is acceptable for such a society as a whole. Therefore, I believe that we may be approaching what Hans Kelsen termed "basic hypothetical norm," to describe a set of values that is irreducible and which cannot be understood through analysis, and serves as the underlying basis for a legal system. At the core of this idea is that the concept of person is understood by Law, ***for civil purposes***: it exists at the moment of birth, that is, when the fetus is completely separated from the mother, for reasons that are fundamentally pragmatic: it is only at that time that the human being may be officially acknowledged by the civil registry in the form of a birth certificate and, further, may be issued the national identity card as a form of ID with fingerprint, photo and number. Given the technology and resources that are currently at our disposal, it would not be possible to proceed otherwise. Furthermore, it is at that biological moment that the Law grants the human being its identity features: name, nationality, assets, address, marital status, rights and responsibilities, which the human being living inside the womb does not have. However, this pragmatic reason, which fundamentally addresses the question of familial assets is not to result in that the fetus before birth be only a "centre for regulatory allocation or imputation" for specific effects, and not a life in its full form, albeit at a different developmental stage, with no right to life and whose fate can be disposed by the mother, in certain situations. The human nature of the fetus is clear and evident in and of itself, beyond the paradigmatic clash that this very significant issue has highlighted before this Constitutional Court between views of a natural law or neo-constitutionalist nature and others that are more in line with positivist law, and which need not be examined in this vote. To delve deeper into the issue, when considering the etymological root of the word "abortion", it comes from the Latin prefix ***ab*** (away from, separation from the outside) and the Latin verb ***ortus*** (birth), whose participle is ***oriri*** (to appear, to be born), which leads to the Latin verb that evolved into a noun ***oriens*** (east), which signals from a geographical perspective the place where the sun rises or is born. Therefore, birth deprivation as a concept does not call for establishing, as a logical or value-based ***prius***, whether the fetus is or is not a person: an abortion is simply the deprivation of birth;

d) Furthermore, the discretionary exercise of state ***ius puniendi*** , where the State can both establish crimes (e.g. certain forms of abortion), and decriminalize certain behaviours (e.g. some forms of abortion), exposes, in my opinion, a material fallacy. The use of such an apothegm as a premise surreptitiously involves in the very premise the conclusion that is being sought: whether in this case the

Constitution would allow it. If the aphorism were so evident, this constitutional process would never have taken place;

e) Additionally, it is also not my opinion that human life is a relative value, as deemed to be the case by institutions pertaining to self-defense or the defense of third parties, the fulfillment of duty, the justifying or exonerating state of need, the execution of judicial resolutions, reactions to prison breaks, et cetera. As I view it, human life is always an absolute value in and of itself. The same goes for the legal norm that, stemming from that value and transformed into a legal right, bans the killing of another. The issue is that, **concretely**, and within the context of the legal grounds considered, the legal norm (ban) may yield in its application (which is the case of the mitigating circumstances , such as self-defense or legitimate defense of third parties or even when it is applied to the case, the infraction, in concrete terms, may be unreproachable (exempted or exonerated) due to the abnormal circumstances that resulted in the decision to act (non-exigibility of different conduct due to the exonerating state of need, ***inter alia***). However, due to its nature, both the grounds of justification (typically legitimate action) and the reasons for exculpation (action that is typically illegitimate but unreproachable), must be judged in concrete terms, by the judge of the case. As a result, the mitigating justification or non exigibility of other conduct , depending on the cases cannot be examined in abstract terms as the basis of a legal regulation for the authorization of the termination of a pregnancy, but must be considered only for illustrative, guiding, or analogical purposes, though not in a strict sense. This is up to the judge of the case and, as will be stated below, it does not entail confusing the regulatory granting of powers with the implementation of these powers granted by the legal regulation, given that the problem may already have been present in the regulatory attribution (from the legal regulation as it was drafted.

f) Notwithstanding the above, there has been mention that the legislative technique used in the Bill in question to determine the three legal grounds that authorize the termination of pregnancy consists of what it termed decriminalization, which is to say, a more radical one than mere exculpation or even justification . Based on this criterion – which somewhat contradicts what has been heard in the courtroom from a criminal perspective – abortion would become a socially appropriate medical service which would not even enter the context of categorization as a crime, similar to any current type of surgical intervention, which today is not deemed to be a harmful action justified by medical praxis but an atypical action which does not consist in injuring, hitting or mistreating another being, resulting in bodily harm, but in healing actions in which the harmful effect is more apparent than real and only temporary, in a causal relationship whose purpose is the healing of the patient. I believe that this idea takes things too far, as an abortion cannot have – regardless of the situations in which it is induced – the same socio-ethical weight as a surgery due to, for example, appendicitis. Although it undoubtedly has a component of medical service, this aspect must not be taken out of context so that it results in the only issue of consideration. It is important to ponder the possibility that this form of "decriminalization" is a result of the criminal-legal need to legally exempt the medical team of criminal responsibility , as it would not be exonerated by the personal circumstances of non exigibility of other conduct} which only pertain to the woman, given the criteria of shared culpability [*accesoriedad media*] that are commonly accepted with regard to the authors and participants in a crime.

2. Without disregarding the above, through my vote, I reject the petitions in this point and, as a result, I accept the constitutional legitimacy of the three legal grounds for the termination of pregnancy so often alluded to, but only within the strict boundaries and criteria that follow:
a) Evidently, my fundamental parameter is that the only interpretation in line with the Constitution that can be considered acceptable with regards to each of the three legal grounds of the Bill is either the authentic existence of a conflict of legal rights between the life of the mother and the life of the embryo or fetus, or the existence of a real and concrete situation of inexigibility of other conduct stemming from the abnormal circumstances that motivate or shape her will, given the severe suppression or decrease in the free self-determination of the gestating woman. These situations must be concretely configured by a

tertium non datur, that is, the impossibility of acting otherwise, the concrete lack of alternatives: either the necessary sacrifice of the one yet to be born takes place (indirect from a volitive stance, regardless of the form in which the bodily intervention takes place) or it and the mother die, in the case of the life of the mother being endangered; or, in the case of the inexigibility of other conduct, a real situation must be configured with regards to the state of exonerating necessity between incommensurate legal rights, as per Article 10, number 11, of the Penal Code, which will not be outlined in this document, but which can be linked to the risk of suicide of the mother or severe mental diseases for her; {p.246}

b) As a result, the logic of the ***general-exception rule*** underpins the criteria outlined. As a general rule, abortion constitutes a crime. In exceptions, it is not; neither for the mother, through justification in the case of so-called indirect abortion, nor for the medical team which, in my opinion, shall not be liable only in situations where there is a exonerating legal absolution} which considers criminal policies and social usefulness, but in no case as a result of the fetus being considered a legal interest instead of a human being, or due to the woman being free to terminate the pregnancy, or the behaviour being deemed atypical due to social adequacy. To the contrary, it is precisely because the woman has no right to choose that the law exonerates her. And due to social usefulness and criminal policies, the medical team is granted exonerating legal absolution, even though the abortion consists of an unfair act;
c) Beyond this framework, future concrete cases shall not be covered by the constitutional protections of this bill and shall be liable to be controlled by way of concrete actions of non-applicability;

3. That, having stated the above, I substantiate below the only interpretation that is in agreement with this view of principles, in relation to each of the legal grounds for the exceptional decriminalisation outlined in the Bill that is examined with regards to its constitutionality; {p.247}

A) In relation to the first legal ground in the first paragraph of Article 1, No. 1 of the Bill:

i. I agree in this point with the arguments in sections 55^0 to 59^0 of the minority vote, in the sense that the exact manner in which this ground can be understood – it being the only one that is in line with Article 19, N^0 . 1, paragraph 2 of the Constitution – is that it only authorizes indirect abortions. In such a situation, the termination of pregnancy seeks to save the life of the mother, but lacks the positive intention to end the life of the one yet to be born. As a result, the above would be the only interpretation that is compatible with the Constitution, in this case.

B) In relation to the second legal ground in the first paragraph of Article 1, No. 1 of the Bill:

i. The second legal ground for actively causing the termination of pregnancy refers to the case where "The embryo or fetus has a congenital pathology, acquired or genetic, incompatible with independent extrauterine life, in any case of lethal character.." In order for such an intervention to take place – as stated in Article 119 bis in paragraph 2, as added by point 2 of the Bill – "two **medical specialists** shall provide their medical diagnosis in the same sense" (emphasis added), and these "must be recorded in writing and be done in advance."

ii. The term "specialists" as per the definition provided in the dictionary of the Real Academia Espanola de la Lengua [Royal Spanish Academy of Language] concerns the one "who cultivates or practices a determined branch of an art or science" (first meaning in the aforementioned Dictionary, 23rd edition of the tercentenary, p. 947). In the case of medicine, and although the bill does not make it explicit, the required "specialty" would seem to be related to obstetrics and gynecology and, especially, to the latter, "which is concerned with gestation, birth and post-partum," according to the basic definition of the dictionary (Diccionario de la Lengua Espanola, cit., p. 1561);

iii. In the field of obstetrics, a newer branch called maternal-fetal medicine or perinatology, has emerged, which focuses on the medical and surgical concerns of high risk pregnancies and fetal surgery, with the purpose of lowering morbidity and mortality;

iv. That both during the legislative debate of the Bill in Parliament, especially at the Health Commission of the House of Representatives , as well as in the series of public hearings convened by the Constitutional Court, a number of distinguished scholars from the field of medicine shared some of the statistics related to errors in diagnoses frequently made with regard to the lethality of diseases of the unborn. In this sense, Dr. Sebastian Illanes, a specialist in maternal-fetal medicine and an academic at Universidad de los Andes, stated that "the individual issuing a diagnosis of the anatomy of a fetal patient must have a **specific qualification**. Presently, a **great number of ultrasound scans are performed by general gynecologists**, who usually receive three-months of training in this area. As a result, **70 percent of the diagnoses issued by these doctors is wrong**" (emphasis added) (Annex to the Report by the Health Commission of the House of Representatives for the Bill that regulates the decriminalization of the voluntary termination of pregnancy in three legal grounds, in: Bulletin N. 9,895, 15.09.2.015, pp. 92-94);

v. In the same sense, Dr. Jose Antonio Arraztoa, specializing in gynecology and obstetrics and tenured lecturer at the Faculty of Medicine, Universidad de los Andes, adds that "it is very difficult to diagnose congenital malformations, given that general obstetrician-gynecologists lack the adequate training to make diagnoses, which results in a high risk of terminating pregnancies with normal children**. A national study indicates that 83 percent of diagnoses or suspicions of malformations by obstetrician-gynecologists are wrong**" (emphasis added) (presentation by the aforementioned doctor in the Annex to the Report cited above, pp. 114-115);

