# Constitutional Court Judgment No. 53/1985, of April 11 (Unofficial translation)

The Plenum of the Constitutional Court, made up of Manuel García-Pelayo y Alonso, Presiding Judge, Jerónimo Arozamena Sierra, Angel Latorre Segura, Manuel Díez de Velasco Vallejo, Francisco Rubio Llorente, Gloria Begué Cantón, Luis Díez-Picazo y Ponce de León, Francisco Tomás y Valiente, Rafael Gómez-Ferrer Morant, Angel Escudero del Corral, Antonio Truyol Serra and Francisco Pera Verdaguer, Judges, has ruled

## IN THE NAME OF THE KING

the following

## JUDGMENT

In preliminary appeal of unconstitutionality no. 800/1983, lodged by Mr. J.M.R.G., commissioned by 54 Deputies of the Spanish Parliament, against the final text of the Draft Organic Law on the reform of art. 417 bis of the Penal Code. The State Attorney entered an appearance as representative of the Government of the Nation and the Rapporteurs in this act were the Senior Judges Gloria Begué Cantón and don Rafael Gómez-Ferrer Morant who expressed the opinion of the Court.

## CONCLUSIONS OF LAW

1. The purpose of the appeal to be decided in the present judgment is to determine the constitutionality of the draft bill for the organic law introducing art. 417 bis of the Penal Code declaring that in certain cases abortion shall not be considered a punishable offence. The case borders the limits of the scope of the Law; firstly because the natural bond between the unborn child and its mother creates a special relationship with which there is no comparison in any other social behaviour, and secondly since it is a matter more deeply influenced by moral cultural and social ideas, beliefs and convictions, than issues of any other nature. The Court is obliged to take into account as one of the underlying motives for its reasoning, the peculiarity of the link between mother and unborn child as mentioned above; however any element or form of judgment other than the strictly legal must be treated as an abstraction, since otherwise it would be contradictory to the impartiality and objectivity of the reasoning inherent in the jurisdictional function, which cannot be based on any criteria or guidelines, including personal convictions, other than those of legal analysis.2. The planned reform of the Penal Code to which we referred in the above paragraph states as follows:
"Sole article.- Art. 417 bis of the Penal Code is drafted as follows:
Abortion, if carried out by a Doctor with the woman's consent, shall not be punishable in any of the following circumstances:
1. When it is necessary in order to avoid seriously endangering the life or health of the pregnant woman,
2. When the pregnancy is a consequence of an act classified as an offence of rape pursuant to art. 429, provided that the abortion is practised within the twelve first weeks of gestation and that a complaint has been lodged in respect of the act.
3. When the foetus is likely to be born with serious mental or physical disabilities provided that the abortion is carried out within the first twenty two weeks of gestation and that an unfavourable prognosis is issued by two different medical specialists recommending that the pregnant woman be operated on".

The appellants consider that this draft is unconstitutional as it is deemed to infringe arts. 1.1, 9.3, 10.2, 15, 39.2 and 4, 49 and 51.1 and 3 of the Constitution. The State Attorney in turn considers that the Draft is not unconstitutional. The arguments of both parties have been established in points one two and three of the background to this Judgment and it would therefore there is no need to repeat them here.

3. The key issue on which the questions raised in this appeal rest is the scope of constitutional protection of the unborn child, and therefore it would be appropriate to put forward some general comments on the importance of recognising the right to life within the constitutional system, considerations which we shall specify in greater detail as we develop our arguments. Said right to life, recognised and ensured in its dual physical and moral significance by art. 15 of the Constitution is the projection of a higher value of the constitutional legal system –human life– and constitutes the essential and principal fundamental right, in that it is the real and genuine basis without which the remaining rights would have no possible existence. Inextricably linked to the right to life in its human dimension is the basic legal value of personal dignity acknowledged in art. 10 as the germ or nucleus of rights "which are inherent to human beings". The relevance and greater significance of these values and the rights that they represent are manifested in the actual placing of the constitutional text, as art. 10 is situated at the head of the title concerned with fundamental rights and duties, and art. 15 is placed at the head of the chapter specifying these rights, which shows that in the constitutional system they are considered to be the starting point, as the logical and real prius for the existence and specification of other rights.

4. It is also appropriate to make some preliminary references to the scope, significance, and function of the fundamental rights in the constitutionalism of our times inspired by the social State of law In this respect, legal theory has indicated –consistent with the content and structure of positive regulations– that fundamental rights do not only include subjective rights of the defence of individuals before the State and institutional guarantees, but also positive duties on the part of the State (see in this respect arts. 9.2; 17.4; 18.1 y 4; 20.3; 27 of the Constitution). However, in addition, fundamental rights are the basic structural components, both in terms of the objective legal system overall and in each of its branches, in that they are the legal expression of a system of values which, on the decision of the constitutional assembly should inform the whole legal and political organisation; they are in effect as art. 10 of the Constitution states, the "basis of the legal system and social peace"– From the significance and purposes of these rights within the constitutional system it is clear that the assurance of their duration cannot be restricted to the possibility of individuals exercising their claims, but rather it should also be assumed by the State. Therefore, from the requirement of subjugation of all powers to the Constitution, not only is it assumed that the State has a negative requirement not to harm the individual or institutional sphere protected by fundamental rights, but also a positive obligation to contribute to the effectiveness of such rights and to the values they represent, even when there is no subjective intention on the part of the citizen. This binds legislature in particular which receives from fundamental rights "impulses and guidelines", an obligation which acquires special relevance where a fundamental right or value would be void if cases were not established for its defence.

5. Art. 15 of the Constitution establishes that "everyone has the right to life"– Life is an indeterminate concept on which there are various responses, not merely in terms of different perspectives (genetics, medicine, theology etc) but also in virtue of the various criteria maintained by specialists within each of the points of view considered, and in the evaluation and discussion of which we cannot and are not required to enter into here. Nevertheless, it is not possible to constitutionally resolve this appeal without proceeding from an idea of life which serves as a basis for determining the scope of the aforementioned precept. From the perspective of the question raised herein it is sufficient to specify:

