***F, A. L. s/ Medida Autosatisfactiva*, Expediente Letra "F", N° 259, Libro XLVI (13 March 2012) (Argentina, Supreme Court of Justice of the Nation.)**

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Buenos Aires, March 13, 2012

Having reviewed the file: "F., A. L. s/ self-executing measure,"[1]

Considering:

1°) That on January 14, 2010, A.F., in representation of A.G., her daughter of 15 years of age, requested to the penal justice [system] of the Province of Chubut --before whose courts a criminal proceeding was being held against her husband, O.C., for the rape of A.G.-- that it provide for the interruption of the abovementioned adolescent girl's pregnancy, on the basis of article 86, paragraphs 1° and 2°, of the Penal Code. On that occasion, she indicated that on December 3, 2009, she had laid an information with the Prosecutor's Office of the Province of Chubut reporting the rape, and that, on the 23rd day of the same month and year, a medical certificate had been issued attesting that A.G. was in her eighth week of gestation (pp. 17/18 and certificates found at pp. 1/1 (back) and 11).

[1] TRANSLATOR'S NOTE: Under Argentine law, a self-executing measure (*medida autosatisfactoria*) is an *ex parte* injunction with an urgent and autonomous character, reserved for cases where there is a strong probability that the request made has merit. It is self-executing in the sense that once granted no other action or proceeding is required to satisfy the applicant's ultimate claim. These measures differ from precautionary measures in that the latter presuppose the initiation of a main proceeding within which the said precautionary measures could be requested. See Jorge W. Peyrano, ed., *Medidas Autosatisfactivas* (Buenos Aires: Rubinzal-Culzoni, 1999), cited in María Fernanda Giménez, "Medidas Autosatisfactivas Vs. Proceso" (Paper presented at a conference entitled "VIII Congreso Nacional de Derecho Procesal Garantista: Por la Real Vigencia de los Derechos y Garantías Constitucionales," held on November 2-3, 2006), online: http://www.academiadederecho.org/upload/biblio/contenidos/Medidas_autosatisfactivas_vs_Proceso_GIMENEZ_MARIA_FERNAND.pdf . See also Jorge W. Peyrano, "Lo urgente y lo cautelar" 1195-I Jurisprudencia Argentina 889.

The penal judge held that he lacked the power to adopt measures like the one requested during the investigative stage, reason why he ordered that the file be transferred to the Prosecutor's Office. The latter declared that it had no jurisdiction to decide on the request (p. 85 of the record). A.G.'s mother then initiated the self-executing measure which gave origin to the present case (pp. 17/18), and on January 22, 2010, reiterated to the family court her aforementioned requests, connected to the interruption of her daughter's pregnancy. Those requests were rejected both by the court of first instance (pp. 153/169) and by the court of appeal (pp. 350/379 (back)), notwithstanding the reports ordered, which generally reflected that A.G. "presented depressive symptoms… [and] persistent suicidal ideas" and that "the pregnancy [was] lived as a strange, invasive event… [I]n her internal world it [was] impossible, incompatible and intolerable to characterize somebody who would be the son of her brothers' father, and son of her mother's husband, as her son…," this being the reason why it was found that "the continuation of this pregnancy against the will of [the girl] impl[ied] grave risk to her psycho-physical integrity, including a risk to her life" (cfr.: Interdisciplinary Technical Team (E.T.I. by its Spanish acronym), p. 27 (back)).

2°) That on March 8, 2010, the Superior Court of Justice of the Province of Chubut overturned the decision of the previous instance, thus granting the request of Mrs. A.F. While the court members' reasons differed, there was agreement in the decision on the following points: a) the case fell within the definition of "non-punishable abortion" provided for in

paragraph 2°, first part, of article 86 of the Penal Code; b) that this hypothesis of interruption of the pregnancy was compatible with the constitutional and conventional plexus;[2] and c) that despite the fact that judicial authorization is unnecessary for carrying out this procedure, such authorization was granted in order to put an end to the controversy set out in this case. The medical abortion thus enabled was finally carried out on March 11, 2010 at the Maternal and Child Centre of the Zone Hospital of Trelew (p. 648).

3°) That such decision was challenged through an extraordinary appeal filed, on behalf of the unborn child, by the Subrogating General Counsellor of the Province of Chubut, in his character as Guardian *Ad Litem* and Counsellor for Families and Incompetent Persons. This appeal was granted at pp. 673/676 despite the fact that the abovementioned medical procedure had already been carried out, based on the institutional gravity presented by the case. In his submissions, the appellant grounded his appeal on an understanding that in interpreting article 86, paragraph 2° of the Penal Code, the lower court had not restricted the viability of this authorization to the case of a raped victim who is idiotic or demented,[3] thus ignoring the constitutional-conventional plexus according to which the Argentine State protects life from conception (National Constitution, article 75, paragraph 23: "Congress is empowered: … To issue a special and integral social security system to

[2] TRANSLATOR'S NOTE: The term "constitutional and conventional plexus" (*plexo constitucional y convencional*) is a metaphor commonly used by South American legal commentators, lawyers and judges to refer to the body, system or network of norms of the highest hierarchy contained in a national Constitution and in the international human rights conventions and treaties ratified by the state at hand and incorporated into its domestic legal system.
[3] TRANSLATOR'S NOTE: The archaic and derogatory terms "idiotic" (*idiota*) and "demented" (*demente*), are contained in Article 86 of the Argentine Penal Code (which dates back to the 1920s).

protect children from abandonment, [from] pregnancy up to the end of elementary education…;"[4] American Declaration of the Rights and Duties of Man, article 1°: "Every human being has the right to life, liberty and the security of his person;" American Convention on Human Rights, article 3°: "Every person has the right to recognition as a person before the law," and article 4°: "[1.] 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;" Universal Declaration of Human Rights, article 3°: "Everyone has the right to life, liberty and security of person," and article 6°: "Everyone has the right to recognition everywhere as a person before the law;" International Covenant on Civil and Political Rights, article 6°: "[1.] 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;" Convention on the Rights of the Child, Preamble: "Bearing in mind that, as indicated in the Declaration of the Rights of the Child, "the child… needs special safeguards and care, including appropriate legal protection, before as well as after birth," article 1°: "For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier," and article 6°: "[1.] States Parties recognize that every child has the inherent right to life").

4°) That having accepted jurisdiction over this case in the present level of court, notification of the proceedings was

[4] TRANSLATOR'S NOTE: This quote was taken from the official English-language version of Argentina's National Constitution: Senado de la Nación Argentina, "Constitution of the Argentine Nation," online: http://www.senado.gov.ar/web/interes/constitucion/english.php

given to the Defender General of the Nation, who undertook the representation of child A.G. and expressed that it was pertinent to confirm the decision under appeal (pp. 980/1010), while noting that all the cases of forced pregnancy --rape victims-- must be considered non-punishable abortions, and more precisely, particular cases of the general hypothesis of danger to the health of the pregnant woman (article 86, paragraph 1° of the Penal Code). Moreover, having been served with the proceedings, the Public Defender of Minors and Incompetent Persons undertook the representation of the unborn child and requested that the decision under appeal be overturned (pp. 683/694). In both sets of submissions, this Court was asked to pronounce itself on the admissibility of the appeal under review, as did the various *amicus curiae* briefs submitted to request the confirmation or reversal of the decision. In a timely fashion, it was decided to send the case to the Prosecutor General of the Nation, who argued that the question should be declared abstract (pp. 1021/1022).

5°) Thus, this Court considers that the fact that the grounds of appeal referred to are moot because the abortive procedure has been carried out in the Maternal and Child Centre of Trelew, is not an obstacle to the Court's assertion of jurisdiction.