vi. The presentation by Dr. Jorge Becker Valdivieso is also relevant, in that he is a respected maternal-fetal medicine expert and director of the Obstetrics and Gynecology department at Universidad de Talca, and in his presentation during the public hearings convened by this Court, he indicated that none of the slightly over 50 specialists in maternal-fetal medicine of the country were consulted by any of the branches of the Congress to issue a decision on a topic of such significance as the one that was debated (Public hearing on Thursday, August 17, 2017, 4th Block). In a document attached to his presentation, the specialist highlighted that "**general ultrasound scans find less than 20 percent of malformed beings; when these are performed by a general gynecologist, it increases to 50-60 percent and when performed by a specialist in maternal-fetal medicine does, it is 90 percent**" (emphasis added);
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vii. The field of medicine deals with informed probabilities and suppositions, but not certainties. As William Olsen had already stated at the end of the 19th century, "Medicine is the science of uncertainty and the art of probability." The maxim still has full validity, as demonstrated by the medical texts that cite it almost a century later (cit. In RC Fox, "The Evaluation of Medical Uncertainty." *Milbank Men Fund Q Health Soc.* 1980; 58: 1-49). Hence, despite the use of all the diagnostic tests at hand, the resulting decisions are always taken in a context of uncertainty;

viii. Undoubtedly, the above cannot paralyze a medical decision regarding any morbid incident. Error is integral to such an action. But if, in diagnosing the lethality of the fetus, the margin of inaccuracy far exceeds tolerable levels, as is the case when these tasks are performed by those who lack the required subspecialty to bring the possibility for error to reasonable levels, the informed judgment of the mother could be significantly distorted, leading her to make a decision that is dramatically erroneous for the life of the fetus or embryo;

ix. As the European Commission has indicated in its Communication on the Recourse to the Precautionary Principle, "In some cases, the very existence of divergent views presented by qualified scientists who have investigated the particular issue at hand may indicate a state of scientific uncertainty. " (cited from the Communication to the Report by the WTO Appellate Body in the matter of hormones, paragraph 194);

x. In the risk analysis inherent to a medical diagnosis so significant as to justify the early termination of a pregnancy, the measure adopted -- according with the precautionary principle included in the jurisprudence} of this Court, as will be shown below -- must allow for the appropriate level of protection to be reached so as to not eliminate other available options, but "without seeking to achieve zero risk, which rarely exists" (Section 6.3.1 of the Communication cited above);

xi. The only sense in which this legal ground must be considered to be congruent with the Constitution, in my opinion, is where the expression "two medical diagnoses" issued by "specialist physicians" is understood to mean that this medical assessment or opinion must be issued by experts in the respective branch of the pertinent field. Based on the above points, this would be the domain of physicians with a specialization in maternal-fetal health or perinatology, duly accredited by a legally recognized university that can impart that expertise;

xii. As this very constitutional jurisdiction has stated, the principle of interpretation *favor homine* or *favor persona* -- illustrative in the type of hermeneutic proposed -- forces "the interpreter of regulations to seek that interpretation that most favours the rights of individuals rather than the one that annuls or minimizes them" (STC Rol N. 1484, from 5.10.2.010, c. 25);

xiii. Despite the Legislature being granted the power to allow a termination of a pregnancy on this second legal ground, based on the reasons stated above, the minimization of the risk, the *favour persona* principle and the proportionality of the risk of the life of the unborn versus the high proportion of medical error, lead to the conclusion that a diagnosis issued by specialists who scientifically lack the necessary accreditation, with regards to what is required in this hypothesis, is not congruent with the Constitution if it is assumed that it was not issued by "specialists," as the Bill requires, where these are understood to be specialized in maternal-fetal medicine or perinatology. As the German Constitutional Court has indicated -- in its well-known 1993 decision -- the duty to protect the one who is unborn requires that the necessary medical support in the interest of the woman not undermine the protection of the one who is unborn: this would occur if the intervention by professionals in determining the diagnosis of fetal lethality did not guarantee, within the boundaries of medical science, the best prognosis;

xiv. That a different interpretation of this precept – in the sense that this group could be formed only by obstetricians – would lead to a clear transgression of the constitutional warranties of the right to life of the unborn, subjecting it to too serious an expert error. It would be unfathomable that the Law could support such a preposterous idea. This evaluation clearly does not overstep into the evaluation of the merits, which pertains exclusively to the Legislature, but instead, it interprets, as per the Constitution, precisely the section of the legal regulation in control.

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C) In relation to the third legal ground in the first paragraph of Article 1, No. 1 of the Bill:

That, with the introduction of this legal ground, the Legislature has sought to resolve the dramatic antimony that emerges in the case of a collision between two legal rights of equal value, as are the life of the pregnant woman and that of the child to be born, in anomalous circumstances where the individual is the driving force. In this critical event, as I see it, the course of action is to address the actions of the woman through a legal ground of inexigibility of a different course of action and that of the physicians through a legal exonerating excuse, though without providing a dogmatic explanation for this solution. Regardless of unresolvable axiological considerations, I understand both behaviours as not liable to criminal responsibility, though still unlawful.

In my opinion, this option is valid from a constitutional perspective, so long as it concretely stays within the rigorous boundaries stated above and, therefore, does not become a procedural subterfuge to cover up an abortion based on motivations that are not linked to an authentic crime, however it may present. If, despite everything, this still occurred, there would still be the option of concrete inapplicability due to unconstitutionality, as has been stated.

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Justice Juan José Romero Guzmán agrees to accept the petitions of this case, also on the basis of the additional or complementary considerations set out below:

I.- ESSENTIAL OBJECTIVES OF THIS VOTE.

1. This particular dissenting vote has two major objectives.

The first objective is to present the controversy and debate in an orderly manner favouring its transparency. The argumentative discussion has been confusing, because: (i) in some cases the terminology used was at times erroneous or unclear, giving rise to a linguistic disagreement; (ii) there have been numerous and very diverse argumentative orientations to justify the constitutionality or unconstitutionality of the proposed regulations; (iii) the arguments presented have, in certain cases, been supported by inadequately citing sources or historical records that allowed for incomplete or selective lines of argument; (iv) some cases portray logical errors in their argumentation; and (v) there are differences, inconsistencies or contradictions between the written and oral arguments from specific parties, as well as with respect to other parties making the same claim. The same occurs when contrasting the line of argument and the legal reports submitted by some parties – this is specifically the case with the argument presented by the President of the Republic.

The second objective seeks to demonstrate, in some cases with new arguments, why, in my opinion, the proposed regulations of the Bill under review are in breach of the Constitution. This second objective complements the presentation of analytical frameworks that contribute to clarify or put in order the controversy and the numerous and diverse arguments presented. Thus, in short, I confirm (in some cases in a nuanced fashion) what is expressed in the dissenting opinion and I affirm that the petitions made by a group of senators and representatives must be accepted.

II.- THE BASICS.

2 . The Constitution, in some cases, establishes precepts about what is right and wrong, and what should and should not be done. When, for example, life and physical and mental integrity are established to constitute a right or to be worthy of protection, the meaning behind this is that these are valuable assets for each individual and, needless to say, for society.

3 . The expression on the part of a society about what is valuable, right or wrong, denotes an opinion based on morals or values. This is especially noticeable with respect to human life. In other words, the protection of human life (a value that humanity has tried to respect, with varying degrees of success, at least at a rhetorical level) has, firstly, a moral dimension and, secondly, a legal dimension.

4° In the case of Chile, these types of values or fundamental pillars on the part of society reach their maximum legal expression when they are acknowledged or enshrined in the Constitution. Obviously, the law also reflects our society's options in favor of what it considers to be valuable assets. However, the fact that they should be constitutionally protected and not only legally protected makes a difference.

5. From the perspective of how normative decisions are made in a democracy, the amendment of a constitutional norm implies greater demands than that of a merely legal one. By way of illustration, in order to modify a provision in Chapter III of the Constitution pertaining to Constitutional Rights and Duties, such as that which states that "The law protects the life of the one about to be born" (Article 19, No. 1, second paragraph), two thirds of the representatives and senators in office are needed to approve it (i.e., 79 representatives and 25 senators). This is a more significant requirement than the simple majority of the representatives and senators present, required for this Bill, the constitutionality of which is being challenged.

6° Democratic societies know that there are basic matters required for coexistence that must have a higher level of stability or permanence and that, therefore, should not depend on the pendulum swing of parliamentary majorities and minorities over time, unless a greater level of consensus or approval is reached.

7° For those of us who maintain that the constitutional norm that enshrines in general the right to life and in particular the protection of the life of the unborn is clear, both for jurists and for lay people who seem to understand that provoking death is the opposite of protecting life, any legal provision that authorizes (with more or less conditions) the abortion or intentional death of the unborn human being (which may be called an embryo, fetus, or child who lives in the womb) violates the Constitution.

III.- THE PROBLEM (OR HOW SIMPLE THINGS GET MESSY).

8 °. In simple terms, to resolve a conflict like this, constitutional judges must identify the relevant constitutional regulation(s) and contrast them with the relevant provisions of the Bill. Sometimes this is a simple task, but not always. Moreover, the simple or difficult nature of a judicial decision may be due, firstly, to the degree of difficulty in understanding the meaning of the text or, secondly, to the degree of difficulty in adopting the decision when considering its significance and impact for the country. We must remember that this Court does not act on its own initiative, but has been required to do so and, therefore, abstaining is not an option.

9 °. We all agree that the decision adopted by this Court (after the approval or endorsement granted by Congress) is transcendent and it is also understandable that such a situation can, eventually, be more or less uncomfortable or complex for some of its members. However, I do not agree with how difficult it seems to be to understand the meaning and scope of the protection provided by the Constitution to "*the life of those about to be born*". Indeed, we do not agree on how clear or ambiguous, in and of itself, the language in the Constitution is in this matter, as well as in relation with its proper purpose at the time of its enactment or the prevailing aim that it may be given when considering the constitutional text as a whole. As previously stated, the legal discussion has been particularly tangled, and should not have been so.

10°. Those of us who are about to accept the petitions and declare the unconstitutionality of the challenged provisions maintain that the ultimate justification for the constitutional protection of the life of the unborn obeys the following logical rationale: a) it is wrong to kill an innocent human being; b) the fetus or unborn child is an innocent human being; therefore, c) it is wrong to kill the unborn being.