a) That human life is a process of development, beginning with gestation, and during which a biological reality takes on form and feeling to create a human configuration which ends in death; it is a continuous process subject through the effects of time to qualitative changes of a somatic and psychological nature which are reflected in the public and private legal status of the vital subject.
b) That gestation has generated a tertium which is existentially distinct from the mother although it is she who accommodates it.
c) That within the qualitative changes in development of the life process, and based on the supposition that life is a reality from the start of gestation, the birth itself is particularly relevant as it is signifies the passage from a life sheltered by maternal protection to a life protected by society although with different specifications and modes throughout that lifetime. And prior to birth, the moment at which the unborn child is able to have a life independently from its mother is of particular significance, that is, when it acquires full human individuality.
From the previous considerations it may be assumed that if the Constitution protects life with the relevance mentioned hitherto, it cannot not protect it in that stage of its process which is not only a condition for life outside the maternal protection, but it is also a moment in the development of life itself, therefore it should be concluded that the unborn life insofar as it embodies a fundamental value -human life- as guaranteed in art. 15 of the Constitution, constitutes a legal right, the protection of which is found in the aforementioned fundamental constitutional precept.
This conclusion has also resulted from parliamentary debates based on the drafting of the aforementioned article of the constitutional text, whose proximity in time justifies their use as an interpretive element. The Plenary Congress defended an amendment -approved by the majority – which proposed using the term “everyone” to replace the expression “all persons” – introduced in the Committee for amending the early drafting of the precept in the Draft bill deeming the term to be “technically more correct” for the purpose of including the unborn child and furthermore to avoid the word “person” being considered to be incorporated in the concept of the same in other specific legal disciplines, such as civil and criminal, which otherwise could be deemed to be assumed by the Constitution. However, the ambiguity of the term “all” in the expression “all have the right to life” was not clarified during the debates with respect to the extension of the entitlement to the right, nevertheless in any case, as the defender of the amendment indicated, it constituted an open formula which was considered sufficient as a basis for the defence of the unborn child. The precept was subsequently approved in the Senate by 162 votes in favour, with none against and two abstentions. In short, the objective meaning of the parliamentary debate corroborates that the unborn child is protected by art. 15 of the Constitution even when it does not permit an affirmation that it is holder of the fundamental right.
6. The appellants claim to assume that entitlement, not only from the aforementioned parliamentary debates on the inclusion of the unborn child in the term "all” in art. 15, but also from the systematic interpretation of the Constitution, as well as the international treaties and agreements ratified by Spain to which art 10.2 of the Constitution refers for the interpretation of regulations relating to fundamental rights and freedoms recognised therein. There is, however, no sufficient basis to support its thesis.
With respect to the former, the same appellants acknowledge that the word “all” used in other constitutional precepts (arts. 27, 28, 29, 35 y 47) refers to those who are born, as is deduced from the context and the scope of the law they regulate, however they consider that it may not be concluded from this that the same meaning should be attributed to the term in art. 15. The systematic interpretation of this article should be made, in their opinion, in relation to other constitutional precepts (arts. 1.1, 10, 14, 39 and 49). However, the same general terms in which this argument is developed and the same vagueness of the conclusion reached by the appellants

make it irrelevant, in respect of the specific question raised on the entitlement of the right to life which may correspond to the unborn child.
With regard to the interpretation of art. 15, pursuant to the Universal Declaration of Human Rights and the international treaties and agreements ratified by Spain, it is true that the authentic French version expressly uses the term “person” in art. 6 of the International Agreement on Civil and Political Rights –as does the authentic Spanish version –and in art. 2 of the European Convention on the Protection of Human Rights and fundamental freedoms. and although the Court of human Rights has not delivered any declaration on this point, the European Commission on Human Rights in its task of admitting respondents has done so in relation to art. 2 of the Convention in case 8416/1979 in its decision of 13 May 1980, stating in respect of the term “everyone” or “toute personne” from the authentic texts which, even when it does not appear defined in the Convention, the fact that said term is used therein and the context in which it is used in aforementioned art. 2 would lead to the statement that it refers to persons already born and it is not applicable to the unborn child (points of law 9 and 17) and furthermore, on examining the term “life” the Commission proposed the sense in which art. 2 in question may be interpreted in respect of the foetus, although it did not make any declaration in precise terms on that point, deeming that it was not necessary to decide on the case proposed (medical indication in order to protect the life and health of the mother), restricting itself to excluding from the possible interpretations, that of the fact that the foetus could have a “right to life” of an absolute nature (points of law 17 to 23).
7. In short, the arguments put forward by the appellants cannot be accepted in support of the thesis that the unborn child is also entitled to the right to life, however, in any case, and this is decisive for the issue which is the object of this appeal, we must state that the life of the unborn child, in accordance with the arguments in the foregoing points of law in this judgment is a legal right constitutionally protected by art. 15 of our fundamental regulation.
On the basis of the considerations made in point of law 4, this protection which the Constitution dispenses to the unborn child implies two obligations for the State in general terms: that of refraining from interrupting or hindering the natural gestation process, and that of establishing a legal system for the defence of life which presupposes an effective protection thereof and which, given the fundamental nature of life, also includes as a final guarantee, criminal regulations. This does not mean that said protection needs to be absolute; in fact, as occurs with all constitutionally recognised rights, in specific cases it may and even should be subject to restrictions, as we shall see below.
8. Together with the value of human life and substantially relating to the moral dimension thereof, our Constitution has also raised personal dignity to the status of fundamental legal value, which without prejudice to the rights inherent in it, is inextricably linked to the free development of personality (art. 10) and the rights to physical and moral integrity (art. 15) to freedom of ideas and beliefs (art. 16) to honour, to personal and family privacy and to one's own image (art. 18.1). From the meaning of these precepts it may be assumed that dignity is a spiritual and moral value inherent to the person, which is singularly manifested in conscious and responsible self determination of one’s own life and which is accompanied by a claim for the respect of others.
Dignity is recognised for all persons in general, however, when interpreting the constitution and attempting to specify this principle, the obvious fact of the feminine condition cannot be ignored and the specification of the aforementioned rights in the framework of maternity, rights which the State should respect and to the effectiveness of which it is required to contribute, within the limits imposed by the existence of other rights, also recognised by the Constitution.
9. In the light of the previous considerations we are able to undertake an analysis of the Proposal which is the subject of this appeal in order to judge the alleged unconstitutionality of the cases of declaration of non punishable grounds for abortion contained therein, as alleged by

the appellants.
Legislature is based on a pre-constitutional set of rules which uses the penal system as a means of protecting the life of the unborn child (arts. 411 to 417 of the Penal Code) regulations which do not revise in general but which are restricted to declaring that abortion is not punishable in specific cases namely on therapeutic, ethical and eugenic grounds (point of law 2). The question raised is that of examining whether legislation is able to exclude specific cases of the life of the unborn child from criminal protection.
Firstly, the causes of exemption from liability established in art. 8 of the Penal Code are generally applicable in punishable offences in this Code, something which has never been placed in doubt in this appeal, and from which it is possible to deduce that,- in principle and with their inherent restrictions, they may also prevail, if appropriate in respect of the offence of abortion (arts. 411 and subsequent articles of the Penal Code). However, confining our comments strictly to the question raised by the appellants, we are required to consider whether legislation is constitutionally permitted to use a different technique, by means of which punishability is specifically excluded for certain offences.
The response to this question must be affirmative. On one hand legislation may take into consideration characteristically conflictive situations which affect a particular area of criminal prohibition in a specific manner. Such is the case when the life of the unborn child, as a constitutionally protected right, conflicts with rights relating to constitutional values which are extremely relevant, such as the life and dignity of women, in a situation which has no comparison with any other given the special relation of the foetus in respect of the mother, and the confluence of constitutional rights at play.
These conflicts are extremely serious and of a particularly singular nature and they cannot be considered simply from the perspective of women's rights or from that of protection of the life of the unborn child. Even this cannot prevail unconditionally over those, nor may women's rights prevail absolutely over the life of the foetus, given that that prevalence presupposes loss, in any case of a right which is not only constitutionally protected, but which embodies a central value of the constitutional system. Therefore, insofar as the absolute nature of any of these may be confirmed, the constitutional interpreter is required to consider the rights on the basis of the question raised, attempting to harmonise them, if possible or conversely, specifying the conditions and requirements in which the prevalence of one over the others may be admitted.
Furthermore, legislature which should always bear in mind the reasonable requirements of a conduct and the proportional nature of the penalty in the event of non compliance, may also waive the penalty for a conduct which objectively might represent an insupportable burden, without prejudice to the fact that, if appropriate, the State's duty to protect the legal right in other spheres continues to be pertinent. Human laws contain patterns of conduct of the kind into which normal cases generally fit, however there are some singular or exceptional cases in which punishing a failure to comply with the law would be completely inadequate; legislation cannot employ the maximum constriction -criminal penalty- in order to impose in these cases conduct which would normally be required, however which is not appropriate in certain specific cases.
10. The appellants allege that the scope of the cases laid down by legislature, given the lack of precision in some of the terms used, cannot be defined, which in their opinion infringes the principle of legal security established in art. 9.3 of the Constitution.
The Court cannot share the appellant's allegation since, even when such terms may contain an element of doubt, this does not transform them into concepts which are incompatible with legal security, as they may be defined in accordance with the general idiomatic sense of the term which removes any fear of their being totally indeterminate in respect of their interpretation.
In effect the term, “necessary” used in no. 1 of art. 417 bis of the Penal Code in the draft bill - may only be interpreted in the sense that there is a conflict between the life of the unborn child