Indeed, as the Court has emphasized in various precedents, given the speed with which situations like the one in this case produce their outcomes, in practice it is very difficult for the important constitutional issues they entail to reach the Court without having become abstract. For this reason, to remediate a situation that frustrates the role that every

court vested with the function of supreme guarantor of human rights must have, it is pertinent to establish that cases susceptible of repetition are actionable, but that they would not be reviewable in circumstances analogous to those mentioned above (cfr.: Decisions: 310:819, recitals 6° and 7° of the majority judgment and its dissenting opinion, and its citations; 324:5, 4061). Thus, as highlighted in the well-known precedent of the United States Supreme Court in "Roe v. Wade" (410 U.S. 113-1973), issues related to pregnancy --or its eventual interruption-- never reach the highest court in time to helpfully issue a decision, given that their transit through the previous instances takes longer than the natural course of that process. Consequently, it is necessary to decide on the issues before us, even if they have no utility in this case, in order that the Court's criterion be expressed and known for the resolution of analogous cases which may occur in the future.

6°) That the appellant's grounds of appeal raise a federal issue appropriate for review in this appellate instance, given the argument that in interpreting article 86, paragraph 2° of the Penal Code (article 14, paragraph 3°, Law 48), the superior court in this case compromised provisions recognized by the National Constitution and by international treaties of equal hierarchy. Moreover, dealing with the issue in this proceeding is pertinent given that the failure to consider such issue may compromise Argentina's state responsibility before the supranational legal system, especially if we take into account that various international bodies have censured, in analogous cases, restrictive interpretations by other judicial bodies of [provisions on] access to non-punishable abortion (cfr.:

Concluding Observations by the Human Rights Committee and Concluding Observations of the Committee on the Rights of the Child, Argentina, CCPR/C/ARG/CO/4 of 22/03/2010 and CRC/C/ARG/CO/3-4 of 21/06/2010, respectively).

7°) That given the essence, on the one hand, of the grounds of appeal under discussion --which ultimately lies in the interpretation of constitutional and conventional norms--, and given the federal character of the issue, this Court finds that it is timely and necessary to respond to those grounds from an argumentative construction that may allow us to harmonize the totality of the normative plexus invoked as breached, in light of the pronouncements of various international bodies whose jurisdiction the Argentine State has accepted by signing on to the treaties, pacts and conventions which, since 1994, are part of the constitutional legal order as the supreme law of the Nation (article 75, paragraph 22 of the National Constitution), and whose opinions generate state responsibility in the face of express non-compliance. In this order of ideas, this Court is obligated to establish knowledge of the provisions whose ignorance the appellant claims, and to determine the application of other norms and principles of equal hierarchy through the necessary interpretative criteria, with the caveat that this Court is not limited in its decision by the parties' arguments or the lower court's reasons. Rather, it is only incumbent upon it to make a declaration on the point in dispute (Decisions: 331:735 and their citations).

8°) That in carrying out the task of harmonization (which involves norms of the highest rank and a norm of ordinary law – i.e., article 86, paragraph 2° of the Penal Code) through a

global analysis of the fundamental normative plexus involved and an application of this Court's long-established interpretative principles, it is understood that a broad interpretation of the legal provision must be made. From that perspective and in light of the constitutional principle of legal reserve (article 19 *in fine* of the National Constitution), it must be concluded that the performance of a non-punishable abortion is not subject to the exhaustion of any judicial proceeding.

9°) That based on the previous considerations, it is pertinent to note, first of all, that it is impossible to extract from article 75, paragraph 23 of the National Constitution any basis to support the argument put forth by the appellant.

This is so, first, because this paragraph is part of a clause in which the Constitution grants to the Legislative Power both the power to promote, through positive actions, the exercise and enjoyment of fundamental rights, particularly with respect to traditionally neglected sectors (Decisions: 329:3089, recital 17), and the power to issue a social security regime that protects the mother during her pregnancy and the period of lactation. Thus, the specific reference to the normative framework of social protection of the child, from pregnancy, includes a concrete constitutional mandate to establish, in general, public policies that promote human rights. Therefore, in attention to both the objective animating this provision and the very terms of its text (whereby the jurisdiction granted to th[e legislative] power was meant for the issuance of a specific normative framework on social security and not a punitive one), it is clear that nothing can be derived from this norm to

define, in the sense claimed, the issues of non-punishable abortions in general, and abortions as a consequence of rape in particular.

These reasons are even stronger if we take into account that while an ample debate on the right to life took place during the last session of the Constituent Assembly of 1994, an intent purporting to define the issue of abortion or to limit the reach of article 86, paragraph 2° of the Penal Code to rape victims who are "idiotic" or "demented," was never reflected (in this regard, see National Constituent Assembly of 1994, 34th Session, 3rd Ordinary Session (continuation), August 19, 1994; and Harmonization of articles 67 and 86 of the National Constitution, Volume VI, Centre for Legal and Social Studies, Ministry of Justice of the Nation, Republic of Argentina, pp. 6145/6198).

Therefore, it cannot be validly asserted that it was the will of the authors of the Constitution to limit in any way the reach of the definition of non-punishable abortion to the case of a rape victim who is mentally incompetent.

10) That no mandate whatsoever to interpret the reach of article 86, paragraph 2° of the Penal Code in a restrictive manner derives from the provisions established in article 1° of the American Declaration of the Rights and Duties of Man and in article 4° of the American Convention on Human Rights. This is so because these instruments' relevant norms were expressly limited in their formulation so that the invalidity of an abortion like the one in this case could not be derived from them (see in this regard, Inter-American Commission on Human

Rights, Report 23/81, "Baby Boy," and the discussion surrounding the drafting of the abovementioned articles).

On the other hand, no basis whatsoever to support the theory put forth by the appellant can be derived from the provisions of article 3° of the American Convention, insofar as it enshrines the right of every person to recognition as a person before the law. This is so because the interpretation of the reach that such provision should be given (in relation to the State's obligations with respect to the unborn child's normative protection as a subject of law), cannot be made in isolation from article 4°, nor can it be given a reach of such breadth that would imply ignoring that, as explained previously, the Convention did not intend to establish an absolute protection of the unborn child's right to life.

11) That neither can the ground of appeal advanced by the appellant find support in the provisions of articles 3° and 6° of the Universal Declaration of Human Rights, which enshrine, respectively, the right to life and the right to recognition as a person before the law.

This is so because, in order to ensure coherence in the interpretation of this instrument, those provisions must be analyzed together with article 1° ("*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*"). Thus, in attention to the clear terms in which this statement is formulated, it is impossible to conclude that the norms invoked can be the foundation of a restrictive interpretation of the non-punishable abortion

scenario provided for in article 86, paragraph 2° of the Penal Code.

12) That the appellant's thesis does not find a place in the duty that emanates from article 6° of the International Covenant on Civil and Political Rights.

It is necessary to take into consideration that the United Nations Human Rights Committee has expressed its general position that abortions must be allowed in the case of pregnancies which are the consequence of a rape. Moreover, in examining our country's particular situation, [the Committee] has expressed its preoccupation with the restrictive interpretation given to article 86 of the Penal Code (cfr.: Concluding Observations by the Human Rights Committee: Peru, 15/11/2000, CCPR/CO/70/PER; Concluding Observations by the Human Rights Committee: Ireland, 24/07/2000, A/55/40; Concluding Observations by the Human Rights Committee: Gambia, 12/08/2004, CCPR/CO/75/GMB; Concluding Observations by the Human Rights Committee: Argentina, CCPR/C/ARG/CO/4 of 22/03/2010, cited above).

Therefore, it is clear that it is not possible to derive from this treaty a mandate to interpret the norm restrictively; rather, the opposite conclusion is reached inversely and in attention to the reasons given.

13) That in regard to the relevant provisions of the Convention on the Rights of the Child, it is not possible either to argue that the lower court's interpretation of article 86, paragraph 2° of the Penal Code clashes with them.

