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.