and the life or health of the pregnant woman which cannot be resolved in any other way.
In particular, and in relation to the case of serious harm to health, the term "serious" clearly expresses the idea that there must be a danger of considerable deterioration of health and for a prolonged period over time, all of which would be in line with available medical knowledge at any given time. Furthermore, the term “health” refers to physical or mental health as may clearly be assumed from parliamentary debates.
Finally, with respect to section 3 of the aforementioned article, the term “probable” expresses the idea of a reasonable assumption of truth and responds, as the State Attorney points out, to the presumable caution in medical reports in which the absolute terms or safety of certainty are usually excluded, without in this case the substitution of an indeterminate legal concept for another having any contribution in the opinion of this Court to a greater accuracy or precision in the case in question. Furthermore, the term “serious" expresses on one hand the importance and depth of the problem and on the other, its continuation over time.
11. Having analysed the objection of the lack of determination of the cases alleged by the appellants on the basis of their imprecise terminology, it is necessary to examine the constitutionality of each of the indications or premises in which the bill declares interruption of the pregnancy to be non punishable.
a) Section no. 1 in reality contains two indications which need to be distinguished: the grave danger to the life of the pregnant woman and the serious danger to her health.
With respect to the former, the conflict is between the mother’s right to life and the protection of the unborn child. In this case it should be noted whether if the life of the unborn child were to be unconditionally protected, this would be protecting the life of the unborn child more than the life of the child after its birth and would penalise the mother for defending her right to life, which the appellants also rule out, although they base it in another way; therefore the fact that the mother’s life should prevail is constitutional.
With respect to the latter, it is appropriate to mention that the case of "serious danger" to the health of the pregnant woman seriously affects her right to life and physical integrity. Therefore, the fact that the mother’s health should prevail is not unconstitutional either, particularly bearing in mind the requirement of the significant and lasting sacrifice of her health subject to the requirement of a criminal penalty may be deemed inadequate, in accordance with the considerations contained in Point of Law no. 9.
b) With respect to the indication contained in section number 2 – that the pregnancy is the result of a crime of rape and provided that the abortion is carried out within the initial twelve weeks of pregnancy – it is sufficient to consider that gestation was caused by an act which, not only was contrary to the woman’s wishes, but it was also carried out by overcoming her resistance with violence, and thus harming to a maximum degree her personal dignity and the free development of her personality, seriously contravening the woman's right to physical and moral integrity, to honour and to her own image and personal privacy. To oblige her to bear the consequences of an act of this kind is manifestly unacceptable: the woman’s dignity requires that she cannot be considered as a mere instrument and the necessary consent to assume any commitment or obligation is of particular significance in this case, given the importance attached to giving life to another person, a life which would profoundly affect her own in every aspect.
Therefore the indication in question cannot be deemed to be contrary to the Constitution.
c) Section no. 3 of the article contains an indication of the probable existence of serious physical or mental problems in the foetus. The basis of this case, which includes real limit cases, is the consideration that the use of a criminal penalty would entail the imposition of a conduct which exceeds what is normally required of a mother and the family. The previous statement takes into account the exceptional situation in which parents find themselves, and in particular the mother, and which is frequently aggravated in many cases by a lack of state and social provisions which would contribute significantly to mitigating the assistance requirements of the case and to

removing the insecurity inevitably felt by the parents with regard to the fortunes of the affected child, given the seriousness of its condition in the event of survival.
On this basis and on our previous considerations on whether such conduct can be required, we consider that this case is not unconstitutional.
In respect of this and from a constitutional perspective, it is necessary to mention the connection existing between the terms of art. 49 of the Constitution – including in Chapter III "Governing principles of social and economic policy", from Title I "Fundamental rights and duties" – and protection of the life of the unborn child included in art. 15 of the Constitution. In effect, insofar as progress is made in enforcing preventive policy and in the generalisation and intensity of the assistance in a social State (along the lines initiated in the Law of 7 April 1982 on the disabled, which includes severely disabled and complementary provisions) this will decisively contribute to preventing the situation on which decriminalisation is based.
12. From a constitutional perspective, the bill, since it declares that abortion is not punishable in certain cases, defines the scope of criminal protection of the unborn child, which is excluded in such cases based on protection of constitutional rights of women and the circumstances arising in specific situations. Therefore, having established the constitutionality of such cases it is necessary to analyse whether the regulation contained in art. 417 bis of the Penal Code, in the wording given to it in the Draft Bill sufficiently ensure the result of weighting of the rights in conflict made by legislature in such a way that failure to protect the foetus does not occur outside the situations established, and that neither are the rights to life and the physical integrity of the woman unprotected, avoiding the fact that sacrifice of the unborn child, if appropriate, would unnecessarily entail the sacrifice of other constitutionally protected rights. This is because, as we have mentioned in points of law nos. 4 and 7 of this Judgment, the State is required to guarantee life, including that of the unborn child (art. 15 of the Constitution), by means of a legal system which presupposes an effective protection thereof, which requires, as far as possible, that the necessary guarantees are established so that the efficacy of said system would not be diminished beyond that required by the purpose of the new precept.
Legislature is aware of this concern, as the bill indicates in a general manner, that abortion should be carried out by a doctor with the woman's consent, as well as the fact that in the case of rape a complaint should be lodged, and that in the third case an unfavourable prognosis should be accompanied by the opinion of two different medical specialists from the doctor performing the operation. Legislature has therefore established specific measures designed to ensure that the cases based on partial decriminalisation of abortion are checked; as the State Attorney states, it is a question of measures of guarantee and certainty of the factual prerequisite of the precept in line with what occurs in the positive regulation of our neighbouring countries.
It is therefore essential to examine whether those measures of guarantee are sufficient to consider that the regulation contained in the Draft bill complies with the aforementioned constitutional requirements deriving from art. 15 of the Constitution.
In the first case, that is, therapeutic abortion, this Court considers that the requisite intervention of a doctor to interrupt the pregnancy without any previous medical opinion is insufficient. Protection of the unborn child requires firstly, that, as in the case of eugenic abortion, an appropriately specialised doctor should ascertain the existence of any foundation for the case and should issue an opinion on the circumstances of each case.
Furthermore, in the case of therapeutic and eugenic abortion, this verification, given the nature of the premise, is essential prior to carrying out the abortion, as if it takes place the result would be irreversible, and therefore the State cannot be disinterested in this verification.
Similarly it cannot be disinterested in the actual performance of the abortion, taking into account the rights involved overall – the protection of the life of the unborn child and the right to life and health of the mother, which furthermore, is the basis of decriminalisation in the first case– so

that the intervention may be made in appropriate medical conditions, thus reducing risk to the mother.