Indeed, from the background that preceded the sanction of this Convention, it can be observed that when its Preamble was

drafted, the setting of a pre-determined reach for any of its provisions was expressly rejected (see in this regard, Economic and Social Council, In the Issue of a Convention on the Rights of the Child, Report of the Working Group on a Draft Convention on the Rights of the Child; E/CN4/1989/48, March 2, 1989).

Moreover, from a reading of that background it can be concluded that, in the face of a variety of proposed alternatives, it was expressly decided to adopt the current formulation of article 1°, from which the Appellant's thesis cannot be derived either. This is corroborated by the circumstance that the Committee on the Rights of the Child has stated that those States Parties that do not allow abortions in the case of pregnancies resulting from rape must amend their legal norms by incorporating that scenario. With respect to our country (which does provide for this scenario), it has expressed its concern with the restrictive interpretation given to article 86 of the Penal Code (cfr.: Concluding Observations of the Committee on the Rights of the Child: Palau. 21/02/2001. CRC/C/15/Add.149; Concluding Observations of the Committee on the Rights of the Child: Chad. 24/08/1999. CRC/C/15/Add.107; Concluding Observations of the Committee on the Rights of the Child: Argentina. 21/06/2010. CRC/C/ARG/CO/3-4, cited above).

On the other hand, article 2° of Law 23.849, insofar as it establishes that article 1° of the Convention "*must be interpreted in the sense that a child is to be understood as every human being from the moment of conception*," does not constitute a reservation which, in accordance with article 2° of the Vienna Convention on the Law of Treaties, alters the reach with which the Convention on the Rights of the Child operates

[in Argentina] pursuant to article 75, paragraph 22, of the National Constitution. This is so because, as found in the very letter of the law, while the Argentine State formulated a reservation in relation to the application of article 21 of the Convention, it limited itself to formulating an interpretative declaration with respect to article 1° (see in this regard, Yearbook of the International Law Commission, 1999, Volume II, A/CN.4/SER.A/1999/Add.1, Part 2, Guidelines approved by the Commission in its sessions period No. 51 -1.2; 1.3-).

14) That given that from the constitutional and conventional norms invoked by the Appellant derives no mandate whatsoever that would require us to interpret article 86, paragraph 2° of the Penal Code in a restrictive manner (insofar as it regulates the scenario of non-punishable abortions carried out with respect to pregnancies resulting from rape), it is necessary to emphasize that there are other clauses of equal hierarchy as well as basic principles of hermeneutics established in the jurisprudence of this Court, which impose an obligation to interpret the said norm broadly, as did the lower court.

15) That in this order of ideas, it is necessary to point out that the principles of equality and the prohibition of all forms of discrimination, both of which are fundamental axes of the international and Argentine constitutional legal order (and which in this case have, in addition, a specific application with respect to every woman who is a victim of sexual violence), lead us to the adoption of a broad interpretation of this norm (National Constitution, article 16; American Declaration on the Rights and Duties of Man, article 2°; Universal Declaration of

Human Rights, articles 2° and 7°; International Covenant on Civil and Political Rights, articles 2.1 and 26; International Covenant on Economic, Social and Cultural Rights, articles 2° and 3°, and American Convention on Human Rights, articles 1.1 and 24; in addition to subject-matter specific treaties: Convention for the Elimination of All Forms of Racial Discrimination; Convention on the Elimination of All Forms of Discrimination against Women, especially articles 2°, 3° and 5° to 16, and Convention on the Rights of the Child, article 2°; Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, articles 4.f and 6.a).

Indeed, using legal interpretation to limit the authorization to interrupt a pregnancy to scenarios that are the consequence of rape against a mentally incompetent person would imply establishing an unreasonable differential treatment with respect to other victims of an analogous crime who may be in an equal situation. This interpretation cannot be admitted for it does not respond to any valid criterion of differentiation (Decisions: 332:433 and their citations).

This is especially so where defining the reach of this norm involves adequate compliance with the state's duty to protect all victims of these kinds of events, insofar as it imposes an obligation on the state to provide integral medical attention, both on an emergency basis and in a continuous manner (see in this regard, Inter-American Court of Human Rights, Case of Fernández-Ortega et al. v. Mexico, Judgment of August 30, 2010 [Series C No. 215], paragraphs 124 and 194).

In the context of this understanding, it is pertinent to remember a timely statement made by this Court (Decisions:

331:211, Recital 6°), which asserted that "the structural legal weakness suffered by persons with mental illness --who are already vulnerable to abuse--, creates true 'risk groups' in regard to the full and free enjoyment of fundamental rights," which in turn generates a need to establish effective normative protection. However, this cannot lead us to accept a restrictive interpretation of the norm at hand, given that this delimitation of its reach would not respond to the valid objective of protecting the rights of victims of sexual violence (whose vulnerability is made worse by the circumstance of having a mental disability), but rather to a prejudice that denigrates them as subjects with full rights.

16) That in addition, the principle that conceives persons as ends in themselves and that prohibits that they be treated in an utilitarian manner, derives from the dignity of the person, recognized in various conventional norms (article 11 of the American Convention on Human Rights; article 1°, Universal Declaration of Human Rights; and Preambles to the International Covenant on Civil and Political Rights and American Declaration on the Rights and Duties of Man). The principle of inviolability of the person imposes an obligation to reject a restrictive exegesis of the norm whereby such norm only contemplates, as a scenario of non-punishable abortion, that which is carried out with respect to a pregnancy resulting from the rape of a mentally incompetent female. Indeed, to purport to demand that <u>every other victim</u> of a sexual crime carry her pregnancy to term (which is the consequence of an attack on her most fundamental rights), would be clearly disproportionate and contrary to the postulate, derived from the

abovementioned principle, that prevents demanding that a person make sacrifices of a magnitude impossible to quantify, for the benefit of others or of a collective good (cfr.: Nino, Carlos Santiago, *Ética y Derechos Humanos*, Editorial Paidós, Buenos Aires, 1984, p. 109 onward; *La legítima defensa, Fundamentación y régimen jurídico*, Editorial Astrea, Buenos Aires, 1982, pp. 59, and 63 onward).

17) That in turn, the strict legality and *pro homine* principles impose an obligation to adopt a broad interpretation of this normative scenario whereby an abortion carried out with respect to a pregnancy resulting from rape is not punishable. This is so because a decision on the reach of this provision is limited beforehand by these principles, which impose an obligation, respectively, to "prioritize an exegesis [which is]… consistent with the politico-criminal principle that characterizes penal law as the last resort of the legal order and… [to] privilege the legal interpretation that grants the most rights to a human being vis-à-vis state power" (Decisions: 331:858, Recital 6° and 329:2265). For that reason, we must adopt the interpretation whereby the interruption of a pregnancy resulting from any kind of violence is not punishable, because an exegesis to the contrary --one that reduces the non-punishability of this procedure to the case of a mentally incompetent female-- substantially broadens the reach of penal punishment and denies, to any other victim of rape who may be in this situation, the right to access this procedure.

18) That this Supreme Court considers it timely and necessary to expand upon the terms of this pronouncement, notwithstanding the presence in this case of all the reasons

discussed in the preceding recitals, which have the highest normative hierarchy and from which we must understand that the scenario of non-punishable abortion in article 86, paragraph 2° of the Penal Code includes that which is carried out with respect to every pregnancy resulting from rape, regardless of the mental capacity of the victim. This is so because of the important degree of misinformation that exists on this subject-matter, which has led health professionals to make the performance of this procedure conditional upon the issuance of a judicial authorization. It is this manner of proceeding that has posed obstacles to the implementation of the cases of non-punishable abortion legislated in our country since the 1920s.

Against this backdrop, this Court wishes to expressly clarify that its intervention is meant to dissipate the prevailing confusion with respect to non-punishable abortions, and to avoid a frustration of rights on the part of those who may petition to gain access to them, both of which may attract state responsibility.