11° On the contrary, those of us who are about to reject the petitions dismiss the above basic rationale regarding the value of life recognized in the Constitution, in particular pertaining to the one who is unborn. Nevertheless, given that

(a) it is difficult to argue [against the idea] that the being in the womb whose delivery has not yet materialized is a human being (for example, whether in the 12th or 36th month [sic] of gestation, two hypotheses in which the Bill would allow the termination of the pregnancy), and
(b) it is very difficult to justify that what is wrong is not to kill an innocent human being, but only to kill an innocent person, this latter quality being one that the fetus or unborn being lacks, according to them.

Based on the above, those who are about to confirm the constitutionality of the Bill have tried to demonstrate the following:

(i) that the Bill does not authorize the mother to abort (that is, to deliberately and directly provoke the death of the one not yet born), but only to decriminalize the termination of the pregnancy. Given that this assertion is too weak, as will be explained, they have focused their argument on trying to demonstrate,
(ii) that, although the life of the one who is unborn is protected by the Constitution, the value of such protection is hierarchically lower than the right of the pregnant mother, in specific cases that are very harmful to her life or physical and mental integrity, to interrupt the pregnancy, thus causing the death of the fetus or unborn being.

12°. As it is difficult to deny that a deliberate and direct act aimed at causing the death of the unborn is the antithesis of what the Constitution protects, that is, its life or, in other words, its existence, those who affirm that "abortion on three legal grounds" is constitutional, resort, in my opinion, to a convoluted (and, in the end, forced) argumentative reasoning that is not exempt from logical inconsistencies and errors in the use of empirical evidence, among other issues.

13 °. The method used for the argumentation has, as its starting point, a discussion about what would be the appropriate criteria for the interpretation of the Constitution to resolve the issue. For this purpose, the most convenient (or, perhaps, most useful) interpretative criteria are chosen and others are rejected (although, in some cases, only in appearance).

Of course, defenders of "abortion on three legal grounds" find it very convenient to avoid acknowledging, even tacitly, that directly and intentionally causing the death of an innocent human being is an act that is intrinsically wrong and, therefore, goes against any constitutional legitimation. The right to life and, as far as I am concerned, to the life of the unborn, has as its ultimate justification the aforementioned value-based or moral consideration. The fact that it is unquestionably recognized in the Constitution is, without a doubt, indispensable for there being concrete legal consequences. However, beyond that, it does not constitute, in and of itself, a reasoned justification of the meaning and purpose of the constitutional norm.

Based on the above, it is not by chance that those who reject the petitions explicitly disregard any value-based consideration and, consequently, although implicitly (except when it comes to the pregnant woman) also the use of a criterion of purposive interpretation. I repeat, rights cannot be reduced to unquestionable truths, they do not come out of nowhere. There will always be an implicit (and sometimes explicit) anthropological reason behind them.

The position favouring the constitutional support for the conditional option for a woman to dispose of the life of the unborn child living in her womb reveals a moral position incompatible with the one that justifies the protection of the life of a human person and, in particular, the life of an innocent human being, as expressed in the constitution. In this regard, there is no possibility for neutrality in values.

A comment in passing: it appears that moral and value-based issues are often confused with religious issues and, ultimately, with the separation between Church and State, leading to these being thought of as equivalent concepts.

14 °. Once this first stage of rendering issues relative has been carried out ("or how simple things get messy "), the second stage seeks to justify why the pregnant mother (there is preference for speaking only about the woman) has a preferential right in relation to the protection of the life of the one who is unborn. For this purpose, the argument focuses, as expected, not so much on Article 19, No. 1, second paragraph previously cited, but on the rights of women as a vulnerable group worthy of the broadest protection. This second stage could also be called "creative interpretation."

15° Subsequently, the third stage attempts to minimize the value or hierarchy of what is the central normative focus of the controversy, that is, article 19, No. 1, second paragraph, of the Constitution, which ensures that *"[t]he law protects the life of the one about to be born."*

In this regard, an independent and decontextualized analysis examines the meaning of each of the elements of the sentence: "The law" (the Legislature as a duty bearer), the ruling verb "to protect", that which is protected: "life," and the one who is protected: "the one about to be born ". By virtue of this type of analysis, the phrase that constitutes the regulation is broken down into different parts and is disconnected, in some cases, from the group of constitutional precepts that, together, make up a coherent value system. Through this method of disintegration and analogy with irrelevant constitutional and legal norms, the qualities of simplicity and transparency of the constitutional regulation are regarded as purely apparent.

As a result of this dissociating mechanism, a clear and precise sentence, which is part of a group of closely linked constitutional regulations, is presented as a vague precept providing limited protection. But what is to be protected? The analysis avoids recognizing that the term “life” as associated with the one who is unborn has a more precise meaning than when referring to the notion of “life” as expressed in the first paragraph which refers to the right to life in general. In fact, it ignores that for an unborn being the violation of its "life" is confirmed in only one way: through ending it by means of the termination of pregnancy. That is to say, for one who is unborn, its "life" means "its existence as a human being." In addition, another fundamental qualification is overlooked: an unborn being is necessarily an innocent being. In this regard, we must remember that the Constitution recognizes the possibility of killing someone by way of punishment for a reprehensible act (the commission of a crime). In fact, it does not consider the possibility that, in fulfilling certain prerequisites, one may kill another person as a legitimate form of defense in response to an aggression – it is not possible to consider that one who is unborn could be the actor of any form of aggression as it is, as has been stated, innocent, as well as vulnerable.

16 °. Another erroneous shortcut or argumentative "pirouette" from those who support the opposite position from ours is to (implicitly) ignore the individual nature of the one who is unborn, recognizing only unborn beings in collective terms. This reflects the complexity that the constitutional regulation at the core of this discussion represents for this view and sheds light on much of the confusion and the many misunderstandings in the use of certain linguistic expressions.

17 °. Lastly, we conclude this section by noting that this whole process of "overinterpretation" which, respectfully, seems to encompass the line of argument of the opposing opinion, and that, as we have observed, results in the diluting of the central focus of the controversy, is sprinkled with logical and factual errors in the argumentation, the latter being particularly noticeable in the written observations of the President of the Republic.

IV.- **DEFRAGMENTED CONSTITUTIONAL INTERPRETATION (OR "READING THE COMPLETE SENTENCE")**

18 °. The previous section examined the harmful effects that the interpretative strategy of disaggregation and dissociation has for a clear and transparent argumentative discussion. This section makes use of the opposite logic: rather than dismantling or dismembering the sentence of the second paragraph of Article 19, No. 1 of the Constitution, I will interpret or read the constitutional provision as a grammatical unit. In other words, I will try to discover the meaning of the sentence in the second paragraph previously cited, linking at all times the words protect, life, and unborn, to then link them to the term "The Law", that is, the constitutional reference to the law.

19 °. The constitutional regulation "The law protects the life of the one who is to be born" is written with a high degree of precision, to which the word "life" and the expression "[…] the one who is to be born" contribute in a decisive manner. Indeed, the second part of the sentence composed of the phrase "the life of the one who is to be born" greatly limits the possible interpretative options of the complete sentence.

20° In the constitutional debate that has taken place, those who favor the rejection of the petitions have tried to relativize or weaken the protective intensity of the aforementioned second paragraph for very diverse reasons. Possibly, the most commonly used term has been "gradual protection".

21° The problem is that the options available for the law to grant gradual protection to the life of the one who is unborn are very limited. In effect, the only possible spaces where one might find a criterion to adjust or moderate the intensity of the constitutional protection of the life of the unborn child are regarding: (i) the subject whose life is protected (the one who is unborn) or (ii) the life of the unborn as an object of protection.

22 °. In the first case (i), there is a certainty and a question. The certainty refers to the moment from which "the unborn child" ceases to be in that category, that is, when the birth occurs or, more specifically, when the umbilical cord of the child is cut. The question, in turn, is the following: Is it possible to identify a distinguishing rational or non-capricious criterion to draw a timeline prior to birth and subsequent to its existence as a human being, which allows, thus, to protect its life only from that moment onward? Curiously, whatever the answer, the distinguishing criterion that the Bill uses ignores the potential options (if any) that such a rule allows. Those who reject the petitions seek a constitutional basis of support for the criterion of discrimination used outside the framework of the constitutional provision that, undoubtedly, is the most appropriate and relevant at the time of deciding this case.

23° In order to provide a level of protection to the life of the unborn that is of lesser intensity and, in turn, does not affect the interest of the pregnant mother to too great an extent, a criterion or parameter that allows for a selection of the ones who are unborn who will and will not be protected must be established, as we have stated. Some jurisdictions, like the United States (based on the case *Roe v Wade*), rely on a *criterion* of gestational maturity of the fetus, which translates as a set number of weeks of pregnancy after which the fetus would be assumed to be able to survive autonomously outside the womb.

24 °. In the second case (ii), the distinguishing rational or non-capricious criterion to adjust or moderate the constitutional protection granted to the unborn must be sought considering its life as an object of protection. The problem is that, once again, we find ourselves with an unresolvable problem: the life of one who is unborn is recognized by its existence, and the extent to which it exists cannot be adjusted. In this case, it is not possible to consider that the law protects the life of the unborn by favouring or allowing

its death. This represents the insurmountable boundary beyond which legal regulation becomes unconstitutional.

25 °. Due to the above, co-legislative bodies found a way of presenting the Bill that might be new. This refers to the erroneous expression "decriminalization of the termination of pregnancy," by virtue of which it was declared that the Bill was of a highly moderate nature, or that its reach was very limited. The press talked about the Bill regarding "abortion on three legal grounds." It was not long before the inevitable question was raised: How could this be a Bill with limited reach when, in the abortion cases that it concerns, the pregnant mother is allowed to give death to the subject who is yet to be born and who is in her womb? How could it be possible that the law protects the life of the one to be born while allowing or favouring, if the mother so decides, its very death?

26 °. There are only two explanations that one could try to use to demonstrate that this is a Bill with limited reach. The first one is to demonstrate that the general rule is for abortion to be considered a crime and that, as an exception, the woman may request to terminate the pregnancy on three legal grounds only. Once again, this argument relies on the criteria of adjusting that falls outside the context of the second paragraph of No. 1, Article 19 of the Constitution. This, as we have observed, would be constitutionally inadmissible, as it would imply ignoring the aforementioned regulation, as though it did not exist.

27 °. The second alternative explanation that could possibly demonstrate that this Bill for abortion has limited reach, is to not consider the one who is unborn in an individual manner, but as part of a collective of unborn beings. This option would imply an understanding that the constitutional protection is destined for the group of "unborn beings" as an entity in and of itself separate from the beings that compose it, and not each and every one of the beings who are not yet born. In other words, the supposed exceptional nature of the abortion cases allowed by the Bill would have to be based on the assumption that the unborn ones who fall within the hypotheses of the three legal grounds constitute a minority within the larger group.