Therefore, legislature should ensure that verification of the premise in cases of therapeutic or eugenic abortion, as well as performing the abortion itself, take place in public or private health centres, authorised to that effect, or any other solution deemed appropriate should be adopted within the constitutional framework.

The constitutional requirements would not be unfulfilled if legislature were to decide to exclude the pregnant woman from among the criminally responsible subjects in the event of non compliance with the requirements mentioned in the previous paragraph, given that its ultimate aim is to make effective the duty of the State to ensure that in carrying out the abortion, the limits established under legislation will be observed and in medical conditions sufficient to safeguard the right to life and health of the woman.

With respect to verification in the question of ethical abortion, judicial verification of the offence of rape prior to the interruption of the pregnancy presents serious objective difficulties, since the time which could possibly be taken up by a court hearing would conflict with the maximum term within which the abortion could be carried out. Therefore this Court considers that lodging a prior complaint required by the bill in the aforementioned case, is sufficient to assume the constitutional requirement of verification of the premise to assume its fulfilment.

Finally, as is clear, legislature may adopt any solution within the framework of the constitution, as it is not the concern of the Court to act in place of legislature, however it is, in accordance with art. 79.4 b) of the OLCC, its task to indicate the amendments, which in its view – and without excluding other possible opinions – would permit the bill to be formalised by the appropriate body.

13. The appellants consider that consent in the cases established in numbers 1 and 3 of art. 417 bis of the Penal Code, in the wording of the bill should not correspond to the mother only, and they refer especially to the father's participation considering that this exclusion infringes art. 39.3 of the Constitution.

The Court considers that the solution put forward by legislature is not unconstitutional, given the special nature of the relationship between the mother and the unborn child which means that the decision will have a considerable effect on her life.

14. Finally, the appellants allege that the bill contains no provision on the consequences caused by the criminal regulation in other legal sectors, referring specifically to conscientious objection, in respect of the procedure through which consent of an underage female is given, or one subject to guardianship, and the inclusion of abortion in the Social Security system.

The Court is well aware of the special relevance of these questions and also all those deriving from the right of women to be provided with the necessary information, not only medical, which constitutes a requirement for valid consent– but also of a social kind in respect to the decision to be adopted.

However, such questions, although their regulation may be of particular interest, are unrelated to the judgment of constitutionality of the bill, which should be confined to the contested criminal regulation pursuant to the terms of art. 79 of the Constitution.

Nevertheless, it is pertinent to mention, in terms of the right to conscientious objection that such a right exists and may be exercised, irrespective of whether or not such a regulation has been issued. Conscientious objection is part of the content of the fundamental right to ideological and religious freedom acknowledged in art. 16.1 of the Constitution and, as this Court has indicated on several occasions, the Constitution is directly applicable, especially in matters of fundamental rights.

And with regard to the manner in which the underage or incapacitated female provides her consent, the regulation established by positive law could be applied, without prejudice to the fact that legislature may assess whether the existing regulations are appropriate, from the

perspective of the penal regulation in question.

## RULING

In the light of the foregoing, the Constitutional Court WITH THE AUTHORITY CONFERRED BY THE CONSTITUTION OF THE SPANISH NATION
Has ruled:
that the draft Bill for the Organic Law introducing art. 417 bis of the Penal Code does not conform to the Constitution, not as a result of the cases in which abortion is declared non punishable, but for failing to fulfil in its regulation constitutional requirements deriving from art. 15 of the Constitution, which is therefore violated, and in the terms and to the extent expressed in point of law no. 12 of this Judgment.
This judgment shall be published in the "Boletín Oficial del Estado" (Official State Gazette)
Given in Madrid on the eleventh of April nineteen hundred and eighty five.

## VOTE

Dissenting vote lodged by the Senior Judge Jerónimo Arozamena Sierra in previous appeal of unconstitutionality no. 800/1983
1. I disagree with the grounds and the ruling formulated by my colleagues. In my opinion unconstitutionality as alleged by the appellant group should be declared to be non-existent and, as a result, the legislative procedure should continue its course. Against my proposal, and which obtained the approving vote of six Senior Judges, including the undersigned party of this dissenting vote, the Judgment I contest has concluded in my opinion with a declaration which goes beyond the functional legal limits of the jurisdictional powers incumbent on the Constitutional Court.
Our task, when declaring the unconstitutionality of the contested text, or a part of that text in the preliminary appeal, is to specify this and the constitutional precept or precepts infringed [art 79.4 b) of the OLCC]. What the Court is not permitted to do is to establish amendments or additions to the contested text or to establish or add other precepts. This is what the Judgment effectively does when it tells legislature what it should do in order to adapt the precepts to the Constitution. The Judgment is with all due respect, mistaken in my view when it states (point of law 12, in fine), that it corresponds to the Court “to indicate the amendments which in its opinion –and without excluding other possible changes – would permit the prosecution of the draft law by the competent body”. Even art. 79.4 b of the Constitution does not state this nor does it agree with the principles governing the relation between constitutional jurisdiction and legislation.
2. The constitutional judges did not resolve- did not take a position on art. 15- in respect of the legal –criminal problem of abortion. It is an issue open to the availability of democratic legislature – it has been done with a reinforced quorum of the organic laws-, without the formula with which it has been decided (that of indications, referring to three cases) being in opposition to art. 15 (and the others to which the appellants refer in sustaining unconstitutionality, namely, arts. 1.1, 39.2, 39.4, 43 and 53.1). An attempt to judge a constitutional confrontation should depart from the premise that it is legislature (which enjoys a presumption of constitutionality) which is responsible for the legal form of social relations. To infer from art. 15, as the Judgment does, that the precept is unconstitutional due to the omission of particular specifications in the text, is unconvincing. In reality, what in my opinion it is doing is forming the exclusive mode of criminal liability according to an unconstitutional opinion.
Art. 15 begins in Spanish with an expression with an adjectival function (“todos" or "all”) not

followed by a noun. From the grammatical form used (and the removal from the text of the word "person") it cannot in my view be inferred that the Constitution would leave decided a specific position which would prevent a penal legislative action. The analysis of the text of art. 15, of its creative process and of its systematic connections leads to the notion that the issue of abortion (and how it is addressed in criminal terms ) was left open to legislature. Together with these interpretative paths it is obligatory, through the mandate of art. 10.2 of the Constitution, to refer to international texts which state this precept, and which are valued as an interpretive factor pursuant to art. 10.2 of the rules relating to fundamental rights and freedoms. We shall not comment at length on something which in my view appears to be quite clear namely: Art. 3 of the Universal Declaration of Human Rights, art. 6.1 of the International Covenant on Civil and Political Rights and art. 2 of the European Convention are irrefutable arguments for sustaining that art. 15 of our Constitution interpreted from international texts, does not prevent a system of dealing with abortion which excludes its punishment and, obviously it is not that which is configured in art. 417 bis of the Penal Code (according to the contested bill), as it reveals furthermore the existence of varied ways of dealing with abortion in countries which are signatories to the aforementioned international texts.