To that end it is convenient to transcribe article 86 of the Penal Code, which establishes that "an abortion practiced by a certified physician with the consent of the pregnant woman is not punishable: 1°) If it has been done to avoid danger to the mother's life or health, and if this danger cannot be avoided by other means; 2°) If the pregnancy is the result of a rape or of an indecent assault against an idiotic or demented woman. In this case, her legal guardian's consent shall be required for the abortion."

Thus, from the application to this case of the interpretative guidelines set out by this Court (which state

that "the first source of exegesis of the law is its letter" (Decisions: 304:1820; 314:1849) and that "[the law] must not be given a meaning that puts its provisions in conflict with each other, but rather one that reconciles them and leads them to an integral harmonization of its provisions" (Decisions: 313:1149)), it must be concluded that even on the most minimal and systematic exegesis of this provision, no interruption of a pregnancy resulting from rape is punishable, regardless of the mental capacity of its victim.

We arrive to this conclusion through two sets of reasons. First, it is evident from a mere reading of article 86, paragraph 2° of the Penal Code that the legislator, in using a disjunctive conjunction to refer to "…[i]f the pregnancy is the result of a rape ***or*** of an indecent assault against an idiotic or demented woman" (emphasis added), provided for two different scenarios of pregnancies resulting from a crime of this nature.

On the other hand, a joint and systematic examination of the different paragraphs contained in this norm also leads us to adopt a broad interpretation. Indeed, this provision begins by establishing, as a general premise (which due to the drafting technique used constitutes a common requirement for the two scenarios that are detailed afterwards), that the abortions referred to therein shall not be punishable when performed by a certified physician with the consent of the pregnant woman. It is precisely because this scenario is not applicable to an incompetent woman that it was necessary to establish expressly, as an exception to the general requirement found in the last part of the second scenario, that "*in this case*" (a reference that can only allude to the case of an indecent assault and

which requires that it be distinguished, from a merely semantic point of view, from that of rape) "*her legal guardian's consent shall be required for the abortion*." Therefore, the restrictive thesis must be discarded insofar as it grants an undue pre-eminence to one of the norm's [two] parts, thus rendering its other provisions inoperative.

But moreover, this conclusion can also be arrived to by analyzing this norm jointly with the provisions related to other illicit conducts that may cause non-consensual pregnancies in the girls, adolescents or women who are their victims.

Indeed, the aforementioned article 86, paragraph 2° of the Penal Code, consistent with the [Code's] system of sexual abuses (defined starting at article 119 of this code), differentiates between two groups of pregnancy causes: rape *per se* and indecent assault against an "idiotic or demented" woman. Given that the law is making reference to causes of pregnancy, an "indecent assault" cannot be but a carnal access or another situation that goes against the victim's sexuality and which may produce a pregnancy. Given that every carnal access of a woman with mental deficiencies is already considered a form of rape (the improper one), it is not possible to maintain that when the beginning part of [the provision] says "rape" it too refers to the same kind of victim. It is evident that by exclusion, "rape" refers to violent or coerced carnal access of women who are not "idiotic or demented." The same is true of minors under the age of thirteen, whose mention is not necessary because the law discards the validity of their consent, and declares that any carnal access of them is already rape (improper).

Therefore, this systematic analysis of article 86, paragraph 2° of the Penal Code, in conjunction with the provisions defining the scenarios of sexual violence which would trigger their application should they cause a pregnancy, confirms that any victim of these scenarios who may be found in that circumstance may have a non-punishable abortion. Further, it confirms that in the case of those who are mentally deficient or incompetent and who cannot consent to the act, their legal guardian's consent is needed. This is confirmed by taking into account that when this provision was formulated by making reference to rape and indecent assault, the correlative provision from the Swiss Preliminary Draft Code of 1916 was incorrectly translated --given that, by definition, an indecent assault does not imply carnal access. This code, which constitutes its source, defined a non-punishable abortion as that performed with respect to a pregnancy derived from two different situations: rape and carnal access of a mentally incompetent female, the latter being called "profanation."

19) That after having established in the foregoing recitals that article 86, paragraph 2° of the Penal Code must be interpreted broadly, it is pertinent to stop and consider what occurred in the present case to the young A.G., who had to travel a long judicial road to secure her right to obtain the interruption of a pregnancy that was the result of a rape.

The judicialization of this question, which by virtue of its repetition constitutes a truly institutional practice (in addition to being unnecessary and illegal), is questionable because it forces the victim of a crime to publicly expose her private life. It is also counterproductive, because the delay

that such practice entails puts both the applicant's right to health and her right to access pregnancy interruption in safe conditions at risk.

On this point, the Court considers it unavoidable to highlight that, despite the fact that for ninety years the Argentine Penal Code has regulated various specific scenarios in which abortion is not a crime, such as the one before this Court (article 86, paragraph 2°), a practice contrary to the law is maintained, promoted by health professionals and validated by different adjudicators from the national and provincial judicial powers, who ignore those provisions by requiring what the law does not demand, and impose requirements such as a request of authorization to interrupt a pregnancy that is the result of a rape which, as in this case, ends up having intolerable characteristics in light of the constitutional and conventional guarantees and principles constituting the supreme law of the Nation.

20) That for these reasons this Court is compelled to remind both health professionals and adjudicators from the different national or provincial judicial powers, that by mandate of article 19 *in fine* of the National Constitution (which enshrines the constitutional principle of legal reserve as complementary to penal legality), that the Constituent Assembly has expressly established that "*[n]o inhabitant of the Nation shall be obliged to perform what the law does not demand nor deprived of what it does not prohibit*."[5]

[5] *Ibid.*

21) That the letter of article 86, paragraph 2° of the Penal Code must be interpreted in light of this constitutional mandate, and for that reason, it must be concluded that a person who finds herself in the circumstances described therein, cannot and must not be required to request a judicial authorization to interrupt her pregnancy, given that the law does not require it. Moreover, she cannot and must not be deprived of her right to interrupt the pregnancy given that not only is that practice not prohibited, it is allowed and cannot be punished.

22) That in attention to what has been expressed in the foregoing recitals, this Court finds it necessary on the one hand, to advise health professionals of the impossibility of avoiding their professional responsibilities when faced with the factual situation foreseen in the norm under discussion. On the other hand, it reminds the various adjudicators from the different judicial powers of this country that, pursuant to the text of article 86 of the Penal Code, the legislator provided that if the circumstances in which a pregnancy interruption is allowed are in place, it is the pregnant woman who requests the procedure to a health professional, and it is the doctor --and not a judge on the request of the doctor-- who must decide whether to perform it.

23) That to do otherwise would mean that a power of the State such as the judiciary, whose primary function is to ensure the full effect of constitutional and conventional guarantees, interferes by interposing an extra fence and hindering a concrete situation of sanitary emergency, since any judge called upon to determine whether a cause of non-punishability is in place would make the exercise of a right recognized expressly by

the legislator in article 86, paragraph 2° of the Penal Code dependent upon an unnecessary and senseless bureaucratic proceeding.

24) That respect for the provision in article 19 *in fine* of the National Constitution, in line with the preceding recital, means that a non-punishable abortion is that which is practiced by a "physician with the consent of the pregnant woman" (article 86 of the Penal Code). This circumstance must do away with any attempt to demand more from a health professional and to get him or her to intervene in the concrete situation, given that such a requirement would constitute an obstacle to access incompatible with the rights at play in this permission that the legislator has wished to grant.

On the other hand, the practice of requiring [medical] consultations and certificates unduly conspires against the rights of a rape victim, and results in bureaucratic proceedings that delay the legal interruption of the pregnancy and entail a potentially implicit prohibition of an abortion authorized by the penal legislator. This practice is therefore contrary to the law. Moreover, it must be pointed out that this irregular practice not only contravenes the obligations that article 7° of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women imposes on the State with respect to every victim of violence, but can also be considered to be, in and of itself, an act of institutional violence in terms of articles 3° and 6° of Law 26.485, which establishes the Regime of Integral Protection to Prevent, Punish and Eradicate Violence Against Women in the spheres in which they carry out their interpersonal relationships.