As one may gather, a situation in which the life of each of the ones that are yet to be born is not protected cannot be compatible with the Constitution. If this were the case, the constitutional legitimacy of a law that prevents some from being killed and that, on the other hand, allows for all the ones considered in the three abortion hypotheses to be killed should be accepted. As has already been stated, it is not possible that a law protect the life of the one who is unborn by allowing it to be killed in a direct and consistent fashion.

28 °. It may seem obvious and, therefore, not necessary to highlight that Article 19, No. 1, second paragraph of the Constitution is the most significant constitutional regulation to solve the constitutional controversy before us. There is no other regulation in our Constitution that regards the one who is unborn, let alone its very life. Not only that, some aspects of this regulation make it especially worthy, given that it is clear, precise, and simple, all of which eases its interpretation. I repeat what has been affirmed in one of the first clauses of this vote: the regulation that enshrines the life of the one about to be born is clear, both for jurists and for lay people.

29 °. In contrast to the above, it is not at all evident that there exist supposed constitutional rights that have been raised to justify the constitutionality of the conditional abortions proposed by the Bill. Except for the right to life in the case of so-called therapeutic "abortions" (first ground), where, as has already been explained in this vote, there is no real conflict or tension between the life of the mother and that of the unborn child, the remaining rights that were brought up are all very general or vague.

For example, the right to the physical and, above all, psychological integrity of women was invoked. As it is easy to imagine, it is a right drafted with significant imprecision and whose range of application is very

broad. This does not mean that it was not sensible and convenient, given its imprecision, to draft a norm that more closely resembles a principle rather than a rule.

The aforementioned is even more significant when the supposed right that is raised concerns the woman's freedom and reproductive autonomy, which is not only of a great amplitude or vagueness, but is also not expressly recognized in the Constitution, unlike the previous one.

However, it is important to highlight that for an implicit right derived from the interpretation of a general constitutional principle to defeat not only a clear and precise constitutional regulation, but also one that protects as essential an issue as the life of an innocent human being, a lot more than an exercise of interpretative creation is required. If that were the case, what would be required is a constitutional amendment. In all cases, it is undeniable that the Constitution does not recognize the pregnant mother as having any right to end the life of the being in her womb. It is important to distinguish between having rights or being a constitutionally protected subject from aspiring to have constitutional legal recognition. {p.268}

V.- ABOUT THE CONSTITUTIONAL REFERENCE TO THE LAW.

30 °. One of the fundamental pillars of the argumentative strategy of the President of the Republic and the President of the Chamber of Representatives has consisted in interpreting the reference to the law contained in article 19 No. 1, second subchapter, of the Constitution as "a legal authorization for the Legislature to establish the levels of protection (civil, criminal, health, social security, administrative, among others) for the one yet to be born, so that it will be up to the democratic Legislature to define the levels of protection and, within such definition, there is certainly the partial decriminalization that is the object of the Bill being challenged "(Hearing, Minutes of attorney's plea representing the President of the House of Representatives, p.15).

31 °. According to Guastini (2001, Studies of Constitutional Theory, UNAM-Mexico City, pp. 159-160) under a not so expansive conception of the Constitution, there are times when the Constitution leaves areas (for example, of social and political life) unregulated ("empty area[s] of constitutional right"), in which the Legislature "is free to legislate in one way or to legislate in another, or not to legislate at all", and other areas that are indeed covered, to varying degrees, by the Constitution. In our opinion, the latter is what happens with the case of the unborn, in which the Constitution, in an express way and with a relatively high level of precision, establishes a mandate to the Legislature to dictate legal norms that so specifically protect the unborn and regarding the only attribute susceptible to be protected: his/her life, that is, his/her existence.

On the contrary, according to an expansive reading of the Constitution, the space controlled by the Legislature is more restricted, because, through a creative interpretation (or "overinterpretation") of certain principles or provisions drafted with a degree of minor precision (as, in this case, according to our concept, "the physical and mental integrity of the persons") innumerable implicit or unstated norms can be extracted, suitable for regulating many aspects of social and political life, if not all, in which the margin of legislative action is significantly reduced.

Paradoxically, this is the case of the defenders of the constitutionality of the Bill, who extract from the alluded right to the integrity of the persons, the alleged right of the pregnant mother to put an end to the life or existence of her son/daughter in some circumstances.

32 °. Finally, we present some brief points regarding the repeated idea that "there is no right (or duty to protect) that is absolute". This type of statement usually appears every time it is stated that the legal mandate to protect the life of the unborn is not fulfilled if the law authorizes the mother, whatever the number of grounds, to deliberately cause death to the unborn through the interruption of pregnancy. In

this regard, it seems appropriate to emphasize that care must be used with regard to the repeated argument that the constitutional interpretation by those who are about to accept the petitions ignores a kind of fundamental constitutional dogma. The term "absolute" admits different interpretations and will depend, among other factors, on the degree of precision with which the law is written. Moreover, the border or outline within which the Legislature can move must always be considered as an "absolute" or as a point that "always" must be respected or, in other terms, that must "never" be trespassed.

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Judges María Luisa Brahm Barril and José Ignacio Vásquez Márquez both agree to concur in the decision to reject the petitions brought forth from page 1 -- except in relation to the challenge to the regulation that the Bill makes about conscientious objection as already has been established in the present judgment -- but without sharing the rationale in the following paragraphs and considerations of the majority vote, making the following reservation:

Considerations 26, 27 and 30, all relating to interpretative criteria.
1 . The first two are related to criteria that import self-limitation in the exercise of the powers that this Court holds, and that these Judges do not share.

In fact, in the modern Constitutional State of Law, the constitutional jurisdiction is incorporated into it in the well-understood system of checks and balances to power, which constitutes the true meaning and essence of the principle of separation of functions. In this way, the role of this jurisdiction is to preserve the balance of powers, resolve conflicts between them, control the constitutionality of laws and resolve the issues that arise in this regard, as well as declaring the inapplicability of legal precepts that violate the Constitution and fundamental rights.

2°. According to the above, the role of the Constitutional Courts, in general, both in Chile and in other countries, is to be the highest interpreter of the constitutional text (paraphrasing Montesquieu, it would be "the mouth that pronounces the Constitution"). Therefore, these Judges consider that it is not necessary to stipulate limitations to the exercise of this work of constitutional hermeneutics, which is so important for the respect and protection of the Constitution and, therefore, makes it present in this reservation.

3°. That, on the other hand, with regard to Consideration 26, relating it in turn with the aforementioned, these Judges have considered it pertinent to say, by the way, that the Constitution cannot be interpreted arbitrarily, which would mean a challenge to the exercise of our competence, which should translate into an interpretative fidelity to the text and meaning of the Constitution and the appropriate adoption of the rules of hermeneutics.

In this context, the Constitution obliges us to exercise jurisdiction to resolve conflicts over questions of constitutionality promoted by legitimate bodies, which must be done with full objectivity and rationality, both legal and constitutional, in order to serve as an effective and constructive complement to legislative work, within the framework of inter-institutional collaboration and the principle of constitutional supremacy.

4°. That, for the above, we affirm that the appropriateness of originalism as the only interpretive criterion of the Constitution, is insufficient and lacks flexibility, in general, so it will always be necessary to use other criteria of hermeneutics to resolve a constitutional conflict with the greatest certainty and adequate reasonableness and weighting.

In this sense, the recourse to the reliable history of the precept contained in subchapter 2 of No. 1 of article 19 of the Constitution is particularly pertinent, in addition to the reflective analysis of its text and

the consideration of its relationship with other precepts of the same Fundamental Charter in order to seek harmony among them, flows incontestably for these Judges that do not exist in any constitutional norm, a supposed general right of women to abort. Indeed, free abortion without grounds is not allowed constitutionally, and this is clearly opposed by the rule of subchapter 2 of Article 19 no. 1 of the Constitution, which outlines as a general rule the protection of the unborn, ceding it only, of course, in exceptional cases and qualified by the Legislature, like those that the Bill contemplates.
Thus, for the rest, it was recognized in the speech by the person who appeared on behalf of the Chamber of Representatives.

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Judges María Luisa Brahm Barril and José Ignacio Vásquez Márquez are prevented from concurring with the decision to partially accept the petition brought forth from page 1, as regards the Bill's regulation of conscientious objection, but only in accordance to the reasoning reproduced below:

1° . Conscientious objection instituted as a guarantee is not constitutionally or legally regulated, and the jurisprudence of this Court lacks pronouncements in this respect. Without prejudice to this, and resorting in the first place to the existing doctrine in the matter, regarding the conflict between conscientious objection and obedience to the Law by the coercive nature of the norms, it has been said in relation to the first that "Facing an exception to legal obligation, it must be justified on grounds of a moral nature, in such a way that it is considered reasonable that those who are in a conflict of conscience, not exclusively subjective but with possibilities of becoming a universal moral law, where fulfillment of this obligation is impossible in every way, can find a legal regulation that supports their claim. "(Gregorio Peces-Barba," Civil Disobedience and conscientious objection. "Universidad Complutense, Faculty of Law 1988, pages 168 and 169). That this same author distinguishes between conscientious objections permitted by law and others of a broader nature "when situations arise before legal obligations that are considered susceptible to receive a legal protection exempting those who wield them from compliance with them;

2°. In the second place, and in order to find support in our legal system for the possibility of making conscientious objection to legal obligations difficult or impossible to fulfill based on personal convictions, we can deduce said establishment from the constitutional right to freedom of conscience, established in Article 19 No. 6 of the Political Constitution, which recognizes the full autonomy of persons to believe or not believe in anything and, consequently, to bring to the attention of those reponsible, their impediment to the fulfillment of obligations or legal duties that contradict those beliefs. Thus, it has been resolved by the Spanish Constitutional Court precisely in relation to the practice of abortion established by law, stating that "Conscientious objection forms part of the content of the fundamental right to ideological and religious freedom recognized in article 16.1 of the Constitution and, as the Court has indicated on several occasions, the Constitution is directly applicable, especially in matters of fundamental rights";

3° It should be noted that the so-called institutional conscientious objection could not be understood as covered by Article 19 No. 6 of the Constitution, because it is primarily oriented either to individual freedom of belief, or to the protection of religious entities and the exercise of worship, a presupposition that does not necessarily coincide with health entities;