3. Legislature organises its penal system according to the principles of a State of law, the principle of culpability and the principle of humanity. In configuring a specific conduct as punishable (in this case abortion with consent) some types of conduct may be exempted or grounds configured (generic or specific) for justification or non culpability due to the unenforceability of the conduct. Legislation acts on the principle of worthiness of the penalty and rather than attracting to the field of punitive repression conduct which does not merit criminal sanction. It is certain that the unborn child is a right deserving of criminal protection. Violation of this right is criminally protected, however not all actions classed as criminal provide grounds for the unlawfulness of the conduct. Together with the causes of unlawfulness there are other grounds of unenforceability. The fact that legislature with a greater or lesser degree of technical rigour configures those cases excluded from punishment does not mean that it contravenes any constitutional principle. The perception of whether or not a conduct may be generally enforced, and as a result, whether if it is carried out it should or should not be punished with any penalty depends on a series of factors which legislature takes into account. The legislative powers made effective in art. 417 bis in order to exclude the criminal liabilities in the case of abortion with consent, cannot be said to have exceed constitutional limits and, clearly they have not infringed art. 15 of the Constitution.

4. The insufficiency of the bill (the accusation that it is ambiguous or fragmentary) was alleged by the appellants from the perspective of legal security (art. 9.3 of the Constitution). The Judgment addresses it on the basis of art. 15. I have already expressed my view on the inconsistency of inferring on the basis of art. 15 that the draft law contains an omission which makes it unconstitutional. The text with which I disagree does not properly analyse the real grounds for appeal based on art. 9.3. I believe that this ground should be analysed (long with others which the Judgment also fails to address: arts. 1.1, 39.2 and 39.4) and then concludes by dismissing them.

I believe that it would have been appropriate to declare that the Draft Organic Law reforming art. 417 bis of the Penal Code is in conformance with the Constitution.

Given in Madrid on the eleventh of April nineteen hundred and eighty five.

Dissenting vote formulated by Senior Judge Luis Díez-Picazo in the case of the Judgment delivered in the preliminary appeal of unconstitutionality number 800/1983.

I wish to explain as briefly as possible my reasons for dissenting from this Judgment, which are largely motivated by my understanding of the function of the Constitution and the unconstitutionality of the law.

a) The Judgment of 8 April 1981 (unconstitutionality appeal number 192/1980, "Official State

Gazette of 25 April 1981) stated that “political decisions and political procedure meriting such decisions should be placed on one plane and on anther the qualification of unconstitutionality which should be made according to strictly legal criteria”. And I continue to profess the same idea, namely that considering that a law is not unconstitutional is the conclusion of a legal opinion which does not assume –this should be clearly understood– one is party that law or in solidarity with it.

b) In the Judgment of 8 April 1981 herein we also stated something which I continue to profess. It was this: “the Constitution is a framework of coincidences sufficiently broad to provide room for political options of extremely different kinds. The work of interpreting the Constitution does not necessarily consist of closing the door on options or variants imposing one of them in an authoritarian manner. This conclusion should only be reached when the unanimous nature of the interpretation is imposed by the play of interpretive criteria. We wish to state that the political and governing options are not previously given once and for all"

c) I also recall another opinion of the Court, When we stated that the subject of a case of unconstitutionality are the legal texts which should be strictly considered and not the whole body of regulations of which they are a part. It is clear in my opinion, that the judgment of unconstitutionality affects legal texts and not block regulations or possible results thereof.

I also firmly maintain that there is no unconstitutionality based on the omissions which the legislation may have made.

d) In my modest opinion, unconstitutionality as contradiction of a law with a Constitutional mandate should result from an immediate contrast between the two texts. It could be admitted that it follows an intermediate constructive regulation established by the interpreter. Conversely, an unlimited or too remote extension of the constructive rules deriving from the Constitution appear to me to be very difficult in order to claim unconstitutionality through contradiction of the law judged herein in with the last of the constructive deductions.

The issue is even more risky when in what I term "constructive deductions" there are latent or manifest value judgements, because one may have the impression that a second constitutional line is segregated, which it is very unlikely would operate as a restriction of legislative power, which represents popular sovereignty.

e) Nor do I believe that it is the Court's duty to collaborate in the legislative function or to direct or perfect it. I do not consider that art. 79.4 of the Organic Law of the Court authorises that thesis.

f) In what specifically concerns the law under discussion here, I coincide with the Judgment in the constitutional legitimacy of the so called system of indications and of the indications contained in the draft law although I do not share all the reasons in which that conclusion is based. I simply believe that legislature is empowered to exempt specific cases from general punishability for the purpose of justifying circumstances which affect the reproach of culpability or what has been termed the opinion of worthiness of the penalty.

g) If this is the conclusion reached, it seems to me that one cannot and should not go any further. When conditions of safety of the abortion are indicated, one is passing pointlessly from the terrain of the Penal Code to a hypothetical law of legalisation or liberalisation which is not the case here. It is difficult for me to understand constitutionally that a certain conduct may be punishable, or no longer is so due to the number of doctors involved or due to the place in which it is carried out because one thing is the Penal Code and another is the hypothetical administrative regulation of justified or non culpable abortions.

Given in Madrid on the eleventh of April nineteen hundred and eighty five.

Dissenting vote of the Senior Judge Francisco Tomás y Valiente in the preliminary appeal of unconstitutionality no. 800/1983

1. My opinion defended throughout the deliberation is that the Draft Organic Law contested is totally in conformance with the Constitution. This is the reason for my discrepancy with the

ruling and with point of law no. 12 on which the declaration of non conformance with the Constitution is mainly based. Nevertheless, given the explanatory nature of the ruling itself and the exceptions contained therein, I would like to indicate, before providing the grounds for my disagreement, the points of the ruling and findings with which I am in agreement.

2. I totally agree with the statement of constitutionality in the cases in which the draft art. 417 of the Penal Code declares abortion to be non punishable; this declaration in the ruling is argued in points of law 9, 10 and 11. I agree substantially with the terms and reasoning contained therein, and even ex silentio with what remains unsaid, since they do not contain, nor does any other passage of the Judgment, any statement which would permit it to be supposed that those, and only those, three cases or indications are the only ones which legislature could declare non punishable. In this aspect the Court has been restricted to judging the contested text and nothing more.

3. I also maintain my unreserved agreement with the idea that the unborn child is not the holder of a fundamental right to life, a thesis which I have defended before with my dissenting vote in Judgment 75/1984 of Chamber Two and which is now raised again in this Judgment as a result of arguments which although not identical to my own, do however, coincide in their conclusion. Please see in this respect the final paragraph of point of law 5, all of 6 and the first paragraph of 7, with the statement that the unborn child, even without being holder of the right to life constitutes a legal right, constitutionally protected, with which I am also in agreement. Any legal practitioner is familiar with compatibility and the enormous difference between both concepts, since only a person can hold rights and the unborn child is not a person.