For that reason, the terms of this decision with respect to the proper reach of article 86, paragraph 2° of the Penal Code, as well as the decision's supreme authority (derived from the Court's character as the ultimate interpreter of the National Constitution and its laws (Decisions 324:3025; 332:616)), are sufficient to dissipate any doubt which may exist among health professionals with respect to the non-punishability of abortions carried out on those who claim being victims of rape.

Consequently, and having rejected the possibility of a penal prosecution against those who carry out medical procedures in the scenarios examined in the record, an insistence on conducts like the one under discussion cannot be but considered a barrier to access to health services, and those responsible for those barriers must be held accountable for the penal and other consequences which their conduct may have.

25) That where the legislation has decriminalized and to that extent authorized the practice of an abortion, and provided that the circumstances enabling a non-punishable abortion are present, the State has an obligation as guarantor of the public health administration to make the necessary medical and hygienic conditions to carry it out in a fast, accessible and safe manner available to whomever may request the procedure. It must be fast because in these kinds of medical interventions any delay may result in serious risks to the pregnant woman's life or health. It must be accessible and safe because even though the procedure is legal to the extent that it has been decriminalized, there must not exist medico-bureaucratic or judicial obstacles to access the procedure that may put the recipient's health or even

life at risk (see in this regard, Special Session of the General Assembly of the United Nations, June 1999).

26) That on the basis of the above considerations, this Court finds it timely to issue a reminder that various bodies monitoring the application of international human rights treaties have censured the Argentine State for not guaranteeing timely access to non-punishable abortion procedures as a matter of public health and without interference from the Judicial Power (Human Rights Committee, CCPR/C/101/D/1608/2007 of 29/03/11; Concluding Observations of the Committee on the Rights of the Child; Argentina. 21/06/2010. CRC/C/ARG/CO/3-4).

27) That finally, respect for the provision in article 19 *in fine* of the National Constitution means that article 86, paragraph 2° of the Penal Code requires neither the laying of an information nor proof of the rape or its judicial determination, before a girl, adolescent nor woman may access a procedure to interrupt a pregnancy resulting from rape.

The absence of specific rules on access to permissible abortion in the case of a rape only supposes a need for the victim of this wrongful act, or her representative, to state to the attending professional (through a sworn declaration) that such wrongful act is the cause of the pregnancy, given that the imposition of any other proceeding will not be appropriate because it would entail incorporating requirements additional to those strictly provided for by the penal legislator.

Indeed, as indicated by the World Health Organization, a requirement that in order to qualify for an abortion, rape victims must bring charges against their aggressor, obtain police information, request a court’s authorization or satisfy

any other requirement that is not medically necessary, may become a barrier that discourages those who have the legitimate expectation of seeking risk-free [abortion] services in an early manner. These requirements, designed to identify fabricated cases, delay necessary care and increase the likelihood of unsafe abortions, or may even result in a denial of the procedure because the pregnancy is very advanced (see in this regard, "Safe Abortion: Technical and Policy Guidance for Health Systems," WHO, 2003).

28) That while this Court recognizes the possibility of "fabricated cases," it finds that the risk derived from the irregular actions of certain individuals --which at this point only appear to be hypothetical and could eventually result in a penal wrong-- can never be a sufficient reason for imposing obstacles on victims of sexual crimes that violate the effective enjoyment of their legitimate rights or that may constitute a risk to their health.

29) That for this reason, it is pertinent to exhort the national and provincial authorities to issue norms of the highest level to implement and operationalize hospital protocols for the concrete attention of non-punishable abortions, with a view to removing all administrative or factual barriers to access to medical services. In particular, they shall: contemplate guidelines that protect the [personal] information and confidentiality of the applicant; avoid administrative proceedings or waiting periods that unnecessarily delay care and reduce the safety of the procedures; eliminate requirements that are not medically indicated; and articulate mechanisms that allow to resolve, without delays and without any consequence to

the applicant's health, eventual disagreements that could exist between the attending professional and the patient with respect to the appropriateness of the medical procedure required. On the other hand, there shall be an adequate system that allows sanitary personnel to exercise their right to conscientious objection in a way that does not result in referrals or delays that could compromise the applicant's care. To that effect, it shall be required that the objection be expressed at the moment the protocol is implemented or when activities begin at the respective health facility, so that every institution dealing with the situations examined herein may have enough human resources to guarantee, in a permanent fashion, the exercise of the rights that the law affords victims of sexual violence.

30) Lastly, that by virtue of the gravity and social importance of the issues in this case, this Court cannot fail to note that it is necessary, both at the national and at the provincial levels, to increase precautions for the purpose of providing victims of sexual violence, in an immediate and expedited manner, with adequate assistance to safeguard their physical, mental, sexual and reproductive health and integrity. In this context, it shall be ensured that provision of medical treatment to reduce any specific risks derived from the rape, collection and preservation of evidence of the crime, immediate and long-term psychological assistance to the victim, as well as legal assistance in the case, be provided in a comfortable and safe environment that offers privacy and trust and that avoids unnecessary reiterations of that traumatic experience.

31) That for these same reasons, it is indispensable that the different levels of government in all jurisdictions

implement public information campaigns, with a special focus on vulnerable sectors, to make the rights of rape victims known. Moreover, sanitary, police, education and any other authorities shall be trained so that they can provide the victims of any sexual abuse situation that they may learn about, the necessary orientation and information to gain access, in a timely and adequate fashion, to the medical services guaranteed by the normative framework examined in this case.

For that reason, and having heard the Prosecutor General of the Nation, it is pertinent to:

1) Declare the extraordinary appeal admissible and, for the reasons presented herein, confirm the decision under appeal.

2) Exhort the national and provincial authorities as well as the authorities of the Autonomous City of Buenos Aires with jurisdiction over this subject-matter, to implement and operationalize, through norms of the highest level and in the terms established herein, hospital protocols for the concrete attention of non-punishable abortions and for the integral assistance of every victim of sexual violence.

3) Exhort the national and provincial Judicial Powers and that of the Autonomous City of Buenos Aires to:

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-//-abstain from judicializing access to the non-punishable abortions provided for in the law.

It is ordered that notice be given and that the record be returned in a timely manner. RICARDO LUIS LORENZETTI - ELENA I. HIGHTON de NOLASCO - CARLOS S. FAYT - ENRIQUE SANTIAGO PETRACCHI (concurring)- JUAN CARLOS MAQUEDA - E. RAÚL ZAFFARONI - CARMEN M. ARGIBAY (concurring).

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-//-CONCURRING OPINION OF MADAM JUSTICE MRS. CARMEN M. ARGIBAY

Considering:

1°) In the present case, on January 22, 2010, A.L.F., as legal guardian of her fifteen-year-old daughter A.G., initiated a "self-executing measure" to obtain judicial authorization to have the Zone Hospital of the city of Comodoro Rivadavia, Province of Chubut, interrupt the girl's pregnancy, which was in its eighth week of gestation.

She grounded her request on the first and second paragraphs of article 86 of the Penal Code, and stated that a month prior she had laid an information with the Public Prosecutor of that jurisdiction, concerning the rape of her minor daughter by her husband, O.N. (the girl's stepfather), in the month of November 2009, the pregnancy being the product of that event.

She explained that she had appeared before the judge of the case in the summary proceeding being pursued in the criminal jurisdiction --in which she was the complainant--, requesting an authorization for the interruption of the pregnancy, but that the said judge stated that he lacked "*powers to adopt measures like the one requested during the investigative state*," thus ordering that the file be turned over to the Public Prosecutor in light of the penal judge's lack of jurisdiction to rule on the request (cfr.: pp. 17/18 (over)).