4° With regard to conscientious objection by institutions, although it is very true that conscience is an exclusive right of individual persons, however they pursue specific purposes whose protection by the State is constitutionally recognized in Article 1, third subchapter, when the latter indicates that the intermediate social bodies are recognized with due autonomy to fulfill their purposes;

5° In spite of everything and in function of the due consideration of the juridical goods at stake, the exercise of these exceptional faculties cannot import in any respect the lack of protection of fundamental rights, even less of the constitutional right to the life of persons and of the woman in particular;

6° In view of the preceding foundations, these Judges warn in the following sense;

7° With regard to the sentence "professional staff who perform functions within the surgical pavilion during the intervention", contained in the first subchapter of article 119 ter of the Health Code, modified by the draft Law in question, these Judges affirm that only the expression "professional" within that phrase is unconstitutional, in order to allow the conscientious objection of all the personnel who intervene directly in the medical surgical procedure;

8° Regarding the phrase "in no case", contained in the first subchapter of the aforementioned article 119 ter of the Health Code, modified by the Bill in question, the previous judges deem that it is unconstitutional, because otherwise the autonomy of the intermediate social service bodies would be violated from fulfilling their specific purposes, which are recognized in the Political Constitution of the Republic, imposing on the State, in turn, a duty of protection toward [this structure];

9° Notwithstanding the foregoing, these Judges understand that said guarantee must be exercised in a manner that is harmonious with the rights of the woman affected by any of the grounds in the Bill, so that the institution must adopt all the measures tending to carry out the referral of the woman to an establishment where said objection is not present, so as to always ensure the protection of the constitutional rights to her physical and mental integrity and to her health in general;

10° Regarding the final subchapter of article 119 ter that is incorporated by the Bill into the Health Code, these Judges consider unconstitutional the last part of the aforementioned subchapter, which states: " Nor can it be excused if the expiration is imminent of the term [temporal limit of gestation] established in case N° r 3) [rape] of the first paragraph of article 119 ". The foregoing, on the understanding that this imminence in the term is sufficient to effect the transfer of the woman to another establishment where she can be subject to due medical intervention, so as not to prevent her from accessing the termination of the pregnancy within the period legal 12 or 14 weeks, as applicable;

11° That the foregoing is consistent both with the definition that according to the Royal Spanish Academy should be given to the term "imminent", by defining it as that "Which threatens or is soon to happen", as with due respect for the constitutional right to life of the woman.

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Judge Nelson Pozo Silva states that he concurred with the decision to declare contrary to the Constitution Article 1, numeral 3°, first subchapter of the bill, which introduces a new article 119 ter to the Health Code but only in what concerns to the "professional" voice contained in said provision, for the reasons indicated below:

A. FREEDOM OF THOUGHT.

1°. The ability to behave according to one's own convictions and to stand before third parties, both verbally, through the freedoms of expression and teaching, through acts consistent with it, is the way freedom of thought is protected.

The exercise of this freedom is limited to respect for the rights of others, a limit that may be delegated to the Legislature. Furthermore, the idea of the expansive power of rights and the need to interpret the limits that are established, leads us to the idea that the mere formal existence of a legal duty does not, in principle, nullify the power to act according to one's convictions, a situation that would be protected

through the specific right to conscientious objection. It is not an absolute and unconditional protection, so that the basis of the objected legal duty, which is the claim of noncompliance, is not found admissible by the Law as [it could be admissible] within the moral belief system of the subject, therefore the conflict that leads to conscientious objection will arise.

2° The autonomy of a subject, although initially immune from the coercion of the State and of other persons, finds an insurmountable limit for its expansion in the autonomy of others, protected by the legal mandates that order the community;

3° Adopting a broad criterion of freedom of thought, one that includes ethical reflections of the person, as if it is restricted to the right that protects only the moral judgments of the subject, it can be affirmed that it is the right that ultimately grounds and protects conscientious objection.

4° It must be understood, from the perspective of the regulations applicable to a legal system, that there is a degree of relationship between ideological and religious freedom and freedom of conscience, to the extent that this is a consequence of the fundamental right that is given in a very specific situation: when acting in conscience is contrary to a legal mandate;

B. CONSCIENTIOUS OBJECTION AS a MANIFESTATION OF FREEDOM OF THOUGHT.

5° . However, conscientious objection, or rather, its exercise with full libertarian effects for the objector, is part of the essential content of the freedom of thought and must be admitted exceptionally;

6° It is a distinct right, not fundamental, with different delimiting elements and that will follow its own logic;

7° Conscientious objection will only appear in a very specific circumstance and with a very specific scope. It is a right of peculiar characteristics and atypical structure: in the first place, by supposing a correlative duty for another person to neutralize for the objector the exigibility of a legal duty incompatible with the person's conscience, and secondly, for being always dependent on an obligation as an exception to it, which prevents its stability and permanence (Gregorio Peces-Barba Martínez, "Civil disobedience and conscientious objection," in. Law and fundamental rights, Madrid, Center for Constitutional Studies, 1993, p.390);

8° That the link between both rights is that, when talking about conscientious objection, we are facing something close to an "autonomous constitutional right". The effect of this and its qualification have an implication in the reduction of its scope of application and dissociates conscientious objection from its foundation and explanation, in such a way that the possibilities of objection to the normatively foreseen cases are reduced, separating the objection from awareness of freedom of conscience. In other words, conscientious objection should be understood as an independent but not autonomous right, as a consequence, in the last instance, of the recognition of freedom of thought. With this we want to point out that we are not in the presence of a general fundamental right to conscientious objection with liberating effects for any person who invokes it in any situation;

9° The key to understanding what the right to conscientious objection means and how it operates is found in the circumstance, which like any right, its delimitation must be precise and its scope will never be absolute;

C. CONSCIENTIOUS OBJECTION.

10 °. For Alfonso Ruiz Miguel ("On the rationale of conscientious objection,"in the Yearbook of , Rights, 1986-87, No. 4, page 416), in relation to conscientious objection: "Propose a general theory on the topic

that is as complete and coherent as possible that would delimit the reasons on which such an objection could be based and established criteria to differentiate between possible cases that deserve different treatment," cannot imply the acceptance in general of any qualifying claim as conscientious objection, but simply the possibility of establishing a regulation applicable to any forecasted situation in which it may appear;

11° In the case of conscientious objection, the subjective process that leads to it is not externally evaluable without entering into inadmissible interference in the personal conscience. In formal terms such as the assessment of each person to that of duty, a fact that, as such, always defines conscientious objection, runs the perilous risk approaching the definition of the phenomenon to the evaluation of the content of the objecting subject's beliefs;

12° The objected duty is a relevant element in the scheme of law, but does not have sufficient entity to justify the treatment of each conscientious objection assumption as phenomena of different nature or substance, since the defining element of this establishment is the judgment of the person's conscience based on the contradiction between mandates. The material object regulated by the legal duty objected to is secondary; it does not change the legal nature of the moral reaction that may arise before it.

As an eminently subjective phenomenon, conscientious objection, when posed by different persons in different situations, will always repeat the same scheme, varying only the element that is most external to the subject (the objected duty) and the content of the value judgment in this regard, although not the conclusion of this (the refusal to consider it incompatible with one's convictions) (Daniel Capodiferro Cubero, Conscientious objection: structures and guidelines for consideration, Ed. Bosch, Spain, 2013, p.37);

D. CONCEPT OF CONSCIENTIOUS OBJECTION.

1. CLASSICAL DOCTRINE.

13 °. Historically, the doctrine emanating from Judgment 15/1982 of the Spanish Constitutional Court argued that conscientious objection was a specification of freedom of conscience, which, given that it also presupposes the right to act in a manner consistent with the imperatives of conscience, it was concluded that "it can be affirmed that conscientious objection is a right explicitly and implicitly recognized in the Spanish constitutional order (FJ 6°)." In other words, the full connection between freedom of thought and conscientious objection was admitted, and to be able to operate in practice, it was necessary that conscientious objection be declared in each specific case, since, being an "exceptional exemption from a duty" that which is obtained by the same is "the right to be declared exempt from a duty that, if such a declaration did not exist, would be enforceable under duress "(FJ 7°).

In this judgment, it is recognized that we are not in the presence of an absolute power of release from legal duties, but a right to avail ourselves of an alternative, regulated for them in case of conflicts with personal convictions;

14 °. Judgment 15/1982 refers to a case of conscientious objection in a specific matter (military service) and stressed the need for the express normative provision for the objection. In Judgment 53/1985, the Spanish TC [Constitutional Court] went further and recognized conscientious objection with full effect as a general right, relating to the main purpose of the decision, which was: **the constitutionality of the law that decriminalized abortion in certain cases.**

In the aforementioned judgment, conscientious objection was directly linked to ideological and religious freedom, while directly applying the constitutional text, especially in matters of fundamental rights;

2.- EVOLUTION OF CONSTITUTIONAL JURISPRUDENCE.

15° . The Spanish Constitutional Court, in Judgments 160/1987 and 161/1987 limited the criterion of its own precedent 15/1982. Even considering as a starting point that the possibility of conscientious objection should be recognized in the legal order in some way, in order to prevent new assumptions in an uncontrolled manner, inevitably breaking the principle of legal security;

16° Among its final decisions, the judgment states that "... conscientious objection to the practice of abortions, in the judgment of the Spanish Constitutional Court, deserves to be covered in some way by particular circumstances, without assessing too much what consequences the model of conscientious objection could have in other situations, especially when dealing with a topic tangential to the main purpose of the Judgment: the possibility of refusing to perform abortions for reasons of conscience, at the moment when this democracy knew the legalization of abortion to be a controversial issue and subject to strong political tensions:
In addition, the change in the line of the High Court is evident: **"it goes from recognition as a right with general scope to considering that the extension of the conscientious objection assumptions that, logically, would derive from this recognition is something dangerous for the rule of law "**(Daniel Capodiferro Cubero, op.cit., p.65).
In the end, objector's behavior must always be the exception, in order not to create a formula that justifies the possibility of general disobedience to the laws; this is the jurisprudential doctrine that emanates from the Spanish constitutional court;

3.- TYPES OF CONSCIENTIOUS OBJECTION.