Therefore, according to the Judgment there is no conflict between the rights of the woman and a non-existent fundamental right of the unborn child to life, but rather a conflict between the fundamental rights of the pregnant woman and a legally protected right which is a human life in formation (point of law no. 9). I am completely in agreement with the Judgment in this respect.

4. I have never been an enthusiast of the philosophy of values. Perhaps this is why I do not share (and here my differences begin) the numerous axiological considerations included in findings 3, 4 and 5. Apart from the inaccuracies or unsteady terminology they contain and which it would be too protracted and pointless to refer to here, I do not find a legal-constitutional point, a single pertinent one, to state as the statement effectively does, that human life "is a higher value of the constitutional legal system" (point of law 3) or a "fundamental value" (point of law 5) or a "central value" (point of law 9). That the concept of person is the support and prius logico of all rights seems clear to me and I maintain as such herein. However, this statement does not authorise dangerous axiological hierarchical structuring, which, furthermore, has nothing to do with the text of the Constitution, where in fact in its art. 1.1 it states that the highest values of the legal system are freedom, justice, equality and political pluralism: These and only these. In view of the abstract considerations on life as a value, it is a striking fact that the Judgment does not formulate any comments on the first of those values considered as higher by the Constitution, namely, Freedom. It is perhaps as a result of this omission, which I have not forgotten, that scant attention is paid to the rights of freedom of pregnant women.

5. I understand, although I do not share, the opposition to non punishment of abortion in defence of an alleged fundamental right to life of the unborn child. This is a classic line of reasoning from which it would be possible, with undeniable internal consistency to arrive at a ruling of unconstitutionality in specific regulations of decriminalisation or legalisation of abortion. However, as the Judgment has abandoned that possible point of departure, in its point of law 12 it makes a proposal unwonted in countries with Constitutions and Penal Codes like our own. It should be recalled that the draft art. 417 bis does not contain any legalisation nor any decriminalisation of abortion (point of law 12) however, the simple declaration of the non-punishability of specific conduct is maintaining intact the type of offence of 411 of the Code which, in my opinion, is of very doubtful constitutionality. The fact that in this context the

weighting applied by criminal legislature should be accused of being unconstitutional due to the absence of two so- called guarantees, has led to my essential divergence from this view for the following reasons:

a) It is a logical (or illogical) leap, because between citing art. 15 and the conclusion that two further guarantees are required (why those and only those?) there is no judgment of logical inference.

b) One of the guarantees required, that of the opinion of "a doctor in the appropriate speciality" in order to prove the existence of the premise of therapeutic abortion, is inaccurate in its formulation (which speciality?) and impossible to fulfil in urgent cases.

c) It is not understood why there is a requirement to "carry out the abortion" in a health centre only in the case of therapeutic and eugenic abortion, however not ethical abortion.

d) What the Judgment terms verification of the cases in question is an issue corresponding to the criminal Judge given that the types of conduct regulated in art. 417 of the Penal Code continue to be considered offences. Preventive intervention and to this effect, that of a doctor, is to transfer to that doctor these duties and responsibilities.

Nothing therefore, prevents adding other innovations to these requirements at the initiative of legislation, such as, for example, the attendance of women interrupting a pregnancy in Health Centres and at the cost of Social Security. The same text gives room to these and other desirable improvements. Which highlights the fact that we are assessing a question of perfectibility on the pertinence of which it would be appropriate to dwell.

6. In effect, beyond the intrinsic discrepancy with respect to the formulation of guarantees required, my overwhelming opposition is directed at the actual fact of the requirement. Let us examine why:

a) Judging constitutionality is not a judgment of quality or perfectibility. The Constitutional Court may and should decide the manner in which a specific regulatory text opposes the Constitution, and, as a result, the reason why it is unconstitutional. What it cannot do is make quality judgments.

b) Constitutional jurisdiction is negative; it may formulate exclusions or vetoes on the texts submitted to it. What it cannot do is tell legislature what it should add to the Laws so that they will be constitutional. If it acts in this way, and this Court has acted as such, it becomes a positive legislator.

c) Each Institution should act as it is, not "as if" it were what it is not. There are few logics as disastrous as the logic of "as if" (als ob) The Constitutional Court frequently urged to act "as if" it were that which, in a language neither technical nor innocent, has been called the "third Chamber", has fallen into temptation on this occasion.

d) Just this once, since In resolving previous appeals (read, for all Judgments, no. 76/1983 on the draft OLHAP) this Court never understood that its authority and competence would extend so far, although at that time obviously art. 79.4 b) of the OLCC was in force, cited now as support for indicating what legislature should Do in order to ensure that its law conforms to the Constitution.

e) Art. 79 of the Organic Law on the Constitutional Court, the same article which created outside the Constitution, the preliminary appeal of unconstitutionality in its paragraph 4 b) (an extremely badly drafted version) imposes two duties aimed at two different subjects. It requires the Court, if appropriate, to specify the unconstitutionality of the contested regulation and the constitutional precept or precepts transgressed. It is required of the other subject – "the competent body"- that in order to continue the prosecution of the draft it remove or amend precepts, it is understood, which have been declared unconstitutional. In my view, it should never be interpreted that it is the Court which should indicate to legislature which amendments these should be. In other words, if the Court were to indicate amendments to be introduced, paragraph 5 of the same article 79 of the OLCC would have no point, since if, according to this

text “the declaration in a preliminary appeal does not prejudge the Court’s decision” in any appeals which might be lodged against the law already corrected or amended, it is evidently because such amendments have not been issued in a binding manner by the Constitutional Court.

f) The technique used in this finding has nothing to do with that of so called interpretive judgments, in which, from among the possible interpretations of a contested legal text, the Court declares that one of these conforms to the Constitution, precisely in defence of the presumption of constitutionality of the regulations issuing from democratic legislature.

g) When on such a scant, confused and arguable basis, interpreted in an innovative manner ad casum, the Court dares to go so far, it transgresses the limits of its competence and borders an extremely dangerous state of arbitrariness or judicial decisionism.. Therefore, I wish to express my profound and concerned disagreement with this policy.

With these arguments, and coinciding substantially with those of five other Senior Judges, like them, I sustained, with my vote, the speech presented and defended by the initial Rapporteur in this case, which concluded with a ruling declaring the constitutionality of the contested Law.

Madrid on the fifteenth of April of nineteen hundred and eighty five.

Dissenting vote of the Senior Judges Angel Latorre Segura and Manuel Díez de Velasco Vallejo in the preliminary appeal of unconstitutionality number 800/1983.

1. In the exercise of the powers conferred on us by art. 164 of the Spanish Constitution and art. 90.2 of the Organic Law of the Constitutional Court (OLCC) with the present vote we wish to express our opposing opinion, both in respect of the decision or ruling and on its corresponding grounds. The opinions maintained herein were defendedg during the deliberations supporting the presentation made by the originally appointed Rapporteur Jerónimo Arozamena Sierra, and the position sustained by the signatory Judges coinciding essentially with those of the other four colleagues in this Court in said deliberations.