2°) A day after the filing of the application that originated this file, the family court issued a series of procedural measures, ordering, among others, that the

"interdisciplinary technical team" intervene in order to interview the minor and determine, among other points, "*the consequences and/or the psychological impact on the minor in the event that she be subjected to the [surgical] intervention requested (therapeutic abortion)*"; and sent a letter to the Regional Hospital requesting that "*it assess the situation set out by A[.]G[.] through its Bioethics Committee and issue an opinion on the request*" (cfr.: pp. 19/20).

Subsequently, as a measure to better provide, it was decided to send a letter to the director of the abovementioned hospital requesting that he inform the court "as to whether in accordance with the Protocols, an abortion on an underage female (15 years of age), who is the victim of a rape (art. 86 of the Penal Code), can be performed in lawful conditions and if so, to carry out interdisciplinary evaluations through the Interdisciplinary Committees, provided for these cases" (cfr.: p. 28).

This last measure had to be restated on two occasions by the judge of the case; the first time because the hospital director responded that "prior to the ethico-medical analysis of a period of pregnancy interruption, it must be determined whether the person presents any of the characteristics excepted by the penal code, given that that issue is not a matter on which the committee can render an opinion" (cfr.: p. 40); and the second, because the chief of that institution's tocogynecology department objected to the request, stating "that this committee only advises, it does not issue opinions, and that with respect to the reason for the request to perform an abortion on the patient in question, 'rape" is an element that I

assume the judicial authorities have knowledge of, and as such the only one who could issue an opinion is the judge" (cfr.: p. 80).

3°) On February 16, 2010, after the measures ordered were carried out, that level of court decided to reject the request for the interruption of the girl's pregnancy. Following an appeal from that decision by the plaintiff and the minor A.G. herself, on February 25 of that same year the Appeals Chamber confirmed the negative decision.

One of the arguments expressed by the judges who concurred in forming the majority of the court (for one of its members dissented), was that this case puts judges in the situation of deciding between "*affirming the privilege of life of a minor above another one (unborn child) who [has] not had an opportunity to opt between being and not being*," and that faced with this conflict, "*we are obliged to preserve the right to life and consequently to the unborn child's personhood from the moment of conception, invoking as a last resort, in the face of any situation of doubt, the application of the principle 'in dubio pro vida'*" (cfr. p. 372).

It was also said, repeating considerations made by the judge of first instance, that a discussion between a broad and a restrictive interpretation of article 86 of the Penal Code does not deeply reflect the breadth of the decision, given that on the basis of the constitutional law norms that enshrine every human being's right to life and health from conception in the womb, any interpretation of that norm which may be adopted turns out to be irrelevant.

4°) The girl and her mother challenged that decision by filing appeals to the Supreme Court, which were admitted by the appeals chamber and were later declared formally admissible by the local superior court of justice. On March 8, 2010, this Court decided --in what is relevant to this case-- to annul the decision challenged, declaring that the case falls within the scenario of non-punishable abortion provided for by article 86, second paragraph, first part, of the Penal Code.

In order to reach this decision, the lower court commenced the analysis of the case by stating that to compel the plaintiff to obtain a judicial permit in a scenario like the one at hand is an additional requirement, and that it burdens women and violates their right to access abortion services in the cases authorized by the law. The lower court expressed that the very legislator has not granted judges the task of preferring the life of one person over another, precisely because it enshrined the result of a weighting between the right to life of an unborn child and the right to life of a woman who is a victim of rape.

On this point, the lower court assumed that the application of the two paragraphs of article 86 of the Penal Code does not require judicial authorization, thus leaving to the patient's attending physicians (whether in the private or public health sectors), the responsibility of deciding whether the factual circumstances described in the norm are present, through the application of the principles and rules of the art of healing.

The court went on to affirm that the norm contained in article 86 of the Penal Code applicable to this case is not

contrary to the constitutional block comprised of the National Constitution and the international treaties incorporated therein, insofar as it is consistent with the prohibition on the arbitrary lack of legal protection of an unborn child's right to life from conception. This is so, the court said, because the norm is premised on a consideration that abortion is a prohibited conduct, albeit with the exceptions enshrined in the article at hand, which in turn compromise other fundamental rights of analogous ranking. Accordingly, the legislative decision to not punish scenarios like this one cannot be characterized as irrational or arbitrary, given that it is grounded in a grave and exceptional cause subjected to the legislator's discretion and compatible with the constitutional protection.

Passing in particular to the exegesis of the second paragraph of article 86 of the Penal Code, the lower court asserted that in addition to finding reasons in the norm's text to support what had been referred to as the "broad thesis" --for it recognizes two scenarios of non-punishable abortion in that norm--, it is the principle of legality that requires that the scenarios of non-punishability provided for in the abovementioned article be interpreted with the greatest breadth possible.

Finally, it should be emphasized that the court considered, with respect to proof of rape, that the urgency demanded by the decision to be made does not admit waiting for the conclusion of that proceeding (i.e., requiring a conviction before the scenario in the provision at hand can be triggered). It was thus understood that it is pertinent to analyze the

information laid and, given the impossibility of avoiding any margin of doubt, privilege the victim's detailed account, accompanied by the multiple elements that prove its reliability.

5°) The guardian *Ad Litem* and Counsellor for Families and Incompetent Persons challenged this decision through a federal extraordinary appeal in favour of the unborn person.

As a federal ground of appeal, that party argued that the unborn person's right to life, guaranteed by the National Constitution and public international law treaties, had been violated.

With respect to the factual circumstances of the case, he explained that neither the parties, nor the three decisions issued successively in the previous instances of the process, have any doubt that the girl's pregnancy derives from a rape. This general acceptance of the core factual issue places the resolution of the case in a purely legal ambit, and centres it on the application and interpretation of the norm contained in the second paragraph of article 86 of the Penal Code, in light of the rest of the national normative plexus and the unborn person's right to life.

Having established the applicable normative framework, he went on to express that the authorizations in the article at issue must not be found unconstitutional in general, nor are they derogated because of a "supervening incompatibility" with norms of greater hierarchy. Nevertheless, he asserted that the interpretation of those permissive norms must be prudently restrictive so as to reduce the cases falling within them to a minimal number "of tremendously dramatic" cases.

In that sense, he argued that the broad interpretation of that norm made by the challenged decision in order to declare its applicability to the case and thus authorize the abortion is contrary to every person's right to life pursuant to the constitutional norms invoked. From that perspective, he asserted that the said medical procedure is aimed at interrupting the pregnancy, thus terminating the life of the fetus, which entails an intentional and direct attack against a human being whose existence and rights are guaranteed by the legal order "from its conception." Moreover, he advanced a literal interpretation of the said permissive norm restricting an authorization of the interruption of a pregnancy only to cases of rape of an "idiotic or demented" woman.

6°) In analyzing the admissibility of the federal challenge (pp. 673/676), the Superior Court of Justice of Chubut noted that the abortive procedure had already been performed (see p. 674 (back)). Notwithstanding the foregoing, it stated -- citing precedents from this Court-- that the lack of actual injury caused by the resolution of the conflict should not be a bar to admitting the appeal, for that would be the only way in which the relevant issues argued could be dealt with in federal court. Moreover, it noted that while the appeal did not comply with the regulations approved by Ruling CSJN 4/2007, an exception to that regime could be made in this case for reasons similar to those previously noted. For these reasons, it decided to grant the extraordinary appeal filed.

7°) The appeal is formally admissible insofar as it states that the interpretation given to the ordinary laws by the superior court in this case violates the recognition of a

constitutional right, and that the decision is contrary to the appellant's interest (article 14, paragraph 3° of Law 48).

8°) As indicated by the provincial superior court, it is not a bar to the admissibility of the appeal that the medical intervention whose authorization is the object of this case has already taken place, following the court's grant of the applicants' request (cfr.: report of the provincial ombudsman at p. 648).