17 °. There are two varieties within the model of conscientious objection, the so-called "contra legem" conscientious objection, and the "secundum legem" which is not conscientious objection proper. The first would cover those actions carried out by the person, based on their conscience, against the mandate of a legal rule that imposes a certain behavior not only without possible alternatives, but contemplating a sanction for non-compliance. The second --conscientious objection secundum legem-- includes the assumptions in which the law that contains the rejected legal mandate contemplates an alternative behavior to it, or simply waives it from being performed if the person provides sufficiently strong moral reasons for it; ultimately this version of conscientious objection does not deserve the name of objection because it does not represent pure opposition to the legal duty;

18 °. The secundum legem objection would be a direct manifestation of ideological and religious freedom. Specifically, the freedom to conduct oneself in accordance with one's own convictions among the freedoms protected by the Law, with the Public Power's respect for acting in the conscience of the person, which is the basis for the exemption to fulfill the duty in question. The mere offer of an alternative duty means that the existence of the main mandate is not prejudicial to the right of the subject, because this person would be free to choose the fulfillment of that other duty to avoid the impediments to his internal judgment that the original duty implied. By recognizing a choice of conduct, the Legislature avoids a conflict, allowing the subject to choose within the system it establishes, but not because it considers those convictions to be superior or that it accepts them, but simply out of respect for his/her freedom, solving a social problem.
The secundum legem conscientious objection cannot be qualified as a right of option or as an alternative

because the person does not have the full power to choose one or another possibility of action. The subject is not free in absolute terms to decide what to comply with, [and] needs a strong justification to be able to avail him- or herself of an alternative duty (Marina Gascón Abellán, Obedience to law and conscientious objection, Madrid, Center for Constitutional Studies, 1990, p.249);

E.- THE LEGAL DUTY.
1.- CONCEPT.
19 °. The legal duty consists of an obligation emanated and supported, usually through coercive means, by the Law, regardless of its addressee or scope. This is distinguished from the moral duty of the containing structure and not by its contents, since the latter is not present in a formal and materially legal (positivized) norm. It is not excluded that the legal duty in question may have an ethical or evaluative burden. It is more, as a general rule holds it, since Law and morality are not compartmentalized and the first will always respond to the postulates of a public morality. It is important to distinguish between public duties and private duties, with the private legal duties being those fixed in a civil or commercial contract or derived from a labor or statutory relationship. Faced with these public duties being contained in rules of general scope that emanated from the Public Powers that are often conforming to constitutional guarantees, and where public goods and interests are present that belong to all and for which citizens are not obligated, if they are right in their recognition by their own nature and condition;

2.- PRIVATE LEGAL DUTIES.
20°. Although there is a doctrinal discussion about the admissibility or not of conscientious objection to private law duties, eminently those derived from contractual labor relations, known as trend companies or trend organizations or also called ideological companies, it should be noted that the problem arises from the perspective of determining if the profession of a certain religious or ideological belief can justify a differentiated treatment within the company that exempts the worker affected from their work obligations, specifically a job incompatible with their beliefs or convictions , it is not less true that by virtue of the principle of autonomy of the will and the general theory of obligations, the possibility of objecting to a duty that has been directly, expressly and consciously assumed in a valid manner by a subject is excluded;

21° To allow it, in the previous hypothesis, would undermine legal security, the basis of private legal traffic, insofar as anyone could dissolve the guarantee of compliance that derives from the assumption of a commitment. In these concrete cases, the way to save the imperative of conscience is simply to refrain from assuming the compromise, in other words not to compromise;

22 °. In the case of conscientious objection in labor relations, specifically the right that may exist in the case of the professional obligation to proceed with the practice of an interruption of pregnancy, in the cases allowed by the Legislature, circumscribed to the health professions, the ideological freedom of the worker is, ultimately, directly protected by the Bill discussed in these proceedings;

In this way, the exercise of conscientious objection in the field of labor relations will be very limited, although not denied at the root. The contract itself could take over and prevent any difficulty. It must adhere to the circumstances of the specific case, considering the sacrifice of the freedom of conscience of the worker on the basis of its strict and proportionate need for the fulfillment of business purposes;
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3. - LEGAL DUTIES DERIVED FROM SERVICE IN THE PUBLIC ADMINISTRATION.

23°. Together with what has already been expressed, we must add a nuance for the duties derived from service in the Public Administration, which affects as much as possible the private-labor legal duties emanating from the existing relationship between the public employee and the Administration. These duties that affect an official or person hired by the State (in a role or work with public impact) deserve

different treatment to the extent that its ultimate justification is the performance of third parties or the general interest to which guarantee the Public Power is committed;

24 °. In such circumstances, there is not only the commitment acquired by the autonomy of the will on the part of the (public) worker, but also the need to seek and satisfy the general interest by performance of the obligations of his/her work, to which the public employee has voluntarily committed. The key from this perspective is the scope of the consequences of the fulfillment or breach of these duties, which transcend the private sphere in relation to the private sphere between worker and employer;

25 °. The full submission to the law, constitutionally compiled, complemented with the rights and duties of the basic statute of the Public Employee, where ethical principles, as such: the respect for order, the pursuit of general interest, good faith and respect for the human rights and the prohibition of discrimination, obeying their hierarchical superiors and respecting citizens form a web of duties and obligations between the official and the administration;

26 °. In this way, the rights are delimited by the characteristics of the function, so that the effective and efficient compliance option of this forms the weighting framework to assess conscientious objection among public employees, especially when their performance may adversely affects third party rights. The conflict of conscience, which arises from a duty that binds the employer with the employee does not have to affect the citizens and users of the health system, from whose demand the objected duty arises, because they cannot be held responsible for the possible injury to the objector's ideological or religious freedom;

F.- WEIGHTING

27 °. If the behavior of the objector negatively affects constitutionally determined rights and principles over which they have no legitimacy to dispose, it seems reasonable that the legal system does not allow the full expansion of their right, not guaranteeing the protection of other elements of their environment. What is sought, as far as possible, a balance between them and the freedom of thought of the objector through a weighting trial that confronts both legal rights and concludes which should be sacrificed and to what extent;

28 °. The environment of conscientious objection in the present case is carried out through the questioning of the legal model proposed by the Legislature, about which it is observed that a medical benefit is universally required in every establishment or health service to the patient who requires it, invoking that although this cannot be resolved in accordance with institutional conscientious objection, it is no less true that such a situation must be understood (pages 103 and 104 of the file), as a limitation to the demands that the State can make of the institutions that have a certain religious ideology or not, invoking a freedom of conscience and business with an ideological seal, which is a reason for the release of the objected duty;

29 °. In the event of a collision between personal convictions and the duties derived from a private civil or commercial contract, a public interest is also at stake, which is public security as the basis of private legal transactions, which, together with the principle of prohibition of going against one's own acts {breach of contract?] is inadmissible as an argument;

30 °. In the case of the duties derived from a public employment relationship, the weighting judgment on the admissibility of each possible case of objection is more complex, since there are so many general interests (arranged to be satisfied through the job from which conflicts of conscience are derived) as elements of the private employment relationship.
However, what must be taken into account is the free assumption of the work relevant to the position by whoever enters or works as a public employee, a situation similar to subjection to a private work contract;

31 °. For its own purpose, public employment adds nuances, not necessarily negative, regarding the admissibility of conscientious objection. In effect, any action of the public employee in the performance of duties may potentially affect the rights of third parties, both normal compliance, positively, and abnormal compliance, these rights being, as a general rule, a limit to the exercise of one's rights . Another peculiarity is the scope, in this case, of the principle of legal certainty, as it does not exhaust itself among individuals and to support the principle of legitimate trust towards the Administration;

32 °. Finally on this topic, the fact that a public employee is, in principle, perfectly substitutable in the exercise of their functions, facilitates the consideration of conscientious objection,given that the obligation to the citizen falls on the State and materializes by means of a template with an identical capacity according to the job position, thanks to the access system based on merit and capacity (Daniel Capodiferro Cubero, op.cit., pp. 152-153);

G.- CONCLUSIONS.

33 °. The problem of the inclusion of conscientious objection without limits in a legal system is the practical disappearance of it. To the extent that the law is the ultimate guarantor of social peace and individual freedom, to deny, as a general rule, the obligatory nature of the rules by making them depend on the individual will would be equal to making it disappear;

34°. Conscientious objection should be understood as a normative authorization of behaviors that would otherwise be completely forbidden. It is an option that the Law offers, under strict conditions, to subjects bound by a legal duty to be released from it in assessed cases, in breach of the general principle of obedience to the rules that would otherwise be insurmountable, by authorization and, therefore, is exceptional in nature;

35 °. A normative recognition, with the greatest possible precision, of the right of conscientious objection as such in relation to those cases in which it may operate, independent of the requirements that are exacted in each situation so that the objector's claim produces liberatory effects or that the possibility, due to the characteristic peculiarities of the duty that is rejected or objected, could grant effects to a claim of conscientious objection when faced with an unrecognized case.

36 °. In the face of a lack of unified regulation of instititutional conscientious objection, with a general scope, where what constitutes the right of conscientious objection is defined, what is its foundation, in what cases it is operative and what are the mechanisms for its guarantee. It is not a fundamental right, although its necessary link with freedom of thought means that it should not be considered an autonomous constitutional right either;

37 °. The formula that seems most correct, in the doctrine, has been the one used by the Portuguese Constitution in Art. 41.6: the simple recognition of the right accompanied by the reference to the law as a necessary instrument for the effective configuration of its content and scope and, perhaps, in establishing the guarantee of the remedy of amparo for its defense;

38 °. The Constitution, due to its characteristics as a source of law, cannot contain the precise level of detail for the regulation of conscientious objection to fulfill its function as a guarantee of individual rights while ensuring that its exercise does not infringe the rights of third parties, or legitimate goods or interests;

39° In our opinion, it is a case where the right of formulation is strictly legal, to the extent that its existence can be extrapolated from the recognition of freedom of thought. It is not necessary the express constitutional recognition of the right to conscientious objection; what suffices is its integration within

the whole of the Ordinance with the proper delimitation and the establishment of its limits. It is a right of purely legal configuration;

40 °. It is an institute with the status of a conditional exception, since the approach of a case of conscientious objection outside the normative provisions and, therefore, without rules of exercise or express limits, will generate full liberatory effects with respect to the duty objected , it turns out in practice that such an option has no place in the legal system. Not all qualifying conduct will be admissible as conscientious [objection]; the authority must establish the guidelines for a correct weighing of the elements in play that clearly define what are the limits to the conscientious objector's action, so that {in which?} their claim, although legitimate and protected by law, cannot be satisfied;

41 °. Conscientious objection must be analyzed in two levels: one of identification and the other of admissibility. In the first case, it is necessary to ensure that the claim of the subject is truly an exercise of this right through its contrast with the objective and subjective elements that define it for the concrete scenario. In case of having explicit regulation, the necessary characteristics of the conduct must be contained in the laws of recognition that, if it does not contain them, will constitute one that is a clearly insufficient or inadequately foreseen.
The correct definition of the right is required for the positive establishment of, at least, what duties can be objectionable at the beginning and which are not, although the problem of completeness of a list of this type is evident. There must also be an explicit procedure and the elements to be taken into account in the evaluation process that determines if the factual situation conforms to the definition of conscientious objection, and, therefore, whether it can be considered as a case protected by that [right];