2. Our initial and fundamental divergence is concerned with the attributions assumed by the Constitutional Court (CC) in delivering this Judgment. In effect, the CC does not confine itself to declaring in the ruling on the constitutionality of various points of the contested draft law, but also in the same ruling it makes recommendations, in point of point of law no 12 of the Judgment, it legislature, indicating how it should act. In the case of “therapeutic" abortion, legislature should require the opinion of a specialist. Both in this case and that of "eugenic” abortion, legislature should provide for State intervention by means of the obligation to carry out the abortion in public or private health centres authorised to this effect, or through any solution that legislature deems appropriate.

These provisions presuppose in our opinion, that the CC has assumed the function of introducing amendments to the draft laws subjected to its opinion by means of a preliminary appeal of unconstitutionality. Such a function exceeds the already extensive remit which, not only the Constitution but also the OLCC assign to this Constitutional Court, whose actions cannot approximate to that of a “third Chamber” without causing a dangerous imbalance in our legal and political system by encroaching on powers which are the prerogative of legislature.

3. As a result, we cannot share the opinion expressed in the Judgment that art. 79.4 b) of the OLCC authorises this CC to indicate the amendments which in its opinion, would permit the prosecution of the draft law by the competent body which is indubitably the Spanish Parliament. This interpretation should be rejected, as it leads to the unacceptable conclusion that this Constitutional Court may act as a positive legislator, which goes against the nature of its actual function. An adequate interpretation of this precept is that the Spanish Parliament may freely and in a sovereign manner, in view of the solution in a Judgment substantiating a preliminary appeal, either cancel the precepts of the draft law which have been declared unconstitutional or amend them in order to adjust them to the Constitution. Such is the case that section 5 of art. 79 of the OLCC states as a general rule that the “declaration in the preliminary appeal does not

prejudge the Court's decision in any appeals which may be lodged after the entry into force of the Law containing the text contested through the preliminary channel".

4. Referring to specific aspects of the Judgment, we wish to state that we agree with some of its statements. These include the fact that the foetus does not hold the fundamental right to life, which does not exclude the fact that the State has a duty to protect human life in its various stages of development, including the intrauterine period. We do not believe, in contrast, that this protection should take a penal form in all cases because no constitutional precept imposes protection of that kind. We consider in any case, and in accordance with the Judgment, that decriminalisation of the cases contained in the contested draft law are not unconstitutional.

5. Our dissent in this case is due to the arguments on which the declaration of unconstitutionality are based in the cases of "therapeutic" and "eugenic" abortion, as the case of "ethical" abortion is not subjected to any reproach of unconstitutionality. In effect, having declared that the three cases of decriminalisation are in themselves constitutional, it states that the aforementioned cases of "therapeutic" and "eugenic" abortions lack sufficient guarantees to verify the premises in question, as well as for the due protection of the life and health of the pregnant woman, and that the legal provision of those guarantees is a constitutional requirement deriving from art. 15 of the Constitution. We consider that it cannot be inferred from the "right to life and physical and moral integrity" recognised in the aforementioned constitutional article, irrespective of the scope accorded to these rights, that the State should impose a criminal sanction for cases in which the CC does not consider the established guarantees sufficient. The decriminalisation regulations do not normally contain, nor is it apparent why it should be constitutionally required that they contain guarantees verifying the assumptions. In the event that these are fraudulently invoked, or that in their verification the person entrusted to invoke them (in this case the Doctor) commits punishable negligence, the Courts of Justice shall act, as they are the bodies competent and authorised to do so. And with respect to the measures required for greater protection of life and health of the pregnant woman, nor can we see how that protection constitutionally requires in virtue of art. 15, more guarantees that those established by the Penal Code for other cases, including some which are as delicate and which as equally affect personal privacy as those contained in 428 of the aforementioned Code.

6. For reasons of brevity we shall dispense with mentioning other points of discrepancy or agreement with the Judgment, we must however, mention the lack of precision applied in respect of knowledge of the "conscience clause" the direct derivation of which from art. 16.1 of the CE we share and which may be used, as is logical by the Doctor from whom the abortive practice is required in order to refuse to carry it out. Said clause, based on ideological or religious reasons, is a constitutional right only of the Doctor and other health personnel who have been requested to act directly in carrying out the abortive act.

7. Summarising the foregoing, we conclude by reiterating our nonconformity with the Judgment, for two main reasons: Because it invades the competence of Legislative Power and because we consider that the CC should declare the non existence of the unconstitutionality alleged by the appellants in respect the contested draft law.

Madrid on the sixteenth of April of nineteen hundred and eighty five.

Dissenting vote of the Senior Judge Francisco Rubio Llorente in respect of the Judgment of 11 April delivered in the preliminary unconstitutionality appeal no. 800/1983.

I have voted against this Judgment and I sustained with my vote along with five other judges the presentation which was deliberated initially. It declared the Draft Law of the appeal to be in conformance with the Constitution and this is, in my opinion, the necessary conclusion of the legal reasoning in the case subjected to our consideration.

My reasons for dissent may be summarised in the simple judgment that with this decision the majority exceeds the proper limits of constitutional jurisdiction and invades the scope reserved

by the Constitution for legislation; it thus contravenes the principle of separation of powers, inherent in the idea of a State of Law, and operates as if the Constitutional Court were a type of third Chamber, with powers to resolve the ethical content or the political opportunity of the regulations approved by Parliament. It is true that this erroneous perception of the constitutional jurisdiction seems to be widely extended in our society; that precisely in respect of this appeal the press has expressed a variety of opinions which, either implicitly or explicitly, were based on the premise that the grounds for our Judgment should be an opinion on the ethical legal or illegal nature of abortion, or the appropriateness of its decriminalisation and that (and this is even more distressing) well known political figures, even members of the Government have issued statements clearly based on this same conviction. It is clear nonetheless, that however extended this belief may be, such an idea is completely erroneous and incompatible with our Constitution and the principles on which it is based. The Constitutional Court, which has no popular presentation but which does have tremendous power to invalidate laws which the people's representatives have approved, was not accorded this power on the basis of the personal qualities of its members but only because it is a Court. It carries the force of Law, and its decision cannot therefore be based, as far as is humanly possible, on our own ethical or political preferences, but instead on a reasoning which rigorously observes the requirements proper to legal interpretation. In providing grounds for this Judgment that rigorous reasoning is found lacking and it is the absence of that rigour which in my opinion has led to an erroneous decision.

Although it is neither easy nor pleasant to make a public criticism of arguments presented by colleagues who merit my greatest respect, it is indispensable, in order to ensure that this dissidence is not reduced to an apodeictical opinion, to specifically indicate at least some of the conceptual errors and logical perceptible faults in the Judgment text. In order to do so I shall separately analyse each one of the two distinctly differentiated parts of the text.

The first and the most extensive part, since it covers the first eleven points of law, serves exclusively to support that section of the ruling which states that the unconstitutionality of the draft law does not result from premises of non punishability of abortion considered therein, or in so many words, it supports the argument that a law which declares that abortion carried out with the mother’s consent is not punishable for serious therapeutic, ethical or eugenic reasons. I do not disagree, as has been said, with this conclusion, however I do vehemently disagree with the reasoning which led to it, the main line of argument of which situates the Court outside the scope of what is proper to it and may lead therefore in other cases, to totally inadequate decisions.