On previous occasions this Court has underlined that by the time an authorization is requested from the highest federal court, the speed with which the outcome of situations like the one in this case is produced causes the ground of appeal concerning the constitutional issues raised to become moot before the lower courts. Taking this into account, the Court decided in those precedents to find the federal challenge admissible so that the Court's intervention in this class of cases is not thwarted where there is a reasonable expectation that the situation is susceptible of repetition (cfr. Decisions: 324:4061 and 310:819).

Accordingly, a decision of the Court in this case, even under those exceptional conditions, becomes a useful precedent for the future resolution of identical conflicts, which will be adequately decided on this basis (cfr.: Decisions: 333:777, concurring opinion of Justices Lorenzetti, Fayt y Argibay).

9°) The reasons presented in the preceding recital also provide a basis for the application to this case of the exception contained in article 11 of the Regulation approved by ruling 4/2007.

10) In examining the merits of the issue at hand, we must clarify on a preliminary basis that a review of the manner in which the provincial court has interpreted article 86, second paragraph of the Penal Code is outside the decision-making purview of this federal instance, by virtue of the rule in article 15 of Law 48 which bars this national Court from making pronouncements with respect to issues of ordinary law. As a function of this limitation, it is pertinent to only decide whether or not that interpretation is in conflict with the constitutional provisions invoked in the appeal (cfr.: Decisions: 123:323; 129:235; 176:339; and especially 199:617, among others).

11) As it will be detailed, the superior tribunal of local justice decided to authorize the abortion requested by girl A.G., on the basis of an interpretation that the norm cited encompasses, as scenarios of *non-punishability*, all those cases in which the pregnancy derives from a rape. The appellant, on the other hand, asserts that such exegesis violates the unborn child's right to life, and that the interpretation of the penal norms allowing an abortion "*must be prudently restrictive so as to reduce the cases falling within these authorizations to a minimal number of tremendously dramatic cases*" (sees p. 657 (back)). In the appellant's argument, this interpretation would compel to limit the authorization to those scenarios in which the victim of a rape is a woman who suffers from a mental disability (see recital 5 of this concurring opinion). On the other hand, the criterion of differentiation proposed by the defence in order to justify the latter assertion is based exclusively on the argument that the "idiotic or demented" woman

lacks capacity to give her consent to a sexual relationship, which would allow presupposing that any pregnancy occurring in these circumstances is necessarily the product of a rape.

12) First, it must be asserted that the appellant's latter argument cannot be accepted as a means to ponder whether the permissive norm is reasonable, for it only deals with the greater or lesser need for evidence to determine the existence of a rape depending on whether or not the victim suffers from a psychic disability. This conclusion is not admissible to *constitutionally justify* the exclusion of women without psychic deficiencies, given that beyond the different capacities which they may have, the common characteristic shared by these women is that they have become pregnant as a consequence of an attack on their sexual integrity. On the other hand, the appellant cannot explain why the difference that he argues as being determinative should prevail over the aforementioned common characteristic that brings both groups of women within the scope of this permissive norm.

13) In regard to the core of the thesis put forth by the appellant, it must be noted that the argument underlying it seems to ignore the existence in this case of a severe instance of conflicting interests. This is so because the appeal unilaterally argues that the unborn person's right to life has been affected, but omits any consideration of the other end of the conflict, namely the situation of the 15-year-old girl who is pregnant as a consequence of a rape. This biased argument ignores the integral assessment that the provincial court has made to support the constitutionality of its interpretation of art. 86.2 of the Penal Code, which considers its implications

for the unborn person and weighs the girl's rights against them, setting forth the suffering that she would have to endure in the event of a weighting of interests contrary to that which has been previously defined by the legislator.

Having analyzed in those terms the argument made in the federal challenge --which has been, in turn, the basis for the negative decisions in the first and second levels of court--, it must be asserted that its formulation is incorrect. In addition to disdaining the extreme conflict entailed by a situation which the legislator deemed could only be avoided by affecting the rights of the unborn child, this argument pretends to redefine the weighting of the conflicting interests valued by the norm without presenting any decisive argument to compel such a new examination of the situation. The reasoning scheme of those who have advanced this position throughout the proceedings has consisted in alleging that the fetus's right to life has been violated, together --at best-- with a presumption that the intensity of the violation of the unborn child's mother's rights is in reality lesser than what the permissive norm presupposes, and that the injury that she may suffer can be repaired through alternative measures (for example, psychological assistance to the girl and her family members during the pregnancy).

Such preference for a different scheme for the weighting of values cannot in any way be considered sufficient to find that the legal authorization in article 86, paragraph 2° of the Penal Code is unconstitutional, or to stop applying it. In addition, due to the particular assessment of the injury suffered by the girl who is a victim of rape and of the remedies proposed to repair it, the position referred to above fails to

develop (as a necessary consequence of its argumentative structure) an exhaustive analysis aimed at determining whether subjecting her to the forcible continuation to term of a pregnancy that is the product of such wrongful conduct, could derive in harm of such severity that would definitively demonstrate that the valuation of the interests at play that they had carried out (by inverting the weighting scheme established by the legislator) was incorrect.

14) In accordance with the principles allowing us to take jurisdiction over the constitutional remedy requested and following the lower court's interpretation of the ordinary law, [we find that] the systematic structure of the permissive norm defining the non-punishability of an abortion performed, with her consent, on a woman who has become pregnant as a consequence of a rape, presupposes precisely the existence of a situation of conflict in which a danger to a legitimate interest can only be avoided at the cost of affecting the legitimate interest of a third party. It is only because of this specific context that the legislator accepts an otherwise prohibited conduct as being socially acceptable (cfr.: articles 85, 86 first paragraph, 87 and 88 first paragraph, of the Penal Code).

As the local superior tribunal well notes, the power to structure a legal solution in the form of an exceptional normative authorization is within the exclusive jurisdiction of the Legislative Power. A decision on which of the parties has to endure a detriment to their legal interests constitutes an assessment appropriate to the legislator's jurisdiction, insofar as the legislator determines the colliding interests and clearly defines the factual context in which the interference must take

place, and as long as the legal remedy provided to resolve it is proportional to the gravity of the conflict.

The exception to the criminalization of abortion contained in article 86.2 of the Penal Code (as interpreted by the lower court) complies sufficiently with the abovementioned standard of constitutional validity, given that in its weighting of the conflicting interests, the legislator concretely justifies the substantial preponderance of the interest privileged through a legal indication that the pregnancy must have been caused by a rape. It also requires the consent of the victim or her legal representative.

Linked to the so-called *criminological indication*,[6] this normative framework delimits the exceptional scenario in whose context a pregnancy interruption is justified --namely in the case of the aforementioned wrongful act--, whose undoubtedly negative interference in a woman's vital spheres underlies the untenable character of the conflict with the unborn person's interests. Also, through the system organized around such indication, it is possible to concretely elucidate the weighting exercise on which the legal decision rests, namely: the symmetrical relationship between the woman's lack of responsibility for the situation that generated the conflict and

[6] TRANSLATOR'S NOTE: In civil law countries where the prohibition of abortion is not absolute, a determination as to when and how an abortion is permitted can be made through a system of timeframes (i.e., an abortion is allowed if performed within a particular number of weeks from conception), a system of indications (i.e., where the relevant penal code provides "indications" or scenarios in which an abortion shall not be punishable), or a combination of the two. A "criminological indication" thus refers to a legally-defined case of exception in which an abortion shall not be punishable (or its punishment shall be reduced) because the pregnancy has been caused by a wrongful act amounting to a criminal offence. See, for instance, Sergio Romeo Malanda, "Las Eximentes por Analogía en el Código Penal Español de 1995. Especial Referencia a la Aplicación Analógica de la Indicación Criminológica del Aborto" (2005) 16 Revista de Derecho Penal y Criminología 169.

the irrationality of attributing the cost of assuming a duty of solidarity to her (e.g., force her to carry the pregnancy to term under pain of punishment).