42 °. The admissibility of the objector's claim in the concrete circumstances of the particular case, [requires] weighing both those elements of the predicable environment of the general claim of applicable conscientious objection and the specific circumstances of the individual situation.
The regulatory rule must establish both the formula for exercising the right and the guidelines for assessing the claim, without prejudice to the possible application of limits not expressly foreseen;

43 °. It is possible to conclude that a certain claim of conscientious objection should not be admitted in any case. *A contrario sensu*, there will be cases in which, due to the concrete circumstances, it is easier for the subject to be able to put his moral dictates before his legal duty;

44 °. The admissibility must be assessed and adequate and precise limits to unconditionally guaranteeing the satisfaction of the sought objectives through the legal duty, the fulfillment of which is rejected while trying to safeguard, to the extent possible, the objector's freedom of thought;

45° In summary of what has been argued above, the following should be stated:

a.- That for this dissenting judge, conscientious objection can never be institutional, because it is an attribute or right of the person, of individuals and subjects of rights.
b.- That, as has happened in comparative legislation, the peculiarities of the procedure for exercising conscientious objection have been regulated by creating a registry of objectors (for example, Castilla - La Mancha and Navarra, Catalonia when the Generalitat was regulated in July 2009 with the Council of Pharmaceutical Colleges of Catalonia, a protocol regarding the dispensation without prescription in Catalan pharmacies, the sale of emergency contraceptives, the Law 8/1998 of the Pharmaceutical Management of the Autonomous Community of La Rioja where the pharmacist's right to conscientious objection was provided if the health of the patient or user is not endangered, etc.).
c.- That conscientious objection cannot affect citizens' rights in their eventual application, nor limit or

condition them, since this circumstance cannot affect third parties in any case, a circumstance that directly limits the right to health of the user.

d.- That, likewise, those institutions that receive resources from the State or are subject to health plans with incidence and interests of the State, cannot invoke conscientious objection, to the extent that it affects the interests of third parties.
e.- That it is necessary to adapt in the social by laws, in those institutions branded with religious, or ideological or diverse moral beliefs, so that within the ambit of their own establishments, and without affecting the interests of third parties nor committing State funds, may develop activities of "organizations with [ideological] tendencies", without prejudice to the legal actions of remedy and protection enshrined in the legislation.

{p. 294)

f.- That in a secular state there cannot be a place of conscientious objection in public health establishments or in those that receive any type of financing from the State, since their invocation does not meet the criteria of the institute in question.

46 °. Only the [denounced] term "professional" indicated in subchapter 1 of article 119 ter of the Health Code will be accepted, based on the fact that its use in the context of the regulation is discriminatory; insofar as it is not appropriate to differentiate professionals from those who are not, they are thus violating the constitutional guarantee of constitutional Article 19, No. 2, that is, equality before the law.

47°. TAKING THE CONSIDERATIONS EXPRESSED ABOVE, THE FOREGOING IS TO ACCEPT THE PETITIONS **ONLY** WITH REGARD TO THE TERM “PROFESSIONAL” indicated in the first section of article 1, No. 3 of theBill under examination. RESULTS: UNCONSTITUTIONAL.

{p. 295-6}

The first chapter of the judgment was drafted by Judge Carlos Carmona Santander, with the exception of sections 31, 33, 40, 100 and 102, which were drafted by JudgeJosé Ignacio Vásquez Márquez and section 49, which was drafted by Judge Nelson Pozo Silva.

As for the second chapter of the judgment, it was drafted jointly by Judges Iván Aróstica Maldonado and Domingo Hernández Emparanza.

In turn, the dissenting vote to accept the first chapter of the petitions in the proceedings, was drafted by Judge Marisol Peña Torres, as well as the dissenting vote to accept the denunciation of the third subchapter of article 119 ter of the Health Code, contained in Article 1, numeral 3, of the Bill. The dissenting vote for rejecting the actions of the proceedings on the issue of conscientious objection was drafted by Judge Gonzalo García Pino.

Finally, the Reservations were drafted by Judge Domingo Hernández Emparanza, with respect to the vote to reject the first impugned chapter; Judge Juan José Romero Guzmán, in the concurring vote to accept the claims of the proceedings; Judges María Luisa Brahm Barril and José Ignacio Vásquez Márquez, in the Reservations formulated to both impugned chapters; and, Judge Nelson Pozo Silva, regarding the vote to partially accept the denunciation concerning conscientious objection.

Communicate, notify, register and file.
Rol No. 3729 (3751) -17 CPT

[Signatures]

Pronounced by the Constitutional Court, including its President, Judge Carlos Carmona Santander, and by its Judges Marisol Peña Torres, Iván Aróstica Maldonado, Gonzalo García Pino, Domingo Hernández Emparanza, Juan José Romero Guzmán, María Luisa Brahm Barril, Cristián Letelier Aguilar, Nelson Pozo Silva and José Ignacio Vásquez Márquez.

Authorized by the Secretary of the Constitutional Court, Mr. Rodrigo Pica Flores.

SYNTHESIS
Case No. 3729 (3751) -17-CPT

FIRST CHAPTER OF THE SENTENCE
Decriminalization of the voluntary interruption of pregnancy on three grounds

The Constitution orders the law to protect the life of the unborn. That duty is undoubtedly an active one: it involves caring, favoring and defending the unborn. It also involves non-detrimental interference; and positive measures of empowerment. This duty cannot mean lack of protection, in the sense of not adopting any measures needed for the safekeeping of the unborn. On the other hand, it cannot mean overprotection, in the sense that these measures go beyond reason, and sacrifice of the rights of others. Therefore, the duty to protect the life of the unborn cannot imply an order to neglect the woman. From the text of the Constitution, we cannot follow or infer that the protection of the unborn is an obligation that can involve harm to the mother.

The Constitution's definition of person is built on birth. One of the most important effects of attributing the status of person to someone for constitutional purposes is that they are the only ones entitled to rights. This is what the Constitution asserts. The rights are assured, "to all persons" (article 19). The same is stated in the first paragraph of Article 1 of the Constitution: "persons are born free and equal in dignity and rights." Likewise, several numerals of article 19 refer to the "person" as the holder of rights.

The determination of the concept of person from birth is evident in the constitutional text. In first place, because this is established in article 1, first paragraph, which states that "persons are born free and equal in dignity and rights." A second argument to hold that the unborn is not a person is given by Article 19 No. 1 of the Constitution. This article begins pointing out that the Constitution assures all "persons" the rights that are listed afterwards. Another argument used is that the first paragraph of article 19 No. 1, guarantees the right to life and physical and psychological integrity to "the person". However, the second paragraph - which orders the protection of the unborn- no longer uses the expression "person". It speaks specifically of the unborn. As it was stated on the argument made by the lawyer of the Executive, if the Constitution had wanted to assimilate the unborn as a person, it would not have used the preposition "del" (of it), but "de la" (her/him) that is yet to be born; A third argument is that the following numerals of article 19 only make sense if a person is born or is of a certain age. This is not a mere drafting error. For example, the unborn cannot be charged with a crime. That is why Article 19 No. 3, subsection 4, speaks of "every person charged with a crime". Further , persons have the right to honor and respect and protection of private life (article 19, paragraph 4). Similarly, Article 7 recognizes the right of every person to reside and remain in any place of the Republic and to move to one place or the other and to enter or leave its territory. That cannot be done by the unborn. Also, it cannot exercise the right to choose a

health system (Article 19 No. 9), nor the right to education (Article 19 No. 10), nor to free employment in labor matters (Article 19 No. 16), etc.

The unborn does not have the enabling conditions to be recognized as a person and a holder of rights. As it is inferred from above, the correct way of interpreting the Constitution is not to alter a systematic interpretation nor to subordinate [change] the rest of the constitutional concepts to force room for the unborn by forcing its incorporation into conceptual categories that have not been designed for them.

The protection of the unborn is a matter of great importance for the Constitution. That is why it refers to the unborn and entrusts the Legislature with its safekeeping. Thus, the unborn does not need to have the status of a person and distort the rest of the constitutional and legal system to receive the protection to which it is entitled.

This protection of the unborn cannot be done without due consideration to the rights of women. The Constitution does not enable the State to endanger the life of the mother, nor does it require her to have a child as a result of rape. Protecting the unborn is not an excuse to abandon the woman. The unborn is not the only one protected by the Constitution. The Legislature must search for the formula so that the unborn can reach birth. Nonetheless, beyond a certain limit, women's rights must prevail.

The right to life of all persons is not absolute. As it was declared in the hearings, and defended in Courts, it is limited by death penalty (article 19 N ° 1 of the Constitution). Also, by a series of institutions that legitimize death, such as self-defence, state of necessity or the use of firearms by the police authority. Therefore, it cannot be considered, as it was indicated in previous stages, that the life of the unborn is the only one that cannot be affected in any circumstance, reason or interest.

As for the grounds regulated in the Bill: The first ground, the risk to the life of the mother, does not violate the Constitution as was pointed out, the Constitution does not prohibit abortion, it only refers to the term "protect", in order to safeguard or defend the unborn. On the other hand, according to the recently passed Law about the rights and duties held by persons related to actions linked to their health care, the decision on how to proceed is not uniquely that of the practitioner, because these rules require the consent of the patient. For the same reason, there can be no indirect abortion without this will [voluntary consent]. It is the woman who must establish how to proceed. Not even in cases of risk to life, can the practitioner proceed without her consent (Article 15 letter b). Interruption of pregnancy requested by the woman and risk to life diagnosed by the surgeon, there is no other solution than the interruption to save the life of the mother. As for the second ground, we must dismiss the objections that are beyond the scope of this Court, such as the complaint about the need for two medical specialists, or the complexity of diagnosis, which actually refers to control of the law's application, and even in that case, it cannot be established that the greater or lesser difficulty of diagnosis does not make the law more or less constitutional. That In relation to the objection to the psychological effect on the mothers and their eventual threat to physical and psychic integrity, it is important

to point out that it is the mother who initiates the process of interruption of the pregnancy, without prejudice to all the information and the support that she can be having, it is she who conscientiously assumes the effects of her decision. We cannot start from the basis, as it was maintained during the same public hearings, that a woman's judgement is clouded under these circumstances. The latter does not emanate from the studies. It is the woman who must decide whether to continue with the pregnancy, despite the pathology of the embryo or fetus, which will necessarily end in its death, or to end this situation and proceed to terminate the pregnancy. Why must the judge, the husband, or the doctor make the decision, and not the woman? While a woman is pregnant, she can engage in acts and contracts, she is responsible before the law, she can continue working or studying, she can become a candidate (for public office), and she can vote. For all these acts she is not considered temporarily incapable; Regarding the possible risk that the mother may incur, considering there is no gestational limit in these cases, it must be considered that the decision is subject to the prior and favorable report of two concurring medical diagnoses. And not from any doctor, but from "medical specialists". For the same reason, we rely on the ability of that team and the *lex artis* that guides it. Moreover, the risk is assumed entirely by the woman, since her consent is required. The above is in harmony with the duty to protect the unborn, since the decision to terminate the pregnancy will always be a measure of last resort, a reason why an error in the diagnosis must be minimized and the greatest possible scientific accuracy must be a priority.