This reasoning does not in effect operate with the categories proper to Law (firstly and naturally with the very concept of subjective law) but with those of ethics. Despite the scarcely intelligible considerations (and insofar as they are indeed intelligible, they are as far as I am concerned, unacceptable) which in point 4 are made on the “scope, meaning and function of fundamental rights in the constitutionalism of our times”, Senior Judges who, on this occasion, have formed the majority, are not arguing on the basis of recognition of a fundamental right to life of the unborn child which they expressly deny in findings 5, 6 and 7, but based on the idea that as human life “is a greater value than the constitutional legal system (finding 3) the State is required “to establish a legal system for the defence of life which presupposes an effective protection therefore, and that given the fundamental nature of life (sic) it also includes as an ultimate guarantee criminal regulations" (finding 7). Fundamental rights which are effectively implicated in this difficult issue of criminal sanctioning of abortion with consent (free development of the personality –art.. 10– physical and moral integrity – art. 15–, freedom of ideas and beliefs –art. 16– personal and family privacy – art. 18–) are scarcely mentioned in a rhetorical fashion in point of law 8, or as justification of the non punishability of abortion in the two subsequent points.

In the interests of brevity I shall for the present dispense with an analysis of the logical and conceptual defects which I believe are manifest in the comments on the “indeterminate concept" of life and other points, including the error in failing to address the issue of consenting abortion being classified from the perspective of women’s right to privacy and physical and moral integrity. What concerns me here, for the reasons expressed above, is the need to emphasise that this line of reasoning is not appropriate to a court because it is removed, despite the use of legal terminology, from all known methods of interpretation. Interpreters of the Constitution cannot make a separate consideration from the precepts of the Constitution of the value or values which, in their opinion, are “enshrined” in such precepts, in order to subsequently deduce from them now, as pure abstractions, legislative obligations which are not supported by any particular constitutional text. This is not even a question of making value case law but simply and smoothly supplanting legislature, or perhaps going even further and superseding constitutional power. The values which inspire a particular precept may server in the best of cases to interpret that precept, not to deduce from it obligations (nothing less than the legislature, representative of the people!) which the precept in some way imposes. Through this channel it is clear that the Constitutional Court contrasting the Laws with the abstract values that the Constitution effectively proclaims (which obviously do not include that of life, as life is something more than a mere “legal value”) invalidating any law on the grounds that it is incompatible with one’s one sentiment of freedom, equality, justice or political pluralism. The regulatory planning of constitutionally enshrined values corresponds to the legislature not to the Judge.

Having said this, it must be admitted that all the foregoing considerations on the first eleven points of the Judgment could be excused, as all those findings insofar as they do not lead to the ruling (it is clear that the rulings of the Constitutional Court are required to declare whether or not the Laws are contrary to the Constitution, not the reasons why of one or another, a question which we shall return to later) are a simple although disproportionate sum of obiter dicta which make no requirements for the future. The real grounds of the real decision, that is the declaration of unconstitutionality, are concentrated in a single point of law, number 12, in which art. 417 bis is examined in order to determine “whether the wording given in the Draft sufficiently ensures the result of the weighting of rights in conflict as made by legislature, in such a way that the unborn child is not unprotected outside the situations established, nor is the woman’s right to life and to physical integrity”. In other words, what the Court does here is examine whether the non punishable cases appear described in terms such that only those who effectively are found in those situations are able to avoid punishment; it considers that this is not the case and therefore declares unconstitutionality.

Leaving aside the fact that in the first place, control of constitutionality thus passes to control of the technical perfection of the law and that secondly, an ironic investment of the principle of criminal legality is thus in operation, which from being a guarantee of citizen's freedom now becomes a mechanism designed to ensure the effectiveness of the punishment, which is rather a lot to leave aside in fact, however I shall focus my attention on the analysis of the idea of the State of Law, in my view seriously erroneous, which underlies this argument.

From the value “life” (human life, it must be supposed) it has been deduced that legislature is required to punish any attempt against the life of living beings, even though they may not be persons; as this obligation is however absolute, the Court accepts the possibility that legislature, in cases determined by the conflict of fundamental rights and the right protected, exempts those responsible for an abortion from any penalty. This reasoning, which I do not share, does not lead to any declaration of the constitutional legality of the Draft, as, going further, the Court now claims in this finding, without any justification whatsoever, the need for legislation to establish prior conditions and requirements which will ensure a priori the existence of the case in which the abortion would not be punishable. Examination of the facts and the determination

of the corresponding legal consequences are taken out of the hands of the Judge and entrusted to the Doctor, and the exceptional cases of non punishment of abortion become situations which permit an authorisation for abortion to be obtained.

As is obvious, the idea underlying thinking of this kind is, commonly, that, given man's natural perversity and his tendency to misuse the freedom accorded to him, it would be more appropriate to take as a point of departure a general prohibition, so that only authorised conduct would be legal, rather than its opposite point, the general principle of freedom, according to which everything is legal which is not expressly forbidden. My colleagues in the majority will probably not consciously accept this anti-liberal principle, however it is logically impossible based on the principle of freedom to declare a Law unconstitutional because it does not institute, together with repressive control of conduct ( in rigour, in place of that control) a preventive control Those measures on which the Judgment conditions constitutionality of the law (opinion of a second doctor in the event of therapeutic abortion; need for the abortion to be carried out in duly authorised public or private centres) are surely plausible, as are many others provided in comparative law (need to allow a minimum period of time to elapse from the formal decision to abort until the moment the abortion is carried out, the need for the pregnant mother to receive prior information on the assistance she would receive if she opted to remain pregnant etc.) If this constitutional need for preventive control is not accepted, and it certainly cannot be accepted, there is no reason however, to subordinate the exercise of freedom to them and as a result nor for this court to impose them on legislature, as it is only the lawmakers who are equipped to decide with total freedom the content of the laws within the confines established by the Constitution, as guarantee of the freedom of individuals. Since this declaration of unconstitutionality is based on the omission in the draft of these requirements or conditions (or any other equivalent requisites) which are not constitutionally necessary, the Court imposes on Parliament its own preferences in terms of legislative policy, and this imposition which does not naturally have any basis in either the Constitution or the Law, is arbitrary.

The Judgment is not interpretive, as an interpretive judgment is not possible in a preliminary appeal, nor may it be used to invalidate the regulation, but quite the contrary in order to preserve the validity; it does not respect the precepts of art. 79.4 of the OLCC which orders the Court to indicate the constitutional violation and leave to Parliament the care of removing or amending items required to avoid such infringement, and finally, despite the rhetorical claims to the contrary, it totally ignores the fundamental rights of physical and moral integrity and that of privacy enshrined in the Constitution, and to which pregnant women are indeed entitled, whose dignity so freely cited and even defined in the Judgment, it would seem must continue to be protected by the traditional procedure of considering all abortion an offence, irrespective of its circumstances.

Madrid on the sixteenth of April of nineteen hundred and eighty five.