On the other hand, the exercise of the means used to solve the conflict (interruption of the pregnancy) is adequately regulated by the norm, by channeling proof of the factual elements that make up the permission and the very performance of the procedure through a specific proceeding delegated to the physicians to whom the intervention is requested--thus restricting the possibility of substituting evaluative criteria governed only by the interested party's self-determination for subjection to a legally-established weighting.

In this regard, it must be clear that the foregoing description of the legislator's task does not mean, from the point of view of the National Constitution, that a legal interest is given absolute preference over another, or that it lacks sufficient legal protection through the legal order in force, but only that in exceptional circumstances in which it is impossible to avoid tension between two legal interests through other means, does the Penal Code itself allow to affect one of them as the only way to safeguard the other.

15) Lastly, it must be noted that the framework to exercise the legal permission discussed herein only requires that the physicians to whom the intervention is requested verify that the pregnancy is the product of a rape and that the victim give her consent to those professionals to carry out the intervention. For this reason, and given that the procedure requested in the record has been definitively authorized, the legal exigencies that legitimate the interference cannot become

a substantial obstacle to the effective exercise of a right granted to women. Otherwise the girl would be forced --as it has happened in this case-- to go through an arduous and traumatic judicial process that unnecessarily increased the considerable stigma and suffering derived from the rape of which she was a victim and which, by virtue of the time that has gone by, could have threatened the possibility of performing an intervention without any danger to her health.

For those reasons, and having heard the Prosecutor General of the Nation, it is pertinent to:

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-//-declare the extraordinary appeal admissible and, for the reasons presented herein, confirm the decision under appeal. It is ordered that notice be given. CARMEN M. ARGIBAY.

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-//-CONCURRING OPINION OF JUSTICE MR. ENRIQUE SANTIAGO PETRACCHI

Considering:

That the undersigned concurs with recitals 1° through 4° of Madam Justice Argibay's concurring opinion.

5°) That the Guardian *Ad Litem* and Counsellor for Families and Incompetent Persons challenged this decision through a federal extraordinary appeal in favour of the unborn person. As a federal ground of appeal he argued that the unborn child's right to life had been violated, and that such right is guaranteed by the National Constitution and by various treaties of public international law. He considered that the issue was not centered on the constitutionality of the different authorizations provided for in article 86 of the Penal Code, to which he conceded, but on the broad interpretation carried out with respect to its second paragraph. In this regard, he argued that it was clear that its interpretation must be done in a restrictive manner so as to reduce the cases falling within these authorizations to a minimal number of tremendously dramatic cases.

6°) In analyzing the admissibility of the federal challenge (pp. 673/676), the Superior Court of Justice of Chubut noted that the abortive procedure had already been performed (see p. 674 (back)). Notwithstanding the foregoing, it stated -- citing precedents from this Court-- that the lack of actual injury caused by the resolution of the conflict should not be a bar to admitting the appeal, for that would be the only way in which the relevant issues argued could be dealt with in federal court. Moreover, it noted that while the appeal did not comply

with the regulations approved by Ruling CSJN 4/2007, an exception to that regime could be made in this case for reasons similar to those previously noted. For these reasons, it decided to grant the extraordinary appeal filed.

7°) That as indicated by the provincial superior court, it is not a bar to the admissibility of the appeal that the medical intervention whose authorization is the object of this case has already taken place, following the court's grant of the applicants' request (cfr.: report of the Provincial Ombudsman at p. 648). On previous occasions this Court has underlined that by the time an authorization is requested from the highest federal court, the speed with which the outcome of situations like the one in this case is produced causes the ground of appeal concerning the constitutional issues raised to become moot before the lower courts. Taking this into account, the Court decided in those precedents to find the federal challenge admissible so that the Court's intervention in this class of cases is not thwarted where there is a reasonable expectation that the situation is susceptible of repetition (cfr. Decisions: 310:819 and 324:4061).

8°) That the appellant has not been able to express constitutional arguments sufficient to ground the interpretation that excludes women who do not have psychic deficiencies from the scope of the permissive norm. This is so given that beyond the different capacities which they may have, the common characteristic shared by these women is that they have become pregnant as a consequence of an attack on their sexual integrity. In this sense, the appellant does not demonstrate -- nor do we find-- that that the provisions of constitutional rank

cited recognize categories --or better said, preferences-- like the ones he postulates.

9°) That in regard to the core of the thesis put forth by the appellant, it must be noted that the argument underlying it seems to ignore the existence in this case of a severe instance of conflicting interests. This is so because the appeal unilaterally argues that the unborn persons' right to life has been affected, but omits any consideration of the other end of the conflict, namely the situation of the 15-year-old girl who is pregnant as a consequence of a rape (see analogous arguments in Decisions: 324:5, recital 11, dissenting opinion of Justice Petracchi). This biased argument ignores the integral assessment that the provincial court has made to support the constitutionality of its interpretation of art. 86, paragraph 2° of the Penal Code, which considers its implications for the unborn person and weighs the girl's rights against them, setting forth the suffering that she would have to endure in the event of a weighting of interests contrary to that which has been previously defined by the legislator.

10) That having analyzed in those terms the argument made in the federal challenge, it once again shows that it has been incorrectly formulated given that, in addition to disdaining the extreme conflict entailed by a situation which the legislator deemed could only be avoided by affecting the rights of the unborn child, it pretends to redefine the weighting of the conflicting interests valued by the norm without presenting any decisive argument to compel such a new examination of the situation. The reasoning scheme of those who have advanced this position throughout the proceedings has consisted in alleging

that the fetus's right to life has been violated, together --at best-- with a presumption that the intensity of the violation of the unborn child's mother's rights is in reality lesser than what the permissive norm presupposes, and that the injury that she may suffer can be repaired through alternative measures (for example, psychological assistance to the girl and her family members during the pregnancy).

11) That such preference for a different scheme for the weighting of values cannot in any way be considered sufficient to find that the legal authorization in article 86, paragraph 2° of the Penal Code is unconstitutional, or to stop applying it. In addition, due to the particular assessment of the injury suffered by the girl who is a victim of rape and of the remedies proposed to repair it, the position referred to above fails to develop --as a necessary consequence of its argumentative structure-- an exhaustive analysis aimed at determining whether subjecting her to the forcible continuation to term of a pregnancy that is the product of such wrongful conduct, could derive in harm of such severity that would definitively demonstrate that the valuation of the interests at play that they had carried out --by inverting the weighting scheme established by the legislator-- was incorrect.

12) That without prejudice to the foregoing, the appellant's considerations concerning the norms of constitutional hierarchy fail to take into account that the decision appealed from is grounded autonomously in domestic ordinary legislation whose constitutionality has not been challenged, this being the reason why the appeal lacks the requirement of direct and immediate connection which must exist

between the federal issues proposed and the judgement (cfr.: Decisions: 324:5 and its citations, dissenting opinion of Justice Petracchi). Consequently, the appeal shall be declared inadmissible.

Therefore, and having received the opinion of the Prosecutor General of the Nation, the extraordinary appeal is declared inadmissible. It is ordered that notice be given and that the record be returned in a timely manner. ENRIQUE SANTIAGO PETRACCHI.

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Extraordinary appeal filed **by Alfredo M. Pérez Galimberti, Subrogating General Counsellor, General Ombudsman of the Province of Chubut, in his character as Guardian Ad Litem and Counsellor for Families and Incompetent Persons.**

Notice answered by **A.L.F., on behalf of her minor daughter A.G., and represented by attorney Sandra Elizabeth Grilli.**

Court where the proceedings originated: **Superior Court of the Province of Chubut.**

Lower court that last heard the case: **Appeals Chamber of Comodoro Rivadavia, Chamber B.**

To Access the opinion of the Office of the Prosecutor General of the Nation, visit:

http://www.mpf.gov.ar/dictamenes/2011/casal/abr/f_aurora_f_259_l_xlvi.pdf