Regarding the ground of rape, it is a matter of giving the woman a belated defense from the vexatious attack to which she was subject. The woman does not have to take charge of the consequences of the crime. In effect, there is the pregnancy, which lasts a while, another is motherhood, which lasts a whole lifetime. In addition, various international treaties, already mentioned, establish the State's duty to avoid physical, sexual and psychological violence against the woman. With regard to the criminal objections, it must be observed that the Bill imposed a duty to report the criminal complaints. To do so, it makes the following distinction: On one hand, a woman older than 18 years – in accordance with article 369 of the Criminal Code-is not obliged to make a complain to the justice system or the Public Ministry. Nevertheless, the Bill states that if a woman does not make a complaint, the heads of hospitals or private clinics must report the crime to the Public Ministry. On the other hand, in the case of minors under the age of 18, the same heads of the hospital or private clinic must make the complaint and notify the National Service of Minors. Therefore, It is not that the criminal concern does not matter. It is only that it is not a condition for the interruption procedure.

SECOND CHAPTER OF THE SENTENCE
Conscientious Objection

Numeral 3 of the Bill introduces a new article 119 ter to the Health Code, regulating for the first time in our legal system, the topic of conscientious objection. This regulation exempts the surgeon required to interrupt the pregnancy on any of the described grounds in this section of article 119 – added by No. 1 of the same Bill -- as well as the rest of the professional staff who perform their functions on the interior of the surgical pavilion during the intervention, from the obligation to perform the respective surgical act, if they comply with the indicated formalities.

The provision orders the Ministry of Health to dictate the The Ministry of Health will issue the necessary protocols for the execution of conscientious [objection]", safeguarding the duty to "ensure the medical care of patients who require the interruption of their pregnancy ...". Subsequently, the final paragraph of section 1 of this new article states that "conscientious objection is of personal nature and in no case may it be invoked by an institution."

The constitutional basis of the right in question is usually found in Article 19, No. 6 of our Constitution, which guarantees to all persons "freedom of conscience, the manifestation of all beliefs and the free exercise of all religions that do not oppose morality, decency or public order." However, as can be appreciated from its simple reading, this precept does not contain express recognition of this right, which has been defined as "the right not to be obligated to comply, for reasons of conscience, with the impositions of the law."

There are not many Constitutions, in comparative law, that explicitly recognize in their text the institution under analysis, giving it an effect of liberating [someone] from a concrete obligation. Among the exceptional ones that do, can be mention the Spanish one of 1978, in its article 30.2 which enjoins upon the Legislature the regulation, with due guarantees, of conscientious objection, all this with respect to the military obligations of Spaniards. The National Constitution of Paraguay, of 1992, has its own, in its article 37, which along with recognizing it, extends it "for ethical and religious reasons for cases in which this Constitution and the law admit."

In turn, this issue has been addressed in constitutional justice bodies, both in Europe and Latin America. The European Court of Human Rights, in fact, recognizes and admits national legislation concerning conscientious objection of medical personnel (CEDH, P.S. v. Poland, application no. 57375-08, 5.11.12, para. 107). The interruption of abortion in certain circumstances leads, in many European countries, to a persistent debate about the scope and eligibility for the right to conscientious of objection, not only on an individual basis, but also on behalf of health institutions, a very complex aspect especially when dealing with private institutions with an ideology contrary to these practices. The Parliamentary Assembly of the Council of Europe, in its Resolution 1763 of 2010, had the opportunity to invite the member

States of the Council of Europe "to develop clear and complete legal frameworks defining and regulating conscientious objection in relation to medical and health services" which must guarantee "the right to conscientious objection in relation to the participation of the procedure in question" (4.1).

For its part, the Inter-American Human Rights System recognizes that "the rights and obligations attributed to companies [las personas morales] become rights and obligations for the individuals [las personas fisicas] who comprise them or who act in their name or representation." (Inter-American Court of Human Rights, *Cantos vs. Argentina*, Preliminary Objections, Series C, No. 85-2001, par.22 and 23 [para. 27]). The Court has thus opened the door so that, in exceptional circumstances and in certain circumstances, legal persons may be considered as holders of certain rights and obligations under the Inter-American system. Nevertheless, it has repeatedly stated also that legal persons do not hold the right to freedom of conscience and religion. However, with all these things considered, this approach -- which, as we can see, is not entirely uniform -- is not binding for this instance of constitutional justice. As has been expressed previously in the dissent related to the grounds of voluntary termination of pregnancy, such statements are not binding in this respect, notwithstanding their importance as an hermeneutic tool, relativized in this point by the lack of complete uniformity of these decisions;

Consequently, **the Constitutional Court will base its decision on the right of freedom of conscience and religion that legal persons hold, in matters of institutional objection, in a perspective different from that supported by the Inter-American Court, with strict fidelity to the rule of article 19, No. 6, but also considering the guarantees contained in numbers 11 and 15, in relation to Article 1, third paragraph, of our Constitution.**

Conscientious objection, in the form proposed by the Bill, should be understood as protected by the dignity of persons who --individually or projected in their association with others -- refuse to practice certain types of actions (interruption of pregnancy), for ethical, moral, religious, professional, or other relevance reasons.

In fact, the Constitution, in the first paragraph, article 1, expressly recognizes - among the "Bases of Institutionality" - the dignity of persons, understood as that quality of every human-being that makes them always deserve respect, because it is the source of the essential rights and guarantees intended to be obtained that will be protected (STC Role No. 389, c.17 “) in fact. No law can use persons as instruments; to the extent and cost of having to alienate the very convictions that define them as a persons, like a human resource, to satisfy the desires or needs of others. Such an alienation implies, therefore, depriving the law’s recipients of their very quality as persons, and imposing blind obedience toward the dictates of a a law that does

not recognize that elemental right to rely on their own convictions and not perform an act that violates their conscience.

Thus, conscientious objection, which is the rejection of a practice or duty that conflicts with the most intimate convictions of the person, is precisely a manifestation of the freedom of conscience assured, in our Constitution, in its article 19 N° 6 °.

The doctrine has indicated that freedom of conscience "means to believe in whatever one wishes, whether in political, social, philosophical or religious issues. It is a variant of freedom of thought and includes the right to think freely, the right of each to form his own judgment, without interferences. "

Therefore it is unquestionable that conscientious objection can be interposed by individual persons; all the more so when the Constitution expressly guarantees to all persons the freedom of conscience, in article 19, No. 6, first paragraph. This is the same freedom that the constitutional text does not authorize to limit (No. 26 of the aforementioned article 19), especially when - as in this case - its exercise precisely affects the scope of life of other human-beings. according to the very conviction that is sustained.

In the same line of reasoning, given the nature and peculiarity of the Bill under review, there is no legal reason to restrict conscientious objection only to natural persons who are professionals. When those who are not, may also have their conscience harmed by the procedures in which they must intervene. Nor is it less obvious that conscientious objection can legitimately be raised by institutions or private associations, in this case, according to the constitutional autonomy that the Constitution recognizes to them and any other group in article 1, third paragraph. This reasoning is not exhausted in the individual order, since it also extends and propagates to the associations destined to embody the same free thought, according to the right that secured to all the people by article 19, N ° 15, of the Constitution.

Equally, religious institutions, juridical entities or entities with a confessional ideology that work in the field of health, under the terms of article 19, No. 6, can assert it. It is also possible to present thos objection at educational establishments that have an ideology in the sense indicated, in accordance with article 19, No. 11, of the Constitution.

It should be noted that constitutional jurisprudence has recognized that educational establishments have an ideology that must be respected. This is how the Constitutional Court of Spain, arguing about academic freedom, has stated that "In private schools, the description of the teaching post is given, in addition to the characteristics of the educational level, use of the freedom of teaching and within the aforementioned limits, given to its holder. Any interference of the public powers in the academic freedom of the teacher would be, at the same time, a violation of the freedom of teaching of the Director of the teacher’s Institution. "The Court further states that the ideology" forms part of the freedom of the center "(Judgment 5/1981, February 13, 1981).

DISSENT

The bill that decriminalizes voluntary termination of pregnancy is unconstitutional, because it does not recognize that the unborn is a person and, therefore, a holder of rights under our Constitution. The "legal" definition of person cannot be invoked to deny this status since it relates only to the exercise of economic rights and not to the ownership of fundamental rights such as the right to life. This right, guaranteed to every person, in the first paragraph of article 19 No. 1 of the Constitution, entrusts the Legislature with a special mandate of protection of the unborn, which constitutes a specification of that right referred to the most vulnerable and helpless.

The weighting carried out by the Legislature in this case does not meet the requirements of necessity, suitability and proportionality, because in the event of a conflict between the rights of the woman and those of her unborn child, this conflict cannot be resolved in terms of totally ignoring the right to life of the unborn, leaving him or her stripped of the right. Moreover, in the extreme case of risk to the life of the mother, the current legal system does not penalize the interruption of fetal life when it is the undesired effect of medical treatments aiming to save the life of the mother. But in no case is direct or induced abortion compatible with the Constitution with the deliberate intention of ending the life of the embryo.

As for other circumstances, there is an alternative that is less burdensome than the absolute sacrifice of the life that is about to be born and which is verified through an accompanying social service aimed at guiding the mother to save that life, that does not contemplate ending it.

Likewise, in specific cases, such as rape, a ground of exculpation which maintains the illegality of abortive conduct fits better with the guarantees of the Constitution.

Finally, the procedure to be applied to the three grounds is of such vagueness and indeterminacy that it leaves the way open to appeal for protection of the unborn and to challenge the medical protocols for not fully satisfying the rule